

# Workers' Compensation Section Newsletter

Fall 2012



## From the Chair

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The Workers Compensation Act of Michigan is officially 100 years old this year! Deputy Director Jack Nolish and Rosa Bava have been working tirelessly to organize the Commemoration Ceremony at Wayne State University, which will take place October 18<sup>th</sup> and 19<sup>th</sup>. Our Section is sponsoring this event and it includes a panel of distinguished speakers. The speakers will document some of the prior significant events in our practice. Please take time out of your busy schedules to attend the events, which are outlined in this issue.

In regards to present significant events, most of you have heard by now that the Flint Agency will close its doors before the end of the year. Obviously, Flint is not the first victim of the economic decline of the State, or the first Agency office to close. Many of us have fond memories of practicing in Jackson, Ann Arbor, Mt. Clemens, and other locations, which have closed. I have no doubt that we will adapt quickly to this change and future changes to our practice.

Also, we still await word on whether the US Supreme Court will grant certiorari in *Hadden v. United States*. *Hadden* deals with conditional payments and whether 100% of the amount is due when the parties agree that the defendant was only 10% liable and was only paying 10% of the damages. Vice Chairperson Chuck Palmer authored an amicus brief in support of the petitioner, on behalf of the Section. Recently, Chuck was asked to comment on the significance of the issues and the potential consequences, if the US Supreme Court upholds the 6<sup>th</sup> District Court's decision by US Law Week.

"There would be two very important consequences if the Supreme Court upholds the Hadden decision by the Sixth Circuit. First, torts litigation involving Medicare conditional payments would be significantly impacted, in a negative way. As we pointed out in our brief, most litigation ends up settled, with the litigants compromising their claims. Most lien holders, who understand the risks involving trial, prudently choose to compromise their claims. If Medicare doesn't have to compromise their claims, then we would expect them to take a hard line in settlement negotiations. But if the Supreme Court affirms Hadden, and Medicare does not have to compromise its claims, which will be a significant barrier to settlement of claims and lawsuits. As a result, cases will be harder to settle, and others will be forced to go to trial. The Medicare conditional payment liens have the very real potential to become the tail wagging the dog. In other words, the

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Ella S. Parker, Newsletter Editor

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**From the Chair** Continued from page 1

litigants may be willing to compromise their claims and settle the lawsuit, but Medicare's right to 100% reimbursement could preclude settlements and force trials. Second, the court would be affirming regulations by Medicare that unfairly only provides a framework for compromise of conditional payments in workers' compensation claims. There is absolutely no support in the statute for only compromising one type of case vs tort litigation. There is nothing in the Medicare Secondary Payer Act which would support an interpretation that limits the availability of compromised conditional payments only to workers' compensation claims."

Speaking of Medicare Conditional Liens, *MSPRC.info* provides a portal to obtain conditional lien information much quicker than ever before (to my understanding). *Any claimant or claimant attorney* can register online, login, and request lien information. Rumor has it that letters are being received in 14-30 days! Attorneys representing employers have limited access to this portal!

I would like to thank all of you who have shared your thoughts and concerns, as well as encouragement. I urge all of you to contact me, or any officer or council member at any time. We will continue serve the section as a whole and to strengthen and preserve our practice.

Please mark your calendars for our Winter Meeting, which is tentatively scheduled for December 7, 2012, venue to be determined. Be sure to read the section e-blasts for important updates, including the Winter Seminar, spring meeting, and all Section matters of concern.

—Teresa Martin



**If anyone would like to share any information about their favorite iPad Apps that they use, send Ella Parker the information at [eparker@conklinbenham.com](mailto:eparker@conklinbenham.com). We may be able to insert an article in the Newsletter in the future about this.**

## A Word from the Editor

By Ella S. Parker

Our beautiful state is putting on a grand show with the color display right now. I hope all of you have an opportunity to enjoy the majestic display in your travels to and from work and from Agency to Agency. Unfortunately, we will have one less Agency to travel to before the end of the year. The announcement about the closing of the Flint Agency is included in this newsletter as well as Chief Magistrate Klaeren's detailed explanation as to why that site was selected and where your cases will go. Please review her article for more information.

However, the announcement started me thinking about all the other Agencies that have closed over the years. I also contemplated whether there would be future closings to contend with as well. As is always the case, rumors began spreading about which Agency would be next on the hit list. A few names tossed about included: Kalamazoo, Traverse City, Gaylord and a few in the Upper Peninsula. Only time will tell and we will have to deal with that situation as it comes. Although the ride to St. Joseph was beautiful at this time of year; I really do not miss the leased space at the hotel where the Agency was located.

There are naysayers in our midst who claim the "sky is falling" and workers' compensation in Michigan is dying. I have heard that for the last 20 plus years that I have been practicing workers' compensation. Others have a more optimistic outlook. Statistically, the number of cases has declined over the years. However, even though new filings are down, there has not been an equivalent decrease in the pending cases. The statistics are readily available on the website: <http://www.michigan.gov/wac>.

In 2001, there were 19,985 cases filed (Form 104A's and C's only). In 2011, there were only 7,828 cases filed. This is a 61% decrease in the number of cases *filed* since 2001. In fact, since 1993, the numbers have generally gone down every year.

Now, let us look at some other numbers provided by the Agency--The Aged Case Distribution Chart. As of the end of 2001, there were 16,727 cases pending on the docket. At the

end of 2011, there were 13,375 cases pending on the docket. This is only a 20% decrease in the number of cases pending on the docket—not the 61% one might expect.

If we asked actively practicing attorneys as to their theory we did not see a proportionate decrease in the docket, we would probably get a variety of answers. Several would probably point to the issues with Medicare and Conditional Payments and the delays that are caused by dealing with the Federal Government in those cases as a major cause. I suspect the Agency's own statistics, that are not published, would lend credence to that theory.

Unfortunately, with the Supreme Court denying certiorari in the *Hadden* case, those issues will continue to affect our dockets, the age of the cases, and resolutions.

Another theory that may be proposed as to why there has not been a proportionate decrease in the docket size is that the complexity of the cases has increased over the years. Vocational proofs are now pretty much required in all cases. Despite this, we have seen the number of magistrates decrease in recent years. The number of magistrates has decreased from 26 positions in the past to 17 positions under our Act. And, the rumor mill is at work again indicating that of the nine open positions up for appointment come January 26, 2013; the governor may not fill all of the openings.

With the Amendments to the Act in 2011, the selection process for magistrates has changed. We no longer have a Qualifications and Advisory screening process. Instead, those wishing to apply to be a workers' compensation magistrate need not have any experience at all in handling workers' compensation cases under the amendments. Moreover, there are no term limits anymore. Nevertheless, there are efficiency standards that must be met. So, for those who are interested, please see the governor's website, under Boards and Commissions to submit your application for consideration. <http://www.michigan.gov/snyder/0,4668,7-277-57738---,00.html> ✖



*The Inn at St. John's, Plymouth*

## Workers' Compensation Section Winter Meeting

**December 7, 2012**

**9:00 am to 12:00 pm**

Continental Breakfast with  
Registration Beginning at 8:30 am

The Meeting will be held  
in the Judea Ballroom at  
The Inn at St. John's located at  
44045 Five Mile Road  
Plymouth, MI 48170



## North American Labor History Conference, October 18-19, 2012

*Workers' Compensation Agency celebrates history of Michigan's diverse workforce*

The **Workers' Compensation Section of the State Bar of Michigan** and The Michigan Workers' Compensation Agency (WCA) invite the public to join them in celebrating the history of Michigan's diverse workforce at the 2012 North American Labor History Conference. The Conference runs from Thursday, Oct. 18, through Friday, Oct. 19, at the Wayne State University Law School, Spencer M. Partrich

Auditorium, located at 471 West Palmer Street in Detroit.

The event is being facilitated in partnership with the **Wayne State University History Department, the Wayne State University Law School, and is funded by the Workers' Compensation Section of the Michigan State Bar.**

- The two-day event opens Thursday evening at 7:30 pm with a screening and panel discussion of the film, *1913 Massacre*, by award-winning New York film directors Ken Ross and Louis V. Galdieri.
- The second day of the Conference convenes at 8:30 am and commemorates the 100<sup>th</sup> Anniversary of Michigan's Workers' Compensation Act by presenting a daylong symposium discussing the Act's past, present, and future.

Additionally, the Conference will feature a distinguished panel of speakers and presenters including Lt. Gov. Brian Calley; WCA Director Kevin Elsenheimer, Michigan Technological Institute Professor Lawrence Lankton; Former agency director, Ed Welch; Thomas Hoeg, President and CEO of Agency Business Solutions, LLC (Affiliated with Amerisure); Rutgers University Professor John Burton; H. Allan Hunt, Upjohn Institute; and International Association of Industrial Accident Boards and Commissions Executive Director Jennifer Wolf Horejsh, Executive Director and Executive Director Emeritus Gregory Krohm.

**This event is free of charge.**

For more information on the 100<sup>th</sup> Anniversary Celebration and the 2012 North American Labor History Conference contact Rosa Bava, (248) 822-6447 or Jack Nolish, Deputy Director, Workers' Compensation Agency, (313) 456-3650. Please also check the WSU event website for specific details: <http://nalhc.wayne.edu/>

# October 18 & 19, 2012

Wayne State History Department  
**THE NORTH AMERICAN LABOR  
 HISTORY CONFERENCE**  
<http://nalhc.wayne.edu/NALHC/Home.html>

**Workers' Compensation laws spread across the US in the period between 1910 and 1913.** It followed the coalescence of the rise of labor unions, increases in tort liability and the shift from the paternalistic approach to workers to the acceptance of social responsibility for disadvantaged individuals. Considered to be the first social legislation, it was followed by unemployment and other employee benefits. It was a system, however, that came about with the shift from agricultural to industrial employment. There is another great shift happening with the arrival of the Millennial Generation. The enormous impact of that change will be felt in the practice of Workers' Compensation law.

<b>Thursday</b> 10/18 7:30-9pm	"1913 Massacre" Film Showing Wayne State Law School Auditorium  Panel discussion with: <ul style="list-style-type: none"> <li>• film makers Louis Galdieri and Ken Ross</li> <li>• Prof. Larry Lankton.</li> </ul> An event sponsored by the State Bar open to all conference participants.	On December 24, 1913, the striking copper miners of Calumet were gathered with their wives and children for a holiday party at the Italian Hall. After the festivities had begun, someone -- to this day, no one knows who -- yelled "Fire!"  "1913 Massacre" follows singer/songwriter Arlo Guthrie to the town of Calumet, a once-thriving mining town on Michigan's Upper Peninsula still haunted by the tragic events that inspired Woody Guthrie's ballad, "1913 Massacre."
<b>Friday</b> 10/19 9-10:15	<b>SB Morning Gathering</b> (Coffee service begins at 8:30) Wayne State Law School Auditorium  <i>Teresa Martin</i> , WC Section Chair  <i>Lt. Governor Brian Calley &amp; Kevin Elsenheimer</i> , WCA Director  <i>Morgan E. Dowling, Esq.</i> -Wage Workers' Remedy  <i>Prof. Larry Lankton, Author &amp; Historian</i>	<b>Commemoration of the 100th Anniversary</b>  <ul style="list-style-type: none"> <li>• Event Welcome</li> <li>• The social context of the time</li> <li>• View above The bridge &amp; below the ground</li> </ul>
10:15-10:30	Break	
10:30-12	<i>Thomas E. Hoeg</i> , President and CEO Agency Business Solutions, LLC an Affiliate of Amerisure Mutual Holdings, Inc. Business/Insurance perspective  <i>Edward Welch</i> , Dean of Michigan Workers' Compensation What might have been  <i>Jennifer Wolfe</i> , IAIABC Executive Director -Millenials and The next generation of Workers' Compensation	<ul style="list-style-type: none"> <li>• Multi-focus Discussion of the 100 years of Workers' Compensation—Looking Back; Looking Ahead.</li> <li>• Discussion of the coming demographic changes in the workplace and its impact on WC as we know it. "From Punch Press to Knowledge Worker"</li> </ul>
12-1:20	<b>Joint SBM/WSU Luncheon</b> at McGregor ( <i>interested persons must register &amp; pre-pay through the NALHC website</i> ) or lunch-on-own	<b>Conference Keynote Speaker:</b> Baldemar Vazquez; Farm Labor Organizing Committee
1:30-3:30	<b>State Bar Afternoon Session</b> WSU Law School Auditorium  <i>Professor John Burton</i> , Rutgers University and <i>Gregory Krohm</i> , IAIABC Executive Director Emeritus  Moderator: <i>Dr. H. Allan Hunt</i> , Upjohn Institute	Counterpoint argument from two workers' compensation thought-leaders. These leaders will debate the question of whether or not there has been erosion of workers' compensation protections today. <i>Are injured workers getting short-changed by today's benefit structures? Do employers bear an unrealistic financial burden by the complicated and heterogeneous administrative systems across the United States?</i> Moderator will provide Michigan Perspective
<p><i>These presentations are made possible by the generous support of The Workers' Compensation Section of the State Bar of Michigan working in cooperation with The History Department of Wayne State University, Wayne State University Law School and The Workers' Compensation Agency.</i></p>		



RICK SNYDER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
LANSING

STEVEN H. HILFINGER  
DIRECTOR

September 25, 2012

Over the last two years, MAHS has been examining all expenditures in the entire system including staffing levels, contractual services and facilities. Our goal throughout this process has been to balance the needs of our customers with our available resources and construct the most fair, efficient and customer centric delivery system possible.

We are currently in the process of decreasing staffing levels and reducing our contractual service expenditures. Facility expenditures must now be addressed. We are in the process of collapsing the two Saginaw offices (unemployment and workers' compensation) into one office in the Hart Building. To further reduce costs, we will be closing the Flint Workers' Compensation office.

MAHS is in a position where we have to reduce all of our expenditures and, when considering current lease obligations, the overall state goal of reducing private leases and the proximity of other geographic locations in the state (with the capacity to handle the number of files pending in Flint), the ultimate decision was made that the Flint Workers' Compensation office would be closed following the expiration of the 90-day lease cancellation clause.

It is anticipated that appropriate notices will be sent to the parties of record on all pending cases advising them of the change in location for their hearing. Cases that arose/arise in Lapeer County will be transferred to the MAHS Pontiac hearings office and cases that arose/arise in Genesee County will be transferred to the MAHS Dimondale hearings office. Our goal is to have the transfer complete with hearings beginning in the new locations in December 2012.

We regret any disruption that this change will cause, but MAHS will be working towards making this transition as easy and seamless as possible.

Mike Zimmer  
Chief Deputy Director

## Board of Magistrates Update

By Lisa Klaeren, Chief Magistrate

Recently the Chief Deputy Director of MAHS, Mike Zimmer, announced that the Flint Workers' Compensation Agency would be closing in early December 2012. This decision was made as part of an overall review of facility expenditures, along with an overall statewide goal of reducing private leases. The 90-day lease cancellation clause has been invoked and the last day of the lease is December 9, 2012.

Beginning December 10, 2012, all current cases with Genesee County injuries will be transferred to the Dimondale Agency and all current cases with Lapeer County injuries will be transferred to the Pontiac Agency. For the Genesee County cases, they will remain with the Magistrate that they are currently assigned to as both Magistrate Tjapkes and Magistrate Birch will be moving to the Dimondale Agency and maintaining their individual files. The Lapeer County cases will be distributed to the magistrates assigned to the Pontiac Agency on a random basis. Future claims will be distributed to the various magistrates at the appropriate location.

Once the move is complete, Magistrate Tjapkes and Magistrate Birch will be in Dimondale on a full time basis.

Magistrate Timmons and I will split the remaining docket in Dimondale. In Pontiac the assignments will remain the same, with Magistrates Rochau and Mason working there full time and Magistrate Ognisanti working there three weeks out of four (with one week in Saginaw).

Although this reassignment will cause a readjustment for all parties, this decision was made after careful consideration of MAHS' available resources and the needs of our customers. Transferring the majority of the files to Dimondale will not require any additional space than we already utilize in Dimondale. We would not have been able to do the same in either Pontiac or Saginaw, neither of which have space available to accommodate the Genesee County files.

As with any other location that requires the claimant, witnesses and/or the employer's representatives to travel to attend a hearing, the magistrates will work with the parties to ensure that any inconvenience is minimized. With all of us working together, I am confident that we will adjust to this change without too much difficulty. ✂

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## Michigan Compensation Appellate Commission

By Jack Wheatley

A longtime Workers Compensation Appellate Commission administrator has returned to duty to the Michigan Compensation Appellate Commission. Rita Jenks, who served the now defunct workers compensation appellate commission from 1992 to 2011 as a supervisory legal Secretary, has assumed most of the Michigan Compensation Appellate Commission duties of Mark Long who is now the administrator of the Workers Compensation Funds. Rita, in her new position as departmental analyst, is responsible for the case flow of both unemployment and workers' com-

ensation appeals at the Commission as well as a myriad of other Commission duties. These duties include continuing review of rules, procedures, regulations, and the coordination of the various Commission staff in facilitating the flow of cases. The Commission is pleased to have Rita on board for her workers compensation experience as well as her assumption of Mr. Long's unemployment insurance responsibilities. Rita's most recent assignment with LARA was special assistant to LARA Chief Deputy Director Mike Zimmer. ✂

## But Did You Know . . .

By Martin L. Critchell

All practitioners know that the workers' compensation act does not allow prorating compensation among the prior employers of an employee who contracts a disease. And many remember why; the provision that had once allowed for prorating the compensation for an occupational disease was repealed after the decision by the Michigan supreme court in the case of *Derwinski v Eureka Tire Co*<sup>1</sup> that a back condition could qualify as an occupational disease. But did you know . . . compensation for an occupational disease can be prorated by the involvement of another disease or disability.

The second sentence of MCL.418.431 allows prorating the compensation for an employee with an occupational disease by the amount of the involvement in the disability by another disease or injury by saying,

“Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated or in any way contributed to by an occupational disease, the compensation payable shall be a proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as a causative factor, bearing to all the causes of such disability or death, such reduction in compensation to be effected

by reducing the number of weekly payments or the amounts of such payments, as under the circumstances of the particular case may be for the best interest of the claimant or claimants.”

This provision must be applied because the imperative **shall** is used in the phrase **the compensation shall be a proportion only**. As the Michigan supreme court said in deciding the case of *Stand Up for Democracy v Secretary of State*<sup>2</sup>, “the mandatory term ‘shall’ in MCL 168.482(2), in the absence of any language indicating that substantial compliance with the statute’s requirements suffices, indicates a clear intent that such a petition must strictly comply . . . Consequently, substantial compliance with [§482(2)] is not permitted.”

All of the diseases and conditions must be ascertained and then categorized as occupational and personal and finally, the involvement of the latter as the cause of disability calculated and compensation prorated or “apportioned” accordingly. ✕

### Endnotes

- 1 407 Mich 469; 286 NW2d 672 (1979).
- 2 -- Mich --, -- NW2d -- (2012).

## Upcoming Events

Date	Event	Contact Person	Contact Information
10/18–10/19/12	National Ass'n Labor Historical Conference	Rosa Bava Jack Nolish	rosa.bava@thehartford.com or (248) 822-6447 Nolishj@Michigan.gov or (313) 456-3650
12/07/12	Winter Section Meeting	Andrea Hamm	Andreahamm@millercohen.com
02/10-17/13	Winter Seminar Punta Cana, Dominican Republic	Jill Lisman	Pro Travel, 40 E. Norton Ave, Muskegon MI 49444 (231) 733-8359
06/20-06/22/13	Spring Section Meeting	Ella S. Parker Matt Conklin Chris Rabideau	eparker@conklinbenham.com Matt@conybearelaw.com crabideau@mccroskeylaw.com



**State Bar of Michigan Worker's Compensation Section  
2013 Winter Seminar**

February 10<sup>th</sup> - 17<sup>th</sup> 2013

Punta Cana, Dominican Republic

Now Larimar Punta Cana Resort [www.nowresorts.com](http://www.nowresorts.com)

All Inclusive: An unlimited luxury resort, all inclusive, 7 gourmet restaurants, 9 bars and lounges, tips and all taxes.

On site casino, spa, golf nearby, 5 pools, water activities.

Round trip non stop transfers. 15 minutes from the airport

\$200 in resort coupons per room for individual spending

Direct flights from Lansing and Detroit to Punta Cana:

Travel from Lansing:

Outbound time: 8:00 am arrive 1:15pm

Return time: 2:00 pm arrive 5:40 pm

Travel from Detroit:

Outbound time: 8:00 am arrive 2:10 pm

Return time: 2:10 pm arrive 6:06 pm

Prices per person from Lansing:

Tropical View \$1771

Ocean View \$2020

Preferred Club partial ocean view \$2280

Preferred Club ocean view \$2370

Prices per person from Detroit:

Tropical View \$1821

Ocean View \$2071

Preferred Club partial ocean view \$2425

Preferred Club ocean view \$2525

Deposit of \$350 per person due on September 20<sup>th</sup> 2012

Final payment due December 12<sup>th</sup> 2012

Please contact: Jill Lisman, Pro Travel, 40 E. Norton Ave, Muskegon MI 49444, (231) 733-8359

# Caselaw Update

By Martin L. Critchell

## Supreme Court

The Michigan Supreme Court did not decide any case involving one or another statute in the workers' compensation act during the 2011-2012 Term. However, the Court pronounced principles in three cases that directly affect workers' compensation law.

In deciding the case of *DeFrain v State Farm Mut Auto Ins Co*<sup>1</sup> the Court announced that, "[A]n order of this Court is binding precedent if it constitutes a final disposition of an application [for leave to appeal] and contains a concise statement of the applicable facts and reasons for the decision." (emphasis added) This should answer any further questioning of the authority of the decision in cases such as *Fahr v Gen Motors Corp.*,<sup>2</sup> *Lofion v AutoZone, Inc.*,<sup>3</sup> and *Harder v Castle Bluff Apts.*<sup>4</sup> And this may be the foundation for the Court to render more pronouncements about the law of workers' compensation by peremptory order instead of either remanding for plenary review by the court of appeals or by the Court itself.

In the case of *Douglas v Allstate Ins Co*<sup>5</sup> the Court had two pronouncements about valuing the cost of attendant care provided by a spouse or other member of the family. One was that the spouse had to demonstrate that renumeration for care had been expected.<sup>6</sup> ("an injured person who seeks reimbursement for any attendant care services must prove by a preponderance of the evidence ... the caregiver's expectation of compensation or reimbursement for providing the attendant care.") And the 'best way'<sup>7</sup> to do this is 'for the caregiver to document the incurred charges contemporaneously with providing them'<sup>8</sup> as "[t]he lack of contemporaneous documentation implicates [the] credibility [that] the services were actually rendered"<sup>9</sup> and may affect whether the provider "actually expected payment for providing those services."<sup>10</sup> The other was that the charge by a commercial agency to a patient was not germane because "it also incorporates additional costs into its charge that family members who provide services do not incur ..."<sup>11</sup> The pay by a commercial agency to a nurse who provides care is germane.<sup>12</sup> ("[T]he compensation actually paid to caregivers who provide similar services is necessarily relevant to the fact-finder's determination of a reasonable charge for a family member [who has provided] these services.")

And in the case of *Stand Up for Democracy v Secretary of State*<sup>13</sup> the Court said when the doctrine of substantial compliance would and would not apply. ("the mandatory term 'shall' in MCL 168.482(2), in the absence of any language

indicating that substantial compliance with the statute's requirements suffices, indicates a clear intent that such a petition must strictly comply ... Consequently, substantial compliance with [§482(2)] is not permitted.") Plainly, this may preclude claims of "substantial compliance" in a host of situations before and after a hearing.

## Court of Appeals

The Michigan court of appeals did not render an opinion "for publication" since the last update. The court of appeals did decide several cases that are noteworthy even though technically not authoritative beyond the parties.

In the case of *Coleman v HDS Services/Trettco, Inc.*,<sup>14</sup> the court affirmed an award of compensation for disability under then-MCL 418.301(4) based on the opinion of the vocational expert sponsored by Trettco, not the expert presented by Coleman. The court of appeals said that, "The placement of the employer's burden of production 'after' the claimant's burden of proof does **not** have any bearing on what evidence may be considered in the analysis [required in *Stokes v Chrysler, LLC*, 481 Mich 266; 750 NW2d 129 (2008).]"<sup>15</sup> This idea is hardly new. *Aquilina v Gen Motors Corp.*<sup>16</sup> ("You must consider all of the evidence regardless of which party produced it.")

In deciding the case of *Adair v Gen Motors Corp*<sup>17</sup> the court considered when "retiree" disability under MCL 418.373(1) could apply. The court decided that §373(1) could not apply because Judith Adair stopped work and began an approved sick leave on August 31 and GM later designated her retirement as October 1, 2006. The court rejected the idea that Adair had terminated active employment on June 29 when she accepted a special attrition package that required her to retire by January 1, 2007.<sup>18</sup> The basis for this was that Adair had actually continued to work afterwards.<sup>19</sup>

And in the case of *Holmes v ET4, Inc.*,<sup>20</sup> the court of appeals described the breadth of a job search by an employee to establish disability. The court of appeals ruled that a job search could not be too broad, only too narrow. The court of appeals recounted that Joe Holmes had "considered other jobs even if they did not pay his maximum pre-injury wage."<sup>21</sup> While this was more than considering jobs that paid his maximum wage as required under *Stokes v Chrysler, LLC*,<sup>22</sup> that was not improper. The court of appeals said that, "[T]he Court's warning [in the case of *Stokes v Chrysler*,

Continued on the next page

**Case Law Update**

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*LLC*, 481 Mich 266; 750 NW2d 129 (2008)] concerns a claimant who defines the universe of jobs too narrowly, not too broadly. *Stokes* does not indicate that a claimant fails to consider a 'proper array' when he conducts a job search that may be overly broad."

Importantly, this may be superfluous when a vocational expert is presented by the employer.

**Michigan Compensation Appellate Commission**

In the case of *Bruntjens v Michigan*<sup>23</sup>, the lawyer for the State announced that a videographer might testify at trial when asked about the witnesses who might be called and testify, prompting the lawyer for Bruntjens to demand a copy of the video and the identity of the investigators and when refused, filing a motion for this information or "discovery." *Bruntjens*.<sup>24</sup>

The workers' compensation board of magistrates and Michigan compensation appellate commission denied the request(s) by Bruntjens. The commission first emphasized the disclosure of information before a hearing was proper when it "cannot be obtained in any other fashion because it is under the sole control of the employer." *Bruntjens*.<sup>25</sup> Of course, Bruntjens knew what he did and did not do while videotaped or observed by the investigator.

And the commission then added that the videotape was not a "record, memorandum, report, or data compilation" that had to be provided under Rule 5 (1) in advance of the hearing. *Bruntjens*.<sup>26</sup>

The workers' compensation appellate commission was called upon to decide who was or was not a proper claimant in the case of *Burda v Lincoln Consolidated Sch.*<sup>27</sup>

Karen L. Burda was a custodian who was traveling from one school to another when thrown from the vehicle and died. She was survived by her husband, Robert Burda.

A lawyer appeared at a hearing and announced that he represented the "Estate of Karen Burda but the identity of the representative of the estate was not known.

The workers' compensation board of magistrates allowed this and decided that Karen L. Burda had died from injuries sustained that arose out of and in the course of employment.

On appeal, the Michigan compensation appellate commission vacated the decision saying that the declaration by the lawyer was not sworn testimony and that there was no other evidence that there was actually any estate. And the commission returned the case for the board to reopen the record to establish if there actually had been an estate in which

case "the personal representative ... would be the proper plaintiff ...

The decision by the commission underscores the demand for actual evidence for facts – sworn testimony by some witness or a document – instead of unsubstantiated declarations by lawyers. But the decision by the commission that "the personal representative of an estate, if [one] exists, would be a proper plaintiff" is problematic. A personal representative can continue a claim that an injured employee has filed under MCL 418.375(1). ("If an application for benefits has been filed but has not been decided by a workers' compensation magistrate or on appeal and the claimant dies from a cause unrelated to his or her injury, the proceedings shall not be abated but may be continued in the name of his or her personal representative.") But different protocol applies when an employee dies before a claim is filed as in *Burda*. Only a surviving dependent or the guardian of a surviving dependent can file a claim for death benefits under the second sentence of MCL 418.341. ("The death benefit shall be directly recoverable by and payable to the dependents entitled thereto, or their legal guardians or trustees.") (emphasis added)

A claim for death benefits filed by the representative of the estate of the deceased employee under the authority of *Burda* should be opposed with the reference to §341. ✕

**Endnotes**

- 1 491 Mich 359, 369; - NW2d – (2012).
- 2 478 Mich 922; 733 NW2d 22 (2007).
- 3 482 Mich 1005; 756 NW2d 85 (2008).
- 4 489 Mich 951; 798 NW2d 26 (2011).
- 5 - Mich - ; - NW2d – (2012).
- 6 *Id.* at 2.
- 7 *Id.* at 25.
- 8 *Id.*
- 9 *Id.* at 26.
- 10 *Id.*
- 11 *Id.* at 31.
- 12 *Id.*
- 13 - Mich - ; - NW2d – (2012).
- 14 Unpublished opinion of the Court of Appeals, issued on April 19, 2012 (Docket no. 298468).

Continued on the next page

**Case Law Update**

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- 15 *Id.* at 5.
- 16 403 Mich 206, 212; 267 NW2d 923 (1978).
- 17 Unpublished opinion of the Court of Appeals, issued on May 15, 2012 (Docket no. 299978).
- 18 *Id.* at 3.
- 19 *Id.*
- 20 Unpublished opinion of the Court of Appeals, issued on August 2, 2012 (Docket no. 303954).
- 21 *Id.* at 9.
- 22 481 Mich 266, 298; 750 NW2d 129 (2008). (“the claimant must consider other jobs that pay his **maximum pre-injury wage** to which the claimant’s qualifications and training translate.”) (emphasis added)
- 23 2012 Mich ACO 62.
- 24 *Id.* at 2.
- 25 *Id.*
- 26 *Id.* at 3.
- 27 2012 Mich ACO 41.

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