

Workers' Compensation Section Newsletter

Fall 2014



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From the Chair

By William Housefield



Our Winter Meeting and Seminar is scheduled for **December 5, 2014** at the Dimondale Agency, which is centrally located in the state. Coffee and doughnuts will be available starting at 8:30 a.m. We will call the meeting to order at 9:00 a.m. We have heard that many members continue to struggle with identifying the necessary elements in order to prove disability and wage loss. The role of the vocational expert continues to be an integral element of the proofs. Your Council has arranged for well-known and respected individuals to speak on this topic. You do not want to miss this debate. In addition, we expect reports from the Director of the Agency, the Chief Magistrate, and the Chair of the MCAC.

As many of you may know, there were hearings conducted July 30, 2014 on the new proposed administrative rules for MAHS. My sources tell me that the current rules are significantly different from the original proposed rules. I also understand that the rules went before JCAR (Joint Committee on Administrative Rules) for consideration. There was a request that JCAR waive the normal 15-day legislative sessions rule. My understanding is that JCAR declined to waive the 15 day legislative sessions rule and we are currently in a holding pattern to determine if the legislature will sit for 15 days between the hearing and the end of the year. If they do not, MAHS will submit the rules again in the New Year. If they do have 15 sessions days, they will become effective. Therefore, it is likely that we will have new administrative rules **in effect** within the next few months. There will no doubt be lively conversations and debates regarding the application of the rules to our practice.

If you have not seen an email yet, be on the lookout for the announcement concerning the new webpage for our section. It is all part of the State Bar of Michigan's connect program. You can go to the following link: <http://connect.michbar.org/workerscomp/communityresources/communitymembers> and upload a photograph and/or biographical information. The website will allow members to view announcements, newsletters, meeting minutes and seminar announcements and materials. New features on the web page will allow members to join open forums,

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Ella S. Parker, 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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From the Chair Continued from page 1

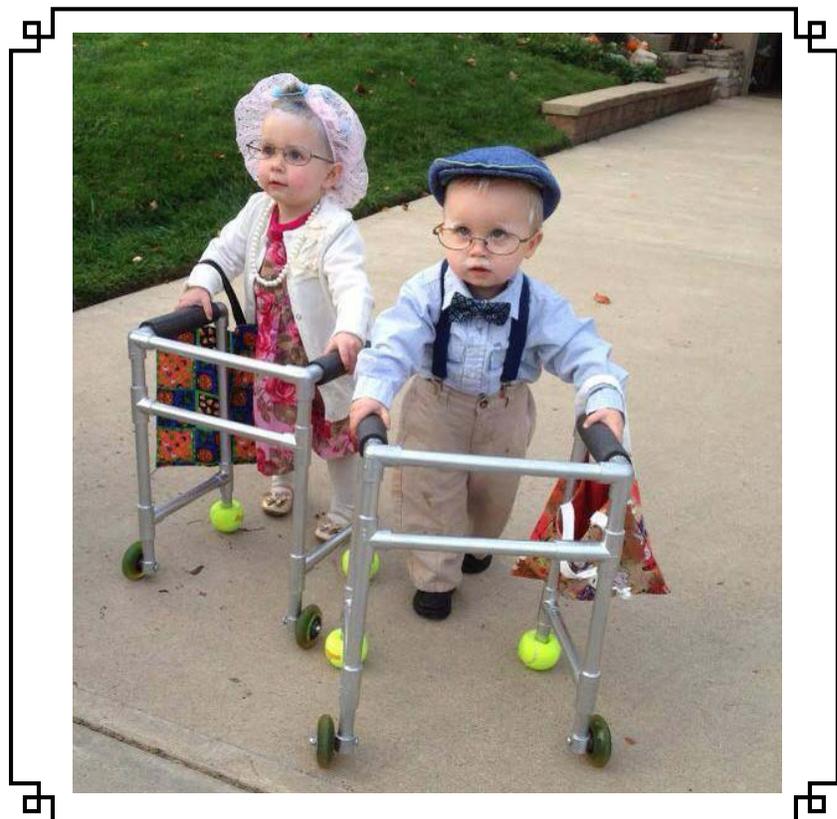
ask or answer questions from peers, share useful documents and resources, and send a friend request to network and make connections.

Council is continuing to look at potential locations for our annual meeting in June 2015 and have tentatively set the meeting dates as June 18 and June 19, 2015. Please mark your calendars accordingly and plan to attend. We hope to see you all in December at the Winter Meeting. ✂

Some State Bar of Michigan Statistics

By J. William Housefield

In 2004 there were 1,004 members of the workers compensation law section. As of 2014 there are 707 members. In 2004 there were 49,899 attorneys that were active members of one or more sections of the State Bar. That number increased to 62,423 for 2014. Many attorneys are members of multiple sections. As of 2014 there were 40,467 active attorneys practicing in the state of Michigan. Just over 1,000 new attorneys per year have been admitted to practice law in the state of Michigan between 2004 and 2014. During this 10 year period 44.6% were females and 55.4% were males. ✂



When We Grow Old



A Word from the Editor: Rambling Thoughts

By Ella S. Parker

A few weeks ago, while I was watching one of my favorite shows, *The Big Bang Theory*, I waited for the post-show vanity card from producer Chuck Lorre. That night, he wrote that he was going to stop writing the vanity cards because he had changed over time. He was no longer the brash young smart aleck he once was. I raised an eyebrow and I thought that's too bad because I found his rambling comments amusing at times. But, I can relate to those sentiments. There are times when I wonder if anyone reads the *Newsletter*. Do people really appreciate the work, the time and the commitment that goes into the *Newsletter*, not only by myself, but by the Chairperson of the Council, Magistrate Klaeren, Marty Critchell, and others who submit articles? I was struggling with writing this column. I know others who have expressed this same concern.

The following week, Chuck Lorre Productions posted vanity card #464, which I quote:

"In my last vanity card I announced that I was quitting writing vanity cards. I was pretty firm about it. Didn't leave myself a lot of wiggle room. Not that I need any. Nothing's changed. I still feel like I made the right choice. Sure, I might have welcomed a groundswell of support for me to rethink my decision. I mean, I have been writing these things for 18 years. You'd think it would mean more to people. But no. The general reaction to my announcement was mild disappointment followed by a shrug. A literal shrug. I actually saw several pairs of shoulders lift earward an inch or two. No one sat me down and pleaded with me to reconsider.

Nor was there a celebration on my having achieved such a singularly unnecessary, non-literary achievement. If anyone felt the urge to reminisce about a personal favorite vanity card

out of the FOUR HUNDRED AND SIXTY-THREE that I've labored over, they certainly didn't bring it up with me. No, the best I could hope for was shoulder spasms. One "friend" politely asked me what I'm going to do with all the free time I'll have now. I said that I planned on cultivating bitterness. He looked to see if I was kidding. I shrugged. Which, if you haven't noticed, is how one elegantly ties up disparate threads in a meandering essay that is clearly destined to be underappreciated."

I laughed because I truly enjoy Mr. Lorre's ramblings in his vanity cards. And, my hope is that someone out there enjoys this *Newsletter* and finds it beneficial, informative or amusing. Since we now only send them out electronically, you will not be able to line your parrot cage with it. ✖



Correction: Please note that in the Summer 2014 Edition of the *Newsletter*, Magistrates Timmons and Slater would like to point out that the de minimus rule mentioned in their article about Medicare only applies to liability cases at the present time.

**State Bar of Michigan
Workers' Compensation Section
Winter Meeting**

**December 5, 2014
9:00 am – 12:00 pm**

Continental Breakfast and Registration will begin at 8:30 am

Dimondale Workers' Compensation Agency
State Secondary Complex
General Office Building
7150 Harris Drive
Dimondale, MI 48821

Introduction: Chairperson and Moderator: J. William Housefield

AGENDA

- | | |
|------------------|---|
| 9:00 – 10:00 am | General Business Meeting <ul style="list-style-type: none">• Chairperson's Report – J. William Housefield• Secretary's Report - Ella S. Parker• Treasurer's Report – Timothy J. Esper• Director's Report – Kevin Elsenheimer• MCAC Chair's Report – George Wyatt• MAHS Update – Chief Magistrate Lisa Klaeren |
| 10:00 – 10:15 am | Break |
| 10:15 – 11:15 am | Panel Discussion: The Evolution of Stokes & Lofton <ul style="list-style-type: none">• James Fuller, plaintiff's perspective• Andrew Nay, defendant's perspective |
| 11:15 – 12:00 pm | Appellate Review from Both Sides <ul style="list-style-type: none">• Daryl Royal, plaintiff's perspective• Martin Critchell, defendant's perspective |

Board of Magistrate Update

By Chief Magistrate Lisa Klaeren

As I have indicated in the past, the one thing we can count on in this world is that there will be changes. Sometimes the changes are good and, sometimes, challenging. The Workers' Compensation Section is dealing with changes in dockets, administrative rules and possibly magistrates.

We have recently shifted dockets in the Upper Peninsula due to a decrease in the number of pending cases. Beginning in November 2014, Magistrate Woons will be covering all of the Upper Peninsula dockets. One month she will be in Baraga on Tuesday and Escanaba on Wednesday and Thursday. The following month she will be in Escanaba on Tuesday and Wednesday and in Sault St. Marie on Thursday. All of the files will be kept with Magistrate Woons in the Saginaw office. This will enable her to resolve issues that arise on any given case in a timely manner, from any of her locations.

The Administrative Rules, governing all administrative hearings (including workers' compensation cases) in the State, are continuing through the adoption process. In October 2014 there was a hearing before JCAR, following changes that were made to the rules after the public hearing in July.

Absent a waiver of the required session days, the rules may not become effective until February of 2015. The most significant change will be the use of a scheduling order that sets deadlines for various actions that need to be completed prior to trial. The magistrates are developing a scheduling order, to be completed by the parties and the assigned magistrate, that identifies appropriate timeframes for completion of things such as IMEs, depositions, facilitations, etc. We will provide a blank copy of the order, once it is completed, so that everyone has an idea of what will be expected.

At 5:00 p.m. on January 26, 2015, the terms of seven of the fifteen magistrates will expire. We anticipate that Governor Snyder will make appointments or re-appointments to fill those seven positions prior to that date. The current locations of those appointments include Detroit, Flint, Saginaw, Dimondale, Grand Rapids and Kalamazoo.

I will be providing additional updated information at the upcoming Section Meeting on December 5, 2014 in Dimondale. ✖

MAGISTRATES' TERM DATES

Sorted by Name

Magistrate's Name	Appointed	Term Expires
Boyle, Brian	06/13/11	01/26/15
Castora, Keith	01/26/13	01/26/17
Colombo, Jane	01/26/13	01/26/17
Grunewald, David	11/15/10	01/26/15
Klaeren, Lisa	03/09/08	01/26/15
Kurtz, David	02/06/09	01/26/17
Logan, Beatrice	01/26/06	01/26/15
McAree, Timothy	01/26/05	01/26/17
McMurray, Luke	02/10/14	01/26/17
Ognisanti, E. Louis	01/31/11	01/26/15
Slater, Chris	01/31/11	01/26/15
Timmons, Robert	07/18/11	01/26/17
Tjapkes, Robert	06/13/11	01/26/15
Williams, David	01/26/13	01/26/17
Woons, Lisa	01/26/13	01/26/17

But Did You Know . . .

By Martin L. Critchell

“Let’s kill all the lawyers” is an expression commonly used by people who are frustrated by one or another rule of law. Jokes from the 1800’s use the line. The Eagles use the line in a song. But did you know . . . its context?

The line was penned by William Shakespeare for the character Dick the Butcher in the history play, *Henry VI, Part 2*. Dick the Butcher tells the leader of the rebels, Jack Cade, “The first thing we do, let’s kill all the lawyers.”

Most scholars understand the line as portraying lawyers as the first guardians of the rule of law and opponents of insurrection because the character Dick the Butcher is a sappy henchman of the malevolent rebel leader, Jack Cade, who impetuously blurts out the line while plotting insurrection.

Other scholars are not so generous. Jack Shapiro, an author of several books about Shakespeare and his plays, says the line is used to highlight the fears of insurrection and civil unrest among the noble class and the resentment of commoners who did not understand and could not afford lawyers who were aligned with aristocrats who could. He says Shakespeare tended to portray commoners with characters such as Dick the Butcher as the subject of satire to dramatize these divisions while distancing himself from the views of insurrectionists such as Cade.

But no scholar understands Shakespeare using the line to express the idea that lawyers are the problem in society and that the solution is elimination of lawyers. Plainly, the line was neither an attack on lawyers nor a slur. It should be a badge. ✖



Be a good egg, invite someone to join the section • www.michbar.org/sections

Michigan Compensation Appellate Commission

By George Wyatt, III

(From his August 28, 2014 Report to the Council)

1. George Wyatt has succeeded Jack Wheatley as chair of MCAC.
2. As of the week ending August 22, 2014 there were 87 pending WC appeals before the MCAC. Of those, 44 had been assigned to commissioners for review.
3. The following commissioners were (re)appointed to four years terms effective August 1, 2014: Lester Owczarski, Jack Wheatley & George Wyatt.
4. Other sitting commissioners whose current terms expire July 31, 2015 are Garry Goolsby, Greg Przybylo & Neal Young. Currently, Mr. Young does not participate in deciding workers' compensation cases unless there is consideration of a case *en banc*.
5. Danielle Brown and Patti Halm are sitting commissioners with current terms expiring July 31, 2017.
6. With the departure of Steve Arwood from LARA to MEDC, Mike Zimmer has accepted the position of Acting Director of LARA. Chris Seppanen in turn assumes the role of Acting Executive Director of MAHS. He will report to Mr. Zimmer through Kevin Elsenheimer, in the latter's capacity as a LARA Deputy Director. Mr. Elsenheimer retains his separate role as Director of the WCA.
7. MCAC is currently meeting Federal guidelines for timeliness in disposition of unemployment appeals. However, we anticipate an uptick in our UC case load as the MAHS lower authority begins to implement a plan to hear an accumulation of cases. ✖

Kids Chance of Michigan Update

By Murray Feldman

Due to the generous contributions of many Section members and others, we are excited to announce that our Scholarship Committee has awarded three more scholarships to deserving students.

Our new scholarship recipients are Selma from Grand Rapids, attending Aquinas College (mentor Dave DeGraw); Claire from Warren, attending Wayne State (mentor Andrea Hamm); and Daniel from L'Anse, attending Northern Michigan (mentor John Heikkila). This brings the total number of scholarships awarded to 8 and the total awards to \$40,000.00 for 2014-2015.

Selma has been named the John Buehler Scholarship recipient.

Please check our website for upcoming events, including a bowling event on November 14, 2014 and for opportunities to join in the fun and/or become a sponsor. www.kidschanceofmi.org

Thanks to all who attended/supported our recent golf event, which raised \$5000.00. ✖



Kids' Chance of Michigan Bowling Fundraiser!

Please join us for a night of bowling, raffles, prizes, and fun!

Friday, November 14th, 7PM – 11PM
(Registration starts at 6:30)

Drakeshire Lanes

35000 Grand River Avenue, Farmington Hills

Includes 2 games, shoes, group picture, pizza, and pop
\$25/registered individual bowler

KCOMI Bowling Registration

Bowler Names:

1. _____ (Team Captain)
2. _____
3. _____
4. _____
5. _____
6. _____

Bowler Email Address:

TOTAL \$ _____

Please make check payable to KCOMI & mail or provide check with form to Azurely Kerr.
Azurely Kerr | Kids' Chance of Michigan | 2485 Ivy Hill Drive, Commerce Township, MI 48382 | Confirmation e-mail will be sent upon receipt

Registration due Friday, November 7th, 2014

- *If registering more than one lane or team, please fill out a form for each*
- *Individual bowlers will be placed on a lane*

Caselaw Update

By Martin L. Critchell

There was only one important decision about the workers' compensation act¹ that was announced by a court or the Michigan compensation appellate commission since the last issue of the Newsletter, *Nichols v Howmet Corp (On Remand)*.^{2,3}

As directed by the Michigan supreme court, the Michigan court of appeals considered just one question. The question was about allocating or apportioning the wage loss compensation for an employee between two workers' compensation insurers of a single employer.⁴ *Nichols On Remand*.⁵ There was no question that the employee, Edwin A. Nichols, had one employer or that the employer had insurance for workers compensation by one insurance company when the employee was injured at work in 1993, Pacific Employers Insurance Company, and by another, American Manufacturers Mutual Insurance Company, when the employee was injured at restricted work in 1998. Those were questions that the Court had decided when the case was first considered, *Nichols v Howmet Corp*.⁶

The court of appeals ruled that the wage loss compensation for an employee *could be* allocated or apportioned between the two compensation insurers of the employer saying that,

"The [workers' compensation [appellate] commission correctly determined that Pacific [Employers Insurance Company], the first insurance carrier, was liable to pay [wage loss compensation] benefits on the basis of [Edwin A.] Nichols wages at the time of [his] original injury. But the commission should not have declined to order reimbursements for Pacific ..." *Nichols On Remand*.⁷

No statute in the workers' compensation act was cited for this. Indeed, the court of appeals recognized that statutes

did allow allocating or apportioning compensation between other people and in other circumstances, but said that those statutes did not preclude allocation here,

"MCL 418.301(5)(e) does not prohibit allocation or reimbursement because it does not address the issue. Nor has the Legislature prohibited, by negative implication, allocating liability between insurance carriers when a partially disabled employee suffers another injury while performing reasonable employment. We conclude that we may order allocation or reimbursement, if either is warranted." *Nichols On Remand*.⁸

Instead, the court of appeals relied on "principles of causation,"

"[T]o hold the first insurer liable for the employee's entire amount of wage-loss benefits under MCL 418.301(5)(e) when a second disabling injury causes the employee to lose his or her job defies principles of causation in workers' compensation law for two reasons. * * * Nichols' 1998 low-back injury separately caused much of the reduction in his wage-earning capacity."²²

Second, an employee's postinjury earnings or ability to earn operates as a credit and mitigates the employer's liability to pay wage-loss benefits.²³ Even after Nichols's 1993 cervical-spine injury, he retained some capacity to work.²⁴ His earnings mitigated Pacific's liability to pay wage-loss benefits.²⁵ Nichols's 1998 low-back injury caused his involuntary removal from the workforce and ended the mitigation of Pacific's liability to pay wage-loss benefits. At that time, American was

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the worker's compensation insurer for any injury. It is logical that American should reimburse Pacific when Nichols's 1998 low-back injury ended the mitigation of Pacific's liability to pay wage-loss benefits." *Nichols On Remand*.⁹

The decision has the unusual result that an insurer must pay wage loss compensation to another insurer, not to the injured employee. As the first insurer, Pacific, remains liable and entitled to reimbursement from the second, American Manufacturers, the decision by the court of appeals is authoritative even though appealed. MCR 7.215(C)(2). ✖

Endnotes

- 1 MCL 418.101 -- .941.
- 2 306 Mich App 215; ___ NW2d ___ (2014)
- 3 Martin L. Critchell represented a party before the Michigan court of appeals.
- 4 *Nichols v Howmet Corp*, 495 Mich 988; 844 NW2d 722 (2014).
- 5 306 Mich App at 217.
- 6 302 Mich App 656, 666-667, 671-672; 840 NW2d 388 (2013), *lv den and remanded*, 495 Mich 988; 844 NW2d 722 (2014).
- 7 *Id.* at 223.
- 8 *Id.* at 221.
- 9 *Id.* at 223-224.

State Bar of Michigan Worker's Compensation Section 2015 Winter Seminar February 8th-15th 2015

Cabo San Lucas, Mexico

Pueblo Bonito Pacifica Golf and Spa Resort Luxury All Inclusive
Adult Only Resort

www.pueblobonitopacifica.com

Direct flight from Detroit:

Delta Airlines: 8:45am Detroit arrive Cabo San Lucas 12:07pm 8th of February

Delta Airlines: 12:52pm Cabo San Lucas arrive Detroit 7:12pm 15th of February

Total Price per person:

Deluxe room \$2332.00

Deluxe Ocean View room \$2531.00

Insurance is additional: \$125.00 per person

A deposit of \$400.00 per person is due on the 16th of September

Final payment is due on the 17th of December

Please Contact: Jill Lisman at Pro Travel

616 844 2200 17220 Van Wagoner Rd. Spring Lake, MI 49456