

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Winter 2013



From the Chair

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What a great turn out we had at the Winter Meeting! I would like to thank Dr. Ilka, Chris Wolfkiel, Phil LeFevre and Ken Eichler for speaking to the Section regarding Evidence Based Medicine. I am sure this is a topic that will be coming up again in the near future. Also, thanks to Andrea Hamm and Phil Frame for all the planning that went into the meeting.

As we have clearly moved into winter in Michigan, it may be helpful to think SUMMER! Mark your calendars for the Annual Summer Meeting June 20-22, 2013 at Boyne Highlands in Harbor Springs.

Speaking of the Summer Meeting, nominations for the Hall of Fame are being accepted. If you have someone you would like to nominate, please do it! See the article in the Newsletter with additional information regarding the nomination process and considerations.

The Section Council meets generally once a month. Our next meeting is on February 1, 2013, at 9:00 am in Dimondale/Detroit through a video hookup. If anyone has any issues that you would like discussed, please let any member of the Council know. And, of course, any member is welcome to attend Council meetings.

—Teresa Martin

A Word from the Editor

By Ella S. Parker



I know some of you may have made New Year's resolutions. If you have not, please check out Chief Magistrate Lisa Klaeren's article as she has some suggestions you may wish to consider.



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This Peanuts comic strip summed up my resolutions from years gone by quite nicely. *Is keeping one out of three bad?* I will leave it to you to decide which one I have been successful at over the years and which two need work.

All kidding aside, there is a lot of great information in this issue of your Newsletter and I hope everyone has an opportunity to read it. The

Newsletter is sent out in an email blast and section members do not receive a hard copy in the mail anymore. The counsel changed this process several years ago for economical reasons. Members are free to print their own copy of the Newsletter by going to the State Bar Website <http://www.michbar.org/workerscomp/newsletter.cfm> or from the link with the email blast.

Recently I noted that not all of our section members have registered their email address with the State Bar of Michigan. Chris Rabideau and I are in the process of obtaining an updated copy of our registered section members to determine whose email may not be included. If you are reading this article by obtaining it somewhere other than from the email blast and have not registered your email, or know someone who has not done so, please log into the State Bar's website or call them and provide your email address. Or you can contact Teresa Martin by phone (248-312-7918) or email (tmartin4@travelers.com) and she can add you to

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Workers' Compensation Law Section Council

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

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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A Word from the Editor

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the email blast list. Our Section sends out email blasts with important information frequently.

Our section members can expect an email blast in the next 30 days regarding our annual Spring (now Summer) meeting. This year we have selected Boyne Highlands in Harbor Springs, MI. The dates are June 20, 2013 to June 22, 2013. There are three different types of room accommodations available at different prices. These rooms are on a first come, first serve basis. Therefore, I recommend making your room reservation as soon as possible.

Please note that a room reservation at Boyne Highlands does not include your registration for the seminar—that is a separate form that will be sent out shortly!

In addition, your section meeting committee wants to make sure everyone is aware that the CHECK IN time is 6:00 pm. Our functions usually begin at 6:00 pm. This may create some conflicts but Boyne could not guarantee early check in. However, if they do not have many reservations for Wednesday night, June 19, 2013 and your room is available prior to 6:00 pm, you will be allowed to check in early. Please be prepared.

Finally, if you do not pre-register for the actual meeting, you may not be seated at the meeting or receive any handouts. While we attempt to provide extra copies at the meeting, the Committee and the Council feel it is only fair that those that pre-registered receive their handouts first. Thanks for your understanding in advance. ✂

This One is For Pat.....

By Michael Podein and Ella S. Parker

Our Section members experienced quite a few losses in 2012. In some instances, we lost actual Section members. In other instances, we lost family members and loved ones. Not one loss was more important than another was and all of them affected their family and friends significantly.

On Saturday, November 4, 2012, Patrick D. Murphy of Strain, Murphy & VanderWal in Grand Rapids passed away unexpectedly in his sleep. For those of us who had the privilege of practicing with Pat over the years, we often joked about his propensity to wear his favorite tan camel hair blazer from September through August. Therefore, in honor of Pat, Mike Podein coordinated Pat Murphy Day on MONDAY NOVEMBER 26, 2012. Mike noted that Pat's camel hair jacket was even mentioned by his priest in his eulogy and "he will be wearing it for eternity." ✂



Bottom Row: Rod Fagerman, Greg Rapp, Gil Girtz, Larry McKaig, Rick Kessler, Alan Gebauer, Glenn House. Second Row: Ella Parker, Jim Joyce, Barry Schroder, Bill Yob, Dave Hulswit, Mike Podein, Brian Flemming, Magistrate Tim McAree, Magistrate Chris Slater, John Combs, Fred Bleakley and Randy Fielstra.

From the Director

Kevin Elsenheimer, Director, WCA

The close of 2012 marks the end of a productive period at the Agency, and begins a period of new challenges.

The year finished with enactment of a sweeping set of administrative rule changes in the health care reimbursement area. The most controversial change involved limiting reimbursement on pharmaceuticals dispensed by physicians. These "repackaged" drugs will now be reimbursed at the same rate as drugs dispensed by pharmacies.

The New Year will see work on additional administrative rule sets covering electronic payment of benefits, evidence based medicine, and the 2013 update to our health care rules.

The Agency will be working in the legislative arena as well. We hope to make progress on a set of amendments updating the Funds Administration statutes, and we will continue to monitor those legislative initiatives that circulate through Lansing involving workers' compensation.

Internally, I am very pleased with the development of our facilitation system. Dave Campbell, our Vocational Rehabilitation specialist, has been promoted to a management-level position and is directly responsible for our facilitation function. Dave is always happy to hear your concerns and questions, and can be contacted through the Agency.

We expect results soon from our work process study. This is the first step in the replacement of our antiquated computer system. I hope to receive recommendations from our IT contractor in time to go to the legislative appropriators this spring. I would like this to be the year that we begin the process of replacing our WORCS system.

The New Year also marks the beginning of my third year at the helm. I want to thank you all for your effective advocacy on behalf of your clients. As it has been in the past, my door remains open. I wish you the best for a productive 2013. ✖

Board of Magistrates Update

By Lisa Klaeren, Chief Magistrate

Throughout 2012, the Board of Magistrates continued their efforts to reduce aged cases and to decrease the average days for a decision to be issued once the record is closed. Our success in aggressively pursuing these areas is reflected in our results.

At the end of 2011, 41.3% of our cases were over twelve months old. Through October 2012, we reduced that number to 36.4%. While not as large of an improvement as we would like, it is trending in the right direction. We will continue our efforts to improve this number further as we begin the New Year.

As many of you may recall, we saw drastic improvement in 2011 in the time taken to issue a decision once the record was closed. Although we have not seen the same level of improvement in 2012, we have maintained those improvements. 96% of the decisions mailed through October 2012 were completed within 42 days of the record closing. The average number of days to issue a decision through October 2012 was 22 days (compared to 84 days in January 2011).

I anticipate that the Board of Magistrates will continue to maintain this level of productivity going forward. With

everyone's cooperation, this should be easily accomplished and result in cases moving more quickly and smoothly through the process.

With the New Year, come new goals or resolutions. Now that the busy December dockets are behind us, a few issues have come up that need the attention of all who utilize the Board of Magistrates: accuracy, appearances and awareness.

We are seeing a trend across the state in errors in Redemption documents submitted to the magistrates for their approval. This includes mathematical errors, failure to include all aspects of the agreement in the Affidavit in Lieu of Personal Appearance, missing documents and references to "the Bureau", *although we have been "the Agency" for years*. Sloppy and inaccurate paperwork does not reflect well on any of us. It also causes delays in our dockets and the completion of hearings, which is costly and inconvenient for everyone. In 2013, we should all resolve to make a concerted effort to ensure accurate and complete paperwork BEFORE it is submitted for approval. If the paperwork is not accurate, your hearing may be moved to the end of the line or rescheduled until it is corrected.

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Board of Magistrates Update

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Another issue that has come up repeatedly is attorneys not appearing at hearings. In most cases, multiple hearings are scheduled at the request of ATTORNEYS, not the magistrates. It is only once the case reaches the aged case list (over twelve months) that the magistrate becomes more active in scheduling hearing dates. Since these multiple hearings are at the request of the attorneys, it only makes sense that something be accomplished at the hearing, or it is a waste of everyone's time. If a hearing is scheduled, you need to attend.

Finally, if you are appearing on a case, you should be aware of what the claim is about and be prepared to discuss it

with opposing counsel. The excuse that "it is someone else's file" is just that, an excuse, and it is not acceptable. Again, it should be everyone's New Year's resolution to not let this happen, as it does not reflect well on the Workers' Compensation Bar.

We are all working hard to make our system more efficient, in an ever-changing landscape. We need to control the things we can control, as there are many things out of our control. Everyone needs to take pride in the job that they do for their clients and the users of the workers' compensation system, and let their work reflect that. ✖

Editor's Note: The official announcement regarding magistrates appointments was not available at time of publication.

But Did You Know . . .

By Martin L. Critchell

Many lawyers have heard the proverb that "possession is nine-tenths of the law." But did you know ... its history?

The proverb dates from the early 17th Century as the *Oxford Dictionary of Proverbs* dates it to 1616, and originally conveyed the idea that someone had to establish ten "points" to be considered the indisputable owner of something. Perhaps all but one, or nine points was enough.

What these "points" were is now lost to time. However, nine points for "success in a law-suit" were listed in *Brewer's Dictionary of Phrases* in the 1894 edition:

- a good deal of money
- a good deal of patience
- a good cause [case]
- a good lawyer
- a good counsel [advise]
- a good witness
- a good jury
- a good judge
- good luck

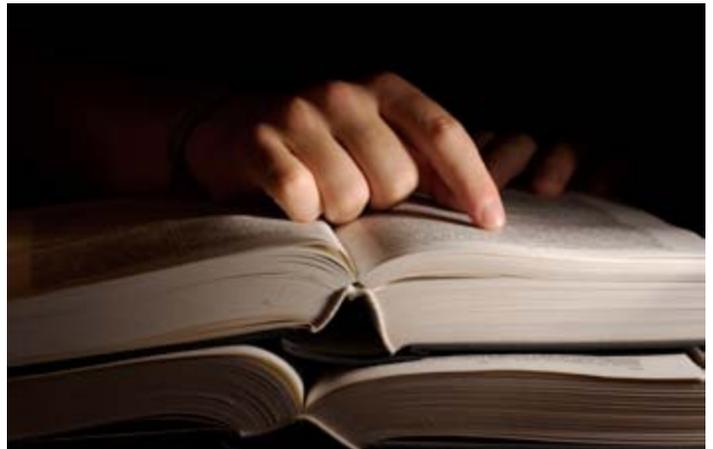
Doubtless, these points were said in jest.

At about the same time, usage of "points" faded and was replaced by the mathematics of "tenths." This may have occurred because the math of "nine tenths" seemed more precise and obviated any knowledge of what the ancient term "points" meant.

While all this may seem quite superfluous now, the idea that someone can prevail by establishing all but one or two of the criteria – nine-tenths – is still with practitioners in a phrase used today, "substantial" compliance. Courts frequently refer to "substantial" compliance with rules as enough to fulfill all of the requirements of law. See e.g., *Laudenslager v Pendell Printing, Inc.*¹ ("substantial compliance applies to briefing and other procedural deadlines in worker's compensation cases. [citations omitted].") And isn't that "substantial" compliance reminiscent of the idea of nine points of ten or nine-tenths was enough? And will we ever know what those original points actually were? ✖

Endnotes

¹ - 215 Mich App 167, 171; 544 NW2d 721 (1996).



Do You Know Your Council?

By J. William Housefield, Jr.

Did you ever wonder what goes on behind closed doors of Council meetings? The minutes from the meeting are readily available online. They can be found online at the State Bar website. Go to www.michbar.org and follow the links to the Workers' Compensation Section. Stay informed by staying up to date with what is going on in your Section. The Council generally meets the first Friday of every month at 9 a.m. A video conference call is arranged between Dimondale and Detroit. Any Workers' Compensation Section member is welcome to attend at either location.

In addition to Council members, the Director of the Agency, Kevin Elsenheimer, or his Deputy Director, Jack Nolish, is invited to participate along with Jack Wheatley (MCAC) and Chief Magistrate Lisa Klaeren. The link to our

Section also allows members to access any current or past newsletters as well as listing upcoming events, such as the Winter Meeting and the annual Summer Meeting in 2013.

Council members are elected to serve the interest of its members and welcome any comments or information that would be beneficial to the Section as a whole.

At the most recent meeting in December, Deputy Director Jack Nolish advised that the on line workers' compensation calculation program has been updated to include tab for PIWEC calculations. However, the Agency is still working on a tab to calculate interest under the amendments to the Act. Also, the Agency has not incorporated the 2013 rates. Therefore, you may wish to wait until after they do so to update your download of the program. ✕

Hall of Fame Nominations

It is that time of year again. It is time to start thinking about summer and the summer meeting. Our Section honors two new inductees as members to the Workers' Compensation Hall of Fame at our annual Spring/Summer Meeting each year. The event is well attended and is an opportunity for us to show our support for those who have influenced our practice and established themselves as proven leaders.

Do you know someone who you think is deserving of this honor? If so, please provide a written recommendation to a member of the Hall of Fame Committee or any member of the Council. The Hall of Fame Committee this year consists of Teresa Martin, Chuck Palmer, John Sims and Dave DeGraw.

Your written recommendation should take into consideration the following requirements and provide an explanation as to how that individual has met the requirements:

- Must have at least 20 years of proven experience in the field of Workers' Compensation Law and be a licensed attorney.
- Possess the highest professional qualifications, ethical standards, character, integrity, professional expertise and leadership.
- Demonstrate a commitment to fostering and furthering the objectives of the Workers' Compensation Section of the State Bar.
- Provide exceptionally high quality professional services to clients, magistrates and the public.
- Provide significant evidence of scholarship, teaching, lecturing and/or distinguished published work in the field of Workers' Compensation.
- Stand out to newer attorneys as model of professionalism in department and advocacy; a person who should be emulated.
- Have earned the respect of the bench, opposing counsel and the workers' compensation community.
- Display civility in an adversarial relationship.
- Avoid allowing the ideology differences to affect civility in negotiations, litigation and other aspects of law practice.
- Demonstrate an active interest in resolving issues.
- Have a thirst for knowledge in all areas of the law that affects their representation of their clients in Workers' Compensation and actively participates in the Workers' Compensation Section.
- Have a reputation as an individual with broad knowledge and involvement in all aspects of workers' compensation law.

Please note that many people may be nominated, but only two will be elected. The Committee will narrow down the nominations to the top four candidates. The Council will have the final vote on the two selected and they will advise the candidates of their selection. ✕

Important Information and Instructions

Summer Meeting June 20-22, 2013

Boyne Highlands, Harbor Springs, MI

Please be aware that there are TWO separate forms you need to fill out if you plan to attend the Summer Meeting at Boyne Highlands: one for the hotel and one for the Section events. This Newsletter only has the Hotel Reservation Form included. We are still working on the Section Meeting Form.

The **HOTEL RESERVATION Form** is provided by Boyne and you should fill out the form and fax it to Boyne Highlands BEFORE May 20, 2013. Rooms are available on a first come, first serve basis. If all the rooms in the first category fill up, you will be moved up to the next category for reservations purposes. We have blocked a limited number in each category. If we blocked more rooms than are booked, your Section would be responsible for the balance between the actual bookings and the guaranteed amount.

Check in time is 6:00 pm. As our events usually begin at 6:00 pm, please plan accordingly. If your room is available before that time, you will be allowed to check in early. However, Boyne Highlands will not guarantee early check in.

You *may* make a reservation online (with certain restrictions) by COPYING the following link into your web browser. You must copy and paste the link to your web browser to get to the correct reservation information. Although we tried valiantly, neither Boyne nor I could get to the correct page by simply clicking on the link below.

<https://www.boyne.com/reservations/Trip-Planner/Set-View/boyne-highlands-resort?ArrivalDate=06%2F20%2F2013&DepartureDate=06%2F22%2F2013&RateFeature1=IR&GroupCode=1072N0>

Please note this link will only allow you to book days from June 20 to June 23, 2013 (1 to 3 days is allowed). If you wish to book a room for Wednesday, June 19, 2013, you will need to fill out the Reservation Form and fax it to Boyne Highlands. The reduced rate will be honored for the extra days. They just are not able to do so with the online reservation system they have.

Once you arrive at the correct reservation screen, there are specific instructions to follow as outlined below:

- **First**, go to the right hand column on the reservation link. Check to make sure your check in date falls on June 20, 2013. Your check out date can be either June 21, June 22, or June 23, 2013.
- **Next**, please verify the number of rooms needed and the number and type of guests.
- Make sure that the **Special Codes** are listed. If not, click on the word Special Codes. When the options show up, enter GROUP CODE: 1072N0.
- Finally, click on **Search availability**.

At this point, the three types of rooms we blocked will show up on the **left** hand side of the screen. Make your selection and proceed to checkout.

The Second Form is the actual **SECTION MEETING REGISTRATION Form** for you and your guests. This form can be filled out and returned to the State of Michigan or you can register online. We will be working with the State to correct a problem we had last year where online registrants could indicate they were bringing a guest but there was no place to enter the guests' name(s). Because of this, the State did not provide appropriate nametags or enough blank nametags for all the additional guests. As many of you know, your drink tickets, and sometimes breakfast vouchers, are placed into the plastic nametags, so this was an important issue last year.

The Section Meeting Registration Form will be provided in a separate email blast when we work out the final details.

Boyne Highlands has many wonderful activities available for you and your family. There are mountain bike trails and rentals, Segway tours, a Zip line, in-door and out door pools, a Spa, hiking areas and, of course, golf courses. There are also some wonderful shops in downtown Harbor Springs. We hope to see you there. ✨



**BOYNE
HIGHLANDS**

BOYNE HIGHLANDS RESERVATION FORM

Group Name: State Bar of Michigan - Workers' Compensation Section

Dates: June 20-22, 2013

Reservations must be made utilizing this form and be received by **May 20, 2013**. Reservation requests received after this date will be taken on a space available basis at current room rates.

When making travel arrangements, please note the check-in and check-out times are on the second page with the room descriptions.

Accommodations: Please indicate your 1st and 2nd lodging preference below. If room type requested is not available, the next available room type and rate will be confirmed. **We cannot guarantee specific rooms/units.**

To better serve all of our guests, reservations cannot be accepted by phone.

ACCOMMODATIONS		
ROOM TYPE	SINGLE OR DOUBLE RATES	INDICATE 1ST & 2ND CHOICE
Inverness	\$142.00	
Inverness Deluxe	\$158.00	
Pleasantview Suite	\$178.00	

Rates are based on the European Plan which includes lodging only. Rates are per room per night.

Rates and a 7% Resort Services Fee are subject to a 6% Michigan State Sales and Use Tax. Rates are also subject to a 5% Local Lodging Assessment.

Boyne Highlands is a smoke free facility.

PLEASE PRINT

ARRIVAL DAY/DATE: _____

DEPARTURE DAY/DATE: _____

SHARE WITH: _____

NUMBER IN PARTY: _____

NUMBER OF ADULTS IN PARTY: _____

AGES OF CHILDREN 18 & UNDER: _____

NAME: _____

COMPANY: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

PHONE / BUSINESS: _____

PHONE / HOME: _____

E-MAIL ADDRESS: _____

BOYNE REWARDS #: _____

SPECIAL REQUESTS *: _____

**BOYNE does its best to accommodate requests, but cannot guarantee them.*

PAYMENT METHOD

CHECK ENCLOSED \$ _____

American Express Visa MasterCard Diners Club Discover

CREDIT CARD # _____ Expiration Date _____

SIGNATURE: _____ Security Code _____

All reservations must be guaranteed by check or credit card deposit.

Checks/money orders should be equivalent to one nights' stay, payable to Boyne USA Resorts.

Credit card imprint is required at check-in for all guests.

Please provide tax exempt form at check out.

Deposits: A deposit equal to the first night's lodging is required with each reservation. Please make check or money order payable to Boyne USA Resorts or include a credit card number. The card will be charged upon receipt of form. Do not send cash.

Cancellation Policy: Cancellation and changes affecting arrival/ departure dates must be made 7 days prior to arrival date in order to receive refund of deposit, less a \$10.00 administrative fee.

Please mail or fax to:
 BOYNE
 Central Reservations Department
 P.O. Box 19
 Boyne Falls, MI 49713
 Fax: (231)549-6844
 Phone: 1-800-GO-BOYNE

**GROUP RESERVATIONS CANNOT BE
ACCEPTED OVER THE PHONE**



BOYNE HIGHLANDS

600 Highlands Drive, Harbor Springs, MI 49740

BOYNE HIGHLANDS ROOM DESCRIPTIONS

Inverness Standard

Two queen beds, wet bar with refrigerator/microwave and one bathroom. The Heather Highlands Inn observes a 6:00pm check-in and 1:00pm check-out.

Inverness Deluxe

Efficiency hotel room with one king murphy bed and one sleeper sofa in living area, gas fireplace, kitchenette and one bathroom. The Heather Highlands Inn observes a 6:00pm check-in and 1:00pm check-out.

Pleasant View Suite

One bedroom condo with one queen bed in the bedroom, one murphy bed and one queen sleeper sofa in the living area, gas fireplace, kitchenette and one bathroom. The Heather Highlands Inn observes a 6:00pm check-in and 1:00pm check-out.

Kids' Chance of Michigan, Inc. Our Chance to Make a Difference

By Murray Feldman

Kids' Chance, Inc. is a national charity with chapters in 26 states (Michigan being the most recent). In existence since 1988, Kids' Chance chapters are collective efforts involving plaintiff and defense attorneys, judiciary, labor, insurance industry, medical providers, and other supporting businesses associated with workers' compensation. Since its inception, Kids' Chance Chapters have awarded over 2,000 educational scholarships and distributed over \$5 million in scholarship funds to children of workers seriously injured or killed on the job.

The purpose of Kids' Chance organizations, both nationally and here in Michigan, is to raise funds to provide higher education scholarships to the children of workers who have suffered serious injuries or died as a result of work events. These children may not otherwise be able to afford higher education.

Michigan Officers are Murray R. Feldman, President; Richard Warsh, Vice President; Len Hickey, Secretary/Treasurer; and Sue DeLong, Executive Director.

The Michigan Executive Committee continues to be formed, as does its Board of Directors.

We need your help! We need volunteers to help in fund raising. We need you to contact your clients, whether they are insurance carriers, self-insured employers, third party administrators, employers, unions, or others to ask for financial support, help with fund raising activities and/or help in identifying candidates for the scholarships. As a statewide organization, we also need help from individuals who are willing to volunteer their time throughout the State.

The scholarships are awarded for education at trade and vocational schools, community colleges, and 4-year colleges and universities. We need volunteers to assist us in notifying high schools and other educational institutions as to the availability of the scholarships and the qualification requirements.

Information regarding eligibility for the scholarship(s) and an application can be obtained by contacting either Sue DeLong or myself. Remember, our ability to award

Continued on next page

Kids' Chance of Michigan, Inc.

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scholarships is entirely dependent on our ability to raise funds.

If you are interested in volunteering or know someone who is interested in assisting us in any of these activities or becoming a member of our Board of Directors, please have them contact Murray Feldman (248-205-2719), Sue DeLong (248-205-2760, Rick Warsh (248-357-7013), or Len Hickey (616-364-2550).

Since I was Chairperson of the Section in 2008-2009, I have been looking for a way to make an impact on the community at large. Kids' Chance of Michigan, Inc. is a way to do that. This is a "comp charity", with scholarships limited to children of seriously injured workers or workers killed while on the job. What an extraordinary way for us to fulfill our mission and represent the workers' compensation community. Members of your Section have pledged their involvement, will you?

If you wish to make a donation, checks should be made payable to Kids' Chance America- Michigan and sent to Kids' Chance of Michigan, Attn: Sue DeLong, 300 E. Long Lake Rd., Suite 200, Bloomfield Hills, MI 48304-2376. Upon receipt of any contribution, a receipt will be sent by return mail. Kids' Chance of Michigan, Inc. is a newly founded organization, which has applied for 501(c)(3) status and is working with Kids' Chance America, which is already a 501(c)(3) charity. All contributions are tax deductible. ✖



Upcoming Events

Date	Event	Contact Person	Contact Information
02/01/13 9:00 am	Council Meeting Detroit/Diamondale	Teresa Martin	tmartin4@travelers.com
02/10-02/17/13	Winter Seminar Punta Cana, Dominican Republic	Jill Listman	Pro Travel 40 E. Norton Ave, Muskegon MI 49444 231-733-8359
03/01/13 9:00 am	Council Meeting Detroit/Diamondale	Teresa Martin	tmartin4@travelers.com
03/14-03/16/13	ABA's Workers' Comp Seminar & Conference Coral Gables, FL	James Reiter	james.reiter@micompdefense.com 248-406-0048 http://www.cwclawyers.org/
05/03/13 9:00 am	Council Meeting Detroit/Diamondale	Teresa Martin	tmartin4@travelers.com
TBD	Past Presidents Golf Outing	Dennis Flynn	dflynn@kgvlaw.com
06/20-06/22/13	Spring Section Meeting Boyne Highlands	Ella S. Parker Matt Conklin Chris Rabideau	eparker@conklinbenham.com Matt@conybearlaw.com crabideau@mccroskeylaw.com

Medicare Update and The SMART Act

By Ella S. Parker

I briefly wanted to touch upon recent activities concerning Medicare issues. There are two separate issues with Medicare: (1) Medicare Set-Aside Accounts and (2) Medicare Conditional Payment letters. There have been recent developments with both.

In late November, the Centers for Medicare and Medicaid Services (CMS) notified many vendors that they completed review and processed a significant number of backlogged Workers' Compensation Medicare Set-Aside cases (MSAs).

These cases included MSAs submitted prior to July 2, 2012. A new contractor took over handling the processing of proposed MSAs on July 2, 2012. The old cases created a backlog that resulted in a significant delay in obtaining approvals in the older submissions. Allegedly the more recent submissions were being processed in a more timely manner.

Although there may be some exceptions, it appears the contractor pretty much accepted the proposed MSAs for the older cases and approved them *en masse*. I have not seen any concrete explanation for why this occurred but one can speculate it may have had something to do with the SMART Act churning its way through Congress at the same time.

The SMART Act stands for Strengthening Medicare and Repaying Taxpayers Act of 2012. There are actually two parts of the Act and Title 1 deals with Medicare IVIG Access. Title 2 deals with Medicare and conditional payments.

The "short" title is "Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012" The House passed HR 1845 on December

19, 2012. The Senate passed the Bill on December 21, 2012. President Obama recently signed the bill.

While the new bill provides much needed assistance with dealing with conditional payments and CMS, the amendments do not become effective until 2014. Here is a link to the Act for those who wish to read it: <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1845eh/pdf/BILLS-112hr1845eh.pdf>

Some highlights include:

- Allowing parties to a case to obtain a more accurate final conditional payment amount online before the case is finalized.
- Providing the information in a downloadable file from the internet.
- Limiting the amount of time CMS has to respond to the request for conditional payments.
- Allowing parties to deal with discrepancies in bills included in the conditional payments within a certain time period.
- Setting a 3 year statutory limitation period from the time of notice for CMS to bring an action to collect reimbursement.
- Creating a minimum settlement amount below which Section 111 reporting is not required.
- Making prior mandatory insurer reporting fines and penalties discretionary instead.

I encourage all of you to review the Act itself and keep your eye out for new rules that must be promulgated to implement the SMART Act. ✖



Caselaw Update

By Martin L. Critchell

Supreme Court

The Michigan Supreme Court did not decide any workers' compensation case since the beginning of the 2012-2013 Term on August 1.

Court of Appeals

Since the last summary of case law, the court of appeals released just one opinion about a statute in the workers' compensation act "for publication," *Cuddington v United Health Services, Inc.*¹

The statute involved in the case of *Cuddington* was the anti-discrimination provision of MCL 418.301(13). ("A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.") The statute itself was *the* basis for the lawsuit by Raymond Cuddington for damages after United Health Service fired him.²

The court of appeals decided that §301(13) applied because Cuddington had been fired after saying that he wanted to see a doctor for problems from an accident at work.³ Simply asking for the time to see a doctor and have medical attention is a *right* under the workers' compensation act.⁴ ("the [workers' compensation act] affords an injured employee a right to seek reasonable, needed medical services for injuries that arise [out of and] in the course of employment.") (emphasis added)

This ruling is noteworthy for several reasons. First, §301(13) can apply whether the request is made during an informal conversation with the employer or in a formal application for mediation or hearing filed with the workers' compensation agency.⁵ ("[T]he plain language of MCL 418.301(13) establishes that a petition for workers' compensation benefits is not a condition precedent to *all* retaliatory discharge claims.") (emphasis by the court)

Second, the court of appeals emphasized a distinction between a right to ask for medical services and the right to have medical services.⁶ ("[W]hile employees have the right to seek medical services for work-related injuries, we readily acknowledge that not all injuries may actually require treatment. Rather, whether an employee 'needed' medical services following a workplace injury necessarily incorporates a fact-

intensive reasonableness inquiry.") This distinction between an employee's right to ask for medical treatment and an employee's right to receive medical treatment is important. A lawsuit under §301(13) for violating an employee's right to ask for care cannot be defeated when it turns out that care is not actually needed.

Finally, the decision is noteworthy by allowing a lawsuit under §301(13) with circumstantial evidence to be evaluated by the standard of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)⁷ ("When a plaintiff presents circumstantial rather than direct evidence of an employer's retaliatory motive, we examine the claim under the *McDonnell Douglas/Burdine* burden – shifting framework.")

Two unpublished decisions by the court of appeals are noteworthy. The case of *Mohney v American Int'l Group*⁸ involved the "law of the case" doctrine. There, the workers' compensation appellate commission reviewed a decision by the workers' compensation board of magistrates, decided that an important fact had not been established, and remanded for the board to receive further evidence and establish the facts.⁹ But after remand, the commission said the mandate had been improvident¹⁰ and then ruled that the initial record could not sustain the initial decision by the board and denied compensation.¹¹ The court of appeals said that this violated the law of the case because the first decision by the commission constituted a determination of fact – the record was inadequate for review – that could not be disturbed after remand.¹² ("the [commission] made its second determination on the basis of the *prior* record, in other words, on the basis of the *same* facts that it had previously determined to be insufficient.") (emphasis by the court)

The most important aspect is not this immediate ruling by the court of appeals. Rather, it is the recognition that the law of the case is not a rigid rule but is a matter of practice and discretion. The case was remanded to the Commission to review the supplemental record developed after the initial remand before making its decision.

*Scharnitzke v Coca-Cola Enterprises*¹³ is the other noteworthy decision that the court of appeals did not release for publication.¹⁴ Actually, the court of appeals reached two decisions in the case. One decision concerned a procedural issue, the availability of a cross-appeal from a decision by the workers' compensation board of magistrates after the expira-

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tion of the time allowed by the second sentence of MCL 418.861a(6).¹⁵ The other decision concerned the substantive issue of the application of *Stokes v. Chrysler, LLC*,¹⁶ to a "closed" period claim.¹⁷

The procedural problem was resolved under the "substantial" compliance doctrine. The court of appeals observed that Christopher M. Scharnitzke filed a brief with the workers' compensation appellate commission in time but not the form also necessary to cross appeal the decision by the board¹⁸ but corrected the defect "within one week after the expiration of the 30 day deadline."¹⁹ The court of appeals also observed that the delay in filing the form to cross appeal did not affect (prejudice) Coca-Cola Enterprises.²⁰

The noteworthy feature is the studied disregard for the rule of the commission that "There shall not be delayed cross appeals." That rule had been the basis of the decision by the commission. Now, the rule is "There shall not be delayed cross appeals" upon a showing of "substantial" compliance or, at least, no affect on the opposing party.

The substantive problem was with the applicability of the ruling in the case of *Stokes*. Scharnitzke said that the four-steps that were described by the supreme court in *Stokes* did not apply when the claimant was totally disabled in anticipation of surgery and convalescence.²¹ The court of appeals ruled that *Stokes* did not apply when an injured employee is "disabled from any and all employment"²² as the commission had said in *Robertson v DaimlerChrysler Corp*²³ but did apply when a physician approved resuming work albeit with restrictions.²⁴ ✖

Endnotes

- 1 - Mich App - ; - NW2d – (2912).
- 2 *Id.* slip op. n2 at 2.
- 3 *Id.* slip op. at 2.
- 4 *Id.* slip op. at 5.
- 5 *Id.* slip op. at 4.
- 6 *Id.* slip op. at 5.
- 7 *Id.* slip op. at 6.
- 8 Unpublished opinion of the Court of Appeals, issued on October 16, 2012 (Docket no. 303797).
- 9 *Id.* slip op. at 1.
- 10 *Id.* slip op. at 1-2.
- 11 *Id.* slip op. at 2.
- 12 *Id.* slip op. at 3.
- 13 Unpublished opinion of the Court of Appeals, entered on October 18, 2012 (Docket no. 304515)
- 14 The author was counsel of record for Coca-Cola Enterprises.
- 15 *Scharnitzke*, slip op. at 1.
- 16 481 Mich 266; 750 NW2d 129 (2008).
- 17 *Scharnitzke*, slip op. at 4.
- 18 *Id.* slip op. at 3.
- 19 *Id.* slip op. at 3-4.
- 20 *Id.* slip op. at 6.
- 21 *Id.*
- 22 *Id.*
- 23 2011 Mich ACO 72 at 12.
- 24 *Scharnitzke*, slip op. at 6.

SBM MEMBER ADVISORY**Notice to Michigan Lawyers about FDIC Insurance Change for IOLTA and Non-Interest-Bearing Accounts**

For the past two years, IOLTA accounts and non-interest-bearing accounts enjoyed unlimited FDIC insurance coverage pursuant to Section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. That provision has a sunset date of December 31, 2012.

Congress is expected to adjourn without extending that coverage, so it is likely that as of January 1, 2013, FDIC insurance available to IOLTA accounts will be \$250,000 per owner of the funds (client), per financial institution, assuming that the account is properly designated as a client trust account and proper accounting of each client's funds is maintained.

This is the same coverage client funds had before the temporary provision permitting unlimited coverage. The \$250,000 amount is not the cap on the total in the pooled IOLTA account; that cap applies to each individual client's funds in that institution (see item 2 at the FDIC link below). Client trust accounts, including IOLTA accounts, are interest-bearing accounts, but it is also worth noting that non-interest-bearing bank accounts will also have this same \$250,000 coverage limit.

Further information on FDIC insurance coverage for IOLTA and other accounts as of January 1, 2013, is at <http://www.fdic.gov/deposit/deposits/unlimited/expiration.html>.