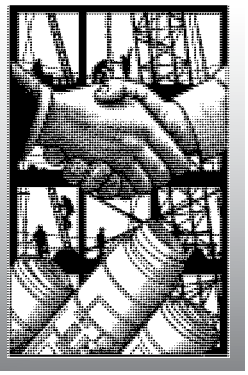
State Bar of Michigan

Workers' Compensation Section Newsletter

Winter 2014



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From the Chair

By Charles Palmer

As we begin 2014, your Section is moving forward after a very successful Winter Meeting. Over 70 people attended the meeting at the University Club in Lansing on December 6th. It was a lively and interesting discussion regarding the state of the law. Again, I would like to thank our panel members, Martin Critchell, Magistrate E. Louis Ognisanti, and Darryl Royal. I would also like to thank Council members Andrea Hamm and Phil Frame for organizing the meeting.

We are starting to work on organizing the annual Summer Meeting, where we elect new officers and members to the Section Council. This year our meeting will be at Crystal Mountain Resort in Thompsonville, June 19-20th. We welcome any suggestions you may have about issues you would like to learn about at the meeting. We will also be soliciting nominations for the Workers' Compensation Hall of Fame. I will be sending out an email blast announcing the committee and soliciting nominations.

And as always, please let your council members know about any issues of concern to you in your workers' compensation practice. We are here to serve you.

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

By Ella S. Parker

"I hope that in this year to come, you make mistakes." This is the beginning of a statement by English Author Neil Gaiman. I read this quote last year and it remained in my thoughts, lurking in the back of my mind, throughout the year. For those of you who know my meticulously ordered mind, you can understand that my first thought when I read it, was "What! I don't want to make any mistakes." Had I only read that first line though I would have missed the entire meaning behind the introductory statement. This year, I thought I would share that line and the rest of the statement with our Section and I hope some of you find it as stimulating and as motivating as I did.

> "I hope that in this year to come, you make mistakes.
>
> "Because if you are making mistakes, then you are making new things, trying new things, learning, living, pushing yourself, changing yourself, changing your world. You're doing things you've never done before, and more importantly, you're Doing Something.
>
> "So that's my wish for you, and all of us, and my wish for myself. Make New Mistakes. Make glorious, amazing mistakes. Make mistakes nobody's ever made before. Don't freeze, don't stop, don't worry that it isn't good enough, or it isn't perfect, whatever it is: art, or love, or work or family or life.
>
> "Whatever it is you're scared of doing, Do it.
>
> "Make your mistakes, next year and forever."[1]

With this inspirational message in mind, I finally found the courage to do something I wanted to do for years: I biked the DALMAC, my first long distance, extended bike ride. I biked 352 miles over 5 days, with my husband and daughter's support. I always dreamed of doing the bike ride from Lansing up to Mackinaw City, but something always held me back--fear of failure. What if I didn't succeed?

After discussing it with my husband, and with his encouragement, I signed up. I trained as much as I could in between juggling my actual job, my home life, and my volunteer work. And, I did it, with Don and Olivia's help. They took down the camper after I left in the mornings, moved it to the next organized overnight area, and set it up again before I finished my ride that day. Would I have been able to do it without them, putting up my own tent each night? I don't know and I am sure glad that I didn't have try.

Some things take a group effort to accomplish, even if they are *your* individual dreams or goals. The same is true about this Newsletter and our Section. This Newsletter would not be possible without all of the wonderful contributions from a lot of different people. I hope that you all appreciate their efforts as much as I do.

In the year to come, I hope that you remember Mr. Gailman's statements and take them to heart. Make mistakes. Try new things. Live. You never know how long you will have the ability to do so.[2] Do Something.

Endnotes

1 Neil Gaiman in his 2012 blog.

2 In memory of Juanita Simms and Magistrate John Buehler

Magistrate Update

By Chief Magistrate Lisa Klaeren

As many of you may know, Sue Jones retired effective December 20, 2013. We wish her well. With Sue's retirement, the new person to contact when requesting non-litigated files be sent to an Agency for redemption purposes is Sharon Todter. Sharon can be reached at 517-322-5993 or by email at *todters@michigan.gov*. Sharon will also be handling all scheduling responsibilities for MAHS, so if there is any question about a hearing, she is the contact person, as the Agency will no longer be handling this aspect of the hearings.

Anyone wanting files sent to Agency offices for review purposes only should contact Susie Schneider. Susie can be reached at 517-636-5518 or by email at *schneiders1@michigan.gov*.

As this point, there has not been any formal decision on the proposed rules for MAHS. However, we will continue to update you regarding any new developments.

Remembering Magistrate John Buehler

By Hon. G. Jay Quist

Governor Rick Snyder appointed John C. Buehler to the Michigan Workers' Compensation Board of Magistrates on June 17, 2011. At the time, John worked as a self-employed attorney and as a tutor and mentor in the Dearborn Heights School District. However, he also had a great deal of additional experience that he brought to the job. John previously worked as a licensed property and casualty insurance agent for AAA Michigan and as house counsel for Kemper Insurance. He earned his law degree from the University of Dearborn-Mercy. John passed away unexpectedly on November 6, 2013 and the Workers' Compensation Community and I will feel his loss.

I first met John about 10 years ago. At the time, I was a magistrate in Grand Rapids and John worked for Kemper Insurance. He frequently appeared in front of me and always impressed with his trial skills. In my opinion, John was one of the best trial lawyers to appear before me in any venue.

Because John was from Dearborn and he had many cases in Grand Rapids, he often stayed overnight in Grand Rapids. This allowed us an opportunity to occasionally socialize after work and discuss many topics.

After I was appointed chief magistrate by Governor Snyder in 2011, I recommended that John be considered for the Board of Magistrates based on his knowledge, skills and presence in the courtroom that I had seen over the years. Fortunately, Governor Snyder and his administration followed my recommendation.

Shortly after John's appointment, I heard some grumblings about his being selected. This is not unusual with any appointment but I was irritated because I knew John well and I was very confident in his abilities. I expressed my frustrations to John and he gracefully told me "I have to earn the respect of the attorneys." And, he did. Within months of his appointment, he earned the reputation as one of the best magistrates on the board. He did so by showing his consideration to the attorneys who practiced in front of him, by his patience with claimants that appeared before him, and by his skills as a mediator resolving countless cases for his colleagues.

Even after his appointment, John came to Grand Rapids a couple of times a year. He was always welcomed in my home. I last saw John on Saturday, October 12, 2013. That night, Magistrate Bob Timmons, Magistrate Chris Slater, John and I were able to visit and share each other's company over dinner and enjoy the Michigan - Penn State football game on television. John left before I got up on Sunday morning and I did not have an opportunity to say good-bye that day. Even if I had, I would never have thought it would be a final good-bye.

John was passionate about his wife Denise, his dogs and college football. He was an intelligent, good-hearted man with a dry sense of humor. John was a good friend and I will miss him.

Attention Counsel Filing Contested Cases Using Form 104A

By Jack A. Nolish, Deputy Director

In our continuing efforts to increase efficiency and reduce costs, the Workers' Compensation Agency is in the midst of several modernization and system enhancements. One of these enhancements involves the application of Optical Character Recognition (OCR) to image indexing data from the form 104A, Application for Mediation or Hearing filed by counsel. These upgrades will enable the Agency to serve our customers with a greater efficiency while positioning the Agency for future operating system upgrades. In the short term, it will enable us to locate a form 104A as soon as it is scanned instead of waiting until its data has been manually input into our data system.

As a result, these process changes require data to be in very specific locations to prevent future problems. This leaves little tolerance for location variation. Therefore, effective September 1, 2013, pursuant to MCL 418.221, the Agency will require that all forms 104A must match exactly those forms found on the Workers' Compensation Agency website, including but not limited to language, block space and positioning, font and dimension. In addition, when data is input into the various forms, an Arial 10 point font must be used, with each field limited to one line of data. The form does not have to be filed on yellow paper.

The form 104A is available for download on the WCA website.

Any form 104A not complying with these requirements filed on or after September 1, 2013, will be rejected and returned unprocessed. In anticipation of these requirements, you should immediately make any necessary modifications to your current systems and processes so that forms filed on or after September 1, 2013 will be in the correct format and not be rejected.

Handwritten or typed forms submitted *in pro per* will continue to be handled as they have in the past but the OCR image indexing will not take place.

As part of the OCR process, please also note that faxed copies of filings will no longer be accepted after September 1, 2013.

Those using Adobe Reader 11 or Adobe Acrobat Pro will be able to save the completed forms on their local computer. Those using prior versions of Reader will not be able to save the completed forms.

Questions regarding these changes or what will be required effective September 1, 2013, should be directed to Ken Smith at 517-322-5937.

We thank you for your continued cooperation as we move through these transitions to better serve you, our customers.

RABA Outing

By LeAnn Latchaw

On October 3, 2013 the annual RABA Golf Outing and Bike Tour was held at the Thornapple Creek Golf Club in Kalamazoo. A few stray rain drops did not dampen the spirits of either the golfers or the bike riders. An array of awards was presented at the dinner. Highlights included golfer Fred Bleakley being bestowed the honored Green Jacket that has been passed down over the years through the ranks of great RABA golfers and bicyclist Ella Parker was deservingly presented with the coveted Yellow TJ Pour House T-Shirt for her outstanding performance in the bike tour. Karen Anderson did a fabulous job in organizing the event and her squeaky rat table centerpieces were a huge hit. We look forward to many years of continued RABA Golf Outings and Bike Tours under Karen's skillful planning and leadership.

Fred Bleakley with the coveted green jacket

Fred Bleakley and Eric Kihm

Ella Parker with the yellow jersey, the award for having the survivor kit in her bike

Magistrate Tim McAree, Roy Hebert, Doug Kirk, Ella Parker, Rod Fagerman, Chief Magistrate Lisa Klaeren, and LeAnn Latchaw

How I Didn't Get Hurt at Work

By Magistrate Chris Slater

This is a mostly true story with a little white lie at the end. On Sunday, June 23, 2013, I was lifting a briefcase when I experienced a shifting sensation near my left shoulder blade. The pain was significant and unremitting. A day or two later, I noticed that my left arm felt funny. I attempted to do a push up and my left arm buckled. Since all workers' compensation practitioners believe that we are a credit or two short of a medical degree, I self-diagnosed a herniated disc in my neck.

I made an appointment with my doctor. He agreed that I was exhibiting all the classic signs of a C7 radiculopathy and ordered physical therapy and a MRI. I commenced physical therapy with that working diagnosis in mind.

Eventually, I underwent an MRI and it showed the following: 1) at the C5-6 level, there was a disc osteophyte complex to the left of midline with superimposed uncovertebral spurring. The ventral aspect of the cord was asymmetrically flattened on the left. There was also severe foraminal narrowing on the left; 2) at the C6-7 level, nearly identical findings were noted as to the presence of osteophytes, spurring, cord compression, and severe foraminal narrowing on the left. Much to my surprise and probably because I remain a few credit hours short of a medical degree, no disc herniation was identified!

Upon reading this MRI study, I became confused as to my ongoing symptoms and functional limitations. While I never experienced significant neck pain or radiculopathy prior to this specific event, the degenerative changes on the MRI films clearly predated the onset of symptoms by years. Further, these degenerative changes might be characterized as conditions of the aging process. I did not see anything in the report suggestive of trauma.

Why was I still symptomatic? I explained to my doctor that I could not have sustained a personal injury arising out of and in the course of my employment given the MRI findings. He could not understand the logic of this statement even though he is only a few hours short of a law degree. He advised me that he could order electrodiagnostic studies to verify the presence of a radiculopathy, but that he already knew that I had radiculopathy based upon my clinical presentation. In addition, he said that the studies would not change his recommended course of care and would be a waste of money.

When physical therapy results plateaued, my doctor recommended a surgical consult. The surgeon recommended a two-level decompression and fusion. I was left with the curious choice of going under the knife for a non-personal injury that must have represented a sprain or strain of some sort at most but which continued to be persistently symptomatic for whatever reason. I thought that a psychological consult might be in order.[1] Was I convincing myself of the existence of these symptoms for some secondary gain? Was I malingering? Did this represent an insidious onset of Munchhausen Syndrome?

The surgeon was quite clear that surgery was indicated, so I decided to go through with it. I underwent the two-level anterior cervical discectomy with Cornerstone allograft arthrodesis at C5-6 and C6-7, with cervical plate stabilization from C5-7 on August 27, 2013. The postoperative diagnosis was cervical radiculopathy due to cervical spondylosis at C5-6 and C6-7. As of this writing, it is too soon to know how well the surgery will turn out in addressing my phantom symptoms from this age-related degenerative condition which went undiscovered for years and years until I sustained my non-work-related injury.

Most of the above is the Gospel truth, except for one thing. I did not experience the onset of symptoms while lifting a briefcase. I experienced the symptoms while exercising. That is the white lie. You didn't think I was making another point, did you? 🛠

Endnote

1 There are plenty of people reading this who either think this is long overdue or could offer up a myriad of appropriate diagnoses in this respect.

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, Bill Housefield and John Simms.

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 deportment 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.

Enter the third annual Law Day creative contest. Entries should illustrate the 2014 Law Day theme, "Democracy: Why Every Vote Matters." Suggested Michigan Legal Milestones are listed below.

http://www.michbar.org/programs/milestones.cfm

One Person, One Vote | Sojourner Truth
Eva Belles' Vote | Freedom Road

To participate in the Law Day contest, one or more milestones may be used to illustrate the 2014 theme in a creative project. Examples of creative projects include essays, debates, mock trials, podcasts, dramatic or musical plays, re-enactments, short documentaries, board games, video games, and more. Electronic submissions are highly encouraged.

LAW DAY 2014

Enter online—www.michbar.org/programs/lawday/

But Did You Know . . .

By Martin L. Critchell

"The truth is a defense" is a common retort by speakers and writers to defend a comment or report of some fact or situation that others dislike. But did you know … its origin?

Harry Croswell was the editor of the *Balance and Columbian Repository*, a newspaper in Hudson, New York, that stridently supported the politics of the Federalist Party of Alexander Hamilton. One of the stories that he published was that President Thomas Jefferson – a founder of the rival Democratic – Republican Party – had paid one James Callender to write a pamphlet during the contentious 1800 presidential campaign maligning George Washington and Washington's successor and Jefferson's opponent, John Adams. This story of "dirty tricks" infuriated Jefferson who urged Governors and several state Attorney Generals to prosecute Croswell. Finally, a prosecutor in New York did charge Crowsell with criminal libel for "deceitfully, wickedly and maliciously devising … to detract from, scandalizing, traduce and vilify" President Jefferson.

Photo from History.com

The defense to this charge was simple enough. The story was true. Jefferson *had* paid Callender. But when the lawyers representing Croswell asked to bring in Callender to testify that he had been paid by Jefferson, the judge announced that, "the truth of the matter published cannot be given in evidence" and the jury convicted.

Croswell then hired another lawyer to appeal, Alexander Hamilton. During six hours over two days, Hamilton argued that the press could never be free unless free to report the truth regardless of the truth casting an "unflattering" light on "the government and individuals." The eloquence and power of the argument was not enough for the court of appeals, which affirmed Croswell's conviction. *People v Croswell*.

This decision was roundly decried as political because three of the four justices were avowed Jeffersonians and as hypocritical as Jefferson had famously said, "If I had to choose between government without newspapers and newspapers without government, I wouldn't hesitate to choose the latter." The derision resulted in the New York legislature enacting the first statute making the truth a defense to a charge of libel.

Croswell was in no way chastened by his prosecution and conviction. Two years later, he reported that a cocktail "is said also to be of great use to a democratic candidate because a person having swallowed a glass of it is ready to swallow anything else." 🛠

New Mileage Reimbursement Rate Effective 1/1/2014

The IRS has decreased the business mileage reimbursement rate to 56.0 cents per mile effective with all miles driven beginning January 1, 2014. The new business mileage reimbursement rate is a decrease of 0.5 cent per mile, as compared to the current rate of 56.5 cents per mile.

The Workers' Compensation Section follows the IRS reimbursement rate for mileage. Therefore, please use the new rate for all mileage beginning 1/1/2014.

Please see the link with the article on the IRS website for further information: *http://www.irs.gov/2014-Standard-Mileage-Rates-for-Business,-Medical-and-Moving-Announced*

Kids' Chance of Michigan Update

By Murray Feldman

Due to the generosity of the entire Workers' Compensation community, including the Section, as well as the tireless work of our many supporters and volunteers, Kids' Chance of Michigan is proud to announce it has awarded its first six scholarships totaling $27,500.

Recipients are:

Joseph McDonnell—U of M	Mentor: Cindy Kriger
Gary Bell—U of M	Mentor: William Crawforth
Benjamin Fenner—Henry Ford Comm College	Mentor: Andrea Hamm
Brittany Richardville—Oakland University	Mentor: Paula Murray
Alexis Bourque—Michigan State Univ.	Mentor: Mike Otis
Paige Canales—Southwestern Michigan College	Mentor: Marian Misterovich

As we celebrate our first scholarship recipients, our thoughts turn to supporting them throughout their college careers and raising funds to provide additional scholarships to future applicants.

We look forward to your continuing support.

Thanks,
Murray R. Feldman, President

Help Kids' Chance of Michigan reach their goal of raising $5,000 to honor the memory of John Buehler by naming a scholarship in his honor. You can send your check to us (Kids' Chance of Michigan, Inc., 300 E. Long Lake Rd., Suite 200, Bloomfield Hills, MI 48304-2376) Make sure to reference John Buehler in the memo line. All contributions are tax deductible.

Kids' Chance of Michigan
Educating Children of Injured Workers

Bowling Fundraiser!

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

Friday, February 28th, 8PM – 11PM
Drakeshire Lanes
3500 Grand River Avenue, Farmington Hills

Price includes 2 games, shoes, group picture, pizza, and pop
$20/registered individual bowler, $25 at the door $100/lane (6 bowlers - $20 savings) $250/team (6 bowlers - includes t-shirts & team sign)

To register please visit *www.kidschanceofmi.org*

Sponsorship Opportunities Available

- Corporate Sponsor (All donations over $500) - Includes signage, logo on t-shirt & website recognition
- Gift Basket Sponsor (Minimum of $50 value)
- Lucky Ball Sponsor ($100 gift card of your choice
- Team Sponsorship ($250) Includes 6 bowlers, t-shirts & team sign

Please direct questions to *azurely.kerr@sedgwickcms.com*

Caselaw Update

By Martin L. Critchell

United States Court of Appeals for the Sixth Circuit

The United States Court of Appeals for the Sixth Circuit decided that an employee who was injured at work could not sue the employer, the workers' compensation administrator, or a physician who was hired by the administrator for damages under the Racketeer Influenced Corrupt Organizations Act[1] commonly known by its acronym, RICO. *Jackson v Sedgwick Claims Mgt Services, Inc (On Reh)*.[2] The basis for the decision was the ruling that a claim to workers' compensation under the Michigan workers' compensation act was not the property of the injured employee as the term *property* is used in the RICO. *Jackson*.[3] ("racketeering activity leading to a loss or diminution of benefits the [injured employee] expects to receive under a workers' compensation scheme does not constitute an injury to 'business or property' under RICO.")

Judge Clay concurred in the decision. However, he thought that "Michigan law would regard as an injury to [Clifton Jackson's] property the allegedly fraudulent interference with [his] ability to make a claim for Michigan workers' compensation benefits and have that claim fairly adjudicated" but that "because §1964(c) contains no clear statement evincing Congress' intent for the federal courts to wade into overseeing state workers' compensation regimes, a traditional area of state purview … the injury does not 'rise to the level of' 'business or property' for purposes of RICO." *Jackson* (Clay, J., concurring).[4]

The dissent concluded compensation was *property* when the employer first knows of the injury. *Jackson* (Moore, J., dissenting).[5]

The decision is authoritative as it was decided en banc with the result of 10-1-5.

The case was appealed to the United States Supreme Court. The Court is expected to decide the request for review before the end of the Term on October 1, 2014.

Michigan Supreme Court

The Michigan Supreme Court decided that the Michigan compensation appellate commission may not vacate a determination just because one source of evidence was inadmissible when there were other sources that remained admissible. *Mulvena v Dept of Transpiration*.[6] The Court said that the commission had been right in deciding that one source of evidence – the testimony of a Dr. Knitter – was inadmissible, ("the Michigan compensation appellate commission's decision that Dr. Knitter's testimony is not competent evidence to prove causation is supported by the record …") *Mulvena*.[7] But the Court then said that the commission had to consider the remaining sources that were relied upon by the magistrate and determine if that residual evidence was "substantial." ("The magistrate relied on more than just Dr. Knitter's testimony to rule … and the [commission's] opinion fails to discuss this remaining evidence.") *Mulvena*.[8]

The decision by the Court is limited to what the *whole record* means when reviewing a fact announced by a magistrate. It is not a commentary on the general review by the commission for it was announced in a peremptory disposition.

Michigan Court of Appeals

The Michigan Court of Appeals released two opinions "for publication" since the last newsletter, *Nichols v Howmet Corp*[9] and *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*.[10]

In the case of *Nichols*,[11] the court of appeals decided the liability for weekly compensation when two injuries occurred at work. Edwin A. Nichols was disabled after sustaining an injury to his neck at work for Howmet Corporation on January 14, 1993. He worked with this disability between March and September, 1997, for Howmet and then between November and December, 1998, for Cordant Technologies, always at lower pay. Nichols lost the job at Cordant because of a back injury at work and had not worked since.

The court of appeals ruled that the first employer, Howmet, and its compensation carrier, Pacific Employers, were responsible for weekly compensation after the subsequent injury to the back at Cordant. The basis for this was that the successive injury rule could apply only when an employee was not disabled by an initial injury at work and then sustained a second injury at work. *Nichols*.[12] ("The successive injury rule applies when either (1) the first injury, by itself, did not disable the employee, or (2) the first injury was disabling, but the employee had recovered from it and was no longer disabled when the second disabling injury occurred.") When an injured employee remained disabled and sustained another injury at work, the provisions of the former MCL 418.301(5)(e) applied and assigned liability to the former employer-carrier, not the latter. *Nichols*.[13] ("MCL 418.301(5)(e) provides that the original employer must pay wage-loss benefits")

The decision is nothing new but only reiterates the pronouncements made by the supreme court in deciding the case of *Arnold v Gen Motors Corp*.[14]

Continued on next page

The decision applies to cases involving injuries before and after the amendments to the workers' compensation act affected by 2011 PA 266. The text in the former §301(5)(e) and MCL 418.301(9)(e)(i) are the same ("*the original date of injury*" and "*the time of the original injury*.")

A special panel of the court of appeals revisited the former MCL 418.161(1)(n) to decide whether Joseph M. Derry was an employee of All Star Lawn Specialists in *Auto-Owners Ins Co v All Star Lawn Specialists Plus,* Inc.[15] Derry sued All Star and Jeffrey A. Harrison in circuit court for injuries that he sustained while performing work for All Star and sued Auto Owners for no fault benefits. Auto Owners opposed the action on the grounds that Deery was an employee and therefore barred under the exclusive remedy statute in MCL 418.131(1). *Auto-Owners Ins Co*.[16]

The court of appeals ruled that each of the three criteria of the former §161(1)(n) had to be established for Derry to be an employee because of the usage of *and* as an associative conjunction instead of as an alternative conjunction. *Auto-Owners Ins Co*[17]:

> MCL 418.161(1) defines, in relevant part, "employee" as:
>
> (*l*) Every person in the service of another, under any contract of hire, express or implied . . . .
>
> ***
>
> (n) Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, **and** is not an employer subject to this act.
>
> ***
>
> "And" is a conjunction, meaning "with," "as well as," or "in addition to." *Id.* at 417. In contrast, "'or' is a disjunctive term indicating a choice between alternatives . . ." *Titan Ins Co v State Farm Mut Auto Ins*, 296 Mich App 75, 85; 817 NW2d 621 (2012). Although this distinction is often overlooked, including in statutes, it should be observed where doing so does not "render the statute dubious." *Id.* at 86.

The understanding of *and* in the former §161(1)(n) as an associative conjunction was different from the earlier ruling in the case of *Amerisure Ins co v Time Auto Transportation, Inc*,[18] and so, *Amerisure Ins Co* was overruled. *Auto-Owners Ins Co*.[19] Essentially, the special panel of the court of appeals indicated that in order for Deery to be considered an *independent contractor*, he had to meet all three criteria under the statute.

Judge Borrello in his dissenting opinion indicated that in order for Deery to be considered an *employee* under §161(1)(n), he must meet the three requirements set out in subsection (n).[20] If he did not, he would not be considered an employee. Deery did not meet all three criteria

Remarkably absent from the decision was any consideration of "reliance issues" in addition to the error in *Amerisure Ins Co*. Overruling caselaw always requires this. Indeed, this criteria was the basis for the decision by the supreme court to refrain from overruling *Swell v Clearing Machine Co*[21] in deciding *Reed v Yackell*.[22] ("we have had no briefing concerning the other stare decisis consideration discussed in *Robinson* [*v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000) …") This is particularly troublesome because the court of appeals quoted from other parts of *Reed*. It is as if the court of appeals did not read the entire decision.

The decision may have limited application because of the amendment to the former §161(1)(n) by 2011 PA 266 that went into effect on January 1, 2013 and ostensibly supplements the criteria beyond the former §161(1)(n).

Michigan Compensation Appellate Commission

The decision by the Michigan compensation appellate commission in deciding the case of *Brezina Winicki v S D W Holdings Corp*[23] is noteworthy for two pronouncements about a claim for a fee from an employer or carrier that must pay the costs of medical care. The first was a concise recitation of the particular circumstances required before a magistrate may assess an employer or carrier with the fee of the lawyer representing an employee in addition to the cost of medical care to be paid. Of note is that the particular bills for the injury must have been presented to the employer for payment and then offered in evidence; an order of "reasonable and necessary" medical care is not adequate. Also, the contract between the employee and counsel must be in evidence to establish the rate. The maximum allowed by rule is not a "default" rate to apply when the retainer is absent. *Brezina Winicki*.[24]

The other noteworthy part of the decision was that another rule applied when the medical bills were paid by another such as a health insurer, health maintenance organization, or other that claims repayment by assignment. *Brezina Winicki*.[25] ("[W]hen a lien interest arises from payment by a medical insurer of work related medical expenses for which the insurer may be entitled to reimbursement by the employer or its carrier, a different, statutory rule pertains. * * * Quantification of *that* payment is to be [made] pursuant to rules established by the Director of the Workers' Compensation Agency. MCL 418.821(2).")

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Endnotes

1 18 USC §1964(c).

2 -- F3d – (6th Cir. 2013).

3 Id. at ___.

4 Id. at ___.

5 Id.

6 ____ Mich ____ ; ____ NW2d ____ (2013).

7 *Id.*

8 *Id.*

9 302 Mich App 656; ____ NW2d ____ (2013).

10 ____ Mich App ____ ; ____ NW2d ____ (2013).

11 Martin L. Critchell was counsel of record for defendants-appellees.

12 302 Mich App at 672.

13 *Id.* at 673.

14 456 Mich 682; 575 NW2d 540 (1998).

15 ____ Mich App ____ ; ____ NW2d ____ (2013).

16 *Id.* at slip op. 2.

17 *Id.* at slip op. 3, 7.

18 196 Mich App 569; 493 NW2d 482 (1992).

19 ____ Mich App at slip op. at 6.

20 ____ Mich App at slip op. dissenting at 1-2.

21 419 Mich 56; 347 NW2d 447 (1984).

22 473 Mich 520; 703 NW2d 1 (2005).

23 2013 Mich ACO 89.

24 *Id.* at 7, 8.

25 *Id.* at 7.