Winter 2003

Workers Compensation Section Newsletter

State Bar of Michigan Workers Compensation Section

New Officers Elected At Well-Attended Annual Meeting

We had an excellent Annual Meeting at the Amway in Grand Rapids last September, with about 70 participants. Brian Goodenough did an excellent job organizing the event. Craig Peterson, Winston Wheaton and Crary Grattan all gave fine presentations. Jerry Marcincowski and Daryl Royal gave an extremely valuable synopsis of Sington. The following individuals were elected to these positions:

Chairperson:	Charles Gilfeather	Saginaw
Vice-Chairperson:	Mike Flynn	Muskegon
Secretary:	Alan Helmore	Southfield
Treasurer:	Richard Warsh	Southfield

See back page for 2002-2003 Council Members

Spring Seminar June 12-14 At Boyne Highlands

The Spring Seminar is June 12-14 at Boyne Highlands. All of the arrangements have been made and we are looking for a good turnout. Mark your calendars now. More information will be mailed as we get closer to Springtime. We are discussing a possible joint program with the Social Security Section. Ronald Ryan will be chairing the Meeting. For more information you can email Ron at: *ryanlaw@ameritech.net*.

Past Chair Golf Outing May 22

Craig Peterson is going to organize the Past Chairperson's Golf Outing for May 22, 2003. To make certain you are on his email list, send him an email at: *cpeter@michigan.gov*.

Bahamian Winter Seminar February 17-24

The Winter Seminar is being held at the Atlantis Resort, Paradise Island, Bahamas from February 17-24 2003. It should be beautiful weather and a respite from this cold snap we are having. As most of you should know, from an earlier mailing, it was necessary to have your money in last November in order to be part of the section package. However, our sources tell us that they have been able to book rooms at the Atlantis Resort online, at *www.ATLANTIS.com*. Your editor went to this web site and attempted unsuccessfully to reserve a room for the week in question, just to see if he could. If you try the "Google" search engine, you will find many travel groups are offering package deals to Paradise Island, Bahamas, and you may find some last minute deals, if not in the Atlantis, then possible in a nearby resort. Good luck.

In this Issue:

Outgoing Chair Alex Ornstein, left receives plaque from incoming chair, Charles Gilfeather at the State Bar Annual Meeting

Daryl Royal, left, and Gerald Marcinkoski, guest speakers taking opposing positions on the Sington case

RECENT COURT DECISIONS

By Jerry Marcinkoski, Lacey & Jones

SUPREME COURT

There have been no Supreme Court decisions released since our last newsletter, at the time of this submission. However, the Supreme Court has granted leave in additional workers' compensation cases. The workers' compensation cases presently pending on leave granted before the Supreme Court are the following:

- *Rakestraw v General Dynamics Corporation* [has a "personal injury" occurred where only the symptoms of a pre-existing problem are elicited by work?]
- *Daniel v Department of Corrections* [was the employee's mental injury barred by intentional and willful misconduct, *i.e.*, sexual harassment, under MCL 418.305?]
- *Sweatt v Department of Corrections* [does the exemption from compensation "for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime" in MCL 418.361(1) apply to bar benefits to a felon who cannot legally be re-employed by the Department of Correction because of his felony conviction?]
- *Auto-Owners v Amoco Production Company* [whether a no fault carrier is entitled to be fully reimbursed for medical expenses from the workers' compensation carrier or whether the no fault carrier is subject to cost containment limitations; and, whether interest attaches to the medical reimbursement.]
- *Barnowsky v General Motors* [what is covered by MCL 418.315(1)'s requirement that the employer is responsible for reasonable and necessary medical treatment?]

COURT OF APPEALS

Illegal Aliens

In the consolidated cases *Sanchez v Eagle Alloy, Inc*/*Vazquez v Eagle Alloy, Inc*, ____ Mich App ____; ____ NW2d ____ (2003), the Court of Appeals held that weekly benefits are suspended, pursuant to MCL 418.361(1), for illegal aliens because of their commission of a crime.

Section 361(1) says in pertinent part: "… an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime."

The employees in these cases were illegal aliens who suffered work injuries. Subsequent to their injuries, each employee was able to return to restricted work. The employer ultimately learned that each employee was an illegal alien and refused to pay weekly benefits thereafter.

Magistrate Grit, who decided each of the cases separately, ruled that weekly benefits were forfeited upon application of § 361(1)'s language quoted above. In *Sanchez*, the Worker's Compensation Appellate Commission reversed the forfeiture of benefits. In *Vazquez*, the Commission issued an *en banc* decision with the majority agreeing that § 361(1)'s "commission of a crime" language operated to suspend payment of weekly wage loss benefits.

The Court of Appeals agreed a suspension is appropriate under § 361(1). The cases initially required the Court to address the following preliminary questions: (1) whether "illegal" aliens could be considered employees under MCL 418.161(1)(l); and, (2) whether the aliens were working under valid "contracts of hire" under § 161(1)(l).

With respect to the former point, the Court said the term "employee" does cover illegal aliens because the Act covers "aliens" in § 161(1)(l) and does not modify the word aliens with adjectives "illegal" or "legal." With respect to the latter point, the Court said that the aliens were laboring under valid contracts of hire because they agreed to perform work in exchange for wages. The Court rejected the employer's argument that fraud voids any "contract of hire," saying the Act is silent on the effect of a false representation in a contract of hire.

The Court then held that the employees did commit crimes by virtue of their illegal status. The Court noted § 361(1) does not require *conviction* of a crime, just commission of it. And, the Court noted that the employees' crimes affected their ability to work, at least until they acquire authorized documentation to work.

For these reasons, the Court held that the Magistrate correctly suspended benefits under § 361(1) in *Sanchez* "beyond the date on which his employment status was discovered" and in *Vazquez* from "the date on which his employment status was confirmed."

WORKER'S COMPENSATION APPELLATE COMMISSION

The Supreme Court's decision in *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002), has affected resolution of many cases pending at the Commission in various ways. Here is how *Sington* is playing out at the Commission in different areas.

Sington Remands

Sington has resulted in a large number of remands by the Worker's Compensation Appellate Commission to the Board of Magistrates for a redetermination of "disability" because the Commission has generally found:

> On the record before us, developed under a dramatically different definition of disability, we are loath to make the determinations required. *Rich v Cold Springs Farm, Inc*, 2002 ACO #337.

Cases tried under *Haske* which, for example, demonstrated an inability to do one's last job and nothing more have been remanded because:

> We agree with defendant that plaintiff's inability to return to work at his original job is not sufficient under *Sington* to establish disability. Unfortunately, because trial took place well before the Supreme Court's decision, the record is sketchy at best regarding the necessary proofs on disability.
>
> On remand, the magistrate will determine plaintiff's qualifications and training, and whether he has lost his maximum wage earning capacity as a result of his work-related injuries. To extent further proofs are required to make these determinations, the magistrate will permit such proofs should the parties desire to present them. *Klish v Peerless Industries*, 2002 ACO #286.

See also, *Boyd v Kes Enterprises, Inc*, 2002 ACO #335 and *Horn v John Jacobs Plumbing & Heating, Inc*, 2002 ACO #329.

Typical remand instructions reveal how the Commission views application of *Sington*. Three examples of typical remand instructions are as follows:

> *Sington* maintains that the availability of any regular employment in the marketplace paying maximum wages within one's qualifications and training demonstrates wage-earning capacity. No disability exists if a job is available at the maximum level of wages within one's qualifications and training.
>
> Given that in the instant matter the magistrate's decision issued prior to *Sington*, the proofs and findings are understandably deficient . . .
>
> We remand to the Board of Magistrates on retained jurisdiction for a supplemental decision. On remand, the assigned magistrate must determine whether plaintiff has established a disability pursuant to *Sington*, *supra*. Specifically, the magistrate must determine whether there are regular jobs in the marketplace at the maximum level of wages within plaintiff's qualifications and training that he can perform. Additionally, the magistrate must make a finding concerning plaintiff's qualifications and training. The magistrate may find instructive the various factors the Supreme Court discussed in *Sington* that the Court indicated may be considered to determine whether an employee is disabled. The magistrate may reopen the record for submission of proofs to properly apply a *Sington* analysis. *Napier v MNP Corp*, 2002 ACO #327.

* * *

> While we recognize the creativity of the worker's compensation bar in identifying factors relevant to earning capacity, we nevertheless think it is a useful exercise to review the *Rea* [*v Regency Olds/Mazda/Volvo*, 450 Mich 1201 (1995)] factors. In general terms, an employee must demonstrate how a physical limitation (or presumably a mental limitation, also) affects wage-earning capacity in work suitable to the employee's qualifications and training. It is not enough for an employee claiming partial disability to show an inability to return to the same or similar work. If the employee's physical (or mental) limitation does not affect the employee's ability to earn wages (maximum, per *Sington*) in work in which the employee is qualified and trained, the employee is not disabled. Evidence bearing on the impact an injury has on one's ability to earn might include evidence of the employee's effort at re-employment and the results of those efforts. Can an employee return to work for the employer where the injury occurred, and if so, on what terms? What qualification and training does an employee have for work other than at the employment of injury? What work is available within the employee's qualifications and training? Sub-questions to the last question might include whether other work was made known to the employee, and with what result? If an employee becomes employed post-injury, the employee's post-injury work history may be relevant. Such a history might include the nature of the work, the length of the employment, wages earned, and if the employment terminated, the reasons for termination. *Stanton v Great Lakes Employment*, 2002 ACO #251.

* * *

> Under *Sington*, a claimant must prove he has experienced an actual reduction of maximum reasonable wage earning ability in work suitable to his qualifications and training in the ordinary job market for such work. The Court noted various factual matters may have to be considered in determining whether the claimant is disabled. The Court specifically noted three factors: (1) the particular work the claimant is both trained and qualified to perform, (2) whether a substantial job market for such work continues to exist, and (3) the wages typically earned for such work in comparison to the claimant's wages when the work-related injury occurred. *Jenkins v Wohlert Corp*, 2002 ACO #289.

Partial Disability And *Sington*

The Commission has had occasion to explain how *Sington* and that partial disability provision of § 361(1) interact. The Commission says an employee whose post-injury wage earning capacity is less than what he or she earned at the time of injury receives a partial rate reflecting the residual capacity to earn. In *Stanton v Great Lakes Employment*, 2002 ACO #251, the Commission explained:

> An employee with diminished maximum wage earning capacity is still required to perform work within his/her retained qualifications and training. Evidence that an employee is "able to earn" diminished wages, as that concept was explicated in *Rea*, *supra*, and *Sobotka v Chrysler Corp*, 447 Mich 1 (1994), will result in a reduction of his/her compensation rate in accordance with the "able to earn" provisions of MCL 418.361(1). Avoidance of an available qualifying job will result in a benefit calculated on the difference between the employee's pre-injury average weekly wage and the amount the employee would have been able to earn had he/she accepted the available, qualifying job.

In *Aiken v Ajax Paving Industries*, 2002 ACO #269, the Commission said:

> With *Sington*, the question of wage earning capacity takes on an entirely new perspective. The issue is not whether plaintiff has established a "new" wage earning capacity outside of his qualifications and training at the time of injury …
>
> The proper question to be analyzed under defendant's petition to stop is, what real jobs in the real world is plaintiff capable of performing within his qualifications and training. Do those jobs pay as much as he was earning at the time of injury? If so, regardless of what plaintiff may actually be earning [post-injury], he is not entitled to weekly benefits, because he would then not be disabled. If his ability to earn is less than what he was earning at [his employer at the time of injury], but more than what he is earning at [his present employer], then plaintiff is partially disabled and entitled to the difference between that amount he could earn and his wages at the time of injury.

Sington And An Actual Return To A Restricted Job For The Injury-Employer

The Commission has also had occasion post-*Sington* to address cases where the employee has returned to a restricted job post-injury for the employer with whom he or she was injured. In remanding those types of cases, the Commission has said:

> Therefore, on remand, the factfinder must initially address whether that work, in more than a *de minimus* fashion was altered to accommodate plaintiff's five-to-ten pound lifting restriction. If the work was not altered, plaintiff is not disabled, because she was able to perform regular employment within her qualifications and training. If, however, the job was

modified in more than a *de minimus* fashion so that it was no longer "regular" work, then the factfinder must explore whether there are other jobs in the marketplace within plaintiff's qualifications and training paying the maximum wages that plaintiff would have been able to acquire. If plaintiff shows that she is no longer able to compete in the marketplace with other workers for top-paying jobs within her qualifications and training, she is disabled. *Lewis v Manhattan Bagels*, 2002 ACO #231.

* * *

Similarly, the instant record does not indicate whether defendant was accommodating plaintiff in more than a *de minimus* fashion by providing her the jewelry counter work. … We remand so the record may be opened to consider the issue of accommodation.

We note that even if the plaintiff was accommodated, the *Sington* analysis must continue. If the jewelry job does not indicate plaintiff's marketable abilities, it must be determined whether there are jobs available paying plaintiff's maximum wage earning capacity within her qualifications and training. *Stroggin v Wal-Mart Stores*, Inc, 2002 ACO #328.

The Interrelationship Between *Sington* And § 301(5)

Sington and the interrelationship with § 301(5)'s "reasonable employment"/favored work provisions has also been addressed. The long-litigated case of *Riepen v Kelsey Hayes Co*, 2002 ACO #334 addresses this interrelationship of § 301(4) and § 301(5). *Riepen* had previously been decided three times by the Commission and also had generated a Court of Appeals' opinion. Mr. Riepen had work-related orthopedic injuries and a non-work-related mental condition. The employer accommodated his work restrictions, but he could not perform the offered job due to his non-work-related mental condition. The Court of Appeals in 2000 had said that Mr. Riepen met the *Haske* definition of disability, and the work within his restrictions was governed by the "reasonable employment" provisions of § 301(5). The Court of Appeals then reasoned that, per *Powell v Casco Nelmor Corp*, plaintiff should be entitled to benefits because a non-work-related condition precluding performance of reasonable employment does not result in a denial of benefits.

The Supreme Court remanded *Riepen* after *Sington* to the Commission.

The Commission on remand applied *Sington*. First, the Commission said the case was no longer to be analyzed immediately as a "reasonable employment" case under Section 301(5) because the "reasonable employment" issue only becomes relevant if the employee first satisfies *Sington*'s interpretation of the definition of disability. The Commission said:

Here, the magistrate found that plaintiff was offered reasonable employment within his physical restrictions, but that plaintiff was justified in refusing defendants' offers because they failed to accommodate his mental restrictions. But *Sington* requires that the issue of disability be analyzed as a prerequisite matter, before the issue of reasonable employment is considered.

… as the parties agree, *Sington* does not take into account non-work-related limitations in determining disability. The *Sington* plaintiff had both work-related and non-work-related shoulder problems. The Court disregarded the latter as irrelevant to a disability analysis: "His physical restriction after his left shoulder injury that precluded him from lifting above shoulder level is the only relevant restriction because the right shoulder injury was not work-related."

Therefore, the case was remanded for reconsideration in light of *Sington*.

In *Shimp v Metaldyne Machining*, 2002 ACO #277, the Magistrate had granted plaintiff an open award of benefits finding that her termination within first 100 weeks of restricted work entitled her to a resumption of benefits under § 301(5)(e) and the *Russell*/*McJunkin*/*Perez* trilogy. On review, the Commission affirmed the Magistrate's finding that plaintiff had a work-related impairment. However, the Commission remanded explaining that § 301(5)(e)'s "for whatever reason" language only becomes applicable if the employee is first determined to be disabled under *Sington*. The Commission said:

However, before we reach the issue of termination from reasonable employment, we must first determine that plaintiff was or is disabled. We do not reach questions arising under MCL 418.301(5) until disability is established under MCL 418.301(4). While this

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matter pended on appeal, the Supreme Court revisited the definition of disability. In *Sington v Chrysler Corp*, 467 Mich 144 (2002), the Court overturned the *Haske* definition of disability. *Sington* shifts the focus from loss of ability to work to the employee's maximum ability to earn. Understandably, proofs demonstrating plaintiff's maximum reasonable wage earning capacity in work suitable to her qualification and training are absent in this record. Because defendant has raised the question of disability, we are compelled to remand this matter for a *Sington* analysis of disability.

En Banc Opinion Regarding Joinder Of Defendants

In *Woodard v Sebro Plastics*, Inc, 2002 ACO #263, the Commission issued an *en banc* opinion relating to the necessity (or lack thereof) of joining employers in a multiple injury case. Plaintiff sued one of the two employers with whom she had worked. The employer targeted by plaintiff joined plaintiff's subsequent employer via a petition for determination of rights. Plaintiff did not amend her application to claim a work-related injury against the subsequent employer.

The employer targeted by plaintiff was found liable by the Magistrate. That employer appealed. The subsequent employer filed a motion with the Commission asking that it be dismissed for two reasons: plaintiff made no claim against it; and, any potential claim is barred by the claim provision in MCL 418.381(1).

The Commission granted an *en banc* hearing to provide guidance to plaintiffs and defendants alike given "the uncertainty that exists over joinder issues."

The employer who had been assessed liability by the Magistrate argued on appeal it had joined the subsequent employer out of concerns which had their roots in old Worker's Compensation Appeal Board cases: *Stanfill v A Z Schmina & Sons Co*, 1997 WCABO 162 and *Lindsay v Marsh-Wood Construction Co*, 1977 WCABO 109. The former case said that it was mandatory that an employer targeted by the employee add a subsequent employer if the targeted employer wished to escape liability. The latter case said that the targeted employer was permitted to add the subsequent employer but not obliged to do so.

The Commission in *Woodard* said that there is "no compelling reason to *require* a defendant to join other potentially liable parties." The Commission said the targeted employer can do so, but is not required.

The Commission then addressed the question of what happens when a subsequent employer is added via a petition for determination of rights. The Commission said if an uncontroverted defense exists that precludes recovery against the added defendant, then the added defendant should be dismissed. But, even if that dismissal occurs, the targeted employer can still attempt to show factually that disability is attributable to injuries incurred while plaintiff had been employed by the dismissed party.

What happens if a subsequent employer is added and the employee continues to make no claim against the added party? The Commission said the claim requirement in § 381(1) can be satisfied via the filing of a petition for determination of rights by the targeted employer because § 381(1)'s claim requirement does not say the employee is the only entity who can make a claim. The Commission said, while it is not mandatory that plaintiff formally amend his or her petition to incorporate dates of injury in the petition for determination of rights, that is the better practice.

The Commission then resolved the motion by dismissing the subsequent employer because no timely claim was made against it by plaintiff nor via the petition for determination of rights. But, the employer targeted by the employee is allowed to argue, if necessary, that plaintiff's condition was subsequently aggravated by her employment with the dismissed employer.

Neither Vocationally Handicapped Fund Nor Employer Liable For Ongoing Benefits

In *Bailey v Oakwood Hospital & Medical Center*, 2002 ACO #185, the Commission addressed the question of liability after 52 weeks in a case where the employee is vocationally handicapped (a/k/a "vocationally disabled") under Chapter 9.

The Magistrate had granted a motion to dismiss filed by the Second Injury Fund (Vocationally Handicapped Provisions) on the basis that the employer had not provided the Fund with timely notice compensation may be payable after the initial 52 weeks, as required in Section 925(1) and *Robinson v General Motors Corp*, 242 Mich App 331 (2000).

The question then became, given that *Robinson* dictated that the Fund was not responsible after 52 weeks for failure of notification, who was liable in light of the fact that Section 921 limits the employer's liability in such cases to 52 weeks?

The Commission analyzed these provisions of Chapter 9, expressing its disagreement with *Robinson* particularly as it applies in a voluntary pay situation. The Commission concluded that since the Fund had no liability beyond 52 (given the lack of timely notification) and since the employer had no liability beyond 52 weeks [given the limitation in § 925(2)] "the injured employee has no recourse." Therefore, plaintiff's entitlement to wage loss and medical benefits ended at 52 weeks.

Redemptions

In *Robbins v Coca-Cola Enterprises, Inc*, 2002 ACO #336, the Commission affirmed the Deputy Director's reversal of a redemption. In so doing, the Commission noted differing descriptions of its standard of review in redemptions. After a historical review of case law on this subject, the Commission settled on its general standard of review, namely: the Commission will determine whether there was any error of law, and whether there was competent, material, and substantial evidence for the factual finding.

Stipulations

In *Munster v City of Battle Creek*, 2002 ACO #284, one issue was whether the Second Injury Fund had stipulated to a particular date of injury because, if it had done so, then the

Chapter 9 provisions applied. The Commission said that, although a reading of the transcript indicates that the Fund did stipulate to a particular injury date, the Fund effectively withdrew the stipulation prior to the beginning of proofs. As a result, no party was misled. The Commission did say as a general matter stipulations are binding, unless withdrawn in this fashion.

"Rolling Averages" For Partial Rates

In *Bacon v Federal Screw Works*, 2002 ACO #204, the Commission addressed how to calculate the "after-tax average weekly wage which the injured employee is able to earn after the personal injury" for a partial disability calculation under MCL 418.361(1) where the employee has actually returned to work and is earning wages. The Commission noted the "common practice" of awarding the full rate and granting the employer credit where there are post-injury earnings, and also other case law which suggested looking at one year's worth of post-injury earnings to determine a post-injury "average" after-tax weekly wage. The Commission opted instead for a rolling average method, as had been mentioned in other cases, saying:

> We agree that plaintiff is only partially disabled. The magistrate followed a historically common practice of awarding the full rate, granting defendant credit for plaintiff's post-injury earnings. The difficulty with that approach arises from the fact that MCL 418.361(1) requires a computation of plaintiff's post-injury average weekly wage. Unfortunately, the legislature has not provided a mechanism for that calculation. One panel of the Commission proposed a method outlined in *McDaniel v Pneumo Corp*, 2001 ACO #27 [leave was denied in *McDaniel* at 465 Mich 916 (2001)]. This method looks to a one year post-injury earnings record. This writer feels that there is no statutory justification for selecting a one year window, preferring instead (for reasons readily apparent) the "rolling average" method adopted by a majority of the Commissioners in two subsequent cases, *Kuzma v Great Lakes Beverage Company*, 2002 ACO #36 [leave denied at the Court of Appeals in CA docket number 240270, June 10, 2002] and *Lomax v Delta Tube & Fabricating Corporation*, 2002 ACO #116.

"Common Practice" Regarding Subpoenas And Pretrial Procedures

In *Hudson v Sisson Transportation Services*, 2002 ACO #256, witnesses were served subpoenas for the original trial date and later informed of the postponed trial date. Counsel explained to the Magistrate she assumed the subpoena would continue, so as to require the witnesses to appear at the postponed trial date. Counsel also noted she believed the witnesses were present at the Bureau on the postponed trial day, but reluctant to appear and testify. The Magistrate ruled that counsel failed to properly subpoena the witnesses. The Magistrate also refused the counsel's request for an adjournment. On appeal, that party argued the Magistrate erred on these points.

The Commission agreed and remanded with instructions to complete the record by affording counsel a means to produce the previously subpoenaed witnesses.

The Commission said Magistrates must communicate to attorneys the Magistrate's practice because what might be "common practice" before one Magistrate may not be applicable in another courtroom. The Commission said:

> Because the act and rule are so limited in their direction as to how magistrates are to issue and enforce subpoenas, it is incumbent on the magistrates to communicate to the attorneys practicing before them how to proceed. It is clear from this record that practice varies among the magistrates and the attorney … was attempting to conform to the general practice. When the magistrate decided that the general practice was not applicable to his court room, he needed to convey that to counsel in advance. No such communication appears.
>
> Magistrates must communicate their reasonable procedures implementing section 853 and rule 6 to attorneys in advance of trial, giving opportunity for compliance. As the plaintiff argued in *Slaten v Human Services, Inc*, 2002 ACO #33, in a similar situation, a "magistrate many not enforce informal, unwritten pretrial scheduling rules in an *ex post facto* manner when the scheduling rules are not even relayed to her counsel until after said rules have been 'violated.'" In *Slaten*, we wrote,
>
> The worker's compensation system functions without any pretrial procedures for taking depositions of witnesses. Without such procedures, a magistrate may impose scheduling rules for each individual case. However, those rules must expressly be communicated to the parties before the parties can be expected to follow them.
>
> In contrast to the instant facts, plaintiff *Slaten* was punished" for failing to follow "the common practice." In the instant case, plaintiff was "punished" for not following an uncommon practice.

Compliance With Rule 5's Pretrial Exchange Of Information

In *Vale v Total Distribution Systems, Inc*, 2002 ACO #191, the Commission addressed application of the Board of Magistrates' Rule 5's "42-day" rule. Plaintiff's counsel filed a notice of intention to introduce the records of a treating doctor. At trial, plaintiff's counsel did not offer the records. Defendant offered them at trial in support of its position. The Magistrate would not admit the records because defense counsel had not complied with the 42-day rule.

The Commission agreed with the Magistrate. The Commission first reiterated the "absolute" nature of the rule:

> As we stated in *Wilson v Northwest Activities Center*, 2000 ACO #275, the rule has three absolute

requirements: a copy of the records must be sent to all parties, a notice of intent to submit records must be filed with the magistrate and copied to all parties, and written objections must be filed if a party opposes the submission of the records.

The Commission said that, "If a party wishes to introduce a 'record, memorandum, report, or data compilation', it must do in accordance with Rule 5. Here, defendant's failure to list the document deprived plaintiff of a 'fundamental right.'" The Commission said plaintiff's counsel was deprived of the opportunity to object to defendant's intention to admit the records and also deprived of the right to schedule cross-examination or conduct other discovery to blunt the effect of the records.

The Commission's decision was 2-1. The dissent would hold that Rule 5 was satisfied upon the submission of the notice of intent of the records by plaintiff's counsel.

Appellate Commission Adds New Feature to Website

The Appellate Commission's new chairperson, Richard Leslie, has announced the addition of a new feature to its website of *http://www.michigan.gov/cis/0,1607,7-154-10576_17495—,00.html*. The new addition is titled "Recent Opinions" and contains highlights of cases felt to be of particular interest. The feature will be updated periodically. Commissioner Leslie indicated that a full 60% of the Commission's recent cases involve *Sington* issues.

Craig's Notes

The following was compiled by the editor from email messages received from: Craig Petersen

Notice

Applications for positions on the Workers' Compensation Board of Magistrates are being accepted by the Qualifications Advisory Committee, Michigan Department of Consumer & Industry Services. An applicant must be a member in good standing of the State Bar of Michigan and must either have five years' experience as an attorney in the field of workers' compensation or successfully complete a written examination.

To meet the requirement of five years' legal experience as an attorney in the field of workers' compensation, an applicant must document to the Qualifications Advisory Committee a period of time totaling five years during which the applicant met one of the following criteria:

- A significant portion of personal practice has been in active workers' compensation trial practice representing claimants or employers.
- A significant portion of personal practice has been in active workers' compensation appellate practice representing claimants or employers.
- Service as a member of the former Workers' Compensation Appeal Board or the Workers' Compensation Appellate Commission.

The qualifying examination will be given on March 7, 2003 in Lansing, Michigan. Applicants will be tested in the areas of knowledge of the Workers' Disability Compensation Act, skills in fact finding, knowledge of human anatomy and physiology, and Michigan rules of evidence. Applicants who have already successfully passed the examination do not need to retake it.

Persons who meet the five years' experience requirement or successfully complete the written examination will be personally interviewed by the Qualifications Advisory Committee to determine their suitability for the position, especially with regard to his or her objectivity. **Previous applicants who have not been interviewed recently are advised to re-apply at this time.**

If you are interested in being considered for a position on the Board of Magistrates, send your résumé to the address below by **February 28, 2003**. Please include a cover letter clearly stating whether you meet the five years' experience requirement or are applying to take the examination.

Qualifications Advisory Committee
Attn: Susan Bickel
Michigan Department of Consumer & Industry Services
P.O. Box 30016
Lansing, Michigan 48909

In Memoriam

I have been informed of the passing of Attorney **Joyce Oppenheim** on Saturday, December 28th. Her funeral service was Monday, December 30th in Southfield. Joyce was a member of the Sachs, Waldman law firm, and a former member of the W.C. Section Council. Joyce will be missed by all.

Ted Gorny, an attorney with the Law Offices of Catherine Gofrank, passed away on Tuesday. Visitation was Thursday, November 21 from 2 p.m. to 9 p.m. at the McCabe Funeral Home, 31950 West 12 Mile Rd., Farmington Hills. The funeral mass was held on Friday, November 22 at 11 a.m at Our Lady of Refuge Church, on Commerce Road, in West Bloomfield.

Medicare Updates

Questions have been raised about whether Sharon Johnson was still processing Medicare's approval of set aside trusts at the regional office in Chicago. In checking with this office, I have been advised that she is still approving the agreements along with two others. Sharon's telephone number is 312/ 353-9857. In addition to Sharon, you may contact Doris Wilson at 312/ 353-1342, and Carol Hanson at 312/ 886-5350. The fax number is 312/ 353-9474. The staff just finished reviewing requests for approvals from the end of October, 2002. They anticipate a reduction in productivity due to staff taking annual leave. I will continue to monitor this situation and advise.

2003 Weekly Benefit Tables

The 2002 State Average Weekly Wage is $724.96 that makes the 2003 weekly maximum $653.00.I have attached in Excel format a spreadsheet showing the maximum and minimum rates from 1982 - 2003. The 2003 Weekly Benefit Tables (rate books) will be available at most workers' compensation offices early next week. A limited supply will be available at these offices. If you need a large quantity of rate books, please contact Lynda Sorrells at 517/ 322-1441.

The 2003 calculation program (version 4.0) is now available. This version contains the following new features:

- 2003 Rate Tables - The program has been modified to include rates for the year 2003.
- Partial Benefits- The "Wage Before" column in the table

Continued on next page

Year	State Average Weekly Wage (SAWW)	90% of SAWW (Maximum Benefit)	2/3 of SAWW*	50% of SAWW (Minimum Benefit for Death Cases)	25% of SAWW (Minimum Benefit for Specific Loss and P&T)
2003	$724.96	$653.00	$483.31	$362.48	$181.24
2002	$715.11	$644.00	$476.74	$357.56	$178.78
2001	$714.46	$644.00	$476.31	$357.23	$178.62
2000	$678.23	$611.00	$452.15	$339.12	$169.56
1999	$644.06	$580.00	$429.37	$322.03	$161.02
1998	$614.10	$553.00	$409.40	$307.05	$153.53
1997	$591.18	$533.00	$394.12	$295.59	$147.80
1996	$581.39	$524.00	$387.59	$290.70	$145.35
1995	$554.22	$499.00	$369.48	$277.11	$138.56
1994	$527.29	$475.00	$351.53	$263.65	$131.82
1993	$506.80	$457.00	$337.87	$253.40	$126.70
1992	$489.01	$441.00	$326.01	$244.51	$122.25
1991	$477.40	$430.00	$318.27	$238.70	$119.35
1990	$474.22	$427.00	$316.15	$237.11	$118.56
1989	$454.15	$409.00	$302.77	$227.08	$113.54
1988	$440.77	$397.00	$293.85	$220.39	$110.19
1987	$433.91	$391.00	$289.27	$216.96	$108.48
1986	$414.70	$374.00	$276.47	$207.35	$103.68
1985	$397.48	$358.00	$264.99	$198.74	$99.37
1984	$370.65	$334.00	$247.10	$185.33	$92.66
1983	$358.89	$324.00	$239.26	$179.45	$89.72
1982	$340.45	$307.00	$226.97	$170.23	$85.11

will now display the total of the AWW and fringes, if any. Also, the program will now allow zero dollars to be entered in the "Wage After" field for those claims that go back and forth from temporary partial to temporary total.

- Coordination of Benefits - In order to be consistent with recent case law regarding the calculation of partial benefits, the program will now calculate coordination of benefits based upon the year benefits are received rather than the date of injury.
- Accrued Payment & Interest Screen - The Grand Total columns in the table were causing confusion because they were really cumulative totals. Therefore, they have been removed and replaced by a Grand Total line at the bottom of the table.
- Third Party Recovery Offsets Screen - The program will now allow for zero dollars to be entered in Line 4 (Total W.C. Paid as of Settlement Date) since third party settlements sometimes take placed before any indemnity benefits are paid.

You can download this program by visiting our website at *www.michigan.gov/bwuc* and clicking on "2003 Workers' Comp. Calculation Program" under BWUC Quicklinks on the right-hand side of the page or by clicking on this link: *http://www.michigan.gov/bwuc/0,1607,7-161-15543_16162-41812—,00.html*

If you have a previous version of this program on your PC, it is no longer necessary to uninstall it first. You MUST save this file to your hard drive and install it from there. The file size is approximately 6MB, so it may take a few minutes depending upon the speed of your connection. This is a single user system. Please do not attempt to install in a networked environment and make accessible by more than one user as both calculation and program errors will occur. This program is also available on CD-ROM. If you would like a copy, please send a letter to Sandra Adams at the Bureau of Workers' & Unemployment Compensation, P.O. Box 30016, Lansing, Michigan 48909. The letter must be accompanied by a padded, stamped ($1.50 worth of postage), self-addressed mailer at least 6" x 8" in size.

Mt. Clemens Move

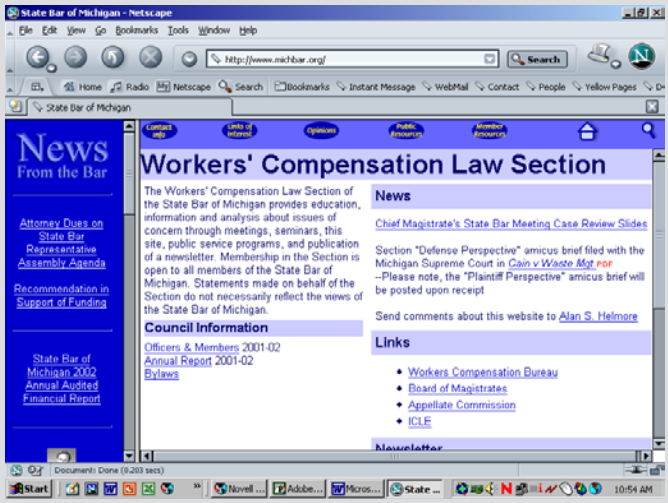
The end of December came and went and we didn't move into new office space in Mount Clemens. We are being told late February or early march. I'll keep you posted.

Redemption Reminder

Requests for non-contested claim files for redemption should be directed to the attention of Sue Jones at the bureau. He telephone number is 517/ 322-6206. You can expedite the process by faxing your request to her at 517/ 322-6012. You can mail your request to P.O. Box 30016, Lansing, MI 48909.

Address Change

Regency Court Reporting has moved down the street to a new address. Their new address is: 3133 Union Lake Road, Commerce Township, MI 48382. Please make a note of this change for future correspondence.



For back issues of this newsletter, checkout our Section Webpage at *ww.michbar.org*!

BOYNE HIGHLANDS RESERVATION FORM

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

Dates: June 12-14, 2003

Reservations must be made utilizing this form and be received by May 11, 2003 Reservation requests received after this date will be taken on a space available basis at current room rates.

When making travel arrangements, please note Boyne Highlands observes a 5:00 PM check in and 1:00 PM check out in the Main Lodge. Condominiums observe a 6:00 PM check in and 11:00 AM check out.

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	ROOM RATES	INDICATE 1ST & 2ND CHOICE
Main Lodge Deluxe	**$139.00 per room, per night**	
Main Lodge Suite	**$165.00 per room, per night**	

Rates are based on the European Plan which includes lodging only. Rates are per room per night.
Rates are subject to a 6% Michigan State Use Tax, a 2% Local Lodging Assessment and 5% Resort Service Fee.

Tax exempt individuals: Please present the state tax exempt form at check out. Indicate your method of deposit below. Personal funds are not exempt from state tax or local assessments.

☐ Company check is enclosed with this registration form.

☐ Please use my personal credit card to guarantee the reservation. A check will be mailed from the company or presented upon arrival.

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 10 days prior to arrival date in order to receive refund of deposit, less a $10.00 administrative fee.

Please mail or fax to:

Boyne USA, Inc.
Central Reservations Department
P.O. Box 19
Boyne Falls, MI 49712
Fax: (231)549-6844
Phone: 1-800-GO-BOYNE

GROUP RESERVATIONS CANNOT BE ACCEPTED OVER THE PHONE

PLEASE PRINT

ARRIVAL DAY/DATE: _____

DEPARTURE DAY/DATE: _____

SHARE WITH: _____

NUMBER IN PARTY: _____

NUMBER OF ADULTS IN PARTY: _____

AGES OF CHILDREN 18 & UNDER: _____

NAME: _____

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

PHONE / BUSINESS: _____

PHONE / HOME: _____

E-MAIL ADDRESS: _____

SPECIAL REQUESTS *: _____

**Boyne USA Resorts 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: _____

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.

Section Council Members 2002-2003

Workers Compensation Section
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933

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