State Bar of Michigan

Workers' Compensation Section Newsletter

Winter 2007

Magistrate Appointments and Re-Appointments

By Murray A. Gorchow, Chairperson
Workers' Compensation Board of Magistrates

Governor Jennifer Granholm has announced the following appointments and re-appointments to the Workers' Compensation Board of Magistrates:

- **William A. Baillargeon** of Saugatuck. Mr. Baillargeon served as a senior trial specialist with the Law Offices of Paula J. Martin before his appointment to the Board for a term that expires January 26, 2011. He succeeds John M. Wierzbicki, whose term has expired.
- **David B. Merwin** of Muskegon. Mr. Merwin served as counsel to Williams, Hughes & Cook PLLC law firm before his appointment to the Board for a term that expires January 26, 2011. He succeeds Paul H. Reinhardt, whose term has expired.
- **Christopher P. Ambrose** of East Lansing, reappointed for a term expiring January 26, 2011.
- **Jennifer L. Crawford** of Twin Lake, reappointed for a term expiring January 26, 2011.
- **Lee A. Decker** of Brighton, reappointed for a term expiring January 26, 2011.
- **Murray A. Gorchow** of West Bloomfield, reappointed for a term expiring January 26, 2011.
- **Valencia L. Jarvis** of Southfield, reappointed for a term expiring January 26, 2011.
- **Rosemary K. Wolock** of Royal Oak, reappointed for a term expiring January 26, 2011.

Continued on page 4

Contents

Section Council

Leonard M. Hickey, Chairperson
3358 Eagle Run Dr NE Ste 100
Grand Rapids, MI 49525
P: (616) 364-2550 F: (616) 364-2551
E: lhickey@hickeycombs.com

Paula S. Olivarez, Vice Chairperson

Murray R. Feldman, Secretary

Joel L. Alpert, Treasurer

Richard L. Warsh, Ex Officio

Jack Nolish, Director, Michigan Workers' Compensation Agency

Murray Gorchow, Chief Magistrate, Michigan Workers' Compensation Agency

Martha M. Glaser, Appellate Commission

Scott C. Strattard, Commissioner Liaison

Terms expiring 2007
John P. Charters, Troy
David DeGraw, Grand Rapids
Mark W. Viel, Big Rapids

Terms expiring 2008
Denice LeVasseur, Southfield
Philip S. Brown, Detroit
Thomas J. Ruth, Saginaw

Terms expiring 2009
Brian G. Goodenough, Lansing
John Sims, Marshall
Charles W. Palmer, Taylor

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

Murray Feldman, 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.

Material for publication should be sent to the editor at:

300 East Long Lake Road, # 200
Bloomfield Hills, MI 48304
mfeldman@stroblpc.com
Phone: (248) 540-2300
Fax: (248) 645-2690

Article submissions are due for:
Spring issue May 15, 2007

From the Chair

The holidays are over and it's back to business as usual. By the time you read this, magistrate appointments and/or re-appointments will have been announced. Uncertainties will have been resolved and magistrates who were awaiting re-appointment will again be able to hear and decide cases. Congratulations to the new appointees and re-appointees!

I take this opportunity to remind you of several important events coming up and urge you to mark them on your calendars.

The section's winter meeting was held February 18-25, 2007 at the Aventura Spa Palace Resort, in Riviera Maya, Mexico. The meeting included daily educational and networking opportunities.

All of the past chairpersons of the Workers' Compensation Section, all current council members, the director of the agency, chairperson of the board of magistrates, and chairperson of the Workers' Compensation Appellate Commission are invited to the Past Chairperson's Golf Outing on May 18, 2007, at Oakpointe Country Club in Brighton, Michigan. Please contact Denice LeVasseur for more information.

Our annual meeting will not be held in September at the State Bar Annual Meeting in Grand Rapids. Our bylaws were amended last year to provide that our annual meeting be held at our spring meeting in June. Our spring and annual meeting will commence on Thursday afternoon, June 14, 2007, and will continue through Saturday morning, June 16, 2007. The meeting will be held at Crystal Mountain Ski & Golf Resort in Thompsonville, Michigan. If you decide to book a room early, be sure to mention that you are a member of the Workers' Compensation Section of the State Bar to obtain the appropriate discount. Barry Schroder of Grand Rapids is chairing the program for the meeting. It is a great opportunity to be updated on recent decisions and trends in the law, learn new practice strategies and find out what is going on at the agency, appellate commission, and board of magistrates. As in the past, there will be a section-sponsored golf event on Friday afternoon. New officers and council members will be elected at the meeting.

Videos of the December 1, 2006 Detroit Workers' Compensation Seminar are now available for viewing. Please contact me or Joel Alpert.

Your council has met periodically, addressing proposed rules and legislation, Medicare, deposition fees, Medicaid, and magistrate appointments (to name a few). Your elected representatives on the council are identified in this newsletter. Please feel free to contact any of us regarding ideas, issues or concerns that you may have that are important to our area of practice.

Best wishes for a productive and prosperous 2007! 🛠

Leonard M. Hickey
Chairperson

The Workers' Compensation Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

Director's Message

By Jack A. Nolish, Director, Workers' Compensation Agency and
Murray A. Gorchow, Chair, Board of Magistrates

Two topics in one article at no extra charge.

First, there have been numerous complaints over the years regarding the attorney fee rules §408.44. Not only have there been complaints about the adequacy of the fee percentages in general, but there has been a specific area of concern over getting attorney fees paid on reimbursements to health or disability carriers. Often the complaint is heard that the carrier (organization, etc.) is refusing to pay attorney fees on the money collected as a result of the successful adjudication or resolution of a case. This can lead to one of two results: the injured worker paying a disproportionate share of the fees relative to the overall recovery in the case, or the attorney not being compensated fully for the benefits obtained as a result of the resolution of a case. This discussion does not address the situation in which attorney fees are requested and properly ordered by the magistrate to be paid in addition to the reimbursement amount. Rather, it looks at the question of the outside benefit provider's ability to deny paying an attorney a fee on reimbursed sums.

The entitlement to reimbursement to a group disability or hospitalization insurance carrier is recognized in §418.821 of the Workers' Compensation Act. That section specifically deals with the attorney fee question by providing:

> . . . When a group disability or hospitalization insurance company; health maintenance organization licensed under former Act No. 264 of the Public Acts of 1974, or part 210 of Act No. 368 of the Public Acts of 1978, as amended; or a medical care and hospital service corporation organized or consolidated under former Act No. 108 or 109 of the Public Acts of 1939, or any successor organization enforces an assignment given to it as provided in this section, **it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the workers' compensation recovery**. M.C.L.A. 418.821 (2). (Emphasis added).

This provision provided the statutory basis for promulgating attorney fee rules which provided, among other things:

> R 408.44 (1) (8) A group disability or hospitalization insurance company that enforces an assignment given to it as provided in the act **shall pay a part of the fee** of the attorney who secured the compensation recovery in the same proportion that the group insurance company payments bear to the total compensation recovery upon which the attorney's fee is based. (Emphasis added).

Significantly, the rule and statute do not provide that the carrier/organization "might" pay if it wants to; rather, both indicate clearly that the carrier/organization SHALL pay. If this information doesn't do the trick in your discussions with a carrier/organization, an application to determine fees is in order under §418.858(1). As we frequently say when we get phone calls about this problem: FILE SOMETHING. The form to use is the blue 104c. A magistrate will conduct the appropriate hearing to determine the applicability of this statutory provision and rule to a fee dispute in each particular case.

Second, cost reimbursement under the new subpoena rule. As with most rule changes, there are always consequences beyond the simple letter of the rule. The new subpoena rule calls for records to be delivered to the party requesting the subpoena. It also places the obligation on the party receiving the records to provide the other parties with copies of any records received, or alternatively, make them available for copying. Compliance with this mandate can easily increase costs to the issuing party.

R 408.44 (5) (b) specifies that reasonable expenses shall include: "Any other medical witness fee, including the cost of a subpoena." The new subpoena rule R 418.56 will likely increase the cost of handling a subpoena due to the mandatory copy obligation. To deal with this, "costs" should include the mandated copy expenses. This would also include the certified mailing costs that have largely replaced the fees paid to process servers. Like any other file cost reimbursement, the magistrates will be looking for some reasonable documentation of the charges claimed and will decide whether to approve the requested amount on a case-by-case basis.

Remember, this analysis only applies to records and documents that have been received pursuant to subpoena. All other copying costs in the routine handling of a case will continue to be considered an ordinary cost of doing business. 🛠

Magistrate Appointments . . .
Continued from page 1

These appointments and reappointments are subject to Section 6 of Article V of the Michigan State Constitution of 1963. They stand confirmed unless disapproved by the Michigan Senate within 60 days.

I have made the following assignments and re-assignments of Magistrates:

In Detroit, Lee Decker is going from Detroit to Pontiac full time. Vic McCoy is going to handle a split docket. He will continue to be based in Pontiac, but every other week, beginning with the week of Feb. 5, he will be in Detroit to handle dockets on Tuesday, Wednesday and Thursday.

In Pontiac, Melody Paige will get former Magistrate Wierzbicki's docket; Decker will get the McCoy docket; McCoy, needing a 1/2 docket in Pontiac, will get the old Paige 1/2 Pontiac docket. Wolock will keep her docket, and will be back on the bench beginning February 12. *In Kalamazoo*, there will be two new Magistrates: Dave Merwin and Bill Baillargeon. Merwin started on February 5. Between then and Baillargeon's arrival on March 19, Jennifer Crawford will also be in Kalamazoo (three weeks per month) with Merwin until Baillargeon arrives. Crawford will continue her one week per month in Traverse City.

In Grand Rapids, as of Mar 19, Crawford joins Tim McAree and Jay Quist, and will be based in Grand Rapids (three weeks), and will continue doing the Traverse City docket the first week each month. *In Flint:* With Crawford leaving, the docket will be in the hands of Mike Harris and Ken Birch.

These assignments and re-assignments have been made given the growing size of the dockets in Kalamazoo, Grand Rapids and Pontiac, as well as the reduction of the size of the docket in Flint. Hopefully these changes will maximize magistrate availability to timely serve everyone in the workers' compensation community. As always, I welcome your questions, observations, thoughts, and suggestions as we go forward. 🛠

Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

As I was driving to the office this morning, it was negative 4 degrees outside. I couldn't help but think of the section meeting scheduled for June 14 and 15 at Crystal Mountain and how sunny and warm it will be there. I encourage you all to mark your calendars now and join the rest of the section for an avalanche of information, and a storm of fun.

For those of you who took the time to read my article about attorney fees in the last newsletter, there was a typo, actually two. In two places I inadvertently referred to section 845, which deals with out-of-state injuries, rather than 858(1), which deals with attorney fees. To anyone who was confused by that, I apologize.

The Commission issued 323 decisions in 2006, up from 2005 (289), but not as many as 2004 (410).

Donna Grit is up for reappointment, her term expires September 30, 2007.

Stokes is pending on Application at the Supreme Court; until further direction by that Court, we continue to apply the standard as set forth by the Court of Appeals. *Stokes v DaimlerChrysler*, _____Mich App ____ (2006); Docket # 268544

Our proposed rule changes have been approved by SOAHR, and have been forwarded to the Legislative Services Bureau. You can view them on our website, *www.michigan.gov/wca*, click on Appellate Commission. The website gives the proposed amendments as well as the rules that were changed as of April 19, 2006. We welcome any suggestions or comments. The website will announce the hearing on the rules when it is scheduled. Comments and concerns may be expressed at the hearing. It is more difficult (but not impossible) to effect change at that point.

Michigan Workers' Comp Costs — Good for Business in Michigan

By Murray A. Gorchow, Chairperson, Board of Magistrates

Remarks made before the Kalamazoo Human Resource Management Association on October 25, 2006; the Annual Meeting of the Workers' Compensation Section State Bar of Michigan on December 1, 2006; and the Michigan Trial Lawyers Association Seminar on January 12, 2007

I would like to speak to you today about Workers' Disability Compensation in Michigan and how it relates to the business climate in our State.

There continues to be a lot of publicity out there asserting that workers compensation costs are "bad for business in Michigan." I am pleased to report that the facts do not bear out this allegation. Just the opposite is true:

In an article surveying several different measures, Edward Welch, former Director of the Workers' Compensation Agency, author of the definitive treatise on Workers' Comp in Michigan, and an authority on workers comp nationally, has noted recently:

> "In 2004, benefits in Michigan were almost 20% below the national average and 34% lower than they were in 1994. Reduced benefit payments demonstrate reduced costs. What other cost of doing business is 34% lower today than it was 10 years ago? Further, the cost of medical treatment for work related injuries in Michigan averaged 34 cents per $100 of payroll compared to 53 cents nationally, i.e., less than 2/3 the national average."

These are not isolated statistics or studies.

In September 2006, Jack Nolish, the Director of the Workers' Compensation Agency, attended the annual meeting of the IAIABC (International Association of Industrial Accident Boards and Commissions). A presentation was made by the staff of the Oregon workers' comp system. Every other year they do an analysis of work comp premiums throughout the country. In both their 2002 and 2004 rankings, Michigan was 30th in premium rate. For 2006, Michigan is ranked 39th. This means that only 11 states in the country have premiums lower than Michigan. In our region, only Indiana was lower. (Indiana is regarded by many observers as having an inadequate benefit system for its injured workers.)

A just completed study done by the Upjohn Institute found that total Michigan business taxes are at or below the national average and below that of the other states surrounding Michigan.

The Workers' Compensation Research Institute (WCRI) of Cambridge, Massachusetts added Michigan to its multi-state benchmarking series in 2006. This is an annual study that "uses special statistical methods to provide the most meaningful interstate comparisons available." I attended their annual meeting November 8-9 in Boston to hear their report. Among its major findings are the following:

> "Costs per claim in Michigan were lower than typical compared with the 13 other large states studied, that together represent nearly 60% of the nation's workers' compensation benefit payments. Three factors largely explain that result: (1) medical payments per claim were substantially lower [MI was the lowest]; (2) the duration of temporary disability was lower than in the other wage-loss states; and (3) the weekly benefit rate was lower than expected, largely because of the [lower] benefit structure [and caps on weekly benefits] in Michigan."

The WCRI study also found: "Growth in total costs per claim was stable in the two most recent years, following annual average increases of 5-10% in the three earlier years of the study period." Over the same periods, total costs per claim in Michigan remained 34-35% lower than the 14 state median.

In attendance at the WCRI annual meeting were over 300 stakeholders from the national workers compensation community, including large and small businesses, organized labor, health care providers, insurance carriers, drug manufacturers and state workers' compensation agencies. They were uniformly impressed with how well Michigan controls workers' comp costs compared to the problems they experience in their states. On February 2, 2007, the WCRI came to Lansing, Michigan and did a slide presentation of its findings for the WCA Director's Advisory Council and all interested

Continued on next page

Michigan Workers' Comp Costs . . .
Continued from page 5

parties to share this important information with the Michigan workers' compensation community and policymakers.

Another national study done by the National Ass'n of Insurance Commissioners (NASI) looked at after-tax returns for work comp insurance carriers and found in 2004 that the insurance companies were doing quite well in Michigan, with an after-tax return on surplus of 17.9% compared to 10.5 nationally. On a 10 year basis, Michigan insurers enjoyed a return of 14.3%, compared to the national return of 7.9%. The NASI study also found Michigan total Work Comp benefit payments per $100 payroll to be 81% of the national average and medical payments only 64 % of the national average.

The NASI study demonstrates that the workers' compensation insurance industry is doing very well in Michigan. Perhaps it is this disconnect between lower comparative benefit costs and insurance carrier profitability that may contribute to the continuing concern expressed by small business regarding their premium costs. The Michigan Economic Development Corporation (MEDC) workers' compensation liaison actively works with businesses across the state, helping businesses to lower their insurance premiums and to find lower premium insurance carriers.

Given the success that our state has had in controlling workers' compensation benefit costs, perhaps now is the time to find ways to improve the system for injured workers in ways consistent with the control of costs that have already been achieved.

While it may have been true during the 1980s that workers' comp costs in Michigan were a problem for business—that is old news. It is no longer true. What is bad for business in Michigan is the perpetuation of this old story that is no longer in touch with today's reality.

The bottom line is that workers' compensation is not bad for business in Michigan. What is bad for the business climate in Michigan is our continued acquiescence and silence in the face of the continuing spread of misinformation regarding the costs of workers' comp in Michigan. Unfortunately, businesses that want to come to Michigan or want to stay and grow in Michigan, can and do get scared off by that false information.

If we want to help bring business to Michigan (and we all do), if we want to encourage the expansion of business and jobs in Michigan (and we all do), then we should be out there spreading the good news about how well Michigan is doing controlling workers' compensation costs. We can and should be proudly saying:

"Workers' comp in Michigan is good for business."

The Effect of Residual Earning Capacity on the Workers' Compensation Rate

By Gary A. Kozma, Atkinson, Petruska, Kozma & Hart, P.C.

This article examines the legal basis for using a workers' compensation recipient's capacity to work after the injury to reduce the rate of compensation that person would have otherwise received. A textual analysis of the workers' compensation act is employed to identify a proper legal basis for such a reduction. The proper legal basis does not support, however, the position presently urged by defendants in cases in which the issue is raised.

Welch[1] identifies section 361(1) of the Workers' Compensation Act [2]as the legal basis for reducing the compensation rate based on a residual earning capacity:

> While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid, to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax weekly wage which the injured employee is able to earn after the personal injury...

Welch distinguishes between two conflicting interpretations of the term "able to earn" in section 361(1). Plaintiff's position is that "able to earn" is measured "solely by wages actually earned" after the personal injury was suffered. Thus, a capacity to earn that is not exercised would be irrelevant since only actual earnings would be subtracted under sec-

tion 361(1) before calculating the compensation rate. Labor market surveys that attempt to identify this residual partial earning capacity would likewise be irrelevant since the existence of these hypothetical jobs would have no impact on the compensation rate.

Defendant's position is that "able to earn" includes both wages actually earned and wages that could be earned from any job available to plaintiff that he is qualified to do. Under defendant's analysis, the term "able to earn" is synonymous with "earning capacity." Consistent with their position, defendants use labor market surveys in attempt to demonstrate hypothetical jobs paying hypothetical wages in order to establish plaintiff's wage earning capacity after the injury. Under section 361(1), the employer is required to pay 80% of the difference between the net wages earned before to Plaintiff's injury and wages the injured employee is "able to earn" after the injury. Thus, defendant would argue that any earning capacity remaining after the injury should be subtracted from plaintiff's wages before the compensation rate is calculated.

Defendant's interpretation is untenable, however, because it conflicts with section 371(1) of the Act,[3] Under section 371(1), "[t]he compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury." The clause "wage earning capacity after the personal injury in the same or other employments" is precisely the same as defendant's interpretation of the "able to earn" clause. Thus, assuming defendant's interpretation is true, reading sections 361(1) and 371(1) together would result in the following calculation:

> Pursuant to section 361(1), subtract the residual net earning capacity from the prior net earning capacity and multiply by 80% to arrive at the compensation payable. Pursuant to 371(1) take the compensation payable and add it to the residual earning capacity to ensure that it is less than the prior weekly earnings.

Assume, for example, plaintiff earned $500 per week gross, with a net of $400, while employed with defendant. Assume further that plaintiff can gross $300 with a net of $240 based on his residual earning capacity. Under 361(1), defendant would take the difference between the two net incomes of $160 and multiply by 80% to arrive at a compensation rate of $112. Under 371(1), defendant would then add the compensation rate of $112 to the residual earning capacity of $300 to ensure that it was less than the prior weekly earnings of $500.

In the example selected, the compensation rate plus the residual earning capacity are less than the prior earnings as required by section 371(1). In fact, the insurmountable flaw in defendant's interpretation of section 361(1) is that in each and every case, the sum of the compensation payable and the residual earning capacity will be less than the prior average weekly earnings at the time of the injury. Therefore, the second step of the procedure under section 371(1) would always be a waste of time. Indeed, any other result is mathematically impossible.

Assume the following:

> A = after-tax earning capacity after injury.
>
> A' + A = after-tax earnings before injury where A' is the difference between pre- and post-injury after tax earnings, a difference that must exist if disability exists under *Sington.*[4]
>
> A + tA = Gross wage earning capacity after injury where tA is the tax on A.
>
> A' + A + tA + tA' = Gross wage earnings before injury where tA' is the additional tax on A'.
>
> CR = compensation rate

Under section 371(1), the compensation rate plus the residual earning capacity cannot exceed the prior earnings:

> CR + A + tA cannot exceed A' + A + tA + tA'.
>
> Subtracting like variables from both sides:
>
> CR cannot exceed A' + tA'.

However, under defendant's interpretation of section 361(1), the following is always true:

> CR = .8 (A' + A - A), or .8(A').

Thus, under defendant's interpretation of 361(1) since the compensation rate is always 80% of A', the compensation rate would always be less than 100% of A' + tA', the formula derived from section 371(1). Section 371(1) would therefore have no consequence whatsoever on the calculation of the compensation rate and would become "mere surplusage," a result abhorrent to the textualist.[5]

Having eliminated defendant's position as a possibility, the question becomes whether "able to earn" means "wages actually earned" as contended by plaintiff. A textual approach suggests that is the case. Consider section 301(5) of the act.[6] According to *Sington*, this section of the act was the legislative response to the common law "favored work" doctrine and addresses disabled workers who work after the injury. Subsection (b) states in pertinent part:

continued on next page

The Effect of Residual . . .
Continued from page 7

> If an employee is employed . . . the employee shall receive . . . weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury . . . .

Here, the legislature is using the phrase "able to earn" to mean "wages actually earned," the same usage of those same words plaintiff attaches to section 361(1). It cannot be said that plaintiff's interpretation of the words "able to earn" in section 361(1) are not true to the text of that section since the Legislature used the same words in section 301(5) in reference to wages that are actually earned from an actual job. Plaintiff's reading is the correct reading because it harmonizes sections 361(1) and 301(5) and eliminates the inconsistency between 361(1) and 371(1).

This analysis creates another potential problem, however. If "able to earn" concerns wages actually earned, it would appear that section 361(1) duplicates 301(5)(b) since both provisions would seem to address the same situation where post-injury employment is actually performed. The first sentence of section 371(1) provides the answer:

> The weekly loss in wages referred to in this act shall consist of the percentage of the average weekly earnings of the injured employee computed according to this section as fairly represents the proportionate extent of the impairment of the employee's earning capacity in the employments covered by this act in which the employee was working at the time of the personal injury.

The phrase "proportionate extent of the impairment" recognizes a scenario in which plaintiff may still be able to perform some of the work he/she performed before the injury. A good example of this is a plaintiff who had two jobs before the injury and can still perform one of them. Another example is a plaintiff experiencing a reduction in duties and pay due to the injury. This inability to perform some, but not all, of the work performed at the time of injury is described by the phrase in section 361(1) which limits the application of that section to instances where "the incapacity for work resulting from personal injury is partial." Indeed, viewing section 301(5) as the legislative response to the common law favored work doctrine as recognized in *Sington*, no other section of the statute would address the rate calculation when plaintiff continues to perform some, but not all, of the work done before to the injury. Thus, section 361(1) does not deal with residual earning capacity at all, but instead addresses the partial loss of earnings caused by the injury. This is the meaning of "partial incapacity" in section 361(1), a term that is not defined in the act.

The foregoing interpretation of these provisions of the act gives effect to every section of the act and eliminates all conflict between the sections. Arriving at the proper interpretation of section 361(1), however, does not eliminate the possibility that the compensation rate can be reduced by the existence of hypothetical jobs plaintiff can hypothetically perform. As noted above, section 371(1) recognizes the concept of an "employee's wage earning capacity after the personal injury in the same or other employments." However, the formula for calculating the compensation rate is more favorable to plaintiffs under section 371(1) than it is under defendant's mistaken interpretation of section 361(1). Instead of subtracting the residual earning capacity from the average weekly wage, the compensation rate is reduced to the extent it would be more than plaintiff's prior earnings when added to the residual capacity.

This formula could reduce or even eliminate the impact of a residual earning capacity on the compensation rate. Consider the following example: plaintiff is married with two dependents and earned $500 per week with fringe benefits valued at $150 before an injury in 2006. The compensation rate without consideration of any residual earning capacity is $420. Defendant uses a labor market survey to prove that plaintiff can work a minimum wage job earning $240 per week. Plaintiff's compensation rate is $410, since $420 plus $240 exceeds plaintiff's "average weekly earnings"[7] of $650 before the injury by $10. Consider another example of a person earning an average of $1,200 per week. That person is entitled to the maximum compensation rate of $706 per week and would need to have a residual earning capacity of more than $494 per week before that rate was affected. Thus, only after the residual earning capacity fills in the amount plaintiff has actually lost as a result of the injury is the compensation rate affected.

The proper calculation of the impact of a residual earning capacity should limit the use of labor market surveys to only those cases in which it will make a substantial difference in the compensation rate. In the first example above, defendant's labor market survey would have saved it $520 annually, hardly worth the effort. In the second example, and any other case where the plaintiff makes an income higher than the state average weekly wage, labor market surveys would only be useful if a substantial residual earning capacity could be demonstrated. It is also important to note that residual earning capacity is not based solely on plaintiff's training and experience. In *Sington*, the Supreme Court stated that whether "plaintiff's injuries

The Effect of Residual . . .
Continued from page 8

would prevent him from competing in the marketplace with other workers" was important to the issue of earning capacity. Thus, the mere existence of hypothetical jobs plaintiff could otherwise perform does not, by itself, establish earning capacity.

Conclusion

This analysis uses a textualist approach to identify specific applications for each section of the act and eliminate conflict between the various sections. Section 361(1) on "partial incapacity" addresses situations in which plaintiff can still earn some, but not all, of the money he or she was earning in the employment(s) held at the time of injury. It is the counterpart of section 351 addressing "total incapacity" and, appropriately, uses the same compensation rate of 80% of the net earnings lost. Section 371 applies when there is a hypothetical residual earning capacity and operates to reduce the compensation rate to the extent the rate plus the residual earning capacity would create a windfall to plaintiff. Section 301(5), the most recent addition to the legislative scheme, is the legislative response to the common law favored work doctrine and applies when work has been obtained but is then lost. 🛠

Endnotes

1 Welch, *Workers' Compensation in Michigan: Law & Practice*, 4th Ed., 2006 Supplement, section 8.2g, pp 8-32 to 8-37.

2 MCL 418.361(1).

3 MCL 418.371(1).

4 *Sington v Chrysler Corp*., 467 Mich 144, 648 NW2d 624 (2002).

5 "The court must avoid interpretations that render a statute surplusage or nugatory" *Griffith v State Farm Mutual Insurance Corp*., 472 Mich 521, 697 NW2d 895 (2005).

6 MCL 418.301(5).

7 The term "average weekly earnings" would include the value of fringe benefits. Earnings are defined as "something earned, especially the salary or wages of a person . . ." The verb "earn" means "to gain, especially for the performance of service, labor, or work." Thus, earnings relates to more than just money, and can also refer to things like good grades, demerits, and respect. If the legislature intended to exclude fringes, it would have used the word "wages" instead of "earnings."

Department of Labor and Economic Growth
Workers' Compensation Board of Magistrates

General Rules

Filed with the Secretary of State on February 21, 2007

These rules become effective immediately upon filing with the Secretary of State unless adopted under sections 33, 44, or 45a(6) of 1969 PA 306. Rules adopted under these sections become effective 7 days after filing with the Secretary of State.

(By authority conferred on the director of the department of labor and economic growth by section 213 of 1969 PA 317, and Executive Reorganization Orders No. 1996-2, 2002-1, and 2003-1, MCL 418.213, MCL 445.2001, MCL 445.2004, MCL 445.2011 of the Michigan Compiled Laws)

R 418.56 of the Michigan Administrative Code is amended as follows:

R 418.56 Subpoena; provision to opposing party; submittal of subpoenaed records; disputes.

Rule 6. (1) A subpoena shall be on an agency approved form and include all of the following:

(a) The party requesting a subpoena shall certify that the matter about which the subpoena is requested is pending before the agency.

(b) A subpoena shall be fully completed before submission to a magistrate for signing.

(c) The return date indicated on the subpoena shall provide a reasonable time for compliance.

(d) Magistrates may sign a subpoena for a case that is assigned to another magistrate.

(2) A copy of a subpoena issued by a magistrate in accordance with MCL 418.853 shall be provided to all parties, or their legal counsel, at the time of issuance.

(3) The party for whom a subpoena is issued shall immediately do 1 of the following:

(a) Provide a complete copy of the records to all parties when received.

(b) Make the records reasonably available for copying when received.

(4) All subpoenaed records shall be returned directly to the party requesting the records.

(5) Only those records admitted into evidence by a magistrate at a hearing shall be placed in the agency file or maintained by the agency.

(6) Any dispute arising under this rule shall be brought by motion before the assigned magistrate and shall have a copy of the subpoena attached. A copy of the motion and the subpoena shall be served on all parties, or their counsel, and proof of service filed with the agency. 🛠

State of Michigan Department of Labor & Economic Growth Workers' Compensation Agency/Board of Magistrates P.O. Box 30016, Lansing, MI 48909	**SUBPOENA FOR PRODUCTION OF RECORDS (and/or) WITNESS SUBPOENA**

Plaintiff (include last 4 digits of social security number)	v	Defendant(s)

In the name of the People of the State of Michigan TO:

YOU ARE ORDERED:

☐ 1. to produce on or before _____ the following records, papers, books and documents:

☐ 2. to appear personally before _____ on:
Date:
Time:
Location:

☐ 3. to both produce the items designated in Number 1, and to appear personally as outlined in Number 2.

All items specified in Number 1 are to be forwarded to: **(DO NOT SEND RECORDS TO ANY WORKERS' COMPENSATION AGENCY OFFICE)**

Note: If copies of business/medical records are mailed, the records custodian shall complete the certificate on the backside of this subpoena and attach a complete copy of the original business/medical records to the subpoena.

If you fail to produce or appear without such material as you have been ordered to produce, you may be found guilty of contempt and punished accordingly in any circuit court within whose jurisdiction the offense is committed.

I certify that this subpoena meets the requirements of R418.56.

Signature _____
(Party requesting subpoena)

Signed this _____ day of _____, 20___.

WORKERS' COMPENSATION AGENCY

_____
Magistrate or Director

Plaintiff Attorney Name, P#, Address, Phone	Defendant Attorney Name, P#, Address, Phone	Defendant Attorney Name, P#, Address, Phone

The Department of Labor & Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency. If you require special accommodations to use the hearings office because of a disability or if you require a foreign language interpreter to help you to fully participate in any proceedings, please contact the agency immediately.

Authority: Workers' Disability Compensation Act 418.853; R418.56
Completion: Voluntary
Penalty: None

WC-508 (Rev. 2/07) Front *(Prior versions obsolete)*

Plaintiff (include last 4 digits of social security number)	v	Defendant(s)

CERTIFICATE OF RECORDS CUSTODIAN

_____, the undersigned after being sworn, states the following:

1. That I am the _____ of _____
   (Your position) (Organization)
   and in such capacity I am the custodian of the business/medical records for this organization.

2. That on _____, I was served with a subpoena in connection with this claim, calling for the
   (Date)
   production of business/medical records pertaining to _____.

3. That I reviewed the original of the records and made a true and exact copy of the original records and that the attached copies of the original records are true and complete.

4. If submitting medical records, it is the regular practice of this organization to contemporaneously and timely record information concerning the treatment and care of the patient and I have attached the records that have been prepared and kept concerning this patient.

Signature _____ Date _____

Subscribed and sworn to before me on _____, _____ County, Michigan.
Date

My commission expires _____ Signature _____
Date Notary Public

AFFIDAVIT OF MAILING/PROOF OF SERVICE

I certify that on _____ a copy of this subpoena with a witness fee and mileage fee was
Date

☐ mailed to the other party(ies) or their attorney(s), securely sealed with full-rate postage attached and deposited with the United States Postal Service.

☐ personally served.

Signature _____ Date _____

Subscribed and sworn to before me on _____, _____ County, Michigan.
Date

My commission expires _____ Signature _____
Date Notary Public

Section's Winter Detroit Seminar a Huge Success

By Murray Feldman

Bill VanWanabeke

John Braden

Despite ice and snow from Lansing west and threatening weather in the Detroit area, well over 100 Section members attended the December 1, 2006 Workers' Compensation Winter Seminar. They were rewarded with many excellent and interesting presentations.

As usual, the presentations by Agency Director Jack Nolish, Appellate Commission Chairperson Martha Glaser, and Chief Magistrate Murray Gorchow were entertaining, thorough, and brought us up-to-date on issues of note.

The Section wishes to thank Mr. John Braden of Kalamazoo for his "State of the Law" presentation and materials.

Our featured speaker, Mr. Bill VanWanabeke, brought us up-to-date on legislative attempts to attack the Medicare problem and offered suggestions as to how each of us could become involved. Even he had to admit this is a very tough battle for us, despite our many attempts to attack this issue from multiple perspectives.

Your seminar committee, Robert Kluczynski, Danielle Susser, Chuck Palmer, and I wish to thank all of you for your attendance at the seminar. Your participation makes our Section stronger and more vibrant, and as your Section Secretary, I encourage you to participate in anyway you can to continue to support your Section.

By the way, based on the fact that no matter when we scheduled the Winter Seminar, there appear to be weather problems, we are considering scheduling it in sometime in August or September 2007 (only kidding. We don't want to encourage bad weather in the summer). 🛠

Murray Feldman

Robert Kluczynski

Murray Gorchow

Martha Glaser

Murray Feldman and Martha Glaser

Danielle Susser

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

For a change, several published Court of Appeals' decisions have been released since our last newsletter, very important ones. First, though, here is the status of workers' compensation matters at the Supreme Court.

Supreme Court

Traveling Employee Doctrine

You might recall from the last newsletter that the Court of Appeals in *Bowman and Auto Club Insurance Association v R.L. Coolsaet Construction Company and Second Injury Fund*, 272 Mich App 27; 723 NW2d 583 (2006), adopted the "traveling employee doctrine" in Michigan. This doctrine provides that an employee is covered by the Act for injuries sustained while on business trips unless the employee is engaged in a personal errand or in an activity whose major purpose is social or recreational. The employer and Fund in *Bowman* appealed the Court of Appeals' decision to the Supreme Court.

In response to those appeals, the Supreme Court issued an order, saying in pertinent part:

> The Court of Appeals erred by adopting the "traveling employee" doctrine under the circumstances of this case. Here, the employee was traveling from his worksite to his home for the time being at the time of his injury. The general rule, that injuries sustained by an employee while going to or coming from work are not compensable, is applicable even when an employee's residence is temporary because of a particular job assignment. *Graham v Somerville Construction Co*, 336 Mich 359 (1953). ____ Mich ____; 725 NW2d 55 (2006).

The Supreme Court then remanded the case to the Court of Appeals for resolution without reference to the traveling employee doctrine.

The particular facts of this case were that plaintiff worked as a journeyman pipefitter. He bid and accepted a job approximately 200 miles from his home and arranged for a temporary residence in a travel trailer campground near the job site. On the day of his injury, heavy rains forced work at the job site to cease early. Plaintiff left the job site and was driving his truck to the campground when he ran a stop sign, struck another vehicle, and was injured.

Out Of State Injuries

As we go to press, we still await the decision of the Supreme Court in *Karaczewski v Farbman Stein & Co*, SC Docket No. 129825. The issue in *Karaczewski* is the viability of the Michigan residency requirement in the provision of the Act that addresses Michigan's jurisdiction over injuries occurring outside the state, MCL 418.845.

Court of Appeals

Stokes v DaimlerChrysler Corporation

Shortly after release of the last newsletter, the Court of Appeals issued its long-awaited decision in *Stokes v DaimlerChrysler Corp* on October 26, 2006. 272 Mich App 571; ____ NW2d ____ (2006). *Stokes* is the case in which the Workers' Compensation Appellate Commission issued a 3-2 *en banc* decision addressing the interpretation of MCL 418.301(4) and *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002). It also addressed whether discovery is permissible under the Act. After addressing those issues in a lengthy 101-page decision, the Commission affirmed the open award of benefits to plaintiff.

Now, in a 2-1 ruling, the Court of Appeals' majority affirms the open award of benefits, but vacates most of the rulings in the majority decision of the Commission. The key points from the Court of Appeals' majority decision, with emphasis for easier reference, are the following:

- Work suitable to the employee's **qualifications and training** "is not limited to the jobs on the employee's résumé, but, rather, includes any jobs the injured employee could actually perform upon hiring." The Court of Appeals said, to the extent the Appellate Commission held otherwise, "it erred."
- Related to the above ruling, the Court of Appeals said "to the extent the WCAC held that as a matter of law a **transferable skills** analysis is irrelevant in evaluating the employee's qualifications and training, it erred. A transferable skills analysis may yield credible testimony that there is actual employment that the employee's qualifications and training makes the employee capable of performing upon hiring, although the employee has never performed it before."
- With respect to **discovery**, the Court of Appeals said, "[t]he WCAC concluded that the magistrate had no authority to order plaintiff to provide discovery to defendant in this matter. This was error." The Court held, "the magistrate has authority to grant relevant discovery necessary for defendant to

develop a defense under *Sington*." This can include a **"vocational expert interview"** of plaintiff. It is a "matter for the magistrate's discretion." The Court also said vocational information "could be sought by **interrogatories** if necessary before trial."

- The Court said the Appellate Commission's "holding that plaintiff did not need to show his **loss of wages** was caused by his work-related injury and resulting disability" is "vacated."
- The Court of Appeals' majority nevertheless affirmed the open award finding plaintiff's proofs sufficient to make "**a prima facie case** of disability" and defendant did not rebut it. The Court majority held that, "[w]hile an interview will no doubt be appropriate in some cases," it was not error for the magistrate to refuse a pre-trial vocational interview in this case. Defendant could have "sought [the information] by interrogatory" and by other means so as "to present a transferable skills analysis" at trial. Finally, the Court of Appeals' majority did not find any abuse of discretion in the magistrate not adjourning the case primarily because defendant "had not … provided [its vocational expert] with plaintiff's employment records" before trial.
- The **dissent** agreed with the majority on most of its major holdings, but would reverse and remand the case to the magistrate "because the WCAC used the wrong legal definition of disability and defendant was denied a meaningful opportunity to discover evidence and present proofs regarding plaintiff's actual qualifications and training."

The defendant in *Stokes* has filed an application for leave to appeal with the Supreme Court, seeking a remand of the case in accordance with the dissent.

Simpson and the *Rakestraw* Rule

In a published decision, *Simpson v Borbolla Construction & Concrete Supply, Inc, Fluor Constructors International, Inc, and Silicosis, Dust Disease & Logging Industry Compensation Fund*, ____ Mich App ____; ____ NW2d ____ (2007) (CA Docket No. 264106, rel'd for publication January 25, 2007), the Court of Appeals limits the scope of the Supreme Court's decision in *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003).

The Supreme Court in *Rakestraw* addressed the question of whether the employee had proven a personal injury for purposes of satisfying MCL 418.301(1)'s requirement of a "personal injury arising out of and in the course of employment." Mr. Rakestraw had suffered from a pre-existing non-work-related condition and claimed that his work aggravated it. The Supreme Court in *Rakestraw* said that to prove he sustained a "personal injury" the employee must demonstrate a condition "medically distinguishable" from his pre-existing condition, rather than just demonstrate a symptomatic expression of the pre-existing condition at the workplace.

Simpson raised the *Rakestraw* issue in the following context. Mr. Simpson was an iron worker who had worked at various jobs for multiple employers over many years. He initially sustained a work injury in 1979 to his wrist. He claimed that his subsequent work through his last day of work at Borbolla Construction aggravated his original work injury. Plaintiff only worked at Borbolla Construction one day.

The Appellate Commission affirmed an open award of benefits attributable to a last day of work date of injury with the Commission saying that plaintiff satisfied *Rakestraw*. The Court of Appeals affirmed that result, but on different reasoning. The Court of Appeals restricts *Rakestraw* to cases involving pre-existing *non*-work-related conditions only.

That is, the Court of Appeals said *Rakestraw*'s requirements do not apply where, as in *Simpson*, the pre-existing problem is itself a work problem. The Court of Appeals explained that *Rakestraw*'s emphasis was on causation ("arising out of and in the course of employment") and not meant as a rule applicable to *all* pre-existing conditions. The Court of Appeals added that plaintiff's one day of work for Borbolla Construction was sufficiently similar to the iron work he had been performing over the years to justify selection of the last day of work as the controlling date of injury under MCL 418.301(1)'s last sentence.

The Logging Fund

In *Jager v Rostagno Trucking Co, Inc and Silicosis, Dust Disease & Logging Industry Compensation Fund*, 272 Mich App 419; ____ NW2d ____ (2006), the Court of Appeals ruled that the Logging Fund was liable for reimbursement to the employer's carrier because the employee was injured in the course of employment in the logging industry as contemplated by MCL 418.531(1).

Section 531(1) says that an employer and carrier liable for a work-related injury can obtain reimbursement for compensation paid in excess of 104 weeks or $25,000, whichever is greater, if the disability is one "arising out of and in the course of employment in the logging industry."

Continued on next page

Recent Cases
Continued from page 15

In this case, the employee was employed by a trucking company and drove trucks hauling wood, pulp, and other raw forest products to sawmills. He was hauling wood from a storage lot to a papermill in Wisconsin when he was injured while taking the chains from his load. The truck he was driving had "'log plates'" designated for vehicles that haul raw forest products.

In finding the injury reimbursable, the Court of Appeals noted that "'employment in the logging industry'" as contemplated by § 531(1) is defined in MCL 418.501(4). That particular section says the statute encompasses those laboring under a "'drivers code no. 2702.'" And this drivers code "'[i]ncludes tranportation of logs to mill' among other activities."

The Court of Appeals held paintiff was engaged in such transportation of logs when his injury occurred. Therefore, reversing the Appellate Commission and reinstating the magistrate's decision, the Court said that the employer and carrier could obtain reimbursement from the Fund.

Wrap-Up Policies

In the published decision *Chase v Terra Nova Industries, et al*, ____ Mich App ____; ____ NW2d ____ (2006) (CA Docket No. 262230, rel'd for publication November 14, 2006), the Court of Appeals addressed a number of complex issues arising under workers' compensation wrap-up policies. The injury in this case was a construction-related injury occurring at the Great Lakes Crossing Mall in Auburn Hills. The general contractor for the project was Sordoni Skanska. Due to the magnitude of the project, Sordoni Skanska obtained a wrap-up workers' compensation policy under MCL 418.621(3).

After the wrap-up policy was issued, certain property at the mall's site was sold to Bass Pro Outdoor World. Plaintiff's immediate employer was a subcontractor participating in the construction of the Bass Pro Outdoor World store. He injured his foot while working. The question presented was whether Sordoni Skanska's wrap up policy covered his injury.

The procedural posture of the case was complicated by the fact that Sordoni Skanska had not been joined as a party at the time the award of workers' compensation benefits was entered. It was only added to the case later when the case was returned on remand from the Workers' Compensation Appellate Commission and the wrap-up policy was then discovered.

As a result, Sordoni Skanska first argued to the Court of Appeals that it could not be held liable because MCL 418.852(1) says liability can only be assessed "at the time of the award of benefits." Since it was not a party "at the time of the award of benefits," it said it cannot be held liable at a later stage in the proceedings. The Court of Appeals was persuaded enough by this argument to remand. The Court said Sordoni Skanska's § 852(1) argument is one where "reasonable minds could differ with respect to whether the statute means that the liability of a carrier must be determined at the time of the award where, as here, the carrier was not a party to the proceedings at the time of the award, and the carrier's potential liability was allegedly not discovered by the parties … until after benefits were awarded." The Court deferred to the Commission's interpretation of § 852(1) directing it to analyze the case under that provision.

The second issue the Court addressed was whether § 621(3) and the wrap-up policy itself intended to cover plaintiff's injury. The Commission had ruled that the injury was covered by the wrap-up policy because plaintiff was injured in an area that was part of the original site plan and there was no exception for the Bass Pro Outdoor World area. The Court found the Commission's focus "misdirected."

The Court said it did not read § 621(3) or the deputy director's authorization order for the wrap-up policy as requiring Sordoni Skanska to cover "all the work of all employees on all jobs performed at the 'site.'" Instead, it only covered "'certain construction jobs' at the site." The Court said the question then becomes "whether plaintiff's job was one of those 'certain construction jobs.'" The Court found the deputy director's authorization order was not helpful in resolving this question because it was simply an overhead map of the entire mall site. The Court therefore directed the Commission on remand to factually resolve whether the locale of the injury was in the area contemplated by the wrap-up policy.

Finally, the Court noted that the wrap-up policy covered all employers on site if they had executed certain documents. Plaintiff's immediate employer had not executed those particular documents. Therefore, the area where plaintiff was injured was arguably outside the scope of the wrap-up policy for this reason. The Court therefore also ordered the Commission to also determine whether the necessary documents were executed and, if not, whether such failure precludes liability being assessed on Sordoni Skanska.

Attorney Fees on Medical Expenses

The question of whether attorney fees can be imposed on employers or carriers under MCL 418.315(1) appears to be before the Court of Appeals on remand from the Supreme

Court in more than one case. The issue is before the Court in *Petersen v Magna Corp*, CA Docket Nos. 273293 and 273924; see, 477 Mich 871; 721 NW2d 586 (2006), and also apparently in *Brackett v Focus Hope and Accident Fund Insurance Company of America*, CA Docket No. 274078 and *Harvlie v Jack Post Corp and St. Paul Fire & Marine Insurance Co*, CA Docket No. 276044.

Workers' Compensation Appellate Commission

Vocational Testimony Post-*Stokes*

Subsequent to the Court of Appeals' *Stokes* decision, the Commission has had occasion to address the issue of the presentation of vocational testimony, particularly as the testimony may be relevant to the employee's transferable skills.

In *Samuels v Lucas Assembly & Test Systems*, 2006 ACO #287, the Commission discussed the Court of Appeals' *Stokes* decision in this respect, saying as follows:

> In rejecting the Commission's holding that a transferable skills analysis is irrelevant, the [*Stokes*'] Court cautioned that such an analysis is not a necessary part of a plaintiff's proofs. In other words, defendants are not prohibited from presenting evidence of transferable skills, but the magistrate will ultimately determine its relevance.[3] The magistrate will also determine whether a transferable skills analysis is warranted prior to the presentation of proofs at trial, as well as whether, in a particular circumstance, a trial may be adjourned to prepare a skills analysis as a result of information obtained during plaintiff's case in chief.

[3] Pursuant to the Supreme Court's Order, the Court of Appeals [in *Stokes*] here followed *Boggetta v Burroughs Corp*, 368 Mich 600 (1962), which held that workers' compensation magistrates have power to grant discovery when necessary.

In *Martin v Eaton Corp*, 2007 ACO #4, the Commission, quoting from former Chairperson Reamon's concurring opinion in *Sington (After Remand)*, offered the following on this point: "'Vocational rehabilitation expert opinion testimony is probably best utilized in cases presenting issues of the claimant's alleged transferable skills.'"

In *Ocenasek v Ridan Party Store*, 2006 ACO #319, the Commission addressed the issue again. In affirming a denial of benefits, the Commission said:

> The plaintiff's arguments can be broken down into two parts: the testimony of a vocational rehabilitation counselor, in conjunction with a transferability skills analysis, is not proper or admissible and that the magistrate erred when he found Ms. Swartz's (the vocational expert's) testimony persuasive. We believe the recent decision of the Court of Appeals in *Stokes v DaimlerChrysler Corp*, ____ Mich App ____ (October 26, 2006, Docket # 268544) controls. The Court of Appeals held a transferable skills analysis may be used to establish there is relevant, available employment that is suitable to the plaintiff's qualifications and training. In addition, the Court noted the fact-finder should be "well-able," to discern the value of any particular transferable skills analysis.

Consequently, in cases such as *Holt v Berrien Mental Health Authority*, 2007 ACO #17, the Commission remanded for a second time, saying "it was error for the magistrate to deny defendants the opportunity to present additional evidence in this case." See also, *Przewozniak v Tesma Sterling Heights*, 2007 ACO #5.

MCL 418.301(5) and Fault of the Employee

In the case of *Johnson v General Motors Corp*, 2007 ACO #9, the Commission addressed the impact of an employee losing her post-injury, favored job through her own fault.

Plaintiff had been receiving benefits pursuant to an earlier open award of benefits. Post-injury she returned to work for the employer at "reasonable employment" (f/k/a favored work). She worked more than 100 weeks at the reasonable employment and was terminated "'for attacking her industrial relations manager'" as he was leaving the Pontiac Bureau of Worker's Compensation. Plaintiff was terminated from her job as a result. Defendant filed a petition to stop compensation benefits on the basis plaintiff had by her actions removed herself from the reasonable employment provided by the employer. Plaintiff sought reinstatement at her job through the collective bargaining process, with her request being initially denied but still pending on appeal at the time of the petition to stop trial.

The magistrate denied the petition to stop and the Commission affirmed. In the controlling opinion, the Commission addressed defendant's argument that plaintiff could not receive benefits under § 301(5)(d). This provision addresses employees who perform "reasonable employment" for 100 or more weeks post-injury and then "'lose[] his or her job through no fault of the employee.'" Defendant argued that since plaintiff *did* lose her job through her own fault, plaintiff had no statutory avenue for recovery after having worked 100 weeks.

The Commission rejected defendant's argument. The Commission concluded that, even if plaintiff cannot recover under § 301(5)(d), plaintiff's entitlement to receive benefits under the general disability provision of § 301(4) remained intact and that provision allowed her to continue to receive weekly benefits.

Continued on next page

Recent Cases
Continued from page 17

The Commission majority also added that plaintiff's attempt to regain her job through the collective bargaining process ended any period of constructive refusal to work that might be relevant under § 301(5)(a).

Insufficient *Prima Facie* Case Under *Sington*

In *Benson v Britton Dwayne Ulmer*, 2006 ACO #252, the magistrate had granted plaintiff an open award of benefits to a roofer for a work-related biceps tendon rupture and corrective surgery that left him with physical limitations. Applying *Sington*, the magistrate granted plaintiff an open award. The magistrate concluded that plaintiff's roofing work, as well as all of his past work experiences, required repetitive use of his upper bilateral extremities, leaving him unable to perform "any of the jobs he had held in the past."

Defendant argued that plaintiff had previously worked as an escort driver and offered no evidence to indicate his injury precluded him from doing that type of driving work. And defendant argued plaintiff offered no evidence "whether or not other jobs as an escort driver are available to the plaintiff, what they pay or whether the work is outside his physical limitations." Finally, defendant argued plaintiff had worked in a restaurant and did not sufficiently prove that his work injury would interfere with performing such restaurant jobs.

The Commission unanimously agreed with defendant and reversed the open award. The Commission said:

> The plaintiff bears the burden of establishing his basic qualifications and training. Without first establishing qualifications and training, which includes inquiry into past-employments, there is insufficient proof that the work-injury interferes with the plaintiff's ability to return to relevant employment activities.

Applying this rule, the Commission said plaintiff did not "provide information on whether or not other jobs as an escort driver are available to the plaintiff, what they pay or whether the work is outside his physical limitations." And, with respect to the restaurant work: "We do not know what type of work the plaintiff performed at the restaurant…. We do not know how long Mr. Benson worked at the restaurant, what he earned, or whether that work is still available."

Social or Recreational Bar

In *Sanders v Bob Evans Farms, Inc*, 2006 ACO #248, plaintiff was scheduled to work overtime at the completion of his eight-hour shift. Before he started overtime, he took a break in the company's break room. On his way back to his work station, plaintiff and several other employees decided to slide down the handrail in the stairwell. Plaintiff injured himself when he landed.

The question presented was whether plaintiff was barred from benefits under MCL 418.301(3)'s second sentence. This sentence says that injuries incurred "in the pursuit of an activity the major purpose of which is social or recreational is not covered under this act."

The magistrate denied benefits and the Commission affirmed. The Commission said that the major purpose of plaintiff sliding down the handrail was social or recreational. It agreed with the magistrate's rejection of plaintiff's argument that most employees slid down the banister and plaintiff had often done so uneventfully in the past. 🛠

Reduction of Energy Use Executive Directive 2007—6

Governor Granholm's Executive Directive ED 2007—6 highlighted the severity of the state's budget constraints, and directs that immediate steps be taken to reduce unnecessary energy usage in state facilities.

In keeping with the directive, please make sure the lights in the attorney/client conference rooms are turned off when you are finished using the room.

Thank you for your cooperation.

Jack Nolish, Director, Workers' Compensation Agency and Murray Gorchow, Chair, Board of Magistrates

Magistrate Assignments

February 5, 2007

(Listed alphabetically by Hearings office)

UP/Gaylord

Thomas G. Moher

Traverse City

Jennifer L. Crawford
(1 week)

Saginaw

James J. Kent
Paul M. Purcell

Flint

Kenneth A. Birch
Michael T. Harris

Grand Rapids

Jennifer L. Crawford
(3 weeks)
(eff 3/19/07)
Timothy M. McAree
G. Jay Quist

Lansing

Christopher P. Ambrose
Garry L. Goolsby

Pontiac

Lee A. Decker
Victor A. McCoy
(2 weeks)
Melody A. Paige
Rosemary K. Wolock

Mt. Clemens

Beatrice B. Logan
Andrew G. Sloss
Richard J. Zettel

Kalamazoo

William A. Baillargeon
(eff 3/19/07)
Jennifer L. Crawford
(2/12-3/18/07)
David B. Merwin

Detroit

Murray A. Gorchow
(Chairperson)
John P. Baril
Carol R. Guyton
Valencia L. Jarvis
Jan C. Leventer
Victor A. McCoy
(2 weeks)
John J. Rabaut
Joy A. Turner

2007 Nominations Open for Major State Bar Awards

The State Bar of Michigan is seeking a few outstanding lawyers and judges to be the recipients of major awards that will be presented at the September 2007 Annual Meeting in Grand Rapids. Nominations are now open, and any member of the State Bar can propose a candidate for the following awards:

- The **Roberts P. Hudson Award** goes to a person whose career has exemplified the highest ideals of the profession. This award is presented periodically to commend one or more lawyers for their unselfish rendering of outstanding and unique service to and on behalf of the State Bar, given generously, ungrudgingly, and in a spirit of self-sacrifice. It is awarded to that member of the State Bar of Michigan who best exemplifies that which brings honor, esteem, and respect to the legal profession. The Hudson Award is the highest award conferred by the Bar.
- The **Frank J. Kelley Distinguished Public Service Award** recognizes extraordinary governmental service by a Michigan attorney holding elected or appointive office. Created by the Board of Commissioners in 1998, it was first awarded to Frank J. Kelley for his record-setting tenure as Michigan's chief lawyer.
- The **Champion of Justice Award** is given for extraordinary individual accomplishments or for devotion to a cause. Not more than five awards are given each year to practicing lawyers and judges who have made a significant contribution to their community, state, and/or the nation.
- The **John W. Cummiskey Pro Bono Award** named after a Grand Rapids attorney, recognizes a member of the State Bar who excels in commitment to pro bono issues. This award carries with it a cash stipend to be donated to the charity of the recipient's choice.
- The **Liberty Bell Award** recipient is selected from nominations made by local and special-purpose bar associations. The award is presented to a non-lawyer who has made a significant contribution to the justice system. The deadline for this award is Wednesday, May 2, 2007. All other award nominations are due on Friday, April 6 at 5 p.m.

An Awards Committee, co-chaired by State Bar President-Elect Ronald Keefe and attorney Francine Cullari, reviews nominations for the Roberts P. Hudson, Champion of Justice, Frank J. Kelley Distinguished Public Service, and Liberty Bell Awards. The Bar's Pro Bono Initiative Committee reviews nominations for the Cummiskey Pro Bono Award. The committees' recommendations are then voted on by the full Board of Commissioners at its June meeting.

Last year's non-winner nominations will automatically carry over for consideration this year. Nominations must be submitted on SBM forms and should include sufficient details about the accomplishments of the nominee to allow the committees to make a judgment. Application forms may be downloaded from *www.michbar.org*. Click on Media Resources, then Events and Awards.

Nominations can be submitted online, by facsimile, or mail to:

Ms. Naseem Stecker
State Bar of Michigan
306 Townsend Street , Lansing, MI 48933
Fax: (517) 482-6248 E-mail: nstecker@mail.michbar.org.

Cummiskey Award nominations should be directed to Gregory Conyers at (517) 346-6358 or *gconyers@mail.michbar.org*. For more information call (517) 367-6428 or (800) 968-1442.

SBM
State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012

www.michbar.org

Presorted
First-Class Mail
U.S. Postage Paid
Lansing, MI 48933
Permit No. 191