State Bar of Michigan

Workers' Compensation Section Newsletter

Winter 2007-2008

The Workers' Compensation Hall of Fame

By Murray R. Feldman, Section Vice Chairperson

Contents

As many of you are aware, there actually is a Workers' Compensation Hall of Fame. I am pleased to announce that your section is revitalizing the Workers' Compensation Hall of Fame, which has been dormant since 2002, when the last inductions were made. We have located the plaques upon which the inductees are identified, and Agency Director Nolish has graciously donated wall space at the Detroit hearing site across from mediators Riley and Burden for a permanent home for those plaques. We anticipate installing the plaques permanently in the spring of 2008, and you'll receive an e-mail inviting you to attend a brief ceremony to honor those who have already been inducted. In addition, I am also pleased to announce the formation of a committee, on a going forward basis, to consider and recommend candidates for future induction. I wish to extend my appreciation to Jim Geroux and Rick Warsh for agreeing to co-chair the committee, along with members Agency Director Nolish, Don Ducey, Steve Pollok (former chairperson), and Len Hickey (former chairperson). We hope that by this spring, the committee will be able to identify candidates for inclusion and to honor these individuals at our summer meeting at Shanty Creek scheduled for June 19-21, 2008. Any suggestions, questions, or nominations can be made to any committee member. 🛠

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

Tom Ruth, 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:

4301 Fashion Square Blvd.
Saginaw, MI 48603
tomrut@bkf-law.com

From the Chair

Dear Colleagues,

It was so nice to see so many of you at the Detroit meeting this past December. Murray Feldman did a wonderful job of putting together the event. I'm thankful for his involvement.

Our speaker, Doug Holmes, reminded us how important it is to get our congressperson's support for legislation regarding CMS. He had a good handout to take with you to your congressperson so that they can understand the basics of the problem and the proposed solution. I have already spoken to my congressman, and he has indicated a willingness to help. I urge all of you to give it a try as well.

The problem becomes more serious when one looks at recent legislation passed by Congress on December 29, 2007. This legislation requires all carriers and self-insureds to determine whether the claimant/plaintiff is a Medicare beneficiary, and if so, to provide all sorts of identifying information (to be determined later by the secretary) so CMS can determine whether Medicare has a lien in the case. What is most alarming is that the fine for failure to comply with the reporting requirements is $1,000 per day per claimant. This new law takes effect July 1, 2009. So it seems while we are proposing legislation to curb CMS, they already have legislation that gives them big clout to enforce their liens.

One recent tip I heard to cut some of the delay in processing at CMS is to submit your proposal and medical information on a disc, much as the process is at Social Security now. I've heard it can cut up to three months off the process. Let me know, if you try this.

I invite everyone to join in Bob Kluzinski's "Leap Year Weekend of Fun" at the DAC. The details are in this newsletter. Bob did a wonderful job putting together a fun and affordable evening with friends. My thanks to him for his efforts in this regard.

Hope to see you there. 🛠

—Paula

Notes from the Director

By Jack A. Nolish, Director, Workers' Compensation Agency

To those I have not seen in person lately, Happy New Year! Each year, many make New Year's resolutions calling for weight loss, increased exercise, saving money, etc. Last year, I did not actually make such resolutions but I have managed to do two out of the three. My resolution for this year is to try and sort out some issues regarding Vocational Rehabilitation dispute resolution.

For as many years as I can remember, VR matters were handled in a simple and friendly matter by appearing before a mediator. Arguments would be made about what this VR counselor was recommending as opposed to some other recommendation. Questions came-up about "job club" as opposed to placement, etc. The vast majority of the cases were resolved amicably. Starting a year or two ago, issues were raised about what a VR hearing should look like and, by the way, where was

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Workers' Disability Compensation Bar Retreat February 29, 2008

Dear Fellow Members:

Join us for a weekend of fun at the Detroit Athletic Club (25 rooms reserved, with an additional 25 rooms at the Hilton Gardens across the street); a cash bar from 5:30 to 7:30 p.m.; dinner, including DAC traditional house salad, filet mignon & jumbo sea scallops, and chocolate gateau (all the while being entertained by piano); the hilarious musical "Menopause: The Musical" at the Gem Theater; and afterglow and bowling at the DAC Abbey Bowling Center from 10:00 p.m. to midnight with coneys and Harmonie Park sliders being served (cash bar from 10:00 p.m. to midnight) for the low, low price of $150per person. That low, low price includes all food, tax, gratuity, room rentals, hosted valet parking, entertainment, theater, and bowling.

You can follow up on Saturday with a trip to the newly refurbished Detroit Institute of Arts or try your luck at the Greektown Casino.

Please contact Maria at (248) 559-3830 to make your reservations.

—Robert A. Kluczynski, Minister of Fun

Update on the Law Seminar

Ella Parker

On November 9, 2007, the Workers' Compensation Section of the Grand Rapids Bar Association hosted its annual Update on the Law seminar. Ella Parker, the supervising partner of Conklin Benham, P.C.'s Grand Rapids office, coordinated the event. The list of speakers included Martin Critchell, Conklin Benham's chief appellate attorney, magistrates David Merwin, Jennifer Barnes, and Chief Magistrate Murray Gorchow. Also speaking were Commissioner Donna Grit and Chairperson Martha Glaser. David Campbell also participated in a panel discussion concerning vocational issues and Sington evaluations. The annual seminar is intended to update the west Michigan attorneys on what has happened, what is happening, and what may be happening in our courts and its impact on our practice. The information provided by all the speakers was extremely informative. Our thanks go out to all who participated and all who attended.

Editor's Note

By Thomas J. Ruth

You should all mark your calendars for the spring meeting at Shanty Creek, June 19-21. I believe most people found the location to be great for the conference, as well as a nice place for family fun. I would like to thank the few "west siders" who have made or are in the process of making contributions to the newsletter. However, we all still await the anticipated article from our own John Cooper—it has to be a good one, since we have waited these two months!

The section plans a meeting this month to discuss the new legislation passed by Congress late last year. The details are few, but it would seem to mandate a notice requirement by carriers and self-insureds regarding CMS eligibility. More importantly, the new law carries with it penalties for non-compliance. The section has information that the law has an effective date in 2009, but we will provide more details after the planned meeting and /or as new information becomes known. Our chairperson, Paula Olivarez, is taking the lead in gathering the information that we will all need in our practice.

We all extend our condolences to Mike De Polo, whose father recently passed away.

Section's Fall/Winter Detroit Seminar a Great Success

By Murray R. Feldman, Section Vice Chairperson

Blessed with good weather, believe it or not, over 125 section members attended the December 14, 2007 Workers' Compensation Section Fall/Winter Seminar. They were rewarded with many excellent and interesting presentations.

As usual, 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. Daryl Royal for his "State of the Law" presentation and materials.

Our featured speaker, Mr. Doug Holmes, brought us up to date on HR2549 and urged each of us to contact our representatives to give this issue a "higher profile." Several members volunteered to contact our congressmen/senators, and we are hoping those efforts will be fruitful. While our attempts to attack the Medicare problem continue and certainly appear daunting, we need to continue to educate our representatives on why this is such an important issue and why action is needed NOW!

As many of you are aware, our section authorized a $1,000 scholarship to assist a University of Detroit Mercy School of Law student as selected by Dean Mark Gordon. Unfortunately, our recipient, Ms. Dana Marcoux, was taking a final at the time of our seminar, but Dean Gordon appeared, thanked us for the scholarship, and accepted our check. Please note our scholarship recipient, Dana Marcoux's, letter of thanks to the section at right.

Your Seminar Committee, Robert Kluczynzski, Danielle Susser, Chuck Palmer, and I wish to thank you all for your attendance at the seminar. Your participation makes our section stronger and more vibrant, and as your section vice chairperson, I encourage you to participate in any way you can to continue to support your section. 🛠

Agency Director Jack Nolish

Workers' Compensation Appellate Commission Chairperson Martha Glaser

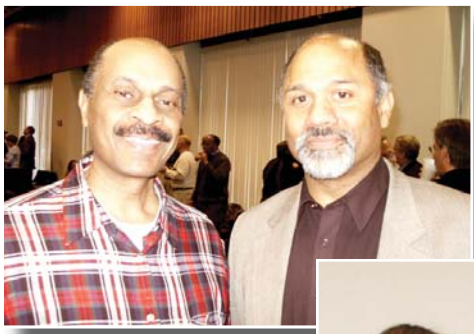
Chief Magistrate Murray Gorchow

Daryl Royal

Danielle Susser

Guest Speaker Doug Holmes

Bob McCubbrey and Barry Adler



Milt Means and Phil Brown

WC Section Chairperson Paula Olivarez, Dean Mark Gordon, WC Section Vice Chairperson Murray Feldman

January 2, 2008

Mr. Murray Feldman
Strobl & Sharp, PC
300 East Long Lake Road, Ste. 200
Bloomfield Hills, MI 48304

Dear Professor Feldman:

I wanted to take this opportunity to graciously thank you and the members of the Worker's Compensation Law section of the State Bar of Michigan for the very generous scholarship bestowed upon me. I am extremely grateful to have been selected for this incredible honor. The scholarship money will be very helpful as I begin the Spring Semester.

As a Law student who has spent the past thirteen years working in the automotive industry, I have a keen interest in pursuing employment-related law as my field of practice. I am specifically interested in the field of Worker's Compensation Law. It is an incredibly intriguing field to me and offers a great opportunity to work with and benefit your client.

I deeply regret I was unable to attend the meeting on Friday, December 14, 2007, and missed the opportunity to speak to you and the other members of the Worker's Compensation Law Section. I hope there will be another opportunity in the near future for me to meet with all of you and thank you in person for this scholarship award. Thank you again for your generosity and belief in my abilities and interest in Worker's Compensation Law. I hope to be practicing with each of you in the next few years.

Kindest Regards:

Dana Christine Marcoux

Jurisdiction Over Out-of-State Injuries A Change In The Law

By Murray Gorchow, Chair of the Board of Magistrates

Change continues to come to the practice of Workers' Compensation in Michigan. Many practitioners are aware of the decision, late last year, of the Michigan Supreme Court in *Karaczewski v Farbman Stein Co*, 478 Mich 28 (2007). The Court overruled *Boyd v W G Wade Shows,* 443 Mich 515 (1993), and held that Section 845 of the Workers' Disability Compensation Act allows jurisdiction over out-of-state injuries only if (1) the employee is a resident of Michigan when the injury occurs **AND** (2) the contract of hire was also made in Michigan. Residence or contract of hire in Michigan, standing alone, is no longer sufficient.

The existence of subject matter jurisdiction is a threshold issue. Lack of subject matter jurisdiction can be raised at any time. It cannot be conferred or stipulated to by the parties where it does not exist. The Michigan Supreme Court has repeatedly held that whenever it is determined that subject matter jurisdiction is absent, the only thing the court can do is dismiss the case. "[A]ny further action it takes, other than to dismiss the action is void." Further, "a court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings." *Bowie v Arder*, 441 Mich 23, 56 (1992).

Section 841(1) of the Act gives Magistrates authority to decide "all questions arising under this act." Section 845 defines when a claim for an out-of-state injury arises under the Act. Section 851 provides that the "worker's compensation magistrate at the hearing of the claim shall make such inquiries and investigations as he or she considers necessary." Therefore, I believe that the presence or absence of subject matter jurisdiction is for the Magistrate to decide, and then act accordingly within the law.

When a case involves an out-of-state injury, counsel for the parties are urged to investigate before filing, or early on in the proceedings, whether plaintiff was a resident of Michigan on the date of injury alleged, and, if so, whether the contract of hire was also in Michigan. Sometimes a question about jurisdiction will be readily apparent from the Application for Hearing, which has the city/county of injury, and a description of the injury. Sometimes the name of the employer, the business or industry involved, or the address of the claimant may cause an inquiry. Please note that plaintiff's "residence" on the alleged date(s) of injury may or may not be the same as the address given by plaintiff on the Application for Hearing.

I submit that for an alleged out-of-state injury, Trials, Redemptions, and requests for entry of Voluntary Payment Agreements are all hearings which should not be engaged in without first clarifying and resolving this jurisdictional question. If plaintiff agrees that there is no jurisdiction, of course, plaintiff may, at any time, simply withdraw its Application for Hearing. If either counsel or the Magistrate believe that inquiry is warranted, a hearing should be held on the record with both parties/counsel present, in order to obtain the necessary information as to plaintiff's residence on the alleged date(s) of injury, and as to whether the contract of hire was made in Michigan. Counsel should come prepared for such a hearing. In many cases, it may become readily apparent whether or not plaintiff's residence was in Michigan on the alleged date(s) of injury. The more difficult evidentiary question may involve whether the contract of hire was also made in Michigan. If plaintiff did have residence in Michigan, you are only half way home to jurisdiction. The contract of hire issue must also be investigated and resolved.

By first resolving the out-of-state jurisdiction question before filing or early on in the proceedings, all of the parties involved may possibly avoid disappointed expectations, costly litigation, and the expenditure of unnecessary time and effort. This is not an issue that can be ignored. 🛠

Looking for a past issue?

You can find back issues at
http://www.michbar.org/workerscomp/newsletter.cfm

Notes from the Director
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the court reporter? Suddenly, it appeared that parties were trying to turn a VR hearing into a mini-trial with sworn, transcribed, testimony. Certainly, this is a far cry from an informal resolution process. VR hearings are not intended to be discovery proceedings. They are not designed to be an opportunity to lock-in a party's testimony as the basis for a termination of benefits or as an impeachment tool at a later date.

Some of this confusion may stem from the Agency's own pamphlet: "Vocational Rehabilitation for Injured Workers…" (WC-PUB-003 1/04) The description of the dispute resolution process in the pamphlet is somewhat vague and certainly in need of an update.

Coming soon to the Agency website and to literature tables near you, there will be a revised pamphlet that will answer the question**: "How are vocational rehabilitation disputes resolved?"** with the following expanded answer:

> If the parties cannot agree on a rehabilitation program or the choice of provider, any one of the parties or the Agency may request a determination by the Agency Director or designee.
>
> 1. **Vocational Rehabilitation Hearing**
>   a. When the parties arrive, an informal discussion will take place.
>   b. The parties will be made aware of their rights and responsibilities and an attempt will be made to voluntarily resolve the dispute.
>   c. If the parties cannot resolve the matter voluntarily:
>   i. The Director or designee will conduct a hearing on the issues involved and render a written order.
>   ii. The parties and any witnesses will be heard by the Director or designee.
>   iii. The order and any exhibits shall constitute the record of the proceedings.
>   iv. There will not be a recording or transcription of the proceedings.
>   v. Documents, reports, and medical records may be submitted for review.
>   vi. The written vocational rehabilitation order will contain a summary of any testimony and documentation considered. The order will also contain the determination made in the case regarding the rights and obligations of the parties.
> 2. **Review of Rehabilitation Order.** If any party disagrees with the Vocational Rehabilitation Order, they may appeal the decision to the Workers' Compensation Board of Magistrates.
>   a. The assigned magistrate will review the vocational rehabilitation order and the documentation on which it was based.
>   b. At the magistrate's discretion, arguments may be heard.
>   c. The Magistrate will determine if the order is supported by competent, material and substantial evidence on the whole record.
>   d. The Magistrate may affirm, reverse, or modify in whole or in part the Vocational Rehabilitation Order.
>   e. Further appeal shall be to the Workers' Compensation Appellate Commission.
> 3. **Non-Compliance with Final Order.**
>   a. If there is non-compliance with the final Vocational Rehabilitation Order, either party may request a compliance hearing before the Director.
>   b. After a hearing, the Director may order suspension or termination of the workers' wage loss benefits, or sanctions applied to the employer.

There is nothing radical about this improved description. The mediators, Burden, Cooper, Miron and Riley, as well as VR consultant Campbell, serve as the Director's "designees." They will conduct the VR Hearing and write the rehab order. Their opinion/order will contain a recitation of the statements presented before them as well as an analysis of any documentation that is considered. The documentation will be considered part of the record. In the unlikely event that one of the parties disagrees with the decision of the mediator, the matter may be appealed to a magistrate who will not be conducting a hearing de novo.

If there is a question of compliance with an order, the matter should be brought before the Director for enforcement and/or sanction.

Hopefully, this will serve to clarify the Agency's approach to handling VR disputes and will continue the past level of civility that was, is and should continue to be the core of the process. I could close by inviting questions or comments but I have learned that the readers of this bulletin do not have to be given an invitation before asking a question or conveying a position.

Workers' Compensation Appellate Commission

By Martha M. Glaser, Chairperson

It is always so inspiring to me to see record turn-outs for the semi-annual section seminars. December's seminar in Detroit was even better than expected, and we finally did get enough chairs for everyone to have a seat.

I'd like to remind everyone that the Commission continues to deplete the backlog, and as previously announced, beginning March 1, 2008, automatic extensions will no longer be given. However, requests for extensions in the form of a motion, will continue to be considered.

I am hoping all practitioners will pay attention to two cases from the Commission in which the Court of Appeals has granted leave.

The first is *Shelly Krastes v Haseley Construction Co. Inc.,* 2007 ACO #18. This case deals with the burden of proof on a petition to stop. Plaintiff asserted that the magistrate's finding of a recovery from her disability was erroneous, where there had not been a showing of a "change of condition", sufficient to allow plaintiff to return to her former work as a heavy equipment operator. We held that defendant had not sustained its burden of establishing a change of condition.

The second case is *Leon v A-3, Incorporated,* 2007 ACO #147. This case discusses independent contractor verses employee, controlled by Section 161(1)(n). The only issue is whether the plaintiff was an employee for purposes of workers' compensation. The Court of Appeals had previously held in the case of *Amerisure Insurance Companies v Time Auto Transportation Inc.,* 196 Mich App 569 (1992) that in order to preclude plantiff from the status of an employee under section 161(1)(n), there must be a finding that plaintiff satisfies any one of the following: He/she maintains a separate business; he/she holds himself/herself out to and renders service to the public **or**; he/she is an employer subject to the Act. Anyone of the three prongs is currently fatal to a workers' compensation claim.

While the Supreme Court has never directly addressed this issue, it appears from other rulings that the Supreme Court may not be in agreement with *Amerisure.* The Supreme Court has reviewed Section 161 in the cases of *Hoste v Chrysler Corp, Plymouth,* 472 Mich 943 (2005), and *Reed V Yackell,* 473 Mich 520 (2005). *Reed* in particular seems to be at odds with *Amerisure.* It is ironic that neither *Amerisure* nor *Reed* were decided in the workers' compensation administration. Both were personal injury cases, decided in Circuit Court….Stay tuned.

Another case of significance, which was issued by the Commission in 2007, is *Michael Reiter v Absopure Water Co.,* 2007 ACO #127. The controlling opinion and dissenting opinion offer differing views of MCL 418.305 (intentional and willful misconduct). The leading case on "intentional and willful misconduct" is *Daniel v Department of Corrections,* 468 Mich 34 (2003). *Daniel* reaffirmed that whether misconduct was "intentional and willful" is a finding of fact. *McMinn v C. Kern Brewing Co,* 202 Mich 414 (1918); *Day v Gold Star Dairy,* 307 Mich 383 (1943).

Mr. Reiter was known to have a back condition. He testified that he was ordered to get receipts from a box in storage, which required lifting the box. He testified that no help was available so he lifted the box, injuring himself. His supervisor testified that he sent a helper with plaintiff and told Mr. Reiter not to lift any boxes. The magistrate found that plaintiff's actions did not involve intentional and willful misconduct. The majority remanded this case to the magistrate to make a credibility determination as to the differing versions. The dissent would have affirmed the magistrate, indicating that under either version plaintiff's action was not intentional and willful misconduct, because such action did not involve quasi-criminal conduct or acts of moral turpitude.

Another issue that has recently drawn some attention is the manner in which we determine whether or not to retain jurisdiction when we remand a case. There is currently no set procedure or rule for making that determination. But as practitioners, it is extremely important that you be aware of the consequences of the Commission retaining or not retaining jurisdiction in our remand orders.

If we remand a case and retain jurisdiction, we will request that the magistrate prepare a supplemental opinion *not an order.* That means that regardless of what the magistrate does on remand, the initial appeal continues to pend. The appellant remains the appellant and the appellee remains the appellee. The briefing and transcript filing requirements are the same as they were before the remand. The supplemental opinion does not change anything, until the Commission once again reviews the case, after remand.

On the other hand, if we do not retain jurisdiction, we will request the magistrate to issue a new order. *The difference here is significant.* When we do not retain jurisdiction, we are in essence washing our hands of the case at that point. The magistrate will issue a new order. At that point, there is no appeal pending. Any party aggrieved by the order on remand, must file a new claim for review.

The Commission has become acutely aware of problems that can develop as a result of retaining as well as not retaining jurisdiction**.** I doubt very much that you will see a remand order go out which does not specify whether jurisdiction is retained. However, if you see a remand order that does not specify…then jurisdiction **has not** been retained. We must affirmatively state that we are retaining jurisdiction, or we lose it.

I look forward to seeing all of you at Shanty Creek in June.

Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Things have been relatively quiet with respect to case law since our last newsletter. Here are the recent developments and the cases to keep an eye on.

Supreme Court

The Supreme Court issued an order in *Simpson v Borbolla Construction & Concrete Supply, Inc* (SC Docket No. 133274, order entered December 7, 2007). The Supreme Court vacated the published opinion of the Court of Appeals saying the Court of Appeals' panel "erroneously held that *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220 (2003), does not apply" to this case.

The Court of Appeals in *Simpson* had held that the *Rakestraw* rule does not apply where the pre-existing condition is work-related. Put differently, the Court of Appeals in *Simpson* restricted the application of *Rakestraw* to cases presenting pre-existing *non*-work-related conditions. It is this aspect of the Court of Appeals' decision the Supreme Court vacated.

The Supreme Court did affirm the result in the case, however, for the reasons stated in the Workers' Compensation Appellate Commission opinion. The Appellate Commission had held the last employer liable because plaintiff's work there aggravated plaintiff's prior work injury in a medically distinguishable manner so as to satisfy *Rakestraw*'s requirement.

Justice Kelly concurred in the result, but would not have vacated the Court of Appeals' *Rakestraw* analysis.

As of the time these case summaries are submitted, we are still awaiting the ruling of the Supreme Court in *Stokes v DaimlerChrysler Corp, n/k/a Chrysler LLC*. *Stokes* had been orally argued before the Supreme Court on the employer's application for leave to appeal on October 4, 2007. *Stokes* addresses the parties' respective burdens of proof on disability under *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).

Another workers' compensation case was recently orally argued at the Supreme Court on the employer's application for leave to appeal. The case is *Gee v Arthur B. Myr Industries, Inc* (SC Docket No. 133762). The case involves the applicability of *res judicata* to a claim for family-provided attendant care under MCL 418.315.

Court of Appeals

There has only been one published decision from the Court of Appeals since our last newsletter and two unpublished decisions. Although we do not normally report unpublished Court of Appeals' decisions because they do not have precedential value, the paucity of Court of Appeals' decisions at this point allows for summary of the two unpublished decisions as well.

"Desertion" in Death Cases

In the published decision *Moore v Prestige Painting*, ____ Mich App ____; ____ NW2d ____ (2007) (CA Docket No. 274252, rel'd December 27, 2007), the Court of Appeals addressed the question of whether the decedent employee had "deserted" his daughter so as to make the daughter a conclusive dependent under the second sentence of MCL 418.331(b).

The relevant portion of this provision of the Act says:

> In the event of the death of an employee who has at the time of death a living child by a former spouse or a child who has been deserted by such deceased employee under the age of 16 years, … such child shall be conclusively presumed to be wholly dependent for support upon the deceased employee….

The deceased employee's former girlfriend claimed the deceased had deserted his daughter. The girlfriend testified that she and her daughter had lived with the deceased employee off and on, but they were not living together at the time of the deceased employee's death.

This case had gone through many appeals and remands previously on different issues, including the admissibility of DNA samples. But, the only issue addressed by the Court of Appeals in this decision is the desertion question. The Workers' Compensation Appellate Commission had held that the word "deserted" is not defined in the Act and, consequently, a dictionary should be consulted to determine its meaning. After so doing, the Appellate Commission found the deceased employee did "desert" the daughter.

The Court of Appeals reversed. The Court said that, although the Appellate Commission acted properly in consulting a dictionary, the Commission's application of that dictionary definition to the facts of the case was wrong.

The Court said that *Random House Webster's College Dictionary* defines "'desert'" in part as "'to leave (a person, place, etc.) without intending to return,' and 'to fail (someone) at a time of need.'" Additionally, "'desertion'" is defined in part as the "'willful abandonment … in violation of legal or moral obligations.'"

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Recent Cases
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The Court said the Commission had found the deceased employee deserted his daughter simply because he did not offer financial support in the six weeks prior to his death. The Court said that the dictionary definition of desert connotes, however, an intent to abandon and a sense of finality. The Court said that the record does not support a finding that the deceased intended to completely abandon the daughter and forsake contact or support obligations. The Court said the deceased did not leave his daughter and his girlfriend; instead, his girlfriend moved herself and the daughter from the deceased's residence. And, the Court noted that, while the deceased was not financially supportive in his last weeks, he still acted as a father to the daughter by, for example, initiating paternity proceedings and providing a DNA sample for testing. The Court added that the legitimacy or illegitimacy of the daughter was irrelevant. A deceased employee might desert a legitimate or illegitimate child under the statute.

Mental Disabilities and Attorney Fees on Medical Expenses

In the unpublished decision, *Brackett v Focus Hope* (CA Docket No. 274078, rel'd October 23, 2007), the Court of Appeals addressed a mental disability claim and a claim that the employer is responsible for plaintiff's attorney fee on unpaid medical expenses.

The employee worked for Focus Hope and was told at the outset of her employment that employees were expected to participate in Focus Hope's annual Martin Luther King Day celebration. After her hire, the employee did not participate in the celebration because she disagreed with the locale chosen for the celebration that year. The employee said she became mentally disabled as a result of being confronted by the employer regarding her decision not to participate in the event. She prevailed before the Magistrate and Workers' Compensation Appellate Commission on her mental disability claim, as well as her claim that the employer was responsible for paying attorney fees on unpaid medical expenses.

The Court of Appeals affirmed in both respects. The Court said a reasonable person on an objective basis could perceive being confronted about non-attendance as harassment or an untoward act by the employer under *Robertson v DaimlerChrysler Corp,* 465 Mich 732; 641 NW2d 567 (2002). And, the Court rejected the employer's argument that the employee's intentional non-attendance constituted intentional and wilful misconduct under MCL 418.305.

With respect to the attorney fee question, the Court said it would defer to the Appellate Commission's construction of the last sentence of MCL 418.315(1) to the effect that a Magistrate may order the employer to pay attorney fees on unpaid medical expenses.

Mental Disability

The Court of Appeals resolved another mental disability case in the unpublished decision: *Beckes v Detroit Diesel Corp* (CA Docket No. 270791, rel'd November 27, 2007). In this case, the employee suffered an undisputed work-related orthopedic injury after lifting at work. He later developed a "somatic delusion" or "neurotic obsession" believing he had continuing back pain related to the lift even though all organic reasons for the back pain had long ceased.

The case was decided many times over the years by different Magistrates and by the Workers' Compensation Appellate Commission. In its first three decisions, the Appellate Commission had denied benefits. In its last decision, the Appellate Commission awarded benefits. On appeal, the Court of Appeals affirmed.

The Court rejected the employer's *Robertson* argument to the effect a reasonable person would not objectively perceive an ongoing work-related back problem. The Court said that: "The fact that plaintiff continued to feel back pain long after the injury healed is his reaction to the actual events, rather than an unfounded perception of events under *Robertson*." The Court said that, per *Robertson*, a claimant's reaction is to be judged subjectively.

Workers' Compensation Appellate Commission

Authority to Enter Voluntary Pay Agreements

In *Mazza/Automobile Club of Michigan v McLaren Regional Medical Center*, 2007 ACO #203, plaintiff and intervening plaintiff appealed the Magistrate's decision that had dismissed all applications on the basis of a voluntary pay agreement.

Plaintiff proceeding *in pro per* appealed the dismissal challenging her attorney's authority to compromise her claim by signing the voluntary pay agreement. The intervening plaintiff appealed as well claiming it had not received appropriate notices of hearing from the Agency.

The Appellate Commission agreed with the plaintiffs and remanded the case for a limited hearing to develop relevant facts. The Commission said that the Court of Appeals in *Bigger v Cadillac Malleable Iron Co*, 156 Mich App 747; 402 NW2d 87 (1986) mandates a hearing when a party challenges an attorney's authority to compromise the claim. The Commission explained that *Bigger* requires two issues be

addressed: 1) whether the attorney possessed the authority to compromise the claim; and 2) whether reinstatement would produce prejudice to the opposing party.

With these guidelines, the Commission asked for a determination of whether plaintiff's counsel had authority to compromise plaintiff's claim. And, the Magistrate was to determine the reason why intervening plaintiff failed to appear on three different dates because the Commission could not determine the reason for the failure to appear.

Handwriting Analysis Reversed

In *Khalil v Oil Exchange C, Inc*, 2007 ACO #200, the trial Magistrate granted the employee an open award of benefits for injuries sustained in an automobile accident. The main question presented was whether plaintiff was an "employee" of defendant or a person excluded by defendant's insurance policy. In finding the policy covered plaintiff, the Magistrate engaged in an extensive handwriting analysis.

On review, the Appellate Commission said it "reject[ed] several of the magistrate's findings because they lack support from substantial evidence and remand for reconsideration of the facts and a supplemental opinion." The Commission said that, while it does generally uphold a Magistrate's authority to determine whether the employee signed any document, it cannot do so here. The Commission found the Magistrate offered "a lengthy examination of particular signatures" on documents, such as exclusion forms, that "resembles the analysis of a handwriting expert." The Commission concluded that "[b]ecause the magistrate does not possess such expertise, her analysis cannot support her finding." The Commission added that the Magistrate "defeats her own finding when she states that many of plaintiff's signatures look significantly different." Over one dissent, the case was therefore remanded for redetermination.

Fall in Parking Lot Not Proved to be Work-Related

In *Anderson v Barbara Ann Karmanos Cancer Institute*, 2008 ACO #8, the employee slipped and fell while alighting from her car in a parking lot after her lunch hour causing a back injury. Following a trial that lasted over five days and produced "[s]even hundred, plus, pages of a record and probably an equal amount of pages of medical records," the Magistrate found the fall to be work-related and granted the employee an open award of benefits. While there were many issues in the case, the threshold issue presented was whether the employee adequately demonstrated the fall occurred in a parking lot owned, leased, or maintained by the employer so as to trigger the presumption that the injury was in the course of employment under MCL 418.301(3) and *Simkins v General Motors Corp (After Remand)*, 453 Mich 703; 556 NW2d 839 (1996).

The Appellate Commission said the Magistrate incorrectly described the employee's testimony as occurring while alighting from a vehicle she had parked in her "*assigned* parking spot." (Emphasis added). The Commission said the employee never testified she was "assigned" a parking place by the employer or that she had parked in a lot assigned by the employer. Consequently, the award was reversed.

Necessity to Prove "Current Wages" at Suitable Jobs

In *Hogle v DaimlerChrysler Corp*, 2007 ACO #233, the employer appealed an open award of benefits. The employer contended the Magistrate failed to evaluate, for "disability" purposes, the economic impact of the employee's physical limitations from his work injury.

The Appellate Commission agreed with the employer but did not reverse the case. Instead, the Commission remanded the case "because the law changed" – the Court of Appeals had released *Stokes v DaimlerChrysler Corp*, 272 Mich App 571; 727 NW2d 637 (2006) – after the Magistrate's trial.

The Commission said that the proofs offered by the employee could not sustain an award because:

> he failed to prove that could not physically perform his prior jobs as a result of his work-related injury. Plaintiff testified that he could not perform his prior jobs. He offered nothing more. He failed to introduce any evidence that linked his inability to perform those jobs to his work injury. In fact, he offered no reason that he could not perform those jobs. He did not provide any information that detailed the physical requirements of his prior jobs. … Plaintiff's failure to introduce sufficient evidence on the issue mandates a conclusion that he failed to prove that he could not physically perform his prior jobs.

The Commission remanded saying "current" wage information at other suitable work is needed:

> *Stokes* requires plaintiff to introduce evidence that establishes a *current* wage for every job he previously performed. Plaintiff failed to offer that proof. His testimony that he did not earn comparable wages does not satisfy the standard. However, because the law changed after his hearing, due process protects him and allows him an opportunity to introduce that evidence. (Emphasis added).

Green Sheet Controls and Necessity to Cross-Appeal

In *Schroeder v T.J. Maxx*, 2007 ACO #208, one of the questions presented was the employee's argument that the Magistrate's written opinion did not conform to the green

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sheet order. The Magistrate ordered the correct weekly benefit rate on the green sheet order, but his written decision recited a different weekly rate of compensation. The employer was allegedly using the lower incorrect rate to pay 70 percent benefits. The employee requested modification of the Magistrate's opinion.

While affirming an open award, the Commission refused the modification the employee requested for two reasons. The Commission said that, first, the employee did not file a timely appeal or cross-appeal so as to legitimately challenge any aspect of the decision. Second, the Commission said the employer is obligated to pay the weekly benefits recited on the written green sheet order. The Commission said "[w]hen the green sheet order and the written opinion conflict, as they do here, there is no question that the green sheet order controls. Judges and magistrates speak through their orders, not through their written opinions."

Therefore, the Commission said that, even if the employee had filed a timely appeal or cross-appeal, it would not modify the Magistrate's written opinion because the green sheet order (with the correct rate) controls.

Retiree Presumption

In *Turek v Metz Baking Co*, 2007 ACO #232, the employee had been a longtime employee for the employer. He suffered a lower back injury in 1999 at work, underwent back surgery, and returned to work with restrictions. He worked at several jobs that accommodated his restrictions. The employer then accused the employee of violating a company policy. It presented him with the option of resigning or being fired. The employee elected to resign in 2004 with the understanding the employer would not contest his application for unemployment compensation benefits. After collecting such unemployment compensation benefits, the employee began working for two other employers.

The Magistrate granted the employee an open award, finding that the retiree presumption in MCL 418.373(1) did not apply. The Commission disagreed. The Commission said the employee was "actively employed" when he left work, which is a condition precedent to application of the retiree presumption. And, the Commission said that the lag time between the employee's resignation from active employment (in January 2004) and the time when he applied for his pension (October 2004) was of no legal significance because "[t]here is no requirement in the statute that leaving active employment has to coincide with the application or receipt of [pension] benefits."

The Magistrate had added that, even if the retiree presumption did apply, the employee met the presumption. Again, the Commission disagreed. Because the employee was working two jobs when he started receiving his pension benefits, the Commission explained that there is no support for the finding that the employee is unable to earn any wages under § 373(1). 🛠

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State Bar of Michigan
Michael Franck Building
306 Townsend Street
Lansing, MI 48933-2012
www.michbar.org

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