

STATE BAR OF MICHIGAN

Workers' Compensation Section Newsletter

Winter 2008



Fall/Winter Seminar Another Smashing Success

By Murray Feldman

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Over 100 Section members gathered on December 5, 2008 for the Section's annual fall/winter seminar held at the Cadillac Place Building in Detroit. Along with excellent presentations by Agency Director Nolish, Chief Magistrate Gorchow, and Appellate Commission Chair Gasparovich, as well as an excellent "State of the Law" presentation by Marty Critchell, several other noteworthy events occurred.

Our workers' compensation scholarship recipient, Crystal Culbert, appeared to accept her scholarship award. Although she did not make any formal comments, Crystal expressed to me, the other officers, and many others in attendance, her profound appreciation for being selected as our scholarship winner.

In addition, Ed Welch appeared and received our Lifetime Achievement Award. Ed's comments were not only thoughtful, entertaining, and most interesting, but represented an oral history of the last several years as regards workers' compensation issues. Our section was very pleased to recognize Ed for his long and distinguished career.

Upon completion of the formal seminar presentation, many adjourned to the third floor where the Workers' Compensation Hall of Fame was re-dedicated in a ceremony by Don Ducey and Nort Cohen.

We have much to be proud of and thankful for as we approach this holiday season.

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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.

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From the Chair

Since my last Chairperson's message, your section officers and council have been busy with many issues of interest. Almost immediately upon the Agency's issuance of Form 105 (now re-designated as Form 105A), issues arose regarding the plaintiffs' rights to discovery under *Stokes*. While I understand and acknowledge there is disagreement as to whether plaintiffs are entitled to discovery under *Stokes*, Agency Director Nolish indicated to the section officers that if we did not take up this issue, the Agency would. Therefore, your section officers met and with the assistance of many, Form 105B (reproduced elsewhere in this newsletter) was created.

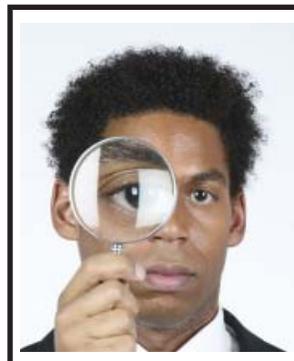
Please note that Form 105B is voluntary. Form 105B creates a reasonable field of discovery and is intended to standardize the exchange of information between defendants/employers and plaintiffs/employees. There are no time limits on when the form is to be sent or returned; note that it is to be signed by a representative of the employer. All issues involving completion of the form should be addressed to the magistrate assigned to the case.

We are proud to announce that immediately after the December 5 seminar, we re-dedicated the Workers' Compensation Hall of Fame plaques in the newly installed display case in the third floor annex of the office in Detroit. If you have any nominations for Hall of Fame inductees, please contact either Don Ducey or Nort Cohen.

I recently attended a State Bar of Michigan meeting for the chairpersons of all State Bar sections. During the course of the meeting, the State Bar informed us of the many programs it is sponsoring. One of those programs, "Law School for Legislators," is of particular interest to our section, and we will be participating in it. I have already formed a committee and will keep you all updated on this project.

I do not know how many of you are aware, but we are one of the largest "specialty" sections of the State Bar. According to State Bar statistics, we have 826 dues-paying section members. We encourage all of you to participate in section activities such as the December 5 seminar and our summer meeting at Crystal Mountain June 18-20, 2009, as well as all other section activities.

I wish to take this opportunity to thank all of you who have shared your thoughts, concerns, and encouragement with me as we continue to address issues as they arise. Your officers and council stand ready to do whatever is necessary to preserve and strengthen our practice area and our section. ✂



Looking for a past issue?

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

Editor's Note

Much has happened since the Summer Seminar. We are now working with Forms 105A and 105B, working those into our practices and looking to see how the new Michigan Supreme Court Justice changes our practice. The financial crisis shows no sign of improvement and we are all looking toward the new national administration for leadership and guidance. Your Section has continued to show initiative and leadership in our small world of Workers' Compensation. The forms that are referenced in this edition are the by-product of hard work and compromise by both sides of the bar.

The Spring/Summer Seminar will be held June 18, 19, and 20 at Crystal Mountain next year. More information will be forthcoming regarding the Spring Seminar as that date draws closer.

The Section was recently invited by the Michigan Supreme Court to file an amicus brief in the *Petersen v. Magna* case. As you may know, that case deals with medical bill issues and who pays the attorney fee in cases where the magistrate awards a fee. After a spirited debate from both sides of the

Council, the Council determined that it would politely decline the Court's invitation to file an amicus. It was clear that a consensus could not be reached at the Council level as to what position we should support in such a brief.

Please take note of the Agency's announcements regarding operating hours.

In these interesting times in which we live and practice I leave you with words of wisdom from a person you may know:

"The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty, and we must rise with the occasion. As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country."

Lincoln's Second Annual Message to Congress,
December 1, 1862.

Tom Ruth

Personality Profile

Theology and Workers' Compensation

By Donna Grit

The next time you see Mike Flynn, plaintiff's attorney from Muskegon, take time to congratulate him on obtaining a master of arts degree in theology from the University of Notre Dame.

For 12 of the last 13 summers, Mike, age 68, has spent a good chunk of his summer living, sleeping, and eating in college dormitories while taking theology courses. For him, it was a vacation. During the rest of the year, he completed independent study projects.

What would inspire a successful attorney to undertake such a task? For Mike, while contemplating an almost successful bid for the Court of Appeals in 1994, he ran across a magazine advertisement for summer classes at Notre Dame. He had always been interested in studying theology, so his wife, Sandra, encouraged him to sign up for classes.

Mike thought perhaps, as a 55-year-old lawyer, he was a bit crazy to be taking theology classes. First, he spent four to five years completing prerequisites in college level theology courses. He then had to take the Graduate Record Exam

(GRE). Finally, he was admitted to the masters' program.

The masters' theology program at Notre Dame is made up almost entirely of "non-traditional" students. Cheron Price, administrative assistant for the program, indicated that of approximately 100 students currently in the degree program, only a small percent came straight from undergraduate programs. It is not uncommon to have students ranging in age from 30 to 70, from backgrounds as diverse as medicine, law, and teaching, and from homes as close as west Michigan and as far as Hong Kong.

Not surprisingly, the program is quite rigorous. After completing his courses, Mike had to sit for a 4 ½ hour written examination and a 40 minute oral examination. Each candidate is required to compose a bibliography of 20 books from five different areas, including systematic theology, biblical studies, spirituality, the history of Christianity, and a theologian of interest. Within each topic, the student has to choose subtopics of interest. The written examination

Continued on page 14

Notes from the Director

By Jack A. Nolish, Director
Workers' Compensation Agency

New Form 105B

To all participants in the Michigan Workers' Compensation system:

With the excellent cooperation, contributions, assistance and persistence of the State Bar Workers' Compensation Section Executive Committee, Murray Feldman, chair, I am pleased to provide for your use the:

- **Work History, Work Qualifications & Training Disclosure Questionnaire** (Form WC-105A)
http://www.michigan.gov/documents/wca/wca_WC-105A_fillin_254643_7.pdf
- **Employer Disclosure Questionnaire** (Form WC-105B)
http://www.michigan.gov/documents/wca/wca_WC-105B_fillin_254575_7.pdf. (You can see the forms starting on page 6 of this newsletter.)

As noted in my memo with the forms, and on the forms themselves, these are voluntary forms designed to assist the magistrates in the reciprocal exchange of information mandated by the *Stokes* decision.

Remember, these forms are to be exchanged between the parties and not mailed to the agency. Completed forms sent to the agency will be returned to the party completing the forms and not placed in the case file. The forms should not be submitted to the agency unless offered and accepted as exhibits in a hearing or at a deposition.

It is hoped that these forms will provide a reasonable means of the parties meeting their disclosure obligations in an economical and expeditious fashion. If there are any disputes regarding the forms and its use, the issues should be raised before the assigned magistrate. If you have questions or comments about the forms themselves, please feel free to contact me. It is my personal belief that with some cooperation and good faith effort, these forms will serve to simplify the proceedings in our cases in light of the more complicated burdens of proof and process indicated in the recent decision. I am trying this voluntary approach to avoid the necessity of creating a formal set of discovery rules and processes. I will greatly appreciate if the parties will assist me in this endeavor. ✂

Jack A. Nolish, Director
Michigan Workers' Compensation Agency
(313) 456-3673/(517) 322-6373
nolishj@michigan.gov

Where Do We Stand Five Months Post-*Stokes*?

By Murray A. Gorchow, Chairperson, Board of Magistrates

Since my last article shortly after the Supreme Court's decision in *Stokes v Chrysler LLC*, 481 Mich 266 (2008), there have been some significant developments in how the Agency and the Board of Magistrates have been handling the transition between the pre-*Stokes* world and the new world under *Stokes*.

Magistrates have responded initially, by freely adjourning trial dates, and continued trial dates to give the parties the additional time necessary to develop the additional proofs required by *Stokes*. Additionally, where appropriate, closed records have been re-opened, before a decision was issued, to allow the parties to develop and introduce *Stokes* proofs. The unavoidable consequence has been delay in resolving cases by settlement; delay in going to trial; delay in completing trial; and delay in the issuance of decisions.

Let me elaborate on the practical effect. Both parties and their attorneys have had to grapple with the significant changes mandated by *Stokes*. Do you or don't you need a vocational evaluation (VE)? How much will it cost? Is the cost justified in a given case? When do you get that evaluation? Can a demand be made or an offer given without a vocational evaluation. Can you get a medical opinion without first getting a VE? Can you get a VE without first getting a medical opinion? How do you get the vocational information you need? Can we mediate or facilitate settlement successfully without first having a handle on the vocational information that may be needed. Can you find a vocational evaluator on a timely basis given the increasing demands for such witnesses to do evaluations and depositions? These practice considerations only begin to scratch the surface.

Additional questions involve the reasonableness of interrogatories; face-to-face vocational evaluations; attorneys choosing to attend or not attend such evaluations; the location, the reasonableness of the length, and the appropriateness of the questions asked at the evaluation. These questions and more are being dealt with by the Board of Magistrates on a case by case basis exercising their discretion depending on the circumstances.

At the same time that attorneys, parties, and Magistrates are dealing with all of these new *Stokes* generated issues and more, the Board of Magistrates has been confronted with a continuing flood of remands from the Supreme Court, Court of Appeals and the Appellate Commission. These remands almost universally necessitate the development of and the

taking of additional evidence to satisfy the new requirements of *Stokes*. This only adds to the delays already mentioned.

Fortunately, thanks to the hard work of Section Chair Murray Feldman and the Section Council, Agency Director Jack Nolish has made available two new forms to facilitate the exchange of information required by the Supreme Court in *Stokes*. The new Form WC-105A—Work History, Work Qualifications Training Disclosure Questionnaire, and WC-105B Employer Disclosure Questionnaire, will enable the parties to obtain and exchange the information needed to comply with the demands of *Stokes*. While completion and use of these forms is voluntary, there already appears to be fairly broad acceptance and use of these forms, because attorneys from both sides, as well as several vocational experts, participated in their creation. There is more information about these forms in this issue of the *Newsletter*.

From my perspective as a Magistrate, the 105A has the virtue of being thorough and user friendly. Instead of having to look at and resolve disputes concerning an untold number of different sets of interrogatories with different wording and different formats as to education, training, and work history, the Magistrate, the attorneys, and the vocational experts will all be working from a consistent easy to use template of information. There will certainly be cases where “one-size-fits-all” does not work, and additional information may be required in the circumstances of a particular case. When that happens, the additional information can be requested informally, or, if necessary by a few additional interrogatories, which do not duplicate the questions that have already been answered on the 105A. Use of the 105A and 105B won’t entirely eliminate disputes over pre-trial discovery, but using them can minimize and narrow disputes at a savings of time and cost to the parties, and a savings of time and energy of the Magistrate. Completion and exchange of the 105A and 105B on a timely basis should go a long way toward mitigating the delays in the development and handling of cases.

I and the other Magistrates have been freely granting adjournment of cases, without regard to the age of the case, because of the due process concerns resulting from the changes in the law brought by the Supreme Court’s decision in *Stokes*. However, as mentioned in my last article, this grant of additional time is not open-ended. As with requests for extensions of time for good cause shown to get medical examinations, the same will become true for *Stokes* proofs. Each Magistrate will soon be exercising their discretion as they believe appropriate under the circumstances of their docket and any given case. I will exercise my discretion balancing what counsel have done or not done to obtain and exchange *Stokes* proofs, as well as any other relevant factors. Good cause shown and this Magistrate’s discretion will be the controlling factors.

In dealing with requests for adjournment; pre-trial *Stokes* discovery disputes over the completion and exchange of the Agency’s new Form 105 Questionnaires, supplemental interrogatories, vocational evaluations, including reports and any labor market surveys; I will consider all relevant circumstances and apply a “Clean Hands Doctrine” where transparency and timeliness will be favored, and gamesmanship by either side will be disfavored.

As I write this article, we are all wondering about the meaning of the recent election and its impact on *Stokes*. To borrow a favorite phrase of Director Jack Nolish: “Stay tuned.” What I can say is that given what we have all had to deal with in such a short time frame, I am pleased that the confidence I expressed in my last article is bearing fruit. The collegiality and goodwill of the Workers’ Compensation Section, has enabled its members to pick up the challenge that *Stokes* presented for us all to cooperate to the end that we can achieve our common objective: the prompt and fair adjudication of claims. ✂



Hours Change

Workers’ Compensation Agency
Grand Rapids, Mt. Clemens, and Pontiac Hearing
Offices Hours Have Changed:

	MONDAY - THURSDAY
Grand Rapids	7:00 a.m.. - 5:30 p.m.
Mt. Cemens	8:00 a.m. - 5:30 p.m.
Pontiac	7:30 a.m. - 5:30 p.m.
	Closed Fridays

For assistance on Friday, please contact:

- The agency’s Lansing Office toll free number: (888) 396-5041
- The Detroit agency office at: (313) 456-3650

Agency forms and other information can be obtained by calling the Lansing number or consulting our web site at: www.michigan.gov/wca

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WORK HISTORY, WORK QUALIFICATIONS & TRAINING DISCLOSURE QUESTIONNAIRE

Michigan Department of Labor & Economic Growth
Workers' Compensation Agency
P O Box 30016, Lansing, MI 48909

The information you disclose in this questionnaire may be used by the magistrate to facilitate exchange of information as required by *Stokes v. Chrysler, LLC*, 481 Mich 266 (2008). Completion is voluntary. Completed forms should be exchanged among all parties and not sent to the Workers' Compensation Agency. Use of this questionnaire does not limit the parties' rights to request further disclosure as provided in that decision.

SECTION 1 – GENERAL INFORMATION

1. Name (First, Middle Initial, Last)		2. Social Security Number (Last four digits only) XXX-XX-		
3. Street Address	4. City	5. State	6. ZIP Code	
7. Do you have a valid driver's license? <input type="checkbox"/> Yes <input type="checkbox"/> No				
If yes, issuing state _____ Expiration date _____ Special endorsements or restrictions _____				
If no, do you have a valid government issued photo I.D. card? <input type="checkbox"/> Yes <input type="checkbox"/> No				

SECTION 2 – EDUCATIONAL / VOCATIONAL/MILITARY BACKGROUND

8. Indicate the highest grade of school you have completed (0-12): _____						
9. Did you graduate from high school? <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, what year did you graduate? _____						
10. If you obtained a GED, what year did you obtain it (either the specific year or best estimate)? _____						
11. Do you have any other disabilities that might be a barrier to employment? <input type="checkbox"/> Yes <input type="checkbox"/> No						
If yes, please describe: _____						
12. Can you read and write English? For example, can you read this form, newspapers, magazines etc.? <input type="checkbox"/> Yes <input type="checkbox"/> No						
13. For each school you attended, provide the following information (please attach additional pages if necessary):						
	School Name	Address if known or City & State	Grade Completed	Degree/ Diploma	Course of Study	Years Attended
High School						
Vocational School						
College						
Post-graduate						
14. Have you completed any type of special job training, trade or vocational school? <input type="checkbox"/> Yes <input type="checkbox"/> No						
a. Type of training _____						
b. Date completed _____						
c. Certifications/licenses received _____						
d. Expiration date of certification/licenses _____						

Name _____

15. *Computer Experience/Access*

Please describe any computer skills/experience/training you have:

- a. Do you have access to the Internet? Yes No
 - b. Do you have an e-mail address? Yes No
 - c. Can you send and receive e-mail? Yes No
 - d. Are you proficient in any of the following computer programs:
 - i. Microsoft Excel Yes No
 - ii. Microsoft Works Yes No
 - iii. Microsoft Word Yes No
 - iv. Microsoft Money Yes No
 - e. Are you proficient in any computer programs other than those named above? Yes No
- If yes, please identify those programs in which you are proficient:

16. For any volunteer activities or hobbies in which you have participated, provide the following information:

Activity/Organization	Years of Involvement	Describe Your Activities

17. Have you been involved in any non-work activities in which you have had a leadership position, such as club president, committee chairperson, etc.? Yes No

If yes, please provide the following information (please attach additional pages if necessary):

Activity/Organization	Years of Involvement	Describe your activities

18. Have you served in the U.S. military? Yes No

Branch _____ Dates _____

Specialized training _____

If you were in the Army, list your Military Occupational Specialty (MOS) code; for the Air Force list your Air Force Specialty Code (AFSC); for the Navy, Marine Corps or Coast Guard, list your rank and type of discharge: _____

SECTION 3 – EMPLOYMENT EXPERIENCE

19. List in chronological order each and every job you have had since age 18, including any periods of self-employment, and provide the information requested. In addition, you are to complete one "Job Detail Form" for each job you list. If you have had more than five (5) jobs since age 18, please list the additional jobs on another sheet of paper. You may photocopy the Job Detail Form so that you have one form for each job you list.

Employer	Address if known or City & State	Type of Business	Job Title(s)	Dates of Employment
1.				to
2.				to
3.				to
4.				to
5.				to

Please list additional employers on another sheet of paper.

20. *Union Employment.* Do you now or have you ever worked through or out of a union hall? Yes No

If yes, please provide the following information (please attach additional pages if necessary):

Union Name	Local Number	Address if known or City & State

The above information, including any attachments, is true to the best of my knowledge. I understand that the information disclosed in this questionnaire may be used by the magistrate in determining my entitlement to workers' compensation benefits.

Signature of Claimant _____ Date _____
(Claimant **must** sign)

Claimant's Name _____
(Printed or typed)

IF YOU HAVE ATTACHED ANY ADDITIONAL PAGES, PLEASE INCLUDE YOUR FULL NAME AND THE LAST FOUR DIGITS OF YOUR SOCIAL SECURITY NUMBER ON EACH ADDITIONAL PAGE.

Completed forms should be exchanged among all parties and not sent to the Workers' Compensation Agency.

DLEG is an equal opportunity employer/program. Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.	Authority: 418.205, 418.221, R408.40b(2) Completion: Voluntary Penalty: None
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JOB DETAIL FORM

Please complete one Job Detail Form for each job listed in Section 3, question 19.

JOB # _____			
Employer's Name (include any self-employment) _____			
Employer's Street Address _____	City _____	State _____	ZIP Code _____
Dates of Employment _____			
Rate of Pay \$ _____ per <input type="checkbox"/> Hour <input type="checkbox"/> Day <input type="checkbox"/> Week <input type="checkbox"/> Month <input type="checkbox"/> Year			
Hours per day _____		Days per week _____	
<i>Describe this job.</i> In this job, how many total hours each day did you: Walk _____ Stand _____ Sit _____ Climb _____ Reach _____ Stoop (Bend down & forward at waist) _____ Crawl (Move on hands & knees) _____ Kneel (Bend legs to rest on knees) _____ Handle, grab or grasp big objects _____ Crouch (Bend legs & back down & forward) _____ Write, type or handle small objects _____			
<i>Lifting and Carrying.</i> Explain what you lifted, how far you carried it, and how often you did this. _____ _____ _____			
Check the heaviest weight lifted: <input type="checkbox"/> Less than 10 lbs. <input type="checkbox"/> 10 lbs. <input type="checkbox"/> 20 lbs. <input type="checkbox"/> 50 lbs. <input type="checkbox"/> 100 lbs. or more <input type="checkbox"/> Other _____			
Check weight you frequently lifted: (By frequently, we mean from 1/3 to 2/3 of the workday.) <input type="checkbox"/> Less than 10 lbs. <input type="checkbox"/> 10 lbs. <input type="checkbox"/> 25 lbs. <input type="checkbox"/> 50 lbs. or more <input type="checkbox"/> Other _____			
Did this job require you to work with the public?		<input type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, describe: _____			
Did this job require you to use machines, tools or equipment?		<input type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, describe: _____			
Did this job require you to use technical knowledge or skills?		<input type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, describe: _____			
Did this job require you to perform any duties such as writing, completing reports, etc.?		<input type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, describe: _____			
Did this job require you to supervise other people?		<input type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, describe: _____			

Signature of Claimant _____ Date _____
 (Claimant **must** sign)

Claimant's Name _____ Social security number XXX-XX- _____
 (Printed or typed) (last 4 digits)

Print

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EMPLOYER DISCLOSURE QUESTIONNAIRE

Michigan Department of Labor & Economic Growth
Workers' Compensation Agency
PO Box 30016, Lansing, MI 48909

The information disclosed in this questionnaire may be used by the magistrate to facilitate exchange of information as required by *Stokes v Chrysler, LLC*, 481 Mich 266 (2008). Completion is voluntary. **Completed forms should be exchanged among all parties and not sent to the Workers' Compensation Agency.** Use of this questionnaire does not limit the parties' rights to request further disclosure as provided in that decision.

Employee Name _____

Social Security Number (last four digits only) XXX-XX- _____ Date of Birth _____

SECTION 1 – EMPLOYER INFORMATION

1. Full name of employer			
2. Address of location where employee was employed	3. City	4. State	5. ZIP Code

SECTION 2 – EMPLOYMENT INFORMATION

6. Regarding employee's employment with employer, provide the following information (attach additional pages as needed):

- a. Dates of employment, inclusive of the last actual day of work.

- b. The employee's wages for each of the 52 weeks prior to the alleged injury/disablement date(s) as well as the last day employee actually worked. If less than 52 weeks of employment, list wages for all weeks employed.

- c. The specific fringe benefits employee received while employed; the employer's cost of any fringe benefits on each alleged injury/disablement date and the last day employee actually performed work for the employer; and the dates of discontinuance for each fringe benefit identified.

COPIES OF RECORDS TO BE SUBMITTED WITH WRITTEN RESPONSES

7. Regarding the date(s) of the alleged injury/disablement, provide the following information:

- a. Employee's job title(s) _____
- b. The dates on which employee held this title _____

8. Regarding employee's job duties throughout the entire period of employment with employer, provide a description of the type of work performed by employee, including any supervisory duties, and specific exertional and non-exertional duties actually performed by the employee. Please attach a written job description if one exists.

9. Was employee's job a regular job performed by other non-injured employees of the employer?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
10. Describe any licensing, training, or certifications required for the type of employment performed by employee.		
11. Has the employer made any job offer to the employee after the alleged date(s) of injury?		
If yes,		
a. What were the specific details of the job offered to employee, including the job title and description, the hours and shift offered, the rate of pay offered, the fringe benefits offered, and the locations and distance from employee's residence?		
_____ _____		
b. When was the job offer made to the employee? _____		
c. How was the job offer conveyed to the employee? _____		
d. If the job offer was in writing, please provide a copy of the written job offer.		
12. Has the employee's employment been terminated?		
<input type="checkbox"/> Yes		<input type="checkbox"/> No
If yes, explain why _____		
If no, explain why the employee stopped working for the employer. _____ _____		

I have provided, or will provide as soon as they become available, copies of all existing medical, employment and personnel records that are relevant to this claim to either the injured worker (if unrepresented), the injured worker's counsel, or employer's counsel.

Signature of employer's representative (**Not** counsel for employer) _____

Representative's name _____ Position _____
 (Printed or typed)

Date _____

Completed forms should be exchanged among all parties and not sent to the Workers' Compensation Agency.

DLEG is an equal opportunity employer/program. Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.	Authority: 418.205, 418.221, R408.40b(2) Completion: Voluntary Penalty: None
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Scenes from the Fall/Winter Seminar



Section Chair Murray Feldman



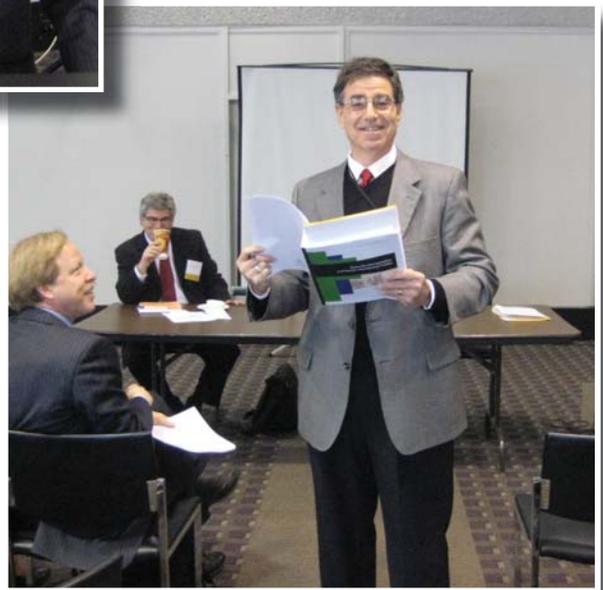
Chief Magistrate Gorchow



Marty Critchell



Appellate Commission Chair Gasparovich



Workers' Compensation Agency Director Jack Nolish

Ed Welch and Murray Feldman



Scholarship winner Crystal Culbert and Murray Feldman



Don Ducey and Nort Cohen



Personality Profile

Continued from page 3

is based on the student's bibliography, but the student has no idea which of the areas will be covered in the examination.

Mike was allowed to take his secretary of 37 years, Mary Schaub, with him to Notre Dame, where she was able to transcribe his answers for the written portion of the exam. Since Mike had only recently learned to type, he did not feel confident in typing his examination answers. Mary said she was "deeply honored" to be asked to transcribe Mike's answers during the examination. She was amazed at Mike's ability to recall large amounts of information, noting he was obviously adept at and loved his studies.

Mike was not allowed an assistant, not even for moral support, as he faced grilling by three senior members of the Notre Dame Theology Department. The oral examination reminded him of the circuit court mediation process, with three different examiners, from three different backgrounds, throwing questions at him, all calling on him to defend his positions.

Mike describes himself as a "cradle Catholic." While he loves the church, he took positions in his examination that

might be considered critical of church policy. He was required to defend those positions to senior members of the department, all of whom took a keen interest in his criticisms of the church.

If you ask Mike how this changed him as a lawyer, he will remind you there is a fair amount of "ministering" in the practice of law. While his studies helped give him more confidence in his faith, he also became more patient and respectful of his clients. He said his studies made him more aware of the intrinsic dignity of all human beings.

When it came to completing this undertaking while maintaining a busy plaintiff's practice, Mike made it clear he had extraordinary support from his wife of 47 years, Sandra, his partners and the staff at McCroskey Law, as well as cooperation from the west Michigan magistrates and defense bar in accommodating his schedule.

Congratulations on obtaining your sheepskin, Mike. ✨

Save the Date!

The Workers' Compensation Section Summer Meeting is scheduled for June 18-20, 2009 at Crystal Mountain.

Expect fun, food, frolicking and frivolity!!
(And who could forget discounts on activities?)

Watch for details in an upcoming newsletter.



Recent Cases

By Jerry Marcinkoski, Lacey & Jones

Supreme Court

The Supreme Court released a number of important orders, many of which are a consequence of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). Amongst the more important orders are the following.

Partial Disability

In *Lofton v AutoZone, Inc.*, ___ Mich ___; 756 NW2d 85 (2008) (SC Docket No. 136029, rel'd October 1, 2008), the Supreme Court vacated the award of benefits and remanded the case to the Board of Magistrates for two reasons. First, the Court remanded for a determination of whether the plaintiff is disabled in light of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). Second, assuming plaintiff is disabled, the Court ordered a determination of plaintiff's weekly rate of compensation with reference to the partial disability provision, MCL 418.361(1). The Court retained jurisdiction in remanding the case. The full text of the Court's order reads:

On order of the Court, the application for leave to appeal the February 4, 2008 order of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we VACATE the decision of the Workers' Compensation Appellate Commission mailed April 4, 2007, and we REMAND this case to the Board of Magistrates for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008). If it is found that the plaintiff is disabled under MCL 418.301(4), but that the limitation of wage earning capacity is only partial, the magistrate shall compute wage loss benefit under MCL 418.361(1), based upon what the plaintiff remains capable of earning. The magistrate assigned to this case may take additional proofs upon request of either party. We DIRECT the magistrate to issue a decision and file that decision with the Clerk of this Court within 126 days of the date of this order.

We retain jurisdiction.

The Court's remand order was a 4-3 ruling. Justice Cavanagh would have denied leave. Justices Weaver and Kelly would have granted leave to reconsider *Stokes*.

Attorney Fees on Unpaid Medical Expenses

In *Petersen v Magna Corp.*, ___ Mich ___; 755 NW2d 658 (2008) (SC Docket Nos. 136542 and 136543, rel'd September 24, 2008), the Supreme Court granted leave to appeal on the issue of prorating attorney fees on unpaid medical expenses under MCL 418.315(1). This case will address whether and how attorney fees can be assessed against employers or carriers on unpaid medical expenses owing as a result of an award. The Court invited various organizations, including the Section, to file *amicus curiae* briefs. The text of the Court's order reads:

On order of the Court, the application for leave to appeal the April 17, 2008 judgment of the Court of Appeals is considered, and it is GRANTED, limited to the issue of the proration of attorney fees in MCL 418.315(1). The parties shall include among the questions to be briefed: (1) what is the meaning of the term "prorate" in the last sentence of § 315(1), and whether that term represents an exception to the American Rule regarding attorney fees (see *Haliw v City of Sterling Heights*, 471 Mich 700, 707 (2005)); (2) whether the magistrate's authority to prorate attorney fees is limited to the parties to the worker's compensation action; and if so, does the penultimate sentence of MCL 418.315(1) limit which parties are subject to proration; and (3) what is the status, if any, of health care providers and medical insurers in prorating of attorney fees.

The Clerk of the Court is directed to place this case on the January 2009 session calendar for argument and submission. Appellants' brief and appendix must be filed no later than November 10, 2008, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than December 12, 2008.

The Worker's Compensation Section of the State Bar of Michigan, the Michigan Self-Insurers' Association, and Blue Cross and Blue Shield of Michigan are invited to file briefs *amicus curiae*, to be filed no later than December 26, 2008. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs *amicus curiae*, with such briefs to be filed no later than December 26, 2008.

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Sazima v Shepherd Bar & Restaurant

In *Sazima v Shepherd Bar & Restaurant*, ___ Mich ___; ___ NW2d ___ (2008) (SC Docket No. 136940, rel'd October 17, 2008), the Supreme Court ordered oral argument and supplemental briefing on a case involving a slip and fall on an icy sidewalk while plaintiff was walking to work. The Court's order reads:

On order of the Court, the application for leave to appeal the June 17, 2008 order of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on November 19, 2008 at 9:30 a.m., on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the decision of the Workers' Compensation Appellate Commission is contrary to *Simkins v General Motors Corp (After Remand)*, 453 Mich 703, 723 (1996). The parties may file supplemental briefs no later than November 12, 2008, on that issue. They should not submit mere restatements of their application papers.

The Court's order was unanimous.

Robertston v Chrysler LLC

In *Robertston v DaimlerChrysler Corp, n/k/a Chrysler, LLC*, ___ Mich ___; 756 NW2d 77 (2008) (SC Docket No. 134805, rel'd September 26, 2008), the Supreme Court denied Chrysler's application for leave to appeal challenging the Court of Appeals' finding that Mr. Robertston's psychiatric injury was work-related. The Supreme Court did remand, however, to the Board of Magistrates for a disability analysis consistent with *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). The order was a 4-3 ruling. Justices Cavanagh and Kelly would have denied leave. Justice Weaver would have granted leave to reconsider *Stokes*.

Other Remands

The Supreme Court remanded a number of other cases for redetermination in light of *Stokes v Chrysler LLC*, 481 Mich 266; 750 NW2d 129 (2008). Among them were cases previously mentioned or summarized in prior newsletters: *Bessinger v Our Lady of Good Counsel*, ___ Mich ___; 756 NW2d 81 (2008) (SC Docket No. 128870, rel'd September 26, 2008) and *Diot v State of Michigan, Department of Corrections*, ___ Mich ___; 756 NW2d 81 (2008) (SC Docket No. 130702, rel'd September 26, 2008).

Court of Appeals

Dual Employment Reimbursement for MPCGA

In *Smith v Parkland Inn*, 279 Mich App 642; ___ NW2d ___ (2008), the Court of Appeals issued a published opinion addressing whether the Michigan Property & Casualty Guaranty Association [MPCGA] can obtain reimbursement of its dual employment payments from the Second Injury Fund where MPCGA pays workers' compensation benefits in place of an insolvent carrier.

The employee in the case had been granted an open award of benefits against Parkland Inn. At the time of her injury, she was also employed by a second employer, a restaurant. Parkland Inn's workers' compensation carrier, Casualty Reciprocal Exchange, paid plaintiff full benefits based upon plaintiff's employment with both Parkland Inn and the restaurant under the dual employment provision, MCL 418.372. Subsequently, the carrier became insolvent. By operation of the Property and Casualty Guaranty Association Act, MPCGA began paying plaintiff's full benefits in place of the insolvent carrier. MPCGA then requested reimbursement under the dual employment provision of the statutory portion of its payment from the Second Injury Fund, consistent with the Fund's past reimbursement to the insolvent carrier. The Second Injury Fund rejected the reimbursement request from MPCGA.

MPCGA filed an application with the Agency contesting the Second Injury Fund's refusal to reimburse. The determinative issue was whether MPCGA is to be considered an "insurer" under that portion of the dual employment provision that requires the Second Injury Fund to reimburse "the insurer or self-insurer quarterly for the second injury fund's portion of the benefits due" under the dual employment provision.

The Court held that MPCGA was entitled to the reimbursement. The Court said all that is required to meet the definition of an "insurer" is that the organization transacts the business of workers' compensation insurance in Michigan. The Court determined that MPCGA is such an organization.

Attorney Fees on Unpaid Medical Expenses

In the published decision *Harvie v Jack Post Corp*, ___ Mich App ___; ___ NW2d ___ (2008) (CA Docket No. 276044, rel'd August 21, 2008), the Court of Appeals ruled that plaintiff's counsel was entitled to payment of attorney fees from the employer on unpaid medical expenses. MCL 418.315(1).

The employee in this case suffered a burn injury to his right leg. The Magistrate granted him an open award of

wage loss benefits as well as reasonable and necessary medical benefits. Thereafter, Blue Cross Blue Shield filed an application seeking reimbursement for medical expenses it had paid related to the treatment of plaintiff's injury. Plaintiff then filed his own application saying that defendant was refusing to pay reasonable and necessary medical expenses. Following trial on these applications, the Magistrate granted the reimbursement sought by Blue Cross Blue Shield and plaintiff, including nursing care reimbursement. The Magistrate also found plaintiff's counsel was entitled to an attorney fee under § 315(1) with regard to the unpaid medical bills. The Magistrate agreed with plaintiff's counsel that the bills would not have been paid but for the fact he filed a petition.

Defendant appealed to the Workers' Compensation Appellate Commission challenging the award of attorney fees. The Commission affirmed the Magistrate. After an unsuccessful application for leave to appeal to the Court of Appeals, the defendant appealed to the Supreme Court. The Supreme Court remanded the case to the Court of Appeals for consideration on leave granted.

The Court of Appeals' opinion on remand concluded that the award of attorney fees was correct. The Court of Appeals said that § 315(1) can be properly construed to allow for imposition of these attorney fees on the defendant. The Court of Appeals also rejected the defendant's argument that *res judicata* barred the claim for an attorney fee. The Court of Appeals held that, although the compensability of medical bills may have been an issue in the initial trial, the premise of the Magistrate's attorney fee decision related to failure to pay medical bills occurring after that first trial. Therefore, the issue of those non-payments could not have been raised at the first trial.

The issue in *Harvlie* appears to be the same issue presented in *Petersen*, described under the Supreme Court cases above. The ultimate outcome of *Petersen* will likely represent the definitive resolution of this issue.

Workers' Compensation Appellate Commission

Cases Under *En Banc* Consideration

The Appellate Commission has two cases, as of this writing, that are under *en banc* consideration. The first is *Nelson v General Motors Corp.* This case raises an issue with respect to Michigan's jurisdiction in cases where one of the alleged injuries occurs out of the state. Under MCL 418.845 and *Karaczewski v Farbman Stein & Co*, 478 Mich. 28; 732 NW2d 56 (2007), Michigan does not have jurisdiction over the injury occurring outside the state of Michigan unless the claimant is a resident of Michigan at the time of the injury and the contract of hire was made in Michigan.

The second *en banc* case is *Slais v State of Michigan*,

Department of State Police. This case presents the question whether the statute and rules require that traditional vocational rehabilitation hearings before the Director or his surrogate be transcribed and/or that the appeal of any vocational rehabilitation order to the Board of Magistrates include there an evidentiary hearing on the record. The Director has filed an *amicus curiae* brief in the case.

Post-*Stokes*' Remands

As would be expected, many cases have been remanded by the Appellate Commission where the case had been tried before *Stokes* in order to afford the parties a hearing on the disability question in light of *Stokes*. Besides heavily quoting the step-by-step procedure described in *Stokes* – outlined in our last newsletter – typical remand comments are:

The multiple changes in legal standards concerning disability created an impossible situation for litigants. They could not make an informed decision about the evidence to introduce at the hearing. Under *Haske v Transport Leasing, Inc, Indiana*, 455 Mich 628 (1997), the decisions were simple. Plaintiff introduced proof that he could not perform any single job and proof that his injury caused wage loss. Then, defendant introduced proofs that plaintiff could perform other jobs. *Sington* changed that, but did not create a clear mandate about what proofs would satisfy the new standard. Since *Sington*, the parties have been subject to a constantly changing mandate. In short, we keep moving the target. In some cases, the standard changed three times between plaintiff's filing and the actual hearing. In fact, the Supreme Court addressed the inconsistent application of the *Sington* standard in its *Stokes* decision. These constant changes prevent a fair process and require a remand in almost every case.

* * *

The Supreme Court also reiterated that plaintiff must prove wage loss. While the Worker's Disability Compensation Act clearly defines wage loss in MCL 418.371, the courts have interpreted wage loss differently. In *Haske, supra*, the Court required plaintiff to prove that he suffered an actual loss of wages after a work injury and that the work injury caused the subsequent wage loss. While the *Sington* Court overruled the *Haske* interpretation of disability, it upheld the need for plaintiff to prove wage loss. Further, the Court in *Sington* failed to offer any different interpretation of the wage loss requirement. In *Stokes* the Court of Appeals did not address wage loss other than expressly vacating the Appellate Commission majority view of wage loss. Finally, the Supreme Court *Stokes* decision mandates that plaintiff prove wage loss, but did not expound further. Thus, we must apply the two-part *Haske* require-

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ment. *Heider-Hagan v Select Medical Corp*, 2008 ACO #165, slip op at pp 5-7.

And, in *Cagle v Supreme Castings Co*, 2008 ACO #213, the Commission remanded, saying:

We agree with the lead opinion that this matter must be remanded to allow further proceedings on the question of plaintiff's disability. In light of *Stokes v Chrysler LLC*, 481 Mich 266, 277 (2008), the magistrate did not correctly define the field of work suitable to plaintiff's qualifications and training and the parties must be allowed the opportunity to present proofs on the matter. On remand, plaintiff "must follow the steps" and, if plaintiff "establishes all these factors, ... the burden of producing competitive evidence then shifts to the employer." [*Id.* at 297, 283-284.] Finally, plaintiff "may then come forward with additional evidence to challenge the employer's evidence." [*Id.* at 284.] And, "[w]hile the precise sequence of the presentation of proofs is not rigid,

all these steps must be forwarded." [*Id.* at 298.] Slip op at p 10 (footnotes omitted).

Necessity to Plead or Appeal Date of Injury Issue

In *Richardson v RWC, Inc*, 2008 ACO #157, the Appellate Commission reversed an award of benefits for bilateral carpal tunnel syndrome because the Magistrate found an injury date that had not been specifically pled.

Plaintiff had worked for defendant from July 1977 until October 2003. He alleged only a last day of work injury. The Magistrate granted plaintiff a closed award based upon an injury date six months prior to plaintiff's last day of work, finding it the proper date of injury because it was on that date plaintiff ceased being able to work 40 hours a week, as he had been previously.

The employer appealed and the plaintiff did not cross-appeal. Plaintiff argued the date of injury should be affirmed as the proper injury date. The Appellate Commission disagreed saying the proper injury date in this case would have been plaintiff's last day of work in October 2003. The Appellate Commission concluded that:

Unfortunately, because the plaintiff does not object to the injury date found by the magistrate, we are not free to find a last day of work injury. The plaintiff was obligated to either appeal the incorrect injury date, or at a minimum, argue for the correct injury date in response to the defendant's cross appeal. Unfortunately, the plaintiff did neither. *Boardman v Department of State Police*, 243 Mich App 352 (2000); *Brewster-Azard v General Motors Corporation*, 2008 ACO #94. The plaintiff abandoned the October 2003 injury date on appeal. *Richardson*, 2008 ACO #157, slip op at p 4.

Consequently, the award was reversed.

Partial Disability

In *Todor v Northland Farms, LLC*, 2008 ACO #153, the Appellate Commission remanded the case for additional proceedings after recounting the following facts.

Plaintiff suffered from two distinct conditions: degenerative disc disease and a rotator cuff tear. Both affected his ability to work. The Magistrate found the degenerative disc disease was not work-related and the rotator cuff tear was work-related. The Magistrate concluded the work-related rotator cuff tear prevented plaintiff from performing all relevant jobs except one. The Magistrate said plaintiff's degenerative disc disease prevented him from performing that one job and awarded plaintiff full weekly disability benefits.



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On appeal, after first noting the case had been decided prior to *Stokes*, the Appellate Commission remanded the case for that reason. And, the case was remanded with these further instructions to the Magistrate:

Likewise, the magistrate erred when she failed to make any wage loss determination after she found that plaintiff could perform the “lighter” work for Zelenka even after his shoulder injuries. Plaintiff attributed his inability to perform the Zelenka propagation manager position to complications from his degenerative disc disease. The magistrate accepted those proofs, but determined that plaintiff’s degenerative disc disease was not work related. Thus, under *Sington* and *Haske*, the magistrate failed to determine what portion of plaintiff’s wage loss was caused by his work injury and what portion was caused by his degenerative disc disease. *Todor*, 2008 ACO #153, slip op at p 5.

Sixth Circuit Court of Appeals

An important federal Sixth Circuit Court of Appeals case relating to workers’ compensation in Michigan must be noted. The case is: *Brown v Cassens Transport Co* (Docket No. 05-2089, rel’d October 23, 2008); it was “recommended for publication.” This is a Racketeer Influenced and Corrupt Organizations [RICO] Act action against an employer, its claim adjusters, and a doctor who evaluated the company’s employees for workers’ compensation purposes. The plaintiffs charged that the employer, the doctor, and the adjusters engaged in fraudulent communications by mail and wire in violation of RICO. The federal trial judge and the Sixth Circuit Court of Appeals originally granted summary relief to the defendants on the basis the plaintiffs failed to plead a particular element necessary to pursue RICO (reliance). Plaintiffs appealed to the United States Supreme Court. While the case was pending there, the United States Supreme Court had issued an opinion in another case. In that other case, the United State Supreme Court eased the RICO pleading requirements saying the reliance element need not be pled. The United States Supreme Court then remanded *Brown* to the Sixth Circuit for it to reconsider plaintiffs’ appeal.

Upon reconsideration, the Sixth Circuit said that, since its prior opinion had turned on the plaintiffs’ failure to plead one factor that is no longer required, this case is to be remanded to the trial judge for further proceedings. In doing so, the Sixth Circuit also rejected the defendants’ argument that application of RICO would invalidate, impair, or supersede Michigan’s workers’ compensation statute. ✖

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Please Note: On September 26, 2001, the Michigan Supreme Court amended Rule 2 of the Rules Concerning the State Bar of Michigan, eliminating the requirement that members of the Bar provide their home addresses to the Bar. Under the amendment, a business address will be sufficient unless it is a mailing address only. Although Rule 2 had included a “residence address” requirement since its inception, the Bar had not requested such information for many years.

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