Winter 2000-2001

Workers Compensation Section Newsletter

State Bar of Michigan Workers Compensation Section

Section Elects

2000-2001 Council Officers and Members

If Dick Woods was known as "W' and Al Helmore was running against him and Judge Chad Schmucker made the final adjudication this election might have received national attention. However, there were no surprises in this election.

Richard Wood is the new chair, Al Ornstein is the new vice chair, Charlie Gilfeather is the new secretary and Michael Flynn is the new Treasurer, Debra Fried was elected as a new council member. A complete directory of the council and members is listed below:

Section Loses Loria and Reamon

This January we lost two giants. Donald Loria died on January 3 and is eulogized on page 3. William G. Reamon, former president of our bar association, died just as this long over-due issue was going to press. A full and fitting tribute to Mr. Reamon will appear in our next issue.

Chairperson:	Richard G. Wood *Ford Motor Company*, Detroit (313) 390-3014; Fax (313) 390-3048
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A Letter to the Editor

Dear Editor:

Our six-lawyer office uses Apple Macintosh computers exclusively. As a result, we have not been able to use some of the computerized materials provided by the Bureau of Workers' Disability Compensation including the calculation of accrued benefits and the computerized word processing forms.

It would be appreciated if any other section members who use Apple Macintosh computers could provide some suggestions as to how they have adapted to the PC world. Please send your good Mac ideas to Jim Rettig, 225 Ludington Street, Escanaba, Michigan 49829, or call 1-800-562-0954.

Thank you for your help.

Yours truly,
James M. Rettig

Spring Seminar at Boyne Highlands

June 14 and 15

Mark your calendar now
and watch for details in the mail
or in our next issue.

Winter Seminar

in Cancun
February 24–March 3

There may still be room for you on this trip to the Blue Bay Marina all inclusive resort just outside Cancun.

Prices including air, accommodations, food and beverages are:

$1,275 double occupancy
$1,535 single
$1,245 triple
$695 children under 12

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Travel Reimbursement Rates Effective January 1, 2001

The Department of Management and Budget has advised that the travel reimbursement rates **effective January 1, 2001** are as follows:

State, City	County/Area	Lodging	Breakfast	Lunch	Dinner
Michigan Select (higher cost) Cities	All of Wayne County	$63 + taxes	$8.50	$8.50	$21
	All of Oakland County				
	Ann Arbor, Charlevoix, Gaylord, Mackinac Island, Petoskey, Traverse City				
In-State (all other) Cities	$63 + taxes	$6.50	$7.25	$16.25	

The rate for private car has been increased to **$.345** per mile.
Listing of the Travel Reimbursement Rates from **1982 to the present.**

2000 Maximum Weekly Benefit Level

The Michigan Employment Service Agency has reported the state average weekly wage as of June 30, 2000 to be **$714.46.** In accordance with Section 418.355 of the Workers' Disability Compensation Act, the 2000 maximum weekly benefit based on 90% of the state average weekly wage is **$644.**

Courtesy of Bureau's website: www.cis.state.mi.us/wrkcomp/

Section Mourns Loss of
Donald W. Loria
1921-2001

Donald W. Loria, premier workers' compensation attorney and lifelong civil rights advocate, died on January 3, 2001. Don was born on October 3, 1921, and grew up in Detroit as the son of a furniture salesman. His legal career spanned fifty-seven years. First associated with Maurice Sugar's office, he later formed a partnership with Jerome Kelman that has remained in practice since its inception in 1943. Don was the senior partner of Kelman, Loria, Will, Harvey & Thompson.

Don received his B.A. degree from Wayne State University in 1942 with high distinction, followed quickly in 1943 with his LL.B. and J.D. from Wayne State University, also with high distinction. While practicing law he continued his education at Wayne, receiving a Master's degree in English in 1950. He served as an adjunct professor of English for many years. He was an accomplished poet who contributed to a literary magazine at Wayne.

Don's legal career was defined by his commitment to equality and justice for the poor, the disenfranchised and the un- or under-represented. He began practicing workers' compensation in the 40's when there was no fun or profit in it. In the 50's he defended citizens accused of anti-American activities by Michigan's own HUAC. In the 60's he went to Mississippi to defend protesters of civil rights abuses against criminal charges. He also helped committed Southern attorneys to be less dependent upon outside help by instructing them in tort law as a means to earn a livelihood and fight civil rights abuses as well. Locally he served as a president of the ACLU and was a lifelong board member.

In the workers' compensation arena, Don carried the banner of injured workers on a case-by-case basis. Over time his vigorous advocacy combined with his consistently innovative and incisive legal analysis were instrumental in expanding coverage of the workers' compensation statute and liberalizing its provisions. Don enjoyed the highest respect of judges and of both the plaintiff and the defense bar. They praise him as a quiet, unassuming person, an honest and fair-minded man, as good in the field as any they have ever known.

Don's special interest in the psychological dimensions of traumatic injuries established him as an expert in the legal field on traumatic neuroses and conversion reactions, a subject upon which he lectured and published in scholarly journals. His keen interest in medical-legal issues generally led to activities designed to cross-fertilize the medical and legal professions through seminars and classes. He helped organize the medical-legal institute that evolved as the Institute for Continuing Legal Education.

Don revolutionized the law of workers compensation with *Carter v Chrysler Corp* 361 Mich 577 (1960), the first case in the entire United States to recognize the compensability of a psychiatric disability caused by a *psychological*, as opposed to a physical, trauma. Some, but by no means all, of his other important contributions to the development of the law of workers' compensation are: Clark v *Chrysler Corp*, 377 Mich 140 (1966) [established the liability of the Second Injury Fund for the loss of two hands that occurred during a statutory lacuna in coverage between 1954-1966]; *King* v *Second Injury Fund*, 382 Mich 480 (1969) [established totally and permanently disabled workers injured before July 1, 1969, as a special class entitled to a yearly increase in their rate of compensation equal to the full difference between their average earnings when injured at the increased rate applicable every year thereafter]; *Joliff* v *American Advertising*, 49 Mich App 1 (1973) [established that injured workers were entitled to a minimum rate of compensation notwithstanding the actual average wage earned]; *White* v *Extra Labor Power*, 54 Mich App 370 (1974) [established that injured employees working through labor brokers were entitled to add a percentage of the brokers' fee to their average weekly wage for purposes of benefit calculation]; *Alexander* v *Director, Bureau of Workmen's Compensation*, 53 Mich App 262 (1974) [established a class action and obtained a writ of mandamus against the Bureau because its method of rate calculation deprived all injured workers of $1 a week]; *McDowell* v *Ford Motor* Co, 53 Mich App 596 (1974) [established that a claimant is entitled to a hearing on the merits notwithstanding prior dismissal due to procedural defalcations]; *Hairston* v *Firestone Tire & Rubber Co*, 404 Mich 104 (1978) [established that a worker can possess, and be impaired in, more than one earning capacity and entitled to compensation for each]; *Lincoln* v *Second Injury Fund*, 231 Mich App 262 (1998), aff'd 461 Mich 483 (2000) and *Gonek* v *Second Injury Fund* CA# 219610 [established that the Second Injury Fund's reduction of the Eva King class' benefits from 1985 to 1993 was unlawful].

In the later years of his practice, Don took up the cause of professional athletes who few believed should receive compensation for their injuries. He was selected by the National Football League Players' Association as the local workers' compensation attorney for the players.

Don leaves Fayette, his wife of 47 years, his daughter Mari, his grandchildren Sascha and Jordan and his nephews. His son, Joshua, died in 1972.

A memorial service was held at the Birmingham Temple on January 7, 2001. Contributions in his memory may be made to any of the many causes he supported, three of which were the Fund for Equal Justice; the American Civil Liberties Union; and JARC, the Jewish Association for Residential Care for persons with developmental disabilities.

By Ann Curry Thompson

Health Care Services Rule Changes Effective 10-24-2000

Article courtesy of Craig T. Petersen, Director of Bureau of Workers' Disability Compensation

Health Care Services Rules and Fee Schedules

Reimbursement fees for physicians treating work-related injuries will be going through some changes.

After 3 years of negotiations with businesses, physicians, and worker's disability compensation insurance carriers, the Health Care Services Division of the Bureau of Workers' Disability Compensation has successfully completed negotiations for new physician fees for medicine, surgery, and radiology services.

The new fees were developed from nationally accepted standards utilizing the Resource Based Relative Value System (RBRVS) methodology for practitioner reimbursement. Cost of living increases were incorporated into the negotiated conversion factors. The new fees will be phased in through a three-step process through 2002.

Fees for medicine and some surgical services will increase, while radiology and a majority of surgical fees will be reduced. Implementation of phase one fees became effective on October 24, 2000 for services provided on and after this date. Fees for phase two will become effective for dates of service on and after January 1, 2001 and phase three fees will become effective for dates of service on and after January 1, 2002.

On October 24, 2000, the following changes for the Health Care Services Rules are effective:

1. Rule 101 has language changes in Subrule (2)(h) and (3).
2. The source documents will cite CPT 2000, HCPCS 2000, RBRVS 1999 and 2000, and Red Book 2000.
3. Rule 114 provides that when a carrier requests a special written report in addition to the medical record, the provider will be able to bill 99199-32 and be reimbursed at $25.00 per page up to 3 pages. If the report is greater than 3 pages in length, the payment will be on a contractual basis between the carrier and the physician.
4. Rule 121 allows the provider to bill the carrier when a nurse case manager or rehabilitation nurse accompanies the patient to the visit. The provider will use RN001 to bill the service and be reimbursed $25.00. This is payable over and above the office visit.
5. In Rule 207, Subrule (5) is deleted as all the codes are updated to the 2000 CPT language and are published in the manual.
6. Rule 404, Subrule (2) has language indicating that the global period for surgical services are adopted from RBRVS as cited in Rule 107. Most surgical services will have a follow-up period or global period of 90 days. The global period or follow-up period includes only routine, non-complicated post surgical care. Office visits for complications are payable during the global period. If a carrier or employer requests the worker to be seen for job evaluation or restrictions, the visit shall be prior authorized and paid by the carrier. The provider will bill 99455-32 and be paid $60.00.
7. Conversion factors for medicine, radiology, and surgery are listed in Table 1002 found in Rule 1002. The conversion factors are as follows:

Type of Service	**10/24/00**	**01/01/01**	**01/01/02**
Medicine	$41.83	$44.42	$47.01
Radiology	$46.46	$46.74	$47.01
Surgery	$48.62	$47.82	$47.01

1. In Rule 1006, Subrule (6) is deleted as all of the procedures and fees for mental health services will be published in the manual.
2. In Rules 1204, 1206, and 1207 the language for Certification of a Carrier's Professional Review Program has been updated.
3. In Rule 1501 language has been updated to reflect that only fees for miscellaneous procedures, Laboratory and Pathology, and Prosthetics/Orthotics will be contained within the actual rules. Procedures that have a relative value will be published in the manual. Table 1501-A (Miscellaneous Procedure Codes) lists the fees for the carrier requested report and the case manager visit.

Taken from the Bureau's website: *www.cis.state.mi.us/wkrcomp/bwdc*

Workers' Compensation Section Web Page Update

By Alan Helmore, Section Web Master
ahelmore@SWBTA.com

I am pleased to report that the Section Web page has recently been updated. If you have used it in the past, you know how easy it is to get information about our practice from the page and it's links. If you haven't been to the page , give it a visit at *www.michbar.org/sections/workcomp*.

The web page lists the Section Officers and Council Members. This year, their email addresses have been included to facilitate communications between members of the Section and the Council. There is a calendar of events for the section and listing of the various committees. (If you would like to serve on a committee, please contact Dick Wood—the Council appreciates all the help we can get.) There are links to ICLE, Bureau, Board of Magistrates and Appellate Commission.

There is also a ***voluntary*** listing of section members available to assist in locating someone to assist with conflicts in parts of the states where individuals might not have a working relationship with other section members. A Plaintiff's (Defendant's) Attorney can locate another Plaintiff's (Defendant's) Attorney to assist in covering a deposition, appearing for a pre-trial or to even refer a client. It is, however a voluntary listing because it is available to anyone who visits the site and the Section has a strictly enforced policy of not providing names and addresses of section members to anyone not specifically using the information for Section purposes. If you wish to be listed, send an email to Al Helmore. Be sure to identify your location(city) and weather your practice is mainly Plaintiff or Defendant…Only one listing/member please.

Insurance Coverage on the Web

By Craig T. Petersen,
Director of Bureau of Workers' Disability Compensation

Current workers' compensation coverage information is now available on the Michigan Workers' Compensation website. The website provides access to information maintained by the Bureau of Workers' Disability Compensation on all employers in the State of Michigan. In the past, people were required to phone the bureau or provide a written request to determine the identity of the current insurance carrier for an employer. People will now have the option of immediately accessing this information around the clock using the internet.

By using this website, people can determine not only insurance carrier information, but also whether the employer has coverage through a group self-insurance plan or has been approved by the bureau to operate on their own as a self-insured employer. This information will be updated weekly.

Insurance coverage lookups can be performed by going to the Michigan Workers' Compensation website at http://www.cis.state.mi.us/wkrcomp and clicking on the Insurance Coverage link at the top right hand of the page.

Workers Compensation Section Newsletter

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Richard G. Wood, Chairperson

Tim McAree, 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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Workers Compensation Section "State of the Workers Compensation Law" Seminar, Detroit, Michigan, November 3, 2000

By Sandra Ganos, Richard Warsh, and Alan Helmore, Co-Chairpersons

The annual "State of the Workers Disability Compensation Law" Seminar was held in Detroit on November 3,2000. The program included comments and reports on significant Workers Disability Compensation matters by Bruno Czyrka, Deputy Director, Magistrate Crary Grattan, Chief Magistrate, Dennis Morrill, Funds Administrator. Guest Speakers were John Demoss, attorney for Blue Cross speaking on the assertion of liens, Patricia Morscheck speaking on Medicare liens, Debbie McCallum speaking on behalf of Medicare liens and July Royce, Assistant Attorney General speaking on behalf of Aetna Liens in state employee claims. Steven Nurenberg spoke on the interaction of Workers Compensation Benefits and first party No-Fault Auto benefits. Duncan McMillan presented the case law update.

BRIEF SUMMARY
videotape is available for detailed review

BRUNO CZYRKA

Bureau statistics were reviewed and are published on the Bureau Web Page (www.cis.state.mi.us/wkrcomp/bwdc) Attorneys are reminded that "rush" requests for files is very disruptive and should be kept to a minimum. Use Bureau approved forms , self drafted forms are confusing and make statistical analysis difficult. Have the bureau file available for the Magistrate at redemptions.

MAGISTRATE GRATTAN

Statistics are available on the Board of Magistrates Web Page. Repeat the statements made by Mr. Czyrka regarding Bureau forms and files.

DENNIS MORRILL

Vocational Rehabilitation is being reviewed by a committee to attempt to make it more responsive to current requirements and practicalities. The Funds have been reviewed by a committee with specific recommendations published at the Bureau Web Page (www.cis.state.mi.us/wkrcomp/bwdc. Click on "What's New Archive", then click on "Funds Review Committee Report")

JOHN DEMOSS
PATRICIA MORSCHECK
DEBBI MCCALLUM

The main thrust of each of these speakers was to encourage early contact with them or their agencies to address their respective liens. They all indicated that the liens will not simply evaporate. Each of them has a sanction that directly affects Plaintiffs and in some cases defendants as well. All three indicated a willingness to consider a compromise, but suggested that early discussions can lead to more reasonable resolutions. Call Ms Mccallum at (313) 962-6610 to discuss Medicare liens, Ms Morscheck at (517) 335-8340 to discuss Medicaid liens or Mr. DeMoss at to discuss Blue Cross liens

JULIE ROYCE

The discussion of the complexity of Aetna disability insurance liens presents a similar situation to the other statutorily recognized liens. Aetna is the insurer for state employees. Her discussion was a very good review of all disability liens requiring a pay back on cases where benefits are awarded under the Workers Compensation Law.

STEVEN NURENBERG

A thorough review of the interaction between the Michigan No Fault Automobile Statute and the Michigan Workers Disability Compensation Act was presented. Basically, Mr. Moss indicated that the benefits payable under the WC Act are primary resulting in a reduction of the same type benefits payable under the No-Fault Act. The injured party has no right of election, so settlement of the WC claim will not result in an increase in No-Fault benefits. The No-Fault carrier can maintain an action for determination of rights under the WC Act. The details of Mr. Nurenberg's discussion will best be obtained by reviewing the Videotape of his presentation.

DUNCAN McMILLAN

Mr. McMillan prepared a very comprehensive review of developments in the Workers Compensation area of practice. He presented several interesting questions which he has raised regarding some of the case law. The handout, an outline of significant cases, is available on request

This years seminar committee wishes to express our personal appreciation as well as the appreciation of the Workers Compensation Section to all of the speakers. We hope that all who attended the Seminar found it to be interesting and informative. Our thanks to all who attended.

RECENT COURT DECISIONS

By Jerry Marcinkoski

Since our last newsletter there have been a number of decisions from the Courts and Commission affecting workers' compensation law, including a larger than normal number of published decisions from the Court of Appeals. Here is a synopsis of the decisions.

SUPREME COURT

Vocationally Handicapped Certificate

In *Brown v Michigan Health Care Corp*, 463 Mich 368; 617 NW2d 301 (2000), the Supreme Court held that the Second Injury Fund could not challenge the validity of a vocationally handicapped certificate, except in one circumstance. Consequently, the employer was entitled to the limited liability afforded by Chapter 9, the Vocationally Handicapped (now known as "Vocationally Disabled") Chapter of the Act.

The employee in this case obtained a vocationally handicapped certificate upon recommendation of the defendant, after which she was hired by the defendant. In obtaining her vocationally handicapped certificate, the plaintiff admitted to having worked in the preceding year for a private individual as a housekeeper and babysitter.

After plaintiff obtained her certificate and was hired by defendant, she suffered a work-related back injury and filed her claim against the employer. The employer joined the Second Injury Fund, claiming that if the employer was liable then its liability was limited to 52 weeks from the date of injury under § 921 of Chapter 9.

The Fund resisted on the basis that plaintiff's vocationally handicapped certificate was invalid because she had been employed within the year preceding issuance of the certificate. The Fund argued that employment with any employer during the year preceding issuance of the certificate renders the certificate invalid under the last sentence of § 905. The Fund additionally argued that this plaintiff did not meet the requisite medical criteria to qualify for a vocationally handicapped certificate.

The Magistrate agreed with the Fund. The Worker's Compensation Appellate Commission and Court of Appeals affirmed.

The Supreme Court reversed. The Court said that, pursuant to Chapter 9's specific language, it is the division of vocational rehabilitation of the department of education who determines whether the employee meets Chapter 9's criteria for "vocationally handicapped" (or vocationally disabled) status. The Court held that the Second Injury Fund is not permitted to challenge a certificate once it is issued, except in the one statutorily recognized circumstance where the injury employer had itself employed the claimant within the preceding 52 weeks.

Case On Leave Granted

The Supreme Court has granted leave to appeal in *Crowe v City of Detroit*, a case involving "like benefits" under § 161. (CA Docket Nos 115983, 115984).

COURT OF APPEALS

Aggravation Of Symptoms And The "Significant Manner" Test

The most important recently decided case by the Court of Appeals is *Mattison v Pontiac Osteopathic Hospital*, ___ Mich App ___ (2000)(CA Docket No 218082, released for publication September 29, 2000). In this case, the Court of Appeals held that an employee can satisfy the "significant manner" test by proving only an aggravation of symptoms, so long as the plaintiff proves that the symptoms were aggravated "in a significant manner."

The "significant manner test" is contained in § 301(2) and § 401(2)(b). These provisions require the employee to demonstrate that his or her condition was "contributed to or aggravated or accelerated by the employment in a significant manner." The Worker's Compensation Appellate Commission had been holding that an aggravation of only the symptoms of these conditions did not satisfy the "significant manner" test, relying primarily upon the Supreme Court's decision in the significant-manner heart case *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993).

The employee in *Mattison* argued that she met the "significant manner" standard even though she only demonstrated an aggravation of the symptoms of her age-related osteoarthritis. Reversing the Appellate Commission, the Court of Appeals agreed that plaintiff can prevail by proving an aggravation of the symptoms, so long as she proves that the symptoms were aggravated in a significant manner. The Court remanded for the Commission to consider the degree to which plaintiff's employment aggravated her symptoms.

The Court reached its decision by reasoning that, since an aggravation of symptoms suffices under the general "any" aggravation standard, the same rule should apply with respect to the "significant manner" test with the additional requirement being that the aggravation of symptoms be "significant." The Court said that in aggravation of symptoms cases the award will "usually [be for] a limited period" until the symptoms subside. The Court distinguished *Farrington* by saying that the Supreme Court's statement there that an aggravation of symptoms does not suffice under the "significant manner" test was *dicta*. The Court of Appeals also distinguished *Farrington* by saying that it was a cardiac case.

Continued on page 8

Continued from page 7

ERISA Preemption of Coordination Of Benefits Provision?

In *Scheuneman v General Motors Corp (On Remand),* ___ Mich App ___ (CA Docket No 199831, released for publication November 3, 2000), the Court of Appeals addressed plaintiff's contention that the Act's coordination of benefits provision was preempted by the federal law, specifically the Employee Retirement Income Security Act (ERISA). The Court concluded that ERISA did not preempt the coordination of benefits provision. Consequently, the Court affirmed the Appellate Commission's holding that the employer properly coordinated plaintiff's benefits.

Plaintiff's argument was that ERISA supercedes any and all state laws insofar as those state laws "relate to" an employee benefit plan. The Court of Appeals found that the coordination of benefits provision does not affect the administration of the pension plan, but only affects the amount of workers' compensation benefits paid. The Court said that the amount of workers' compensation benefits paid is traditionally an area of state authority. The Court said that since Michigan's workers' compensation act has no effect on the amount of benefits paid under the pension plan, there was no ERISA preemption.

Nursing Care Benefits For Being On-Call And The Two-Year-Back Rule

In *Reagan v Detroit Board of Education*, ___ Mich App ___ (CA Docket No 218475, released for publication November 3, 2000), the Court of Appeals addressed a controversy over nursing care benefits that had been the subject of many remands over the years.

Plaintiff's wife was a nursing assistant or nurse's aide and cared for plaintiff until his death. She claimed nursing care benefits, including benefits for the time when she was "on-call" full-time to provide care for her husband. The employer contended that nursing care benefits were only permissible for the precise time that the wife spent changing bandages, feeding, bathing, administering medication, and performing similar tasks. Plaintiff's contention was that, beyond the time spent on those tasks, the wife was entitled to nursing care benefits for the time when she was available to care for her husband even if she was not directly providing care at every moment.

The Court of Appeals said that the time spent merely on-call is compensable if such on-call care is necessary. The Court remanded the case to the Commission for that determination. In so doing, the Court noted that there is a "difference between necessary care and available care." The Court said that proof of necessity, not availability, is the key. Therefore, even though "injured workers . . . can delay their need for care until the time when care is available" that does not mean that such care was unnecessary.

The Court addressed the additional question of whether the two-year-back rule applies to nursing care benefits premised upon an injury date prior to the enactment of the present two-year-back rule. The Court said that the present two-year-back rule applies retroactively to prior injury dates. The Court also said that since the present two-year-back rule limits the payment of "any compensation," that includes medical care and nursing care benefits. For these reasons, the Court affirmed the holding that the award of nursing care benefits was limited to two years preceding the wife's petition for nursing care benefits.

"Threat To Industry" Proofs In Obtaining Reimbursement From The Fund

In *Alston v Chrysler Corporation/Silicosis, Dust Disease & Logging Industry Compensation Fund*, ___ Mich App ___ (CA Docket No 223923, released for publication November 3, 2000), the Court addressed a claim for reimbursement against the Fund under §531, which requires the Fund to reimburse employers for compensation paid in excess of $25,000 or 104 weeks of weekly compensation (whichever is greater) if the disability or death is from silicosis or other dust disease, or an injury incurred in the logging industry.

Chrysler contended that plaintiff was disabled by pneumoconiosis and that the Appellate Commission erred by requiring Chrysler to prove that pneumoconiosis was a threat to the automobile industry before it could obtain reimbursement from the Fund. The Court of Appeals disagreed with the employer and affirmed the Commission.

The Court held that to obtain reimbursement Chrysler must prove a "threat to the industry" except where pneumoconiosis (or silicosis or phthiss) results from employment in an industry "involved in mining, quarrying, or grinding." Where pneumoconiosis, silicosis, or phthiss (or other dust disease) results from any other industry, then "actual proof of an economic threat to the industry is required" before the employer can obtain reimbursement. The Court acknowledged that the "threat to industry" language was not found in the language of the statute, but said that it does derive from case law interpreting the phrase "silicosis or other dust diseases," most notably *Felcoskie v Lakey Foundry Corp*, 382 Mich 438; 170 NW2d 129 (1969).

Chapter 9's Notice Provision

In *Robinson v General Motors Corp,* ___ Mich App ___ (2000)(CA Docket No 215664, released for publication August 25, 2000), the Court of Appeals addressed a Chapter 9 notice question.

The employee was certified as vocationally handicapped (or "vocationally disabled") under Chapter 9. He filed for workers' compensation benefits against his employer, who initially disputed the claim but ultimately entered into a voluntary payment agreement. After doing so, the employer wrote the Fund describing the voluntary payment agreement and requested reimbursement under Chapter 9. The Fund rejected the request on the basis that the employer had not provided the Fund with timely notice as required by § 925(1). This provision says that "not less than 90 or more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the Fund whether it is likely that compensation may be payable beyond"

one year from the date of injury.

Upon being refused reimbursement, the employer filed an application against the Fund. The Appellate Commission rejected the requested relief on the basis that the employer had not satisfied the statutory notice requirement.

The Court affirmed the Commission. The Court emphasized that the statutory notice provision was mandatory. The Court recognized that the notice provision was "silent on the consequences of an employer's failure to give notice to the Fund," but felt that the sanction of dismissal was necessarily implied from the statute.

Appellate Procedure Before The Appellate Commission

In two cases, the Court of Appeals has addressed procedural questions relating to prosecuting appeals before the Appellate Commission.

In *Brooks v Engine Power Components, Inc,* ___ Mich App ___ (2000)(CA Docket No 213999, released for publication May 9, 2000), the Commission had dismissed plaintiff's appeal for failure to file transcripts in a timely manner and also subsequently denied plaintiff's motion for reconsideration of that ruling.

The Court of Appeals reversed the Commission on the basis that it abused its discretion in dismissing the appeal.

The underlying facts were as follows. Plaintiff timely appealed an adverse decision from the Magistrate and ordered the transcripts from Shultz Reporting. Six weeks later, Shultz Reporting informed counsel that it no longer processed transcripts for Grand Rapids workers' compensation matters and that Dolman Technologies Group now handled those matters. Counsel then mailed a letter to Dolman requesting that it prepare the transcripts.

Sometime later, the Commission noted that it had not received the transcripts or a request for an extension of time to file such transcripts and, for that reason, was dismissing the case.

The Court of Appeals relied on orders from the Supreme Court, which they indicated were binding precedent, to conclude that the Commission abused its discretion. The Court said that counsel could rely upon Dolman to either file the transcript timely or, alternatively, to advise counsel that the transcript would be filed late. The Court said that, although counsel could have anticipated that a delay might occur and moved for an extension of time to file the transcripts, the Court would nevertheless find that the untimeliness was due to reasons beyond the control of counsel. [But, see discussion of a decision released by the Worker's Compensation Appellate Commission in *Robinson* below].

In *Boardman v State of Michigan, Dept of State Police*, ___ Mich App ___ (2000)(CA Docket No 216319, released for publication November 21, 2000), the Court addressed an issue relating to preservation of issues before the Commission.

The underlying facts of the case were that the employee had parked in the employer's parking lot and had walked a considerable distance carrying to the workplace heavy items for a Christmas party. It was exceptionally cold that day, the temperature being several degrees below zero. Upon arriving at his workstation, the employee complained of chest pains. An ambulance was called. The employee died in the ambulance from cardiac arrest.

The employee's spouse filed a claim for death benefits. The Magistrate found that the exposure to the cold contributed to the deceased's heart failure in a significant manner, but that the cold did not constitute an employment-related event. On that basis, the Magistrate denied benefits.

The plaintiff – and only the plaintiff – appealed to the Commission. The Commission agreed with plaintiff's argument that, given §301(3)'s coming-and-going provision, the decedent's exposure to cold was work-related. The Commission disagreed with the Magistrate that exposure to cold was a "significant" factor in the decedent's death. The Commission found that the decedent's exposure to cold was at most a minor factor, given that plaintiff was a high-risk coronary patient and "a walking invitation to a heart attack." The Commission ruled, however, that since the Magistrate had specifically found that cold was a significant factor and since the employer had not appealed or cross-appealed that particular finding by the Magistrate, plaintiff prevailed.

The employer argued to the Court of Appeals that it had not waived consideration of the work-relationship issue by failing to file an appeal or cross-appeal regarding the issue. The Court of Appeals agreed with the employer.

The Court said that the Commission wrongly "concluded that its hands were tied as far as rendering a different finding of fact or conclusion of law regarding the application of the significant-manner test." The Court said that the employer's responsive brief as an appellee at the Commission level contended that there was competent, material, and substantial evidence on the whole record to support the decision denying benefits and that sufficed to preserve the issue. The Court cited cases to support the idea that a party is not required to file a cross-appeal to urge affirmance on an alternative ground.

WORKERS' COMPENSATION APPELLATE COMMISSION

Petitions To Stop Compensation

In *Reiss v Pepsico Metropolitan Bottling Works,* 2000 ACO 312, the Commission decided an important case relating to petition to stop procedures.

The employer filed a petition to stop arguing that pursuant to *Haske v Transport Leasing, Inc, Indiana,* 455 Mich 628; 566 NW2d 896 (1997), was no longer liable for plaintiff's disability because the disability had ceased to be related to the work injury. The plaintiff resisted the petition on the basis that it did not comply with Administrative Rule 10, which is the Bureau's administrative rule setting forth requirements for petitions to stop. The petition to stop administrative rule at issue in this case was the rule as it read prior to its amendment on May 11, 1999. Prior

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to its amendment, the petition to stop rule read:

> When compensation is being paid under an order or award of the administrative law judge or appeal board, compensation shall not be discontinued or reduced without a further order or award, except as provided in subrules (3) and (4) of this rule. A petition to stop compensation shall include both of the following:
>
> (a) Proof of payment of compensation to within 15 days of the date of the filing of a petition to stop compensation.
>
> (b) An affidavit which sets forth the fact that the employee has returned to gainful employment and which substantially describes the nature of the employment, or a signed statement from a physician stating that the employee is able to return to his former employment.

Effective May 11, 1999, this administrative rule was changed. It now reads as follows with the

Italicized portions representing the changes from the prior rule:

> If compensation is being paid under an order or award of the magistrate or worker's compensation appellate commission, then compensation shall not be discontinued or reduced without a further order or award, except as provided in subrules (3) and (4) of this rule *and sections 301(5)(b) and 361(1) of the act*. A petition to stop compensation shall include both of the following:
>
> (a) Proof of payment of compensation to within 15 days of the date of the filing of a petition to stop compensation.
>
> (b) An affidavit stating that the employee has returned to gainful employment and substantially describing the nature of the employment, or a signed statement from a physician stating that the employee is *able to return to employment* (emphasis added).

The Commission said that this amended rule resolves some problems that had resulted from the old administrative rule, but did not resolve the specific problem posed in this case. Even the amended rule "still does not allow an employer to file a petition to stop benefits where the disability is no longer due to work or based on failure to accept employment or rehabilitation."

The Commission then undertook a historical analysis of Administrative Rule 10, finding that at one point it was considered unconstitutional. The Commission concluded saying that the employer could pursue the petition to stop, explaining:

> . . . this rule continues to haunt the system today because it has been tortured to fit circumstances for which it was not designed. By repeatedly re-enacting the rule even in amended form, the Bureau has never matched the text of the rule with any gap in the statutory or case law provisions concerning stopping compensation.
>
> . . . As a result, Rule 10 cannot be binding to the extent it purports to limit the legal and factual grounds for stopping compensation. The magistrate did not err in allowing defendant's Petition To Stop to proceed.

Voluntary Payments

The Court of Appeals remanded the case *Morley v General Motors Corporation* to the Commission for further consideration, after granting a motion to intervene filed by the Director of the Bureau. This case involves an alleged late payment pursuant to a voluntary pay agreement. The broad issue involved is the issue of whether voluntary pay agreements are enforceable under the Act.

Termination For Good Cause Or A Refusal To Work?

In *Castillo v Holiday Inn of Holland*, 2000 ACO #522, the Commission decided a case on remand from the Court of Appeals. The Commission was directed to apply the reasonable employment trilogy of *Russell v Whirlpool Financial Corp*, 461 Mich 579; 608 NW2d 52 (2000); *McJunkin v Cellasto Plastic Corp*, 461 Mich 590; 608 NW2d 57 (2000); *Perez v Keeler Brass Co*, 461 Mich 602; 608 NW2d 45 (2000). In doing so, the case brought forth the differences in *Russell* and *Perez*.

The Commission explained the tension between the two cases and its summary of the holding of each case as follows:

> Resolution of this case on remand comes down to the question of whether what occurred between plaintiff Adolfo Castillo and employer Holiday Inn of Holland in December 1996 is more like the facts in *Russell*, or more like the situation in *Perez*. *Russell* holds that an employee is entitled to a resumption of wage loss benefits when he or she involuntarily loses his or her reasonable employment, performed for less than 100 weeks, for whatever reason. Under a situation such as found in *Russell*, an employee terminated for good cause is entitled to a resumption of weekly benefit payments. *Perez*, on the other hand, holds that a refusal of reasonable employment produces a suspension of weekly benefit entitlement, with such suspension continuing until the employee makes a good faith effort to end the period of refusal. Under *Perez*, the only relevant consideration on the matter of refusal is the action of the employee. If the employee has commenced a period of refusal, subsequent withdrawal of a reasonable employment offer by the employer does not produce a

resumption of weekly benefit entitlement. To be entitled to reinstatement of weekly benefits, the employee must end the voluntary absence and demonstrate that it has ended.

There is an obvious tension between *Russell* and *Perez*, and it occurs when an employee knowingly engages in conduct which leaves the employer no choice but to end the reasonable employment relationship. When an employee takes action which necessitates termination, the fact finder must decide whether the job was taken away involuntarily or the employee constructively refused the job. Such a constructive refusal occurs when the employee's actions reveal the lack of a good faith effort to perform an integral part of the proffered reasonable employment. That is precisely the question we face in this case. Did Mr. Castillo have his reasonable employment taken away by the employer involuntarily, or did his actions constitute a refusal of the job?

The Commission then examined the factfinding of the Magistrate. That factfinding was that plaintiff knowingly and "persistently" engaged in conduct designed to avoid performance of the reasonable employment offered by the employer. The Magistrate found that the employer had made "extensive efforts" to provide reasonable employment, but plaintiff responded with a "pattern of conduct" that indicated an unwillingness and refusal to perform the work. The Commission concluded by saying:

Based upon the analysis provided by the magistrate, this case presents a situation akin to *Perez*. Plaintiff knowingly and "persistently" engaged in conduct designed to avoid performance of the reasonable employment offered by the employer. Despite the extensive efforts by the employer to provide such employment, Mr. Castillo engaged in a pattern of conduct that lead the magistrate to conclude that he refused that employment. His conduct allowed the magistrate to disbelieve his statements that he somehow was willing to return to work.

Incapacitation From Earning At Least One Week

In *Baker v Pemco Diecasting Corp*, 2000 ACO #449, the employer argued that the employee had not lost enough days from work to qualify for benefits under Section 311. Section 311 reads:

No compensation shall be paid under this act for any injury which does not incapacitate the employee from earning full wages, for a period of at least 1 week, but if incapacity extends beyond the period of 1 week, compensation shall begin on the eighth day after the injury. If incapacity continues for 2 weeks or longer or if death results from the injury, compensation shall be computed from the date of the injury.

The Commission said that "the language of section 311 does not impose a re-qualification period every time an employee goes off work as long as he or she has previously lost seven consecutive days' wages as a result of the injury." Therefore, the Commission affirmed the Magistrate's award of five days of weekly compensation benefits because plaintiff had earlier missed consecutive months of work due to the same work injury.

Seasonal Employment

In *O'Brien v Muskegon Area Intermediate School District*, 2000 ACO #448, the employee suffered a work injury at a year round job. She returned to "reasonable employment"/favored work. The favored job paid her wages equal to or greater than her original job. But, the favored job was not year round – she had the summer months off. Plaintiff worked more than 250 weeks at this favored job. The question presented was: whether the employer is liable to pay benefits during the summer months when the reasonable employment was not available?

The Magistrate held that the employer was liable. The Commission affirmed. The Commission said:

In this case, the employment to which plaintiff returned after her injury is different in character from her original job. Her job now is seasonal, lasting only during the regular school year and not year round. Although this job represents a new wage earning capacity according to the findings of the magistrate, it replaces the wages of her original job for only three-fourths of the year. To the extent that plaintiff is unable to earn wages during the summer, her new wage earning capacity does not replace her former wages.

As a result, the magistrate was correct when she determined that plaintiff's new wage earning capacity does not deprive her of wage loss benefits during the summer months when she is unable to work because of her injury.

Jurisdiction Over Labor Broker Versus Employer

In *Hubbard v Laidlaw Transit Co*, 2000 ACO #406, an employee was killed at work on his first day at the job. He worked for Laidlaw through a labor broker [Staffing America]. His dependents filed for death benefits against Laidlaw. Laidlaw redeemed.

After the redemption, Laidlaw filed an application at the Bureau seeking reimbursement for the monies paid to redeem their liability from Staffing America. The Magistrate held that Laidlaw had no right to proceed against Staffing America. Laidlaw appealed.

The Commission reversed. The Commission noted that, first, the Bureau generally has jurisdiction to determine who is the employer in labor-broker situations. The Commission then addressed the closer question of whether Laidlaw's redemption precluded it from proceeding with its reimbursement claim against Staffing America.

The Commission held that Laidlaw could pursue such reimbursement. The Commission said that, given the redemption,

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the employee was no longer an indispensable party because he had no interest in the outcome of the claim by Laidlaw against the labor broker. The Commission also said that there is no case law or statutory provision that requires Laidlaw to join the labor broker prior to a redemption, although "the preferable method of proceeding is to join all potentially responsible parties prior to settlement, simply for the sake of judicial economy and consistency of results."

Post-*Brooks* Decision Regarding Dismissals For Failure To File Transcripts

In *Robinson v Wayne County,* 2000 ACO #332, the Commission decided a case involving a dismissal of an appeal for failure to file the transcripts or a timely request for a transcript extension.

Recall that in *Brooks* the Court of Appeals had said that an appealing attorney could rely upon the court reporter to either file the transcript timely or, alternatively, to advise counsel that the transcript would be filed late, all as described above under the "Court of Appeals" section. The Commission distinguished *Brooks* in the case of *Robinson* on the following basis.

In *Brooks*, the dismissal had occurred when the Commission policy obligated court reporters to file transcripts. The current Commission policy requires the appealing attorney to file the transcripts. The Commission said that under its current rules, "reliance on the court reporter cannot continue." Therefore, the appeal was dismissed.

The Commission did note, however, that it routinely grants extension requests when transcripts have been ordered and payment for them has been made.

Avoidance Of Lesser Paying Post-Injury Work Bars All Weekly Benefits

In *Shrider v Michigan Motor Exchange*, 2000 ACO #504, the Commission addressed a work avoidance ruling by the Magistrate. The Magistrate had concluded that plaintiff was avoiding available work by sabotaging an employment interview, an interview for a job that would have paid less than plaintiff had been earning at the time of his work injury. The Magistrate granted an open award at a reduced rate reflecting what plaintiff could have earned at the lesser paying job. Both the plaintiff and defendant appealed.

Plaintiff appealed on the basis that there was insufficient evidence to support a finding that he was avoiding work. Plaintiff also argued that the Magistrate did not have jurisdiction to resolve this issue because it related to vocational rehabilitation under Section 319. The employer appealed to argue that the Magistrate should have denied all benefits for work avoidance.

The Commission agreed with the Magistrate that plaintiff was avoiding available work by doing such things as reporting intoxicated at a job interview for a security guard position. The Commission also agreed that the Magistrate was correct in concluding that the question of "whether or not his conduct amounted to avoiding work" was different from vocational rehabilitation under Section 319.

The Commission in a 2 – 1 split did not agree that plaintiff was entitled to ongoing partial rate of compensation. Instead, the majority of the Commission denied plaintiff all benefits. The Commission said that "mitigation is an obligation" of the employee. And, "because by reporting to the interview intoxicated for a job as a school security guard, [plaintiff] guaranteed there would be no job offered." On this basis, the Commission held that the penalty for avoiding work, even though lesser paying, should be the same as the penalty for refusing reasonable employment under Section 301(5)(a).

The dissenting Commissioner said that the Magistrate reduced benefits on the basis of *Haske*'s discussion of work avoidance and Section 301(4), the definition of disability. Since *Haske* does not deal with Section 301(5)'s reasonable employment provisions, the dissent would affirm an ongoing partial rate rather than deny all benefits as in Section 301(5)(a).

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