



Recent Case Developments

MI SUPREME COURT

Tax Records/Employment Relationship

Loos v J.B. Installed Sales, Inc.

In *Loos v J.B. Installed Sales, Inc.*, the Supreme Court (in lieu of granting leave to appeal) reversed Court of Appeals and reinstated the decision of the worker's compensation magistrate. The Supreme Court ruled that the Court of Appeals improperly held that income tax records, regarding whether the plaintiff was paid wages or nonemployee compensation, are irrelevant to the question of whether the plaintiff is an employee under MCL 418.161(1)(n). The Supreme Court held that such records are directly relevant to the question of employee status. The Supreme Court cited *Blanzy v Brigadier*, 240 Mich App 632 (2000) and *Betancourt v Ronald Smith*, 1999 ACO #608.

Social and Recreational

Buitendorp v Swiss Valley, Inc.

In *Buitendorp v Swiss Valley, Inc.*, the Court (in lieu of granting leave to appeal) vacated the decision of the Workers' Compensation Appellate Commission (WCAC) and remanded the case to the worker's compensation Board of Magistrates for reconsideration under the proper legal standard. The Supreme Court ruled that the magistrate and WCAC employed an improper legal framework in analyzing the facts of this case by assessing whether the major purpose of the plaintiff's *overall* activities were work related. Under MCL 418.301(3) and *Eversman v Concrete Cutting & Breaking*, 463 Mich 86 (2000), the major purpose of the plaintiff's activity *at the time of injury* determines whether the social or recreational bar applies.

Out-of-state injuries/Retroactive Application

Bezeau v Palace Sports & Entertainment and Brewer v A.D. Transport Express, Inc.

In *Bezeau v Palace Sports & Entertainment and Brewer v A.D. Transport Express, Inc.*, the Supreme Court recently heard oral arguments on the issue of whether the jurisdictional standard established at MCL 418.845, as interpreted by the Supreme Court in *Karczweski v Farbman Stein Co*, 478 Mich 28 (2007), should be applied in this case. The issue pertains to "out-of-state" injuries and the

Supreme Court was asked to retroactively apply the statute.

COURT OF APPEALS

Intentional Tort Exception

Fries v Mavrick Metal Stamping, Inc.

The Court of Appeals in *Fries v Mavrick Metal Stamping, Inc.* issued an opinion concluding that the exclusive remedy provision of the Workers' Disability Compensation Act did not preclude plaintiff's claim of an intentional tort. The claimant sustained amputations of both of her arms when loose clothing that she was wearing triggered sensors on a stamping press. The Court of Appeals affirmed the Circuit Court's order denying defendant's motion for summary disposition as the claimant had presented evidence to suggest that the employer was aware of the problem involving the press some two years prior to the claimant's injury. There was also testimony presented that the manufacturer of the press had offered safety guards to prevent this problem but the employer failed to install them. Given these suggested facts, the Court concluded that

CONTENTS

Recent Case Developments Michigan Supreme Court to the Appellate Commission Level.
Page 1

Ask the Attorney - Have a legal question about a worker's compensation matter?
Page 6

Legislative/Case Watch A look at introduced and pending legislation that can impact Workers' Compensation in Michigan.
Page 6



a reasonable jury could conclude that the employer had actual knowledge that an injury was certain to occur and willfully disregarded such knowledge which could satisfy the claim of an intentional tort.

Acceptance of Retirement Package/Not Considered Removal From Workforce

McCrorey v General Motors Corp. (Unpublished)

In an unpublished opinion, McCrorey v General Motors Corp, the Court of Appeals affirmed the Magistrate's award of benefits. The defendant had argued that the claimant had voluntarily removed himself from the workplace when he accepted a retirement package offered to him while recovering from back surgery due to a work-related injury. Defendant's position was that the claimant's wage loss following acceptance of the retirement package was no longer attributable to the work injury. In rejecting these arguments, the Court of Appeals concluded that while the claimant had "voluntarily removed" himself from the workforce, there was no indication that the claimant had been offered or was performing reasonable employment when he accepted the retirement proposal. The Court concluded that the removal provisions pertain to situations where an employee receives a bona fide offer of reasonable employment (favored work) and refuses that employment without a good or reasonable cause. In such instances, the employee will be considered to have voluntarily removed himself or herself from the workforce and no longer entitled to wage loss benefits.

The Court of Appeals also rejected defendant's argument that the claimant failed to establish that he had a wage loss attributable to his work injury. The Court concluded that it was clear that even prior to the claimant's acceptance of the retirement offer, he was not able to work due to his previous injury. Acceptance of the retirement proposal did not change that fact.

Causal Relationship/Arising out of and in the Course of/ Idiopathic Fall

Harris v General Motors Corporation (Unpublished)

In another unpublished decision, the Court of Appeals, in *Harris v General Motors Corporation*, affirmed a denial of benefits. The employee suffered a fatal head injury near the end of his shift when he fell backwards onto the floor of the men's bathroom at the plant. There was no dispute that the fall caused the fatal injuries; the sole issue was whether the employee's fall was work related or an idiopathic fall attributable to some personal cause. A co-worker testified that he was walking from the urinals to the sink when the employee entered the men's bathroom and headed to the urinals. The witness was washing his hands when he suddenly heard a loud thud, and then saw the employee laying on the floor. There was no water or other foreign substances on the floor that would make it slippery.

The medical examiner performed an autopsy and determined that the cause of death was a blunt force trauma to the back of the head. There was no evidence that the employee suffered an aneurism or stroke before falling, but he also could not rule out the possibility that the fall was caused by a slowed heart beat. He acknowledged that when people slip and fall there is an instinctive attempt to protect their head with their hands and arms and that there was no sign that the employee had done so in this case. A defense medical expert believed that the fatal injuries were caused by a direct fall to the ground unrelated to any slipping or tripping. The employee had a history of high blood cholesterol and a family history of heart disease. He also had an unusually slow heart rate, which could have caused him to become dizzy and fall. He had complained of a headache and neck pain within a week prior to the fall.

The Court of Appeals held that the Appellate Commission did not commit legal error in affirming the magistrate's denial of benefits in this case. It was incumbent upon the Plaintiff to show a causal relationship between a work related event and the employee's injury or that the injury was somehow aggravated by the conditions at work. An injury of an unknown or idiopathic nature is not compensable simply because it occurred while the employee was in the course of employment on the



employer’s premises. An injury does not “arise out of” the employment unless some causal relationship exists between a work related event and the disabling injury. As a general rule an injury does not arise out of the employment where the predominant cause of the harm was attributable to personal factors and the circumstances of the employment did not significantly add to the risk of harm.

WORKERS' COMPENSATION APPELLATE COMMISSION

En Banc Decision/Wage Loss/Work-Related Injuries

Epson v Event Staffing, Inc. (En Banc)

In a 3-1 decision, the Appellate Commission in *Epson v Event Staffing, Inc.* 2009 ACO #152 (En Banc), considered whether the claimant established a wage loss directly attributable to a work-related injury. En banc decisions involve situations where all members of the Commission participate in the consideration of the claim. Such decisions are considered to have precedential value under section 274 of the Workers' Compensation Act.

A professional Arena League football player sustained a left foot injury in January 2006 during a team scrimmage. The injury required surgery and the claimant was bedridden for 3-4 months following the surgery. He also required in-house nursing care.

The claimant was paid workers' compensation benefits from January until May 2006, the end of the Arena League football season. The defendant took the position that he was not entitled to weekly workers' compensation benefits during the off-season, when he would not be playing football and experiencing a wage loss. The Magistrate relied upon the Michigan Supreme Court's decision in *Gasparick v H C Price Construction Co.*, decided in 1976, holding that seasonal

workers are entitled to year-round wage loss benefits. On appeal, the defendant pointed to the recent decision by the Court of Appeals in *Raybon v DP Fox Holdings, LLC*, concluding that under section 301(4) of the Act, there must be a causal connection between the wage loss and the work injury to establish ongoing entitlement to benefits.

A majority of the Commission agreed highlighting the fact that the Supreme Court had previously disavowed the concept that a claimant was automatically entitled to wage loss benefits regardless of the reason for his/her unemployment. Under section 301(4), to establish a wage loss, an employee must also prove that the wage loss is attributable to the professed work injury. Disability and compensable wage loss are separate issues. The claimant must establish a connection between the wage loss and the work injury. While seasonal employees are not automatically disentitled to benefits during the off-season, they still need to show that their professed disability is the reason for their alleged wage loss. In this particular case, the majority concluded that the matter had to be remanded back to the Magistrate on the limited issue of whether the claimant had established such a link.

Attendant Care/Rule V Hearings

Heck v General Motors Corp.

The plaintiff was initially awarded general disability benefits by order entered in 1985. The award also provided for reasonable and necessary medical expenses. There was no claim for attendant care at that time. Subsequently, in 1992, by order, plaintiff was awarded total and permanent disability benefits for loss of industrial use of both legs. Then, in 2008, the plaintiff filed an Application for Mediation/Hearing seeking attendant care services. He also then filed for a Rule V request with the Director for failure to pay medical benefits.

Plaintiff's position before the Director was that the original award for medical care included attendant care. The Director conducted a Rule V hearing and concluded



ed that the plaintiff was entitled to reasonable and necessary attendant care services and also ordered the defendant to pay a \$1,500.00 late payment penalty for not complying with the prior order directing payment of medical benefits. The defendant appealed the Director's decision which was ultimately decided by a Magistrate pursuant to section 837. The Magistrate disagreed with the Director's findings. The Magistrate concluded that an award of reasonable and necessary medical expenses does not include attendant care services. It was further noted that the testimony presented suggested that the need for professed attendant care services was the result of the claimant's Parkinson's disease and had nothing to do with the claimant's work injury. The Appellate Commission agreed and affirmed the Magistrate's decision vacating the Director's order.

Wage Loss/Work Injury/Causal Connection

Schooler v Northwest Airlines, Inc.

The plaintiff was a pilot for the defendant employer. On January 5, 2004, while flying from Milwaukee to Minneapolis, the claimant suffered a seizure. He was fastened into his seat at the time of the seizure as a result of regulations. Because of his seizure, he jerked and twisted forward which resulted in a burst fracture involving his low back. The Magistrate found that the claimant had established a work-related injury and disability. The Magistrate also awarded attendant care services but denied plaintiff's request for an attorney fee from the defendant for recovering the attendant care benefits.

In three separate decisions, the Appellate Commission ultimately remanded the matter back to the Magistrate on the issue of whether the claimant's wage loss was attributable to the work injury. In concurring decisions, the Appellate Commission highlighted the case of *Epson v Event Staffing, Inc*, in which the distinction was raised between the fact that the claimant needed to establish that the wage loss was directly attributable to the work injury. It was noted that the claimant's seizure had resulted in disability in and of itself and its temporal relationship to the back injury may suggest that

the wage loss was not directly attributable to the found work injury.

Disability/Vocational Testimony

Binkley v Alstom Power, Inc.

In a 2-1 decision, the Appellate Commission reversed the Magistrate's award of benefits. The majority concluded that the plaintiff failed to satisfy the Stokes disability analysis.

The claimant had a ninth grade education and worked as a boilermaker most of his adult life. He also worked as a foreman supervising other boilermakers. The claimant sustained a work injury on December 1, 2006, when he slipped and fell on some ice. The majority agreed that there was no question that because of his work injury, the claimant was limited to sedentary work and could no longer work as a boilermaker where he earned his highest average weekly wage. However, there was testimony presented by the defendant's vocational expert suggesting that his work as a boilermaker included transferrable skills. The plaintiff did not submit any vocational testimony and acknowledged that since his work injury, his job search efforts were very limited. The majority rejected the Magistrate's attempted "common sense" approach to conclude that the claimant's transferrable skills would preclude him from earning what would duplicate or exceed his wages as a boilermaker. Having failed to sustain his burden of proof, benefits were denied.

Reasonable Employment Offer/Wage Loss

Crandall v Oakwood Health Care

The plaintiff, a registered nurse, suffered work-related back, right shoulder, hip, and neck injuries. She was treated at an occupational clinic and returned to work the following week with restrictions. She continued working for several weeks passing out medication, when she was terminated for not meeting the hospital's expectations.



There was some initial consideration regarding whether the defendant had made a bona fide offer of reasonable employment to the claimant. The Magistrate apparently spent a great deal of time addressing this issue. However, the Commission did note that the vocational testimony presented revealed that prior to obtaining her bachelor's degree in nursing, the claimant worked for approximately 20 years as a secretary. In addition, while in nursing school, the claimant also worked as an aide at a medical center. She had significant earnings while working for the defendant as a nurse, earning approximately \$60,000.00 a year at the time of her injury.

The Commission highlighted the fact that even defendant's vocational expert agreed that based upon the claimant's restrictions and transferrable skills, he could not find employment for her that would pay her pre-injury maximum wage. He was hopeful that, over time, she might eventually earn at or above her prior salary. However, he could not identify any work within the claimant's qualifications and training that would suggest that she had no wage loss. Consequently, the Appellate Commission did ultimately affirm the Magistrate's decision awarding benefits.

Timely Claim Made/Award of Wage Loss Benefits Reversed

Boykins v General Motors Corporation

In another 2-1 decision, the Commission found that the claimant made a timely claim of her alleged work-related back injury but failed to establish disability under the Stokes criteria.

The claimant last worked for the defendant in June 2000 and subsequently took a total and permanent disability pension for non-occupational depression. She then filed an Application for Mediation/Hearing with the Workers' Compensation Agency in March 2007 seeking workers' compensation benefits for alleged orthopedic injuries. The Magistrate awarded continuing benefits subject to the application of the one year back rule (even though workers' compensation benefits were never paid). The Commission majority found that time-

ly claim had been made as the defendant was acutely aware of the claimant's orthopedic problems as she regularly treated at the plant medical department claiming that those conditions were work-related. The majority agreed with the defendant that the Magistrate did not adequately address the Stokes criteria. He made no attempt to describe the claimant's qualifications and training. He did not define what jobs the claimant was qualified and trained to perform within the same salary range as her maximum earning capacity at the time of her injury. Consequently, he was unable to determine whether the work-related condition prevented the claimant from performing all of the applicable jobs. Furthermore, there was no testimony to support the conclusion that the plaintiff was not able to perform her regular job on her last day of work because of her alleged work-related difficulties. The majority concluded that "at best, some of the medical testimony suggested that the plaintiff has a work-related medical impairment" but there was not enough evidence presented to assess whether these impairments prevented the claimant from performing some or all of the jobs identified as being within her qualifications and training. In addition, the claimant did not indicate whether she had looked for work and was unable to demonstrate that some of the work that she might be able to perform, even taking into account her supposed restrictions, was unavailable to her. Consequently, the majority modified the award of the Magistrate to delete the award of wage loss benefits. The claimant remained entitled to medical benefits for her work-related injury.

Application of Rakestraw/Preexisting Work-Related Conditions

Woods v Eaton Corporation

In a third 2-1 decision, the Workers' Compensation Appellate Commission remanded this matter to the Magistrate for additional analysis -- but no further proofs -- in terms of whether the plaintiff established that his preexisting low back condition had been aggravated by his work activities to result in a last day of work date of injury. The Commission majority found that the Magistrate improperly concluded that Rakestraw v Gen Dy-



namics Land Systems, Inc, did not apply in this case. In Rakestraw, the Supreme Court considered what constituted a "personal injury" under the Workers' Compensation Act and concluded that there must be a finding of "medically distinguishable changes" or pathological changes to support such a conclusion. This is not limited to situations as suggested by the Magistrate in this case involving preexisting conditions which were work-related. Each alleged injury must be analyzed under the Rakestraw criteria.

Disability/Failure of Proofs of Remand

Coulter v General Motors Corporation (WCAC)

This matter returned to the Appellate Commission following remand to the Magistrate to consider application of the Sington/Stokes standard of disability. On remand, the Magistrate, once again, concluded that the claimant was entitled to continued benefits. The Commission disagreed concluding that the claimant failed to present any proofs on remand to establish her qualifications and training to determine what jobs she might be capable of performing, including jobs that she may have never performed in the past. The claimant also did not offer any evidence regarding attempts to secure work following her alleged disability. Consequently, the Commission reversed the award of wage loss benefits but concluded that the claimant was still entitled to reasonable and necessary medical care for her work-related injury.

Ask the Attorney

What is the significance of the Trammel v Consumers Energy case?

The issue in *Trammel* was whether a claimant's non-amputated left leg should be evaluated in a "corrected" or "uncorrected" state when determining whether the claimant is entitled to specific loss benefits under Sec. 361 of the Act. The Appellate Commission unanimously upheld the magistrate's decision to apply the analysis

to the "uncorrected" state.

What this means in practical terms is that a magistrate will look to the evidence to see if a claimant has lost the industrial use of the extremity or body part before any corrective surgery. If the claimant has lost the industrial use, then he or she would be entitled to specific loss benefits under the schedule in Sec. 361 regardless of any subsequent corrective surgery.

The case was appealed to the MI Supreme Court but the Court recently denied leave on 2-26-10. This leaves open the possibility that claimants may re-file for specific loss benefits especially where there has been a joint replacement. Moreover, it leaves many unanswered questions. For example, a scenario could occur where a claimant loses the industrial use of a hand and is awarded specific loss benefits. However, because of a subsequent corrective surgery the claimant regains quite a bit of function in the hand. What if the claimant later injures that same hand; can he or she be awarded specific loss benefits again for the same hand? Or, does the employer or carrier get a credit for the specific loss benefits previously paid?

Legislative / Case Watch

MI HOUSE BILL No. 5284, which attempted to create a presumption of contribution, acceleration or aggravation in a significant manner, between lung disease or other conditions and exposure to secondhand smoke in the workplace under certain conditions, appears stalled.

SENATE BILL 0972, was introduced to clarify the coverage for chiropractic care under the worker's compensation act and tie it to the prior definition of chiropractic service as defined 1-1-2009. (See subsequent article about expanded chiropractic care under "news" section, pg. 7) The bill was signed into law effective 1-5-10.

MI HOUSE BILL 5687 was introduced in Dec. '09 to amend Sec. 405 of the WCA to provide for a presumption for certain firefighters and occupational cancer.



Issue 2010, Number 6

The Bill is similar to previously submitted bills in the Senate and House (i.e. **SENATE Bill 102**, **SENATE BILL 109** and **HOUSE BILL 4473**.)



Chiropractic Confusion

On January 5, 2010 Governor Granholm signed into law legislation that enlarged the scope of valid chiropractic treatment to include all of the bones, joints, muscles, tendons, and ligaments in the body, not just the spine. However, the Governor also signed into law legislation that exempts workers' compensation from this change. A carrier is responsible to pay only chiropractic treatment to the spine as that was all the law allowed on January 1, 2009.

There may be some confusion as chiropractors or employees may ask for payment for chiropractic care for a knee or an elbow which is now covered under the new legislation but excluded by the workers' compensation act. Chiropractic bills and charges will need to be carefully reviewed to eliminate uncovered charges.

Proposed Rule May Impact Upon IME's

Hearings were held in December on a proposed administrative rule change regarding requirements of physicians and health professionals who conduct independent medical examinations. The proposed rule requires that the examiner must be duly licensed in Michigan or another state. The examiner must have no history of disciplinary actions or sanctions. This includes any loss of staff privileges or participation restrictions that have been taken or are pending by any hospital, government agency/unit, or regulatory body that raises a substantial question as to his or her physical, mental, or professed competence or moral character. They must have the same or higher level of education, certification, and, if applicable, board certification as the physician or health

professional treating the claimant. The examiner must have devoted a majority of his or her professional time, during the year immediately preceding the date of the examination, to active clinical practice and/or instruction of students in an accredited health professional school or accredited residency or clinical research program, within the medical specialty most relevant to the subject of the independent medical examination.

If adopted, this rule is to become effective May 1, 2010. Obviously, the rule raises significant concerns in terms of making determinations for independent medical evaluations. For instance, the requirement that the examiner must have the "same or higher level of education, certification, and/or board certification" as the so-called treating physician can certainly call into question whether one specialty trumps another. There is also a significant concern regarding retired physicians who are able to devote their time to conducting independent medical evaluations but would now be excluded given the requirement that the examiner must spend a majority of his or her professional time in active practice. As of this writing, the rule has yet to be formally adopted but we do need to remain mindful of this potential development.

Agency Reductions

By executive order, Governor Granholm reduced the number of workers' compensation magistrates in the state from 26 to 17. This has led to a realignment of magistrates in a number of jurisdictions with several magistrates having to devote their time to conducting hearings at multiple sites. Budgetary constraints, productivity concerns, and a declining case load have been offered as justifications for these reductions. It is anticipated that efficiency concerns will continue to impact upon the Workers' Compensation Agency for the foreseeable future. Undoubtedly, these concerns may play a role in how an individual magistrate might handle his or her docket and we will need to plan accordingly.



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