Conklin Benham Newsletter

10-7-2010

Issue 2010, Number 7

Recent Case Developments

MI SUPREME COURT

Jurisdiction / Out-Of-State Injuries

Brewer v A.D. Transport Express, Inc.

This case involves consideration of section 845 of the Workers' Compensation Act concerning whether the Agency has jurisdiction to consider claims involving out-of-state injuries. The provision was amended by the Legislature in 2008 with an effective date of January 13, 2009. The plaintiff alleged a work-related injury occurring in Ohio dating back to 2003. The Court needed to consider whether the 2008 amendment applied retroactively to include plaintiff's claim.

This particular provision of the Workers' Compensation Act has a rather confusing and frustrating history. Since its original enactment in 1921, it provided that the Agency had jurisdiction over out-of-state injuries if (1) the injured employee resided in this state at the time of the alleged injury and (2) the contract of hire was made in Michigan. Despite this seemingly superficial plain reading of the statute, Boyd v WG Wade Shows held in 1993 that the requirements of both residency and a contract of hire were "unduly restrictive;" and by simply meeting one of those requirements, a claimant's case could be properly considered in Michigan. In effect, the Court interpreted the provision to require either residency or a contract of hire to have been made in the state in order for there to be jurisdiction.

Finally, in Karaczewski v Farbman Stein and Co, considered by the Court in 2007, the Boyd case was overruled and it was held that the plain meaning of the statute required that both the requirements of residency and a contract of hire would have to be met for there to be jurisdiction. In so deciding, the Court indicated that its ruling would only have prospective application and not apply to any claimants who were receiving benefits as part of a final judgment under the rationale of the Boyd decision.

However, following the Karaczewski decision, the Legislature then sought to amend section 845 to provide that the Michigan Workers' Compensation Agency would have jurisdiction over out-of-state injuries "if the injured employee is a resident of this state at the time of the injury or the contract of hire was made in this state." (emphasis added) As indicated, this amendment became effective on January 13, 2009.

In the Brewer case, the Court majority concluded that the amendment did not apply to Mr. Brewer's claim noting that the Legislature did not express an intent that it should apply to claims prior to its enactment. The provision also made specific reference to its effective date being January 13, 2009, and omitted any reference to it having prior application. The Court also noted that the Legislature clearly adopted the amendment as a reaction to the Karaczewski decision. The Court majority suggested that the amendment actually created an entirely new jurisdictional requirement stating that it may even be more expansive than as suggested by the Boyd decision. It seemed to create a new rule under which either a Michigan contract of hire or residency would suffice to warrant Michigan jurisdiction. This acknowledgment by the Court is somewhat troubling in that it could potentially open the door to a variety of unforeseen circumstances which appear not have been contemplated by the Legislature in its quick reaction to

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the Karaczewski decision. While it seems clear that the Legislature intended to put matters back to the way things were viewed under Boyd, in so doing, the Court in Brewer suggested that it may have expanded jurisdiction rather than confining it to the requirements under Boyd. The Brewer court concluded that as the amendment created a new rule of law under which either a Michigan contract of hire or Michigan residency would suffice, the amendment would only apply to claims after its effective date of January 13, 2009.

In another case yet to be decided by the Court, Bezeau v Palace Sports & Entertainment, the Court is to consider whether the judicially-created requirements or residency and contract of hire in the Karaczewski case have retroactive application.

Application for Leave Granted / Dismissal of Appeal / Failure to File Transcripts

Ferdon v Sterling Performance, Inc.

The Supreme Court recently granted leave to appeal in this case to consider whether the Appellate Commission abused its discretion in dismissing Plaintiff's appeal. The appeal was dismissed for failing to timely file with the Commission transcripts of the trial proceedings as mandated by Section 861a of the Act. The Court's order suggests that the transcript consisted of a mere 7-pages and contained no substantive information. Pursuant to its order the Court is to consider whether the Commission abused its discretion; and, if so, whether less harsh actions would have been appropriate.

Loss of Industrial Use / Joint Replacement / Specific Loss

Trammel v Consumers Energy Co.

The Michigan supreme court denied reconsideration of the application for leave to appeal in the case of *Trammel v Consumers Energy Co*. This leaves the decision by the Michigan workers' compensation appellate commission as *the* rule that a knee replacement procedure constitutes the specific loss of the leg at the time of that procedure. However, a case could be developed to revisit the problem. Specifically, a case could be developed to establish that a knee replacement is not like the surgical removal of the head of the femur and part of the socket of the pelvis and the implementation of a prosthetic joint but is simply the coating of the head of the tibia and the end of the femur. Also, it would be important to develop the idea that it is akin to the implanting of pins to promote healing of a broken or fractured bone in a hand. Certainly, the specific nature of "knee replacement" was never developed in the record or otherwise presented to the Michigan Court of Appeals or the Court.

Causal Relationship / Idiopathic and "Unexplained" Falls

Harris v General Motors

The Michigan Supreme Court denied leave to appeal to consider a case involving an employee who slipped and fell in a restroom located on the company premises. There was testimony presented at trial that it was an idiopathic or unexplained fall. What is rather interesting is that three members of the Supreme Court would have considered the application to determine whether there is, in fact, a distinction between idiopathic and unexplained falls to warrant an award of benefits.

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COURT OF APPEALS

Statutory Employment / Joinder of Parties / Re-Litigation of Claims

Bennett v Mackinac Bridge Authority et. al.

In this case, the Court of Appeals reversed a decision by the Workers' Compensation Appellate Commission and sent the matter back to the Board of Magistrates for reinstatement of the Plaintiff's claim against the Defendants. Plaintiff had alleged that while working as a painter for Allstate Painting Company, an uninsured, he injured his right knee. He initially filed a claim against the uninsured employer which resulted in an open award of benefits. However, being unable to collect from the uninsured under the terms of that award, Plaintiff then filed a claim against Defendants naming them as statutory employers.

In the subsequent claim, the Magistrate dismissed Plaintiff's application indicating that it was barred by the legal doctrine of *res judicata.* Essentially, under this legal doctrine once a claim has been decided it cannot be re-litigated. The doctrine operates as a bar to a subsequent action involving the same claim, demand or cause of action. Defendants had successfully argued before the magistrate that Plaintiff could have pursued his claim against them in connection with the original action filed against the uninsured employer. As the Plaintiff failed to pursue his claim against them at that time, his subsequent claim should be barred. The magistrate's dismissal of the subsequent petition was affirmed by the Workers' Compensation Appellate Commission. However, the Court of Appeals disagreed and believed that Plaintiff's petition alleging that the Defendants were statutory employers should be reinstated.

The Court of Appeals noted the absence of a mandatory party joinder rule in workers' compensation proceedings. Under this rule, a Plaintiff is required to bring an action against all persons or entities against which rights are claimed. The doctrine of *res judicata* was also noted to be a judicially created doctrine requiring (1) a prior decision on the merits of the claim; (2) that the issue involved was either actively resolved in the initial proceeding or could have been resolved in the first case if the parties, exercising reasonable diligence, had brought the issue forward; and, (3) that both actions were between the same parties or their privies. In ordering reinstatement of Plaintiff's petition claiming statutory employment, the Court of Appeals concluded that a mandatory joinder of parties rule in workers' compensation proceedings would subvert the supposed legislative intent as no such requirement was found in the Workers' Disability Compensation Act ("WCDA"). The Court noted examples in other statutes in which the legislature expressly required a joinder of parties in litigated claims while a similar provision did not appear in the WDCA. The Court also specifically noted provisions within the WDCA that did mandate the joinder of the Second Injury Fund in cases involving a vocationally disabled worker, as well as a former provision requiring the joining of prior employers in claims involving an occupational disease. In the Court's view, as the legislature appeared to be aware as to how to require the joinder of parties outright and had prescribed methods by which one party may compel the joinder of other parties in these other situations, but did not do so as it pertained to claims of statutory employment, such a joinder was not required. Consequently, Plaintiff should be allowed to pursue his claim against Defendants claiming they were statutory employers in this case.

Intentional Tort Exception / Injury "Certain to Occur"

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Johnson v Detroit Edison

Defendant Detroit Edison appealed from the Circuit Court's order denying a motion for summary disposition. The case involved the employee's claim of an "intentional tort" against the employer which would allow the employee to pursue a claim in Circuit Court under the exception to the exclusive remedy provision of the Workers' Compensation Act. The Court of Appeals concluded that the trial court properly denied the employer's motion for summary disposition; meaning that the employees could pursue their claim in Circuit Court. The Court of Appeals concluded that when an employee can show that (1) the employer subjects an employee to a continuously operative dangerous condition that it knows will cause injury, (2) that the employer knows that its employees are taking insufficient precautions to protect themselves against that danger, and (3) that the employer does nothing to remedy the situation, then an intentional tort claim can be pursued in Circuit Court.

The plaintiffs worked for the defendant as power plant operators. The claim was that in that capacity, they would be required to dump bottom ash from four industrial boilers or furnaces. This would result in byproducts including hot ash and unburned coal material. When the operator would open the boiler's ash gate, the ash would fall through a sluice and be carried away by running water. At times, large coals would remain and block the running waters so the operator would be required to break them loose with a long poker in order to sufficiently clear the boiler. The employees engaged in bottom ash dumping were required to wear safety glasses, hard hats, ear plugs, cotton gloves and jeans.

The plaintiffs in this case maintained that in the process of emptying the bottom ash from a boiler, the hot ash exploded and resulted in serious burns and other injuries. They claimed that at the time of the incident, two of the boiler's five gates had been broken for several months to a year. As a result, some of the doors on the gates were corroded and could not be closed all the way. This caused the ash to build up improperly behind the operating gates. The ash and coals would then tumble over the other gates and build up which plaintiffs maintained caused the blowout or explosion resulting in their injuries. The plaintiffs alleged that other employees regularly suffered minor burns as a result of this condition and that the employer was well aware of the situation. The plaintiffs contend that the situation had been present for a number of years and that prior to the incident resulting in their injuries, the employees had expressed concerns regarding the broken ash gates to management on numerous occasions at pre-shift meetings. The plaintiffs argued that management had acknowledged the dangers associated with the broken gates but later explained that there was no money to fix the problem. A union field representative also testified that management had been informed of these complaints at least a year prior to the plaintiffs' injuries. There was a plant safety meeting held just prior to the plaintiffs' injuries in which it was discussed with management how to repair the system and how to complete the job in a safe manner. According to the union field safety specialist, management agreed that something had to be done but indicated that the repairs were not in the budget. They had planned to make the repairs when funds became available.

The Court of Appeals concluded that under these facts, the defendant had actual knowledge that injuries were certain to occur as the result of the dangerous conditions that existed. It further concluded that the plaintiffs had presented evidence that the defendant failed to remedy the condition that caused their injuries despite defendant's knowledge of the condition and the oppor-

tunity to remedy it. Consequently, the Court of Appeals held that the plaintiffs could pursue their claim.

WORKERS' COMPENSATION APPELLATE COMMISSION

Reasonable Employment / Unreasonable Refusals, Voluntary Withdrawal from the Workforce

Clarke v Kerry, Inc.

The claimant suffered a work-related disability and injuries to his back and knee in a specific event occurring on January 26, 2008. Subsequently, the claimant returned to work with restrictions until mid-May 2008. He maintained that he stopped work at that time as he thought that there was no longer work available within his restrictions. He remained off work for three days and then returned to his restricted job. He worked for two more days when he was fired for failing to call in or show up for work for the earlier three day period.

The Appellate Commission concluded that the matter had to be sent back to the Magistrate as he failed to consider whether the claimant was, in fact, performing "reasonable employment" when he left work and whether he stopped performing that job for a reasonable cause. The implication being that the claimant may have voluntarily withdrawn himself from the workforce as a result of his failure to report to work during the three day period. The suggestion at trial was that the claimant thought that favored work was no longer available to him which was something that was apparently denied by the employer but not considered by the Magistrate in his decision.

The case also involved a claim of dual employment. The Commission reversed the Magistrate's determination regarding the use of discontinued fringe benefits to determine the percentage of liability between the employer and the dual employment fund. The Commission agreed with the defendant's argument that discontinued fringe benefits should not be used to determine the apportionment between the employer and the fund. The Commission affirmed the Magistrate's determination that the claimant satisfied the disability requirements under Stokes. However, it again remanded the matter back to the Magistrate for consideration in terms of whether the claimant with his subsequent return to work had refused reasonable employment and whether he withdrew himself from the workforce by that refusal.

Disability Standard / Remand Orders / Use of Vocational Testimony

Figurski v Sova Steel, Inc.

In this case, the Appellate Commission affirmed the Magistrate's opinion on remand finding that the claimant established disability under the Stokes standard. Originally, the Magistrate found that plaintiff failed to establish disability. However, on appeal, the Commission sent the matter back to the Magistrate in light of the Supreme Court's June 2008 decision in Stokes which clarified the disability standard. On remand to the Magistrate, the plaintiff provided additional testimony regarding his previous jobs, his qualifications and training, and his job search efforts. Deposition testimony was also provided by vocational experts. The Commission agreed with the defendant's argument that the testimony presented by plaintiff's vocational expert was deficient. However, the Commission noted that the testimony from defendant's own vocational expert, "standing alone, makes the plaintiff's case." Defendant's vocational expert interviewed the claimant and performed a transferrable skills analysis and labor market survey and concluded that the claimant's residual wage earning ca-

pacity was well below his pre-injury maximum wage earning capacity.

This case highlights the fact that careful consideration should be given before deciding whether a Stokes vocational assessment is necessary in each case.

Partial or Total Disability / Residual Wage Earning Capacity / Section 301 or 361

Harder v Castle Bluff Apartments

The plaintiff sustained a work-related injury resulting in disability. However, the defendant maintained that the testimony of the vocational experts clearly established that the claimant had a residual wage earning capacity suggesting partial disability and, accordingly, benefits should be reduced. The Commission disagreed.

The claimant sustained an injury on May 31, 2006, while working as a maintenance supervisor. He returned to work in October 2006 performing administrative duties but was laid off after one month. Defendant then obtained the services of a vocational expert in an effort to find him other work. The claimant was provided with several job leads and worked for a brief period of time for a subsequent employer but funding for that position ended and the claimant resumed his job search. The vocational expert established that the claimant, with the restrictions placed upon him by the physicians and with his transferrable skills, would be capable of earning between $8.00-$14.06 per hour. The Magistrate had concluded that the claimant was earning $20.00 while working for defendant.

The defendant maintained that the claimant's benefits should be reduced relying upon the order from the Michigan Supreme Court in Lofton v Auto Zone, Incorporated. In Lofton, the Court remanded a case to the Board of Magistrates in light of the Stokes decision but further directed that the Magistrate consider whether the claimant in that case was partially disabled. If so, the Court directed the Magistrate to compute wage loss benefits under section 361(1) of the Act based upon what the claimant remained capable of earning. Section 361 indicates that if the incapacity from a personal injury is partial, the weekly compensation rate to be paid is 80% of the difference between the injured employee's after□tax average weekly wage prior to the injury and the after-tax average weekly wage which the employee is able to earn after his or her personal injury.

At trial, the Magistrate rejected the defendant's attempt to utilize Lofton to reduce benefits claiming that the Court's order was "not binding precedent" and limited to the facts of that particular case. The Magistrate also rejected defendant's argument concluding that the plaintiff establish that the jobs identified by defendant's vocational expert were not reasonably available to him. He concluded that the defendant could not reduce plaintiff's wage loss benefits based upon a theoretical wage earning capacity.

In affirming the Magistrate, the Appellate Commission concluded that section 361 was not applicable to the facts involved in this particular claim. Rather, the Commission concluded that section 301(5) was applicable as the claimant had made an attempt to return to reasonable employment; and, accordingly, that provision alone was applicable. Section 301(5) pertains to situations in which an injured employee is found to be disabled and attempts to return to work performing light duties or "reasonable employment." However, what the Appellate Commission neglected to recognize was that application of that particular subsection is also predicated upon establishing disability under the terms of section 301(4) which defines disability as a limita-

tion of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease. The requirement of section 301(4) also sets forth that the establishment of disability does not create a presumption of wage loss. Apparently, under the Commission's 'reasoning' in this particular case, a "partially disabled" employee cannot return to reasonable employment. Quite frankly, it appears to be a rather strained reading of the statute.

Pro Se Plaintiffs / Dismissal of Applications

Mayse v Wirt Transport Company

In this case, the Appellate Commission majority concluded that the Magistrate appropriately dismissed the claimant's Application for Mediation/Hearing. The majority noted that a party who chooses to proceed without counsel does so at his or her own peril. The Magistrate refrained from assisting the unrepresented party. Similarly, on appeal, an unrepresented party must follow the regular appellate rules. In this case, the plaintiff failed to identify any legal basis for altering the Magistrate's decision so his appeal was denied.

A dissent argued that the Magistrate was too harsh in dismissing the claimant's Application. His attorney withdrew as counsel and the Magistrate then immediately dismissed his Application. The dissent believed that the claimant should have been afforded more time to seek another attorney despite the fact that his former attorney had previously advised him of his intent to withdraw as counsel more than a month prior to the scheduled hearing.

Typically, Magistrates are acknowledged as having a great deal of latitude in managing their dockets. As a result, the dissent in this particular case was rather unusual.

Casual Relationship / Hepatitis

Reves v Lakeland Regional Health Systems

Plaintiff worked for Defendant as a critical care nurse. In 1992, after having worked for Defendant for approximately five months, while attempting to roll a patient over, various leads and lines broke free, spraying Plaintiff with the patient's bodily fluids. Approximately 4-6 weeks later, Plaintiff began developing sore throats, nausea, and extreme fatigue. Plaintiff maintained that she did not have these symptoms prior to coming to work for Defendant. She was diagnosed with Hepatitis C, and began Interferon treatments. While undergoing these treatments, she developed severe right hip, thigh, and knee pain. After investigating the claim, Defendant agreed to voluntarily pay workers' compensation benefits. Initially, Plaintiff did not lose a lot of time from work. She continued to work but missed occasional time and was not able to perform all of her former work duties due to her chronic fatigue.

Plaintiff then began treating with a psychiatrist who diagnosed her with anxiety and depression. He related these conditions to the decline in her health which also included the development of fibromyalgia which was thought to be related by the stress caused by her illness. The psychiatrist concluded that the Plaintiff was totally disabled from any employment.

Plaintiff stopped working for Defendant in December 1997, due to severe fatigue. She began treating with a rehabilitation medicine specialist at that time for her fatigue, fibromyalgia, and depression related to her Hepatitis C as well as for leg neuritis. The rehabilita-

tion specialist related the neuritis to the Interferon treatments Plaintiff underwent for her underlying Hepatitis C condition. The doctor acknowledged that Plaintiff had a number of underlying non-work related medical conditions including ulcers, a stroke, left knee difficulties, shoulder problems, gall bladder surgery, diabetes, peripheral neuropathy, fine motor tremors, high blood pressure, and morbid obesity.

Defendant sent Plaintiff to a pain medicine specialist who commenced treatment for her bilateral neuropathic leg pain. As a result of such treatment, he felt the Plaintiff could attempt to perform a sedentary desk job. The Plaintiff was also seen by a liver specialist who concluded that the liver biopsies revealed only a mild form of Hepatitis C which would not require any restrictions. He also opined that fibromyalgia is not commonly seen as a manifestation of Hepatitis C, but acknowledged that he was unsure if such a condition could be brought on by stress. He did agree that if there was a close temporal relationship between the claimant's Interferon use and the onset of the neuritis, there was a likely relationship. However, most causes of Interferon caused neuritis clear up once the treatment is stopped. Defendant also had the Plaintiff seen by a neurologist who could not explain Plaintiff's ongoing complaints. Plaintiff was also seen by a psychologist who diagnosed a mild to moderate recurrent depression which he related to stresses brought on by the Plaintiff's Hepatitis C, fibromyalgia, and stress but that he did not find to be disabling. Defendant also had the Plaintiff seen by an internist who concluded that the Plaintiff had virtually no ongoing symptoms of significant liver disease and that the supposed relationship between Interferon treatments and neuritis as well as between Hepatitis C and fibromyalgia were tenuous at best. However, the internist acknowledged that the Plaintiff had been placed on a lot of pain medication as a result of her chronic complaints and would have to be weaned off that medication before she could return to work as a registered nurse.

The Commission simply affirmed the Magistrate's award of continuing benefits in this case. It concluded that while there were differing medical views presented, there was competent, material, and substantial evidence to support the Magistrate's finding of a work related injury and resulting disability.

Death Claim / Dependency

Stockton v Accel Towing

In this death case, the employee only worked for the defendant for approximately 2½ weeks prior to his death. His widow then filed an Application for Mediation/Hearing. The sole issue on appeal was whether the Magistrate properly concluded that the plaintiff failed to prove that she was a partial dependent in order to be awarded any benefits. The Appellate Commission's majority affirmed the Magistrate's denial of benefits. It was noted that before and after the decedent's employment with defendant, both he and his wife pooled their earned income and shared in expenses. Proof was offered at the time of trial which demonstrated their individual earnings but there was no evidence presented to establish how much each spouse spent (together or separately) on various items. Consequently, the majority concluded that the Magistrate properly denied benefits as plaintiff failed to establish either total or partial dependency.

Reasonable Employment / Duration of Suspension of Benefits

Sutkowi v General Motors Corp.

The claimant was originally awarded benefits based upon an alleged October 2003 date of injury involving his right knee and a bilateral hip condition. However, weekly benefits were suspended as of March 22, 2005, when the Magistrate found that the claimant had unreasonably refused work within his restrictions and capabilities. Subsequently, the claimant filed another Application for Mediation/Hearing indicating that his "unreasonable refusal" ended as of February 26, 2007, the day after he underwent hip replacement surgery. The claimant further contended that after his surgery and recuperation, he attempted to return to work within his restrictions but was advised by his employer that the favored work was no longer available for him. The Magistrate reinstated benefits as of that date and the defendant appealed to the Appellate Commission.

In affirming the Magistrate's reinstatement of benefits, the Commission found that the claimant's actions in undergoing the hip surgery provided a "good and reasonable cause" for his refusal to perform the previously offered favored or restricted work. The Commission felt that the claimant ended his "unreasonable refusal" by notifying his employer of his pending surgery and subsequent willingness to return to restricted work once released by his physicians.

Stokes Remands / Job Searches Not Required / Partial Disability Analysis Rejected

Umphrey v General Motors Corporation

This case typifies the Appellate Commission's current handling of cases following remands to the Board of Magistrates in light of Stokes v Chrysler LLC, requiring a vocational disability analysis. On remand the parties submitted expert vocational testimony which the Magistrate concluded supported a diminution in Plaintiff's maximum wage earning capacity as a result of his work related injury. Following the Magistrate's decision on remand, Defendant filed a further appeal with the Commission arguing in part that Plaintiff had failed to put in sufficient evidence to establish that he engaged in job seeking efforts following his work related injury as required by the Supreme Court in Stokes. Defendant also argued that at most the vocational testimony established a partial disability requiring an independent finding by the Magistrate to determine the proper rate of benefits under the Supreme Court's order in Lofton v AutoZone, Inc.

The Commission rejected Defendant's arguments and affirmed the Magistrate. It noted that the Magistrate concluded that the Plaintiff had looked for jobs following his work related injury but Defendant merely did not think that his efforts were sufficient. The Commission agreed that when a Plaintiff fails to conduct a job search effort, his or her workers' compensation benefits may be jeopardized. The job search issue was irrelevant when both vocational experts concluded that the Plaintiff had a reduction in his maximum wage earning capacity as a result of his work related injury.

The Commission also rejected Defendant's claim that the magistrate should have made independent findings that the Plaintiff had merely established a partial disability under Section 361(1) and be awarded partial benefits as suggested by the Supreme Court's order in Lofton v AutoZone, Inc. In a number of decisions involving this issue, the Commission has simply refused to follow the partial disability analysis suggested by the Lofton order, simply finding the order not to be binding in other cases. However, in a concurrence in this case, the Chairperson further concluded that even if the testimony of Defendant's vocational expert was accepted, suggesting that the Plaintiff could perform entry level minimum unskilled work at approximately $8.00 per hour, such was not enough to impact the result under Section 361(1), involving the calculation of benefits after a finding of par-

tial disability.

The provision requires a comparison between the hourly pay the Plaintiff was able to earn at the time of his injury and the hourly pay he is able to earn thereafter in light of any restrictions attributable to his work injury. The weekly compensation is to be equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation. The concurrence believed that the post injury after-tax average weekly wage required actual employment experience and not a hypothetical determination of what the Plaintiff might be capable of performing following his work injury. The concurrence also highlighted the fact that Defendant's vocational expert also agreed that the likelihood of Plaintiff being able to find even unskilled entry level work was "highly unlikely". Consequently, since these lower paying jobs were not reasonably available to the Plaintiff, there was no basis for going forward with a partial wage loss analysis. The concurrence also rejected the theoretical assumption that these $8.00 unskilled entry level jobs would be available on a 40 hour per week basis and justify a reduction in Plaintiff's benefits. In the concurrence's view, once an employee has established disability, an employer could not reduce the amount of wage loss benefits it is otherwise obligated to pay, if the employee also demonstrates that the "after-tax average weekly wage" of what he is "able to earn after the personal injury" is zero. Under this view, one of the ways this can be established is for the Plaintiff to demonstrate that the employment thought to be within the Plaintiff's capabilities is not available.

One crucial item that the concurrence fails to recognize in this analysis is the need for the Plaintiff to establish that the resulting wage loss is directly attributable to the Plaintiff's work related injury. The concurrence seems rather cautious to highlight the fact that Defendant did not argue that the availability of such work was attributable to factors unrelated to the Plaintiff's professed work injuries, such as the current economic climate or other factors.

Unreasonable Refusals / Reasonable Employment

Shajira v General Motors Corporation

Plaintiff was originally awarded benefits based upon a 2004 work related back injury. However, the Magistrate suspended benefits after Plaintiff refused to perform reasonable employment that was offered to him. Plaintiff provided expert medical testimony suggesting that he could not perform any work because of his back injury. Plaintiff also offered testimony suggesting he had extensive physical limitations requiring significant restrictions. On the other hand, Defendant offered medical testimony suggesting that the Plaintiff could return to work without any restrictions. Defendant also offered testimony establishing that, at most, the Plaintiff would require a twenty pound lifting restriction. Subsequently, Defendant offered Plaintiff two different inspection jobs consistent with the suggested twenty pound lifting restriction. The Magistrate found the lifting restriction to be reasonable. Plaintiff attempted to perform the jobs for only short periods of time. The magistrate concluded that these were not justifiable efforts and amounted to unreasonable refusals to perform reasonable employment that had been offered to him. The Magistrate also concluded that Plaintiff failed to establish at time of trial that he had ended his unreasonable refusal to perform the reasonable employment. Benefits continued to be suspended until such time that Plaintiff ended his refusal. The commission concluded that the evidence suggested the magistrate's conclusions and affirmed the

suspension of benefits.

Average Weekly Wage / Vacation Time

Turek v Metz Baking Company

Among other issues, this case involved whether the claimant's vacation time should be considered a part of the claimant's average weekly wage or as a fringe benefit. Plaintiff argued that his vacation pay should be included in his average weekly wage as he received such payments as a part of his regular pay on a periodic basis whether he took his vacation or not. The inclusion of the vacation pay in the calculation of the claimant's average weekly wage had the potential of making a significant difference in the case. If the vacation pay was considered part of the wage, the plaintiff's weekly wage would be augmented by that amount, resulting in a potentially higher workers' compensation rate. If treated as a fringe benefit, it could not be used to raise the potential rate to greater than two-thirds the state average weekly wage for the year of injury involved, as provided in Section 371(2) of the Workers' Compensation Act.

The Commission agreed with the Magistrate's conclusion that the vacation pay should be included in the calculation of the average weekly wage and not treated as a fringe benefit in this case. Whether vacation pay is treated as a part of one's average weekly wage or considered a fringe benefit is largely a factual issue. Vacation pay is either part of the average weekly wage or fringe benefit, but not both. In this particular case, as Plaintiff was paid his vacation pay along with his normal wages during weeks he worked, the Commission concluded that it was appropriate for the magistrate to categorize those payments as part of his weekly wage.

Legislative / Case Watch

MI House Bill No. 5952 attempts to exclude from the definition of "commission of a crime" an alien's working without employment authorization or an alien's use of false documents to obtain employment or to seek work.

MI House Bill No. 5962 attempts to remedy the supposed practice of misrepresenting "employees" as "independent contractors." The provision would make such a practice a felony or misdemeanor, depending upon whether the violation is knowing or unintentional and subject to fines and potential imprisonment.

MI House Bill No. 6148 proposes to include those practicing mortuary sciences and volunteer morticians among those eligible for benefits from the State under certain emergency or disaster situations.

U.S. News and World Report gave Conklin, Benham a First - Tier Ranking in the field of Workers' Compensation and listed the firm on its list of Best Law Firms for 2010

Don Ducey, a founding member of our law firm, celebrates his fiftieth year practicing law. He received his B.A. from the University of Michigan and his J.D. from the University of Detroit. He has tried numerous cases on behalf of employers and insurance carriers in connection with contested workers' compensation claims. He is a member of the Michigan Workers' Compensation Hall of Fame, and was given the Most Respected Advocate Award by the Michigan Trial Lawyers of the State of Michigan. Don also is the past president of the Workers' Compensation Section of the State Bar of Michigan and was inducted into the American Bar Association College of Workers' Compensation Attorneys in 2008.

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