WORKERS' DISABILITY COMPENSATION

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I. INTRODUCTION

The *Survey* period between August 1, 2008, and July 31, 2009, is framed by the opinion of the U.S. Court of Appeals for the Sixth Circuit in the case of *Brown v. Cassens Transport Co.*[1] and the Michigan Supreme Court in the case of *Petersen v. Magna Corp.*[2] It includes three

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1. 546 F.3d 347 (6th Cir. 2008), *cert. denied*, 130 S. Ct 795 (2010). The author was counsel for an amicus curiae supporting the request for rehearing by defendant-appellant and supporting the petition for certiorari filed by defendant-appellant.

2. 484 Mich. 300, 773 N.W.2d 564 (2009). The author was counsel for amici curiae supporting the defendant-appellant.

decisions by the Michigan Supreme Court — *Romain v. Frankenmuth Mutual Insurance. Co.*,[3] *Zahn v. Kroger Co.*,[4] and *Stone v. R.W. Lapine, Inc*[5] — four by the Michigan Court of Appeals — *Loos v. J.B. Installed Sales, Inc.*,[6] *Romero v. Burt Moeke Hardwoods, Inc.*,[7] *Kenney v. Alticor, Inc.*,[8] and *Reece v. Event Staffing, Inc*[9] — and two en banc decisions of the Michigan Workers' Compensation Appellate Commission — *Slais v. Michigan Department of State Police*[10] and *Trammel v. Consumers Energy Co.*[11]

Except for the group of *Romero*,[12] *Kenney*,[13] and *Reece*,[14] the cases in the *Survey* share one feature: each involved the relationship between a statute in the Workers' Disability Compensation Act (WDCA)[15] and a different statute or rule. For example, the first case considered in the *Survey*, *Brown*,[16] involved the relationship between the statute in the WDCA allowing an employer to self-insure the responsibility for workers' compensation[17] and the statute in the McCarran-Ferguson Act[18] that excludes the business of insurance from the Racketeer Influenced and Corrupt Organizations Act (RICO).[19] The last case, *Petersen*,[20] involved the relationship between a statute in the WDCA about the fee for a lawyer who effected the payment of the costs of medical care to an employee or provider[21] and the "American Rule"[22] concerning the responsibility for the fee of counsel. The clarity of the decisions

3. 483 Mich. 18, 762 N.W.2d 911 (2009).

4. 483 Mich. 34, 764 N.W.2d 207 (2009).

5. 483 Mich. 1007, 764 N.W.2d 574 (2009).

6. No. 275794, 2008 WL 4958532 (Mich. Ct. App. Nov. 20, 2008), *rev'd*, 485 Mich. 993, 775 N.W.2d 139 (Mich. 2009).

7. 280 Mich. App. 1, 760 N.W.2d 586 (2008).

8. No. 278090, 2009 WL 1717372 (Mich. Ct. App. June 18, 2009).

9. No. 284451, 2009 WL 2371889 (Mich. Ct. App. July 30, 2009).

10. 2009 Mich. ACO # 10, 23 MIWCLR 38 (2009).

11. 2009 Mich. ACO # 10, 23 MIWCLR 162 (2009). The author was counsel for the defendant before the appellate commission considered the case and was counsel for an amicus curiae supporting the application for leave to appeal that defendant-appellant filed afterwards.

12. 280 Mich. App. 1, 760 N.W.2d 586 (2009).

13. 2009 WL 1717372.

14. 2009 WL 2371889.

15. MICH. COMP. LAWS ANN. §§ 418.101 – .941 (West 2009).

16. 546 F.3d 347.

17. MICH. COMP. LAWS ANN. § 418.611(1)(a).

18. 15 U.S.C.A. § 1012(b) (West 2009).

19. 18 U.S.C.A. § 1962(c) (West 2009).

20. 484 Mich. 300, 773 N.W.2d 564 (2009).

21. Haliw v. Sterling Heights, 471 Mich. 700, 691 N.W.2d 753 (2005).

22. *See* MICH. COMP. LAWS ANN. § 600.2405(6) (West 2009). *See also Haliw*, 471 Mich. at 707, 691 N.W.2d 753 at 756.

depended upon the degree to which this feature was recognized. For example, *Brown* creates an irreconcilable conflict with state case law.[23]

The relationship between a specific provision in the WDCA and the other statutes that were established by these cases may have dramatic consequences for the administration of workers' compensation.

The group of *Romero*,[24] *Kenney*,[25] and *Reece*[26] all involved the application of the rules for an employee to establish disability that the Michigan Supreme Court had described in the case of *Stokes v. Chrysler L.L.C.*[27] These cases are important because of the potential problems created from an incomplete analysis of *Stokes*.

II. *BROWN V. CASSENS TRANSPORT CO.*: WORKERS' COMPENSATION AND RICO

The WDCA requires an employer to have insurance for workers' compensation.[28] There are five different ways for an employer to fulfill this obligation:

- self-insurance under the auspices of the director of the Workers' Compensation Agency,[29]
- a contract of insurance,[30]
- membership in a defined group of employers,[31]
- a surety bond,[32]
- passive compensation insurance.[33]

An employer who does not fulfill one of these protocols is an uninsured employer and not a self-insured employer, even in the case where the employer is paying workers' compensation.[34]

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23. 546 F.3d at 361.
24. 280 Mich. App. 1, 760 N.W.2d 586.
25. 2009 WL 1717372.
26. 2009 WL 2371889.
27. 481 Mich. 266, 750 N.W.2d 129 (2008).
28. MICH. COMP. LAWS ANN. § 418.611(1) (West 2009).
29. *Id.* § 418.611(1)(a).
30. *Id.* § 418.611(1)(b).
31. *Id.* § 418.611(2).
32. *Id.* § 418.611(1)(a).
33. MICH. COMP. LAWS ANN. § 418.171(1) (West 2009).
34. Director, Bureau of Workers' Disability Comp. v. BMC Mfg., Inc., 200 Mich. App. 478, 481-82, 504 N.W.2d 695, 697 (1993).

Almost all self-insured employers purchase specific excess insurance.[35] Specific excess insurance is a policy by which an insurance company pays workers' compensation above an agreed amount in a particular case.[36] This protects an employer in an unusually costly case or when a large number of employees are injured or killed at the same time.[37]

Many self-insured employers retain a company to administer the claims for workers' compensation.[38] A so-called third party administrator must be approved by the director of the Workers' Compensation Agency.[39]

The Sixth Circuit considered and described the relationship between one of the above protocols — self-insurance under M.C.L.A. section 418.611(1)(a) — and RICO[40] in the case of *Brown v. Cassens Transport Co.*[41] Cassens Transport Co. was an employer that had been approved by the director of the Workers' Compensation Agency to self-insure its responsibility for workers' compensation under M.C.L.A. section 418.611(1)(a) and that had hired Crawford & Co., an approved administrator, to administer the claims for workers' compensation by injured employees.[42] When some employees said that Cassens Transport Co., Crawford & Co. and certain doctors had violated RICO by denying workers' compensation, Cassens claimed the lawsuit brought as a result was barred by the McCarran-Ferguson Act,[43] a law that precludes applying a federal statute in the face of a state statute enacted to regulate the business of insurance.[44]

The court decided that the McCarran-Ferguson Act did not apply because Cassens Transport Co. had been a self-insured employer and so the lawsuit by its employees under RICO could proceed.[45]

One point is crucial here: Cassens self insures. Therefore, the practices at issue in this case do not relate to those provisions of the WDCA that address the 'business of insurance.' Moreover, self-insurance does not relate to the 'business of insurance' under the

35. *Employment Law in Michigan (An Employer's Guide)* (2008: ICLE) § 13.24 pp 13-16.
36. *Id.*
37. *Id.*
38. MICH. COMP. LAWS ANN. § 418.611(8)
39. *Id.*
40. 18. U.S.C. § 1961-68 (Supp. 2009).
41. *Brown*, 546 F.3d 347.
42. *Id.* at 351.
43. *Id.* (quoting McCarran-Ferguson Act, 15 U.S.C.A. § 1012(b) (West 2000)).
44. *See* Humana, Inc. v. Forsyth, 525 U.S. 299, 306-07 (1999).
45. *Brown*, 546 F.3d at 361.

McCarran-Ferguson Act because there is no relationship between an insurer and an insured.[46]

The decision in *Brown* has a wide application. Cassens Transport Co. is one of about 600 employers who have been approved by the director of the Workers' Compensation Agency to self-insure the liability for workers' compensation and to have so-called third-party administrators.[47] Such employers include companies like General Motors, Chrysler, Ford Motor, AT&T, DTE Energy, and along with almost every county and public university in Michigan, they collectively account for nearly half of all workers' compensation paid each year.[48] As a result of *Brown*, all are now subject to a lawsuit under RICO for denying a claim for workers' compensation or suspending workers' compensation in addition to a lawsuit in the Workers' Compensation Agency.

The ruling by the sixth circuit in *Brown* that self-insurance under M.C.L.A. section 418.611(1)(a) is not actually insurance conflicts with the understanding by the Michigan courts.[49] The sixth circuit, in deciding *Brown*, did not reconcile the conflict. The *Brown* court apparently did not even know of the established understanding of self-insurance considering neither *Chicago Road Investment Co.* nor *Wallace* was mentioned in any brief.[50]

The decision by the court in the case of *Brown* may cause many self-insured employers to end self-insuring the responsibility for workers' compensation under M.C.L.A. section 418.611(1)(a). An employer can buy a policy of workers' compensation under M.C.L.A. section 418.611(1)(b) or join a defined group of employers under M.C.L.A. section 418.611(2) which will certainly establish insurance

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46. *Id.*

47. MARTIN L. CRITCHELL, WORKERS DISABILITY COMPENSATION, MICHIGAN INSURANCE LAW AND PRACTICE, ICLE § 13.23 at 13-15 (2009).

48. *Id.*

49. Heinz v. Chi. Rd. Inv. Co., 216 Mich. App. 289, 303, 549 N.W.2d 47, 54 (1996) (holding that "[S]elf-insurance in the worker's compensation arena is the functional equivalent of purchasing a commercial insurance policy."). *See also* Wallace v. Consol. Freightways, 199 Mich. App. 141, 144, 500 N.W.2d 752, 754 (1993) (declining "to distinguish between an employer obtaining bureau approval to act as a self-insured and an employer obtaining a certificate of Michigan insurance coverage."). However, a policy is certainly insurance under the McCarran-Ferguson Act. Membership in a defined group under MICH. COMP. LAWS ANN. § 418.611(2) is too. Health Care Ass'n Workers Comp. Fund v. Bureau of Worker's Comp., 265 Mich. App. 236, 248, 694 N.W.2d 761, 769 (2005). "[B]y the express language of MCL 500.2016 [a worker's compensation self-insurer group] is engaged in a proscribed practice in the business of insurance if it engages in the conduct it is prohibited from committing by MCL 500.2016(1)(a)." *Id.*

50. *See Brown*, 546 F.3d 347.

under the McCarran-Ferguson Act consistent with *Brown* and preclude a lawsuit by an injured employee under RICO. The costs of buying a policy or joining a defined group of employers and the control over the administration of claims are not significantly different with a large deductible to reduce the cost of a policy of workers' compensation. In addition, the insured employer can retain the right to assign counsel or, at least, approve the law firms and clinics that may manage claims. The increase in these costs are likely to be offset by the end of the assessments to fund the Self-Insurers' Security Fund that pays workers' compensation when a self-insured employer is insolvent.[51] Indeed, the abandonment of self-insurance by just several self-insured employers could increase the assessments to the remaining self-insured employers enough to make it too expensive for those to remain, not only making self-insurance under M.C.L.A. section 418.611(1)(a) a dead letter, but making the Self-Insurers' Security Fund insolvent.

III. *ROMAIN V. FRANKENMUTH MUTUAL INSURANCE CO.*: WORKERS' COMPENSATION AND COMPARATIVE NEGLIGENCE

With just three exceptions, an employee cannot sue an employer or a co-employee for damages from an injury sustained at work.[52] The relief under the WDCA is regardless of fault.[53] Though usually barred from suing the employer or a co-employee, a statute in the WDCA does allow an employee to sue other people whose breach of duty resulted in an injury.[54] When an injured employee sues and effects a recovery, the

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51. MICH. COMP. LAWS ANN. §§ 418.501(1), .502, .537(1)-(4), .551(3) (West 2009).

52. MICH. COMP. LAWS ANN. § 418.13(1) (West 2009). "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." *Id.*

53. Simkins v. Gen. Motors Corp., 453 Mich. 703, 711, 556 N.W.2d 839, 843-44 (1996):

> An employee who suffers an injury arising out of and in the course of his employment will be eligible for compensation regardless of whether the employer was at fault. In return, the employer is immunized from tort liability because the worker's compensation act, under M.C.L. § 418.131(1); M.S.A. § 17.237(131)(1), provides that this compensation is the exclusive remedy . . . .

Id.

54. MICH. COMP. LAWS ANN. § 418.827(1) (West 2009).

> Where the injury for which compensation is payable under this act was caused by circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed

employer or compensation carrier must be repaid any workers' compensation that has been paid.[55]

This relationship between these statutes in the WDCA and the statutes in the Revised Judicature Act (RJA)[56] that allocate fault among parties to a personal injury lawsuit[57] was considered and resolved in a case concerning the reimbursement of workers' compensation.[58] The Michigan Court of Appeals held that the statutes in the RJA did not change the applicable statutes in the WDCA so that the amount of reimbursement of workers' compensation under M.C.L.A. section 418.827(5) could not be reduced at all by the ratable amount of the fault of the employer.[59] However, the decision by the court of appeals in *Rodriguez* did not involve allocating the fault of the employer to reduce the amount of the damages that a tortfeasor might pay.[60]

The decision by the court in *Romain* does allocate fault, although not in the context of a lawsuit by an injured employee against a tortfeasor under M.C.L.A. section 418.827(1).[61]

David and Joann Romain were homeowners who fell ill because of toxic mold and sued Frankenmuth Mutual Insurance Co., their homeowners insurer, Insurance Services Construction Corp., the contractor that Frankenmuth had recommended to repair and correct a

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to enforce the liability of the third party for damages in accordance with this section.

Id.

55. *Id.* § 418.827(5).

Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall immediately be paid to the employee or his or her dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

Id.

56. MICH. COMP. LAWS ANN. §§ 600.101-.9948 (West 2009).

57. MICH. COMP. LAWS ANN. § 600.2957(1) (West 2009) states:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault.

58. Rodriguez v. A.S.E. Indus., Inc., 275 Mich. App. 8, 738 N.W.2d 238 (2007).

59. *Id.* at 20, 738 N.W.2d at 245. The court held, "[T]he Legislature clearly and unambiguously provided that an employer is entitled to reimbursement without regard to its own fault. Therefore, we reject ASE's argument that the statutory lien in this case [under MCLA section 418.827(5)] should be reduced by 70 percent to reflect the allocation of negligence to the employer.").

60. *See Rodriguez*, 275 Mich. App. at 14, 738 N.W.2d at 242.

61. 483 Mich. 18, 762 N.W.2d 911.

mold problem, and IAQ Management Inc. (IAQ), a company that certified that the contractor's work was complete and effective.[62] IAQ was dismissed from the lawsuit because the court decided that it had owed no duty to the Romains.[63] Defendant Insurance Services Construction Corp. subsequently claimed that its liability for damages to the Romains had to be reduced by the ratable amount of the fault of IAQ.[64]

The Michigan Supreme Court in *Romain* ruled that the liability for damages to the Romains could not be reduced by the ratable amount of the fault of IAQ because IAQ did not owe a duty to the Romains.[65] When an injured employee sues a tortfeasor for damages from an injury received at work under M.C.L.A. section 418.827(1), the employer is in the same position as IAQ was in. The employer has no duty to the employee because the responsibility of the employer for workers' compensation under M.C.L.A. section 418.131(1), is without regard to the fault of the employer.[66] Accordingly, the fault of the employer cannot be considered in determining the amount of the damages that a tortfeasor must pay.

This is likely to have a broad impact in the practice of personal injury litigation because a tortfeasor can claim that the employer was negligent or "at fault" when an employee was injured on the job and then sues. Employees (and self-insured employers and workers' compensation insurers wanting reimbursement of past-paid workers' compensation) are most likely to cite *Romain* to eliminate the reduction in the damages for the putative non-party (employer) at fault.

The exceptions to the first sentence of M.C.L.A. section 418.131(1) do not affect this. One exception allows an employee to sue the employer for damages from an intentional tort.[67] The other exception allows an employee to sue for damages when the employer does not have one or another of the five kinds of workers' compensation insurance.[68] When

62. *Id.* at 23, 762 N.W.2d at 914 (Young, J., dissenting).

63. *Id.* at 20, 762 N.W.2d at 912.

64. *Id.*

65. *Id.* at 21, 762 N.W.2d at 913 (holding that "proof of a duty *is* required 'before fault can be apportioned and liability allocated' under the comparative fault statutes, MCL 600.2957 and MCL 600.6304.").

66. MICH. COMP. LAWS ANN. § 418.131(1).

67. *Id.* § 418.131(1) states "[t]he only exception to this exclusive remedy is an intentional tort."

68. MICH. COMP. LAWS ANN. § 418.641(2) (West 2009) provides that "[t]he employee of an employer who violates the provisions of section 171 or 611 shall be entitled to recover damages from the employer in a civil action because of an injury that arose out of and in the course of employment notwithstanding the provisions of section 131."

one or the other exception applies, the only defendant in the lawsuit will be the employer. There will not be another tortfeasor claiming to reduce its liability for damages when an injured employee sues the employer for an intentional tort.

IV. *ZAHN V. KROGER CO.*: WORKERS' COMPENSATION AND INDEMNIFICATION

The Michigan Supreme Court in *Zahn* considered and resolved the relationship between M.C.L.A. section 418.131(1) that makes workers' compensation the only recourse for an employee injured at work and an indemnification agreement with someone who is later sued by the employee under M.C.L.A. section 418.827(1).[69] In *Zahn*, Timothy Zahn was an employee of Cimarron Services, Inc., who sued Kroger Co. and F.H. Martin Construction Co., a general contractor, for injuries related to a construction accident during a renovation of a Kroger store.[70] F.H. Martin sued Cimarron Services to indemnify it for anything paid to Zahn based on a contract of indemnification.[71]

Cimarron Services, the employer of Zahn, said that it could not assume the liability of F.H. Martin, the general contractor, because it was immune from liability under M.C.L.A. section 418.131(1).[72] The court rejected this argument and found no statute in the WDCA or rule of contract law to prohibit an employer from voluntarily assuming the liability for the negligence of a customer or vendor.[73] Essentially, the court found that there was no relationship between M.C.L.A. section 418.131(1), and an indemnification agreement between an employer and a customer or a vendor.[74]

The court was right. There are two different relationships involved. One is between the employer and the employee, which is the subject of the WDCA.[75] The other relationship is between the employer and its customers and vendors, which is not the subject of the WDCA.

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69. *Zahn*, 483 Mich. 34, 764 N.W.2d 207.

70. *Id.* at 37, 764 N.W.2d at 208-09.

71. *Id.* at 37, 764 N.W.2d at 209.

72. *Id.* at 42, 764 N.W.2d at 211 (stating "Cimarron suggests that an employer cannot be required to assume liability for a particular type of damages for negligence from which it is otherwise shielded as a matter of law.").

73. *Id.* (stating "[N]othing in contract law precludes an employer from voluntarily assuming liability for negligence through contractual arrangement. Similarly, nothing in the WDCA precludes parties from entering into such an agreement.").

74. *Id.*

75. MICH. COMP. LAWS ANN. 418.131(1).

The decision by the *Zahn* court echoed the earlier decision in the case of *Dale v. Whiteman.*[76] Just as in *Zahn*, an employee, Robert A. Dale, was injured while working for Carl Goldfarb and subsequently sued a customer, Ernest Whiteman, for damages under M.C.L.A section 418.827(1).[77] Whiteman then sued the employer, Goldfarb, for indemnification of any of the damages that he might be forced to pay to the employee.[78] The Michigan Supreme Court allowed indemnification upon an equitable principle, and not by reason of a contract.[79] The difference between *Dale* and *Zahn* was that in the case of *Zahn*, there was a specific contract of indemnification between the employer and customer.

V. *PETERSEN V. MAGNA CORP.*: WORKERS' COMPENSATION AND THE "AMERICAN RULE"

The statute in the WDCA concerning the responsibility of an employer for the costs of medical care needed by an injured employee also mentions prorating the fee of a lawyer who effects those payments.[80] In *Petersen,*[81] the Michigan Supreme Court determined the relationship between this statute and the "American Rule" that a party in a lawsuit is responsible for the fee of the lawyer that the party hired and not the fee or costs incurred by the opposing party.[82]

A majority of the court agreed only that the word prorate in the last sentence of M.C.L.A. section 418.315(1) allowed dividing the fee charged by the lawyer for the injured employee between the employer and the workers' compensation insurer of the employer.[83] While not

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76. 388 Mich. 698, 202 N.W.2d 797 (1972).

77. *Id.* at 701, 202 N.W.2d at 798.

78. *Id.*

79. *Id.* at 706, 202 N.W.2d at 800-01 (stating "[T]he right to indemnity might be predicated upon the theory of bailment . . . . Or it might be implied as a part of the undertaking of Goldfarb to wash the car . . . . We prefer to base such right upon the equitable principle that Whiteman was without personal fault . . . .").

80. MICH. COMP. LAWS ANN. § 418.315(1) (West 2009), provides:

> If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The worker's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

81. 484 Mich. 300, 773 N.W.2d 564 (2009).

82. *See Haliw*, 471 Mich. at 706-07, 691 N.W.2d at 756-57.

83. *Peterson*, 484 Mich. at 339, 773 N.W.2d at 585 (Hathaway, J., concurring), (stating, "I concur in the lead opinion only to the extent that it concludes that the term

explicitly agreeing with the idea expressed in *Petersen* that "would also hold that the American Rule of attorney fees does not apply to section 315(1),"[84] the limitation of prorating the fee of the lawyer hired by the injured employee between the employer and its workers' compensation insurer implies this. Certainly, prorating or dividing the fee between the employer and its workers' compensation carrier can only occur if both the employer and its workers' compensation carrier are responsible for it.

Neither the majority opinion nor the concurrence in *Petersen* explained how the decision operated when an employer was self-insured for the responsibility for workers' compensation. When an employer was self-insured for workers' compensation, prorating an attorney fee assessed on the costs of medical care between the employer and workers' compensation insurer was impossible as the employer and workers' compensation insurer were one and the same.[85] And there was no recognition that the WDCA is a so-called direct action in that an employee can sue the insurer directly,[86] meaning that virtually no insured employer takes a role after reporting a claim to the workers' compensation insurer. These oversights mean that one entity will always pay all of the attorney fee that is to be prorated: either the self-insured employer or the workers' compensation insurance company of an insured employer.

Petersen does not apply when a group carrier claims repayment of its payment of medical costs under an assignment by an employee. The group carrier must pay a portion of the fee of the lawyer hired by the employee under M.C.L.A. section 418.821(2).[87] This means that a group carrier, such as Blue Cross or UNUM cannot claim an attorney fee in

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'prorate' in MCL 418.315(1) applies exclusively to employers and their insurance carriers.").

84. *Id.*

85. MICH. COMP. LAWS ANN. § 418.601(a) ("Whenever used in this act: Carrier means a self-insurer or an insurer.").

86. MICH. COMP. LAWS ANN. § 418.651, provides:

> The person so entitled, irrespective of any insurance or other contract, shall have the right to . . . enforce in his or her own name in the manner provided in this act the liability of any insurance company who may have insured, in whole or in part, the liability for such compensation.

87. MICH. COMP. LAWS ANN. §418.821(2) (West 2009) provides:

> When a group disability or hospitalization insurance company; health maintenance organization licensed under former Act No. 264 of the Public Acts of 1974, or part 210 of the Act No. 368 of the Public Acts of 1978, as amended; or a medical care and hospital service corporation organized or consolidated under former Act No. 108 or 109 of the Public Acts of 1939, or any successor organization enforces an assignment given to it as provided in this section, it shall pay, pursuant to rules established by the director, a portion of the attorney fees of the attorney who secured the worker's compensation recovery.

addition to its claim for reimbursement under M.C.L.A. section 418.821(1).

Petersen does not apply to any other kind of benefit as a lawyer hired by an employee receives a fee from the amount of weekly compensation, the expenses of vocational rehabilitation, penalties and the like, not in addition to these. Similarly, the lawyer hired by a surviving dependent or an administrator receives a fee from the compensation and the cost of last illness, funeral and burial when an employee dies from an occupational injury or disease, not in addition to these.[88]

The most likely consequence of *Petersen* will be that lawyers who have been hired by employees to prosecute a claim for compensation will no longer contact providers such as doctors, laboratories, and hospitals to establish and negotiate the amount of repayment with a portion allocated for attorney fees. Instead, lawyers will likely contact the providers to maximize the amount of unpaid expenses by increasing the amount of the fee.

Moreover, *Petersen* may motivate lawyers to pursue lawsuits for medical expenses when compensation is being voluntarily paid. There is likely to be an increase in claims for "medical only."

Petersen may also motivate lawyers to develop claims for out-of-pocket expenses paid by an employee *and* other care, principally attendant care and home and auto modification. The cost of attendant care and home and auto modification is substantial (hundreds of dollars) and adding a fee to that may motivate more of these kinds of claims.

These consequences will mean more work in addition to evaluating doctor and hospital records for history, diagnosis and the like, the billings will also have to be obtained and evaluated.

While the court established a relationship between one statute in the WDCA, M.C.L.A. section 418.315(1), and another rule, the "American Rule" in deciding the case of *Petersen*, the relationship between the "American Rule" to another statute in the WDCA, M.C.L.A. section 418.858(1), was not considered, much less resolved. The determination of this relationship is quite important because M.C.L.A. section 418.858(1) describes a special procedure to follow after a dispute about attorney fees and the cost of medical care is decided by the Board of Magistrates.[89] After a magistrate decides such a dispute about either an attorney fee or the cost of medical care or both, review is available

88. *Petersen* was limited to a case in which an injured employee had paid the cost of medical care, hired a lawyer, and sued for reimbursement from the employer.

89. MICH. COMP. LAWS ANN. § 418.858(1) (West 2009).

before the director of the workers' compensation agency.[90] An appeal to the workers' compensation appellate commission is available from the decision by the director.[91]

This means that a case may be bifurcated after a decision by the Board of Magistrates, as an appeal from a decision of a claim to weekly workers' compensation is to the workers' compensation appellate commission while the decision of a claim to attorney fees under *Petersen* or the amount of the attorney fee based on the amount of the cost of medical expenses is to the director of the workers' compensation agency. This bifurcation may have serious consequences as the director might abstain from a review until after the appellate commission reviews and resolves the direct appeal that the claimant is not eligible for any workers' compensation because an injury was not work-related. Further, the appellate commission might simultaneously defer its review until after the director completes his review so that all claims, weekly and medical and attorney fees under *Petersen*, are before it.

Aside from the difficulty of administration, bifurcation may complicate review by the workers' compensation appellate commission because of the different standards of review that apply to the different decisions subject to review. There is one specific standard of review when the appellate commission reviews a decision by a magistrate.[92] This standard does not clearly apply to the review of a decision by the director of the Workers' Compensation Agency under M.C.L.A. section 418.858(1).[93] No standard of review is mentioned there.[94]

Nevertheless, the relationship between the statutes in the WDCA will need to be considered and resolved as a result of *Petersen*.

VI. *STONE V. R.W. LAPINE, INC.*: WORKERS' COMPENSATION AND EARNINGS

The amount of weekly workers' compensation is based on the average weekly wage of an employee at the time an injury is sustained at

90. *Id.* "The payment of fees for all attorneys and physicians for services under this act shall be subject to the approval of a worker's compensation magistrate. * * * After an order by the worker's compensation magistrate, review may be had by the director if a request is filed within 15 days." *Id.*

91. MICH. COMP. LAWS ANN. § 418.858(1) provides: "[t]hereafter the director's order may be reviewed by the appellate commission on request of an interested party, if a request is filed within 15 days."

92. MICH. COMP. LAWS ANN. § 418.861a(3)-(4) (West 2009).

93. *Id.* § 418.858(1).

94. *See id.*

work.[95] The length of service before the injury is important to decide this under a statute in the WDCA.[96] There is a particular model based on length of service, when, for example, the injury occurs during the first week,[97] during the second through the thirty-eighth week, M.C.L.A. section 418.371(3),[98] and any time after that, M.C.L.A. section 371(2),[99] a subsection of this statute provided for an exception for "special" circumstances.[100]

The relationship between subsection six and the other subsections to calculate an average weekly wage was decided in the case of *Stone II*.[101] Initially, the court said that subsection six could apply even though one of the other models applied because of the length of service before the employee had been hurt.[102] On reconsideration, the court did not change

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95. MICH. COMP. LAWS ANN. § 418.351(1) (West 2009); MICH. COMP. LAWS ANN. § 418.361(1) (West 2009).

96. MICH. COMP. LAWS ANN. § 418.371(2)-(4) (West 2009).

97. *Id.* § 418.371(4) provides:

> If an employee sustains a compensable injury before completing his or her first work week, the average weekly wage shall be calculated by determining the number of hours of work per week contracted for by that employee multiplied by the employee's hourly rate, or the weekly salary contracted for by the employee.

98. *Id.* § 418.371(3) provides:

> If the employee worked less than 39 weeks in the employment in which the employee was injured, the average weekly wage shall be based upon the total wages earned by the employee divided by the total number of weeks actually worked. For purposes of this subsection, only those weeks in which work is performed shall be considered in computing the total wages earned and the number of weeks actually worked.

99. *Id.* § 418.371(2) provides: "[t]he average weekly wage shall be determined by computing the total wages paid in the highest paid 39 weeks of the 52 weeks immediately preceding the date of injury, and dividing by 39."

100. *Id.* § 418.371(6) provides:

> If there are special circumstances under which the average weekly wage cannot justly be determined by applying subsections (2) to (5), an average weekly wage may be computed by dividing the aggregate earnings during the year before the injury by the number of days when work was performed and multiplying that daily wage by the number of working days customary in the employment, but not less than 5.

101. 483 Mich. at 1007, 764 N.W.2d at 574.

102. 482 Mich. 982, 755 N.W.2d 623 (2008) (citing Rowell v. Sec. Steel Processing, 445 Mich. 347, 356-57, 518 N.W.2d 409, 413 (1994)).

> [T]he Court of Appeals erred by holding that the average weekly wage must be calculated pursuant to MCL 418.371(3) in every instance where it can be determined using that subsection. The average weekly wage calculation provisions reveal 'the Legislature's overriding desire to have the basis for compensation reflect an accurate measure of wages.' *Rowell v Security Steel Processing*, 445 Mich. 347, 356-357 (1994). In this case, the magistrate did not err in choosing to utilize MCL 418.371(6) . . . .

any of this but decided that the magistrate had mistakenly applied the law.[103] This decision by the court in *Stone I* and *Stone II* means that subsection six is not a rule that applies only by default when no other subsection applies but is an alternative rule to subsections two through four. Instead of considering subsection six only after establishing that subsections two through four cannot apply by their own terms, now practitioners must determine the average weekly wage under subsections two, three, or four based on the length of service *and* under subsection six. Practitioners then decide which of the two is "just."

The court did not say when subsection six is "just" and applies instead of the alternate under subsections two through four.[104] Injured employees will say it applies when providing a higher weekly benefit. Employers will say that it is just when providing a lower rate. As there is no suggestion by the court in *Stone I*, *Stone II* or any other ruling, the debate may only be resolved by another lawsuit.

VII. *LOOS V. J.B. INSTALLED SALES, INC.*: WORKERS' COMPENSATION AND TAX FILINGS

The WDCA was amended to define who was an employee.[105] This statute replaced the earlier case law definition that was commonly known as the "economic realities" test.[106]

How this statute relates to tax filings has been an ongoing concern. Sometimes, statements made to the Internal Revenue Service have been considered important, if not compelling.[107] In the case of *Blanzy* the Michigan Court of Appeals said that Jerome Blanzy had maintained a

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Id.

103. *Stone II*, 483 Mich. at 1006, 746 N.W.2d at 574. The court said:

> [W]e MODIFY our order dated September 17, 2008 by adding the following language at the end of the order: 'Although the magistrate did not err by choosing to utilize MCL 418.371(6) to calculate plaintiff's average weekly wage, he did err by failing to apply the specific formula provided in subsection (6).'

Id.

104. *Id.*

105. MICH. COMP. LAWS ANN. § 418.161(1)(n) (West Supp 2009) provides:

> As used in this act, 'employee' means . . . [e]very person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

106. Hoste v. Shanty Creek Mgmt., Inc., 459 Mich. 561, 571 592 N.W.2d 360, 364 (1999).

107. Blanzy v. Brigadier Gen. Contractors, Inc., 240 Mich. App. 632, 643, 631 N.W.2d 391, 397 (2000).

separate business, and could not be considered an employee of Brigadier General, because of the reports to the IRS.[108] Sometimes statements made to the Internal Revenue Service have not been considered important. The workers' compensation appellate commission has almost routinely said that tax filings may not be considered when deciding employment under M.C.L.A. section 418.161(1)(n).[109]

In the case of *Loos*, the Michigan Court of Appeals has said that there is no relationship at all between the description of employee in M.C.L.A. section 418.161(1)(n) and tax filings.[110] The court said that the workers' compensation appellate commission had been entirely correct in deciding whether James A. Loos, Jr., was an employee of J.B. Installed Sales, Inc., without regard to the tax filings by J.B. Installed Sales.[111]

The decision is problematic for several reasons. First, the court disregarded its decision in *Blanzy*, in which tax filings were relevant and, indeed, the basis for the decision.[112] *Blanzy* was a published opinion and authoritative under the rule of stare decisis.[113]

The court also disregarded the statute apportioning the responsibility for weekly workers' compensation when an employee has a second

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108. *Id.*

> The magistrate stated: [P]laintiff listed his occupation on his individual income tax returns as 'self-employed,' he filed social security self-employment tax, his U.S. Individual Income Tax Returns reflected business income rather than wages or salary and he filed a schedule C, Profit or Loss from Business (Sole Proprietorship). We find that this constitutes substantial evidence for the magistrate's finding that plaintiff ran his own business . . . .

Id. See also Pulsipher v. Statewide Forest Products, 481 Mich. 943, 944, 752 N.W.2d 455, 456 (2008) (Markman, J., concurring).

> [T]he WCAC erred to the extent that it concluded that federal income-tax forms alone may never determine the legal question of employment. Federal tax forms are always compelling evidence of the employer-employee relationship and, in some cases, federal tax forms alone may be sufficient evidence of this relationship.

Blanzy, 240 Mich. App. at 643, 613 N.W.2d at 397.

109. *See* Loos v. J.B. Installed Sales, Inc., 2006 Mich. ACO # 309, 21 MIWCLR 6 (2006); Beck v. T.G.M. Broadband Cable Servs., Inc., 2007 Mich. ACO # 53, 21 MIWCLR 79 (2007); Pulsipher v. Statewide Forest Products, 2007 Mich. ACO # 96, 21 MIWCLR 124 (2007); Moore v. Nolff's Constr., 2007 Mich. ACO # 211, 21 MIWCLR 249 (2007).

110. 2008 WL 4958532 at *1.

111. *Id.* (stating "[W]hether taxes were withheld or whether plaintiff was issued a Form 1099 or a W2 were not incorporated into MCL 418.161(1)(n) and, therefore, reliance on such to determine whether [he] was an 'employee' was improper.").

112. *See Blanzy*, 240 Mich. App. at 644-45, 613 N.W.2d at 397.

113. *See* MICH. CT. R. 7.215(c)(2). "A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." *Id.*

job.[114] Only those wages that both employers have reported to the IRS can be considered in determining the ratable amount of weekly workers' compensation to be paid by the employer.[115]

Finally, while the court was entirely accurate in observing the analytical focus, it did not confront exactly *how* one or another of the factors could be established.[116] Certainly, a tax filing reflects that a claimant was or was not an employee or a contractor under M.C.L.A. section 418.161(1)(n).

The Michigan Supreme Court reversed this decision by the court of appeals, saying that income tax records were "directly relevant" to deciding that a claimant was or was not an employee. *Loos v. J.B. Installed Sales, Inc.*[117] The court was in complete agreement about the principle.[118] A dissent only said that the particular case had been correctly resolved.[119]

VIII. *ROMERO V. BURT MOEKE HARDWOODS, INC.*, *KENNEY V. ALTICOR, INC.*: DISABILITY AND *STOKES V. CHRYSLER L.L.C.*

After more than a decade of disputes, the Michigan Supreme Court ruled that the inability of an employee to resume a particular job after an injury at work was not enough to establish a disability under M.C.L.A. section 418.301(4)[120] and qualify for weekly workers' compensation.[121]

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114. MICH. COMP. LAWS ANN. § 418.372(1)(a)-.372(b) (West 2009).

115. *Id.* § 418.372(2) provides: "For purposes of apportionment under this section, only wages which were reported to the internal revenue service shall be considered, and the reports of wages to the internal revenue service are conclusive . . . ."

116. *Loos*, 2008 WL 4958532 *1 (holding "The statutory factors must be the focus of the analysis").

117. 485 Mich. 993, 993, 775 N.W.2d 139, 140 (2009) ("The Court of Appeals improperly held that income tax records regarding whether the plaintiff was paid wages or non-employee compensation are irrelevant to the question of whether the plaintiff is an employee under MCL 418.161(1)(n). Such regards are directly relevant to the question of employee status.").

118. *Id.* (Cavanagh, J. concurring in part and dissenting in part) ("[I] concur with the majority's statement that tax records are relevant to the question of whether a plaintiff is an employee under MCL 418.161(1)(n).").

119. *Id.* ("I would affirm the result [that was] reached by the Court of Appeals.").

120. MICH. COMP. LAWS ANN. § 418.301(4) provides: "As used in this chapter, 'disability' means a limitation 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."

121. *See* Sington v. Chrysler Corp., 467 Mich. 144, 158, 648 N.W.2d 624, 633 (concluding "[A]s did the *Rea* Court before us, that 'disability' as defined in M.C.L. 418.301(4) cannot plausibly be read as describing an employee who is unable to perform one particular job because of a work-related injury, but who suffers no reduction in wage earning capacity.").

Disputes continued to rage at the workers' compensation appellate commission largely because *Sington* only described what was not a disability, not what actually was disability.[122] These disputes were recognized and resolved by the court six years later in the case of *Stokes v. Chrysler L.L.C.*[123] In the case of *Stokes*, the court announced a simple four step consideration by which an injured employee could establish a disability under M.C.L.A. section 418.301(4).[124]

The Michigan Court of Appeals has addressed the ruling by the *Stokes* court several times during the period of the *Survey*.[125]

The decision by the court of appeals about the disability of Pablo Romero under *Stokes* is problematic. Disability under *Stokes-Sington* was not actually justiciable in the case of *Romero* because Romero had sustained the specific loss of a leg to qualify for weekly workers' compensation for 215 weeks under M.C.L.A. section 418.361(2)(k).[126] The fact that Romero had the loss of a leg under M.C.L.A. section 418.361(2)(k) meant that a question about disability under M.C.L.A. section 418.301(4), as explained in *Stokes* and *Sington*, would arise only at the end of the 215 weeks.[127] Romero's 215 weeks ended on January

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122. *See* Stokes v. Chrysler L.L.C., 481 Mich. 266, 276, 750 N.W.2d 129 (2008). ("Since *Sington* [*v. Chrysler Corp*, 467 Mich. 144; 648 N.W.2d 624 (2002)], lower courts and tribunals have closely analyzed a claimant's burden of proof, but the application of that standard has arguably been inconsistent."). See generally, *Stokes* at 276-279 for a survey of decisions by the appellate commission.

123. *Stokes*, 481 Mich. at 297, 750 N.W.2d at 147 (2008).

124. *Id.*

> (1) The claimant must disclose all of his qualifications and training; (2) the claimant must consider other jobs that pay his maximum pre-injury wage to which the claimant's qualifications and training translate; (3) the claimant must show that the work-related injury prevents him from performing any of the jobs identified as within his qualifications and training; and (4) if the claimant is capable of performing some or all of those jobs, the claimant must show that he cannot obtain any of those jobs. If the claimant establishes all these factors, then he has made a prima facie showing of disability satisfying MCL 418.301(4).

Id. at 298, 750 N.W.2d at 147.

125. *See, e.g., Kenny*, 2009 WL 1717372 at *1; *Romero*, 280 Mich. App. at 6, 760 N.W.2d at 589.

126. *See Romero*, 280 Mich. App. at 14, 760 N.W.2d at 593 (holding "In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified . . . Leg, 215 weeks."). "Although the magistrate used the phrase 'loss of industrial use in awarding plaintiff benefits, there is no indication that the magistrate or the WCAC misunderstood or misapplied the specific-loss standard." *Id.*

127. *See* Van Dorpel v. Haven-Busch Co., 350 Mich. 135, 143, 85 N.W.2d 97 (1957).

> The sole question in all of these cases should be: after the passage of the number of weeks allowed for the specific loss or losses falling short of declared total disability, can the injured workman go back to work? If he can — and

14, 2005, years after Romero's last medical examination and years after Romero had last testified.[128] There was no evidence about the Romero's situation after the 215 weeks ended.[129]

The decision by the court about *Stokes* was unilateral. The case of *Romero* was briefed and then argued to the Michigan Court of Appeals well before the Michigan Supreme Court decided *Stokes*. The case of *Romero* was briefed and then submitted for a decision after oral argument on November 15, 2007,[130] and *Stokes* was later decided by the court on June 12, 2008.[131] Neither Romero nor Burt Moeke Hardwoods filed a supplemental authority or a brief about the impact of *Stokes*. Indeed, there was no real opportunity to do so as the Michigan Court of Appeals issued *Romero* within seven weeks after the court issued *Stokes*.

The Michigan Court of Appeals' treatment of *Stokes* is best seen in its references to the case. The only reference to the ruling about disability by the court in *Stokes* is a footnote after the recitation of the *Sington* ruling and then only a recapitulation of the four step analysis.[132] This fact and the release of the decision within weeks of *Stokes* directly implies that the *Romero* court had already prepared the opinion and simply appended *Stokes*, rather than direct further briefing and argument, rewriting the opinion, or peremptorily reversing and remanding the case to the workers' compensation appellate commission for reconsideration.

These anomalies, the lack of justiciability of disability under M.C.L.A. section 418.301(4), the simple addition of *Stokes* to an existing decision, and the expediency of releasing the decision, suggest that great caution should be exercised when approaching *Romero*.

These various anomalies in *Romero* were absent from the case of *Kenney v. Alticor, Inc.*[133] The problem in that case was about disability under M.C.L.A. section 418.301(4), and, in particular, the adequacy of the record about the second requirement under *Stokes* of establishing the

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> fortunately he usually does — then well and good; if he can't, and if there are competent proofs to support his claim of continuing disability, then his compensation should be continued.

Id.

128. *Romero*, 280 Mich. App. at 2, 760 N.W.2d at 587-88. The trial was on November 14, 2003. Romero v. Burt Moeke Hardwoods, Inc., 2005 Mich. A.C.O. # 178 at 15, n.17. The medical examination was before that.

129. *Id.* at 14, 760 N.W.2d at 593.

130. *Id.* at 1, 760 N.W.2d at 586.

131. *Stokes*, 481 Mich. at 266, 750 N.W.2d at 129.

132. *Romero*, 280 Mich. App. at 6, n.1, 760 N.W.2d at 589 n.1.

133. 2009 WL 1717372 at *2.

work that an employee had been qualified and trained to do before having an injury.[134]

The court said that evidence from a source other than the employee was needed.[135] This ruling by the court of appeals largely confirms the protocol followed by almost all claimants after the court decided *Stokes*.[136] Virtually every claimant to weekly workers' compensation because of disability under M.C.L.A. section 418.301(4), hired a career counselor or vocational rehabilitation specialist to establish the qualifications and training of the employee when injured at work and then describe the employment opportunities afterward.[137] This protocol likely developed from the aversion to the risk of relying upon the testimony of the claimant alone, or to the work of collecting the information from other sources such as newspapers. The decision by the Michigan Court of Appeals in *Kenney* will likely be seen by practitioners as validating that aversion. Practitioners will likely view *Kenney* as an example of the risk of not presenting the testimony of a qualified expert career counselor or vocational rehabilitation specialist.

The *Kenney* court also addressed the adequacy of the evidence of a connection between a disability and a loss of earnings required under the ruling in *Sington*.[138] Without describing exactly what Julie M. Kenney had said, the court said that her testimony about her inability to find an employer who would now hire her was too generalized.[139]

As with the ruling about fulfilling the second step under *Stokes*, this ruling largely confirms the practice of almost all claimants after *Stokes*.[140] The use of a career counselor or a vocational rehabilitation specialist developed quickly after *Stokes* to fulfill the requirement of establishing the qualifications and training of the employee and the employment opportunities that remained after an injury was sustained.[141] They are also used to establish the success or failure of the injured

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134. *Id.* (holding "With respect to the second of the 'steps' required by *Stokes*, for example, plaintiff presented no proofs showing what jobs, if any, she is qualified and trained to perform . . . .").

135. *Id.* (reasoning "[T]he claimant is still required to present an objective means to assess employment opportunities, such as job listings from a newspaper, a job-placement agency, or a career counselor.").

136. Personal assessment of author.

137. Personal assessment of author.

138. *Kenney*, 2009 WL 1717372 at *2.

139. *Id.* (determining that "[P]laintiff's generalized and conclusory testimony regarding her inability to find an employer willing to hire her for any job simply lacks sufficient detail to allow a proper . . . disability analysis . . . .").

140. Personal assessment of author.

141. Personal assessment of author.

employee in exploiting any employment opportunities.[142] The ruling by the court in *Kenney* may fix this practice in place by demonstrating the hazard of the alternative of using the testimony of the injured employee alone.

IX. *REECE V. EVENT STAFFING*: DISABILITY AND LOSS OF EARNINGS

After the court decided *Sington*, a controversy arose about the need to correlate a disability, once established under M.C.L.A. section 418.301(4), with the loss of income to receive weekly workers' compensation. The origin of the controversy was the overruling of *Haske v. Transport Leasing, Inc.*[143] by the court in *Sington*.[144] Some thought that the court had overruled only the part of *Haske* in which disability had been said to be the inability of an injured employee to resume one particular job, which would not have disturbed the ruling that an established disability still had to be correlated to a later loss of wages.[145] Others thought that *Haske* had been completely overruled, including the requirement that disability had to be a cause of a loss of earnings. The court ended this controversy in *Stokes*[146] and emphasized its ruling in a case decided soon afterwards, *Harvey v. General Motors Corp.*[147]

The Michigan Court of Appeals has expanded on this in *Reece v. Event Staffing*.[148] There, the court recognized that a connection between a disability established under M.C.L.A. section 418.301(4), and a loss of earnings was required and then decided that the connection could be broken because of a circumstance that occurred before the injury.[149]

In the case, Travis Reece was a professional football player who received injuries during a game that were disabling under M.C.L.A.

142. Personal assessment of author.

143. 455 Mich. 628, 566 N.W.2d 896 (1997).

144. 467 Mich. at 172, 648 N.W.2d at 640. (stating that "[W]e overrule the *Haske* definition of 'disability' as that term is used in M.C.L. § 418.301(4).").

145. *See Haske*, 455 Mich. at 643, 566 N.W.2d at 902 (determining "Because wage loss is not presumed, an employee who demonstrates that he has suffered a disability must establish that this disability has resulted in a wage loss.").

146. *See* 481 Mich. at 297, 750 N.W.2d at 146.

147. 482 Mich. 1044, 769 N.W.2d 590 (2008) (holding "the Workers' Compensation Appellate Commission erred in stating that an employee does not need to demonstrate a connection between wage loss and the work-related injury. An employee is indeed required to demonstrate such a connection" (citing *Sington*, 467 Mich. at 160-61, 648 N.W.2d at 634)).

148. 2009 WL 2371889 at *1.

149. *Id.*

section 418.301(4).[150] This established disability resulted in an immediate loss of wages, as Reece could not play in the next game.[151] And this relationship between disability and the loss of wages continued as Reece remained unable to play in the remaining games.[152] However, the court of appeals decided that existing relation between the disability that Reece had and the loss of wages ended with the end of the season because the employment had been scheduled to end then.[153]

This is a dramatic decision because it relies on the term of employment to end the relation between disability and the loss of wages rather than the decision of the employee, which had always been the focus.[154] In *Perez v. Keeler Brass Co.*, the court said that weekly workers' compensation was not available when a disabled employee decided to quit working after an injury.[155] And in *Sington*, the court said that weekly workers' compensation was not available when an employee decided to quit working *before* having an injury that resulted in disability.[156] While nuanced, the emphasis on the fixed term of employment instead of the actual decision by the employee to end work is quite dramatic. It may allow an employer to limit the duration of weekly workers' compensation before an employee is ever injured by limiting the term of employment to a fixed period of time or to a specific task.

The decision by the Michigan Court of Appeals in *Reece* is also important because it does not suggest whether the relationship between disability and the loss of wages that ended with the term of employment,

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150. *Id.* "While playing professional football for the Grand Rapids Rampage of the Arena Football League, plaintiff sustained repeated injuries to his right shoulder during tackles. The magistrate found the combined effect of these shoulder injuries to be disabling under MCL 418.301(4) . . . ." *Id.*

151. *Id.*

152. *Id.*

153. *Reece*, 2009 WL 2371889 at *1 (stating "[A] claimant must demonstrate a clear connection between wage loss and work-related injury. This requisite connection is not shown when plaintiff's lost wages are attributable to the end of the football season, rather than his shoulder injury" (citation omitted)).

154. *See, e.g., Sington*, 467 Mich. at 160-61, 648 N.W.2d at 634; Perez v. Keebler Brass Co., 461 Mich. 602, 612, 608 N.W.2d 45, 50-51 (2000).

155. 461 Mich. at 612, 608 N.W.2d at 50-51 ("The statute makes clear that an employee's unreasonable refusal of reasonable employment is equivalent to a withdrawal from the work force. . . ." (citation omitted)).

156. 467 Mich. at 160-61, 648 N.W.2d at 634 (stating "[A]n employee might suffer a serious work-related injury on the last day before the employee was scheduled to retire with a firm intention to never work again. In such a circumstance, the employee would have suffered a disability, i.e., a reduction in wage earning capacity, but no wage loss because, even if the injury had not occurred, the employee would not have earned any further wages.").

the end of the football season, might or might not restart with the following term or "season."

The decision by the *Reece* court can apply well beyond football and professional sports. *Reece* can apply to any employee who has been hired for a fixed term or a "season" such as school teachers, lifeguards and summer camp counselors, nursery workers, and roofers.

The appellate commission reproved the ruling by the court of appeals in *Reece* when deciding the case of *Epson v. Event Staffing, Inc.*[157] There, the appellate commission said that,

> [t]he defendants have wrongly suggested that under the non-published (and non-binding) Court of Appeals decision in *Raybon* [*v. D.P. Fox Football Holdings, L.L.C.*[158]] that seasonal employees are not entitled to wage loss benefits after the end of the season. We disagree. * * * [The claimant] is not, as the defendants suggest, automatically disentitled to wage loss benefits just because the season has ended."

This may be authoritative for practitioners, magistrates hearing cases, and the panels of the appellate commission as it was part of an en banc decision by the appellate commission.

X. *SLAIS V. MICHIGAN DEPARTMENT OF STATE POLICE*: VOCATIONAL REHABILITATION HEARINGS

The procedure to establish a claim for vocational rehabilitation under M.C.L.A. section 418.319(1) is different from the procedure to claim any other benefit under the WDCA. The claim is heard and decided first by the director of the workers' compensation agency, [159] and then by a hearing referee or workers' compensation magistrate.[160] A claim for any other benefits is first heard and decided by a workers' compensation magistrate[161] and then by the appellate commission.[162]

The relationship between the statute requiring the director of the Workers' Compensation Agency to conduct the first hearing of a claim to vocational rehabilitation with other law has been serious. The principal problem has been with the procedure available before the

157. 2009 Mich. A.C.O. 152 at 32.
158. No. 268634, 2007 Mich. App. LEXIS 1751 (Mich. Ct. App. July 17, 2007).
159. MICH. COMP. LAWS ANN. § 418.319(1) (West 2007).
160. *Id.* § 418.319(2).
161. MICH. COMP. LAWS ANN. § 418.847(1) (West 2007).
162. MICH. COMP. LAWS ANN. § 418.859a(1) (West 2007).

director. There have been two main problems. One is that the director of the workers' compensation agency usually delegates the hearing to either a vocational rehabilitation consultant or to a compensation mediator.[163] But neither the consultants nor mediators are authorized to administer an oath to witnesses.[164]

The other problem is that no record is made of the initial hearing of a claim to vocational rehabilitation.[165]

While recognized,[166] the appellate commission had not resolved the problems until the en banc decision of *Slais*.[167] The resolution was as unique as the relationship. The appellate commission did not impose a requirement of recording the initial hearing of a claim to vocational rehabilitation by the director of the workers' compensation agency or designee of the director to reconcile M.C.L.A. section 418.319(1) with the requirements of procedural due process. Instead, the appellate commission ruled that the board of magistrates must conduct a second hearing to fulfill the requirement of due process of law because a statute in the WDCA authorizes a magistrate to administer an oath to any prospective witness,[168] and another statute[169] requires a record of the hearing by a magistrate.[170]

The decision ends the prior practice of review by a magistrate as if the decision about vocational rehabilitation by the director of the workers' compensation agency was only subject to an appeal.

XI. *TRAMMEL V. CONSUMERS ENERGY CO.*: WORKERS' COMPENSATION AND JOINT REPLACEMENT

In deciding *O'Connor v. Binney Auto Parts*, the Michigan Court of Appeals ruled that the occasion for determining a loss of a part of the body under M.C.L.A. section 418.361(2)(a)-(l) was after an implant had been done.[171] The basis for this ruling was the court's appreciation of the

163. *See* Mazzara v. Cappucini Giuseppe Masonry, 2000 Mich. ACO #386, 13 MIWCLR 1790 (2000).

164. *See id.* MICH. COMP. LAWS ANN. § 418.853, second sentence, authorizes that the director, magistrates, and an arbitrator sitting under MICH. COMP. LAWS ANN. § 418.864(1) can administer an oath. This does not include the consultants and mediators who usually conduct the initial hearing of a claim for vocational rehabilitation.

165. *See* Slais v. State of Mich., Dep't of State Police, 2009 Mich. ACO # 10, 23 MIWCLR 38 (2009).

166. *See Mazzara*, 2000 Mich ACO # 386, 13 MIWCLR 1790 (2000).

167. 2009 Mich. A.C.O. 10, 23 MIWCLR 38.

168. MICH. COMP. LAWS ANN. § 418.853.

169. MICH. COMP. LAWS ANN. § 418.858(1).

170. *Slais*, 2009 Mich. ACO # 10, 23 MIWCLR 38.

171. 203 Mich. App. 522, 534, 513 N.W.2d 818, 823 (1994) (stating "The instant case

difference between an implant that was actually a part of the body and a prosthesis that was worn by the employee, which had been recognized in the earlier case of *Tew v. Hillsdale Tool & Manufacturing Co.*[172]

This ruling by the court in *O'Connor* has not been reversed or modified. However, the Michigan Supreme Court said that it disagreed with a distinction between an implant and a non-implant in *Cain v. Waste Management, Inc.*[173] This was problematic as the disagreement with the distinction could mean both implants and non-implants should be considered to decide a specific loss or both implants and non-implants should never be considered.

The appellate commission has taken the disagreement with *O'Connor* to mean that both an implant and a non-implant cannot be considered when deciding a claim to weekly compensation for a physical loss under M.C.L.A. section 418.361(2)(a)-(l).[174]

There are two consequences for employees because of the decision by the appellate commission. One is that the resumption of work may be delayed for years. The incentive for an employer to provide an employee with work that accommodates the residuals from an injury at work is actually the reduction of weekly compensation under M.C.L.A.

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concerns the implant of a device that becomes part of the leg itself. If such a procedure proves to be successful in restoring the use and service of [the] leg, it is the leg *so restored* that should be evaluated." (emphasis added)).

172. *Id.*

> Second, [the court in deciding *Tew*] pointedly distinguished between an external prosthesis and an implant: 'If by some medical procedure an object or device is attached to or implanted in the injured member, it has become part of the body. The issue of industrial loss would then be viewed with respect to what the [employee] can do with the member as altered . . . . An arm or leg which contains a surgically inserted pin is, nevertheless, an arm usable in industry without an aid . . . A distinction can and should be made between artificial devices or objects which are made part of the body and external aids which merely enable a person to accomplish what the limb or member cannot do on its own.' We accept the *Tew* Court's distinctions as useful and valid.

Id. (quoting Tew v. Hillsdale Tool & Mfg. Co., 142 Mich. App. 29, 36, 369, N.W.2d 254, 257 (1985) (internal citations omitted)).

173. 465 Mich. 509, 521 n.12, 638 N.W.2d 98, 105 n.12 (2002) (stating "As indicated in n10, both *Tew* and *O'Connor* distinguished between artificial devices or objects that are made part of the body and external aids that merely enable a person to accomplish what the limb or member cannot do on its own. We cannot agree with this distinction because it has no basis in the language of the statute." (internal citations omitted)).

174. Trammel v. Consumers Energy Co., 2009 Mich. ACO # 126, 7, 23 MIWCLR 162 (2009) (holding "Because the statute makes no distinctions and because the Michigan Supreme Court has already indicated [that] it will apply the statute as written, we conclude the external device versus implant distinction is not relevant in a § 361(2) specific loss claim.").

section 418.301(5)(b).[175] Indeed, it was this statute that motivated Consumers Energy to provide Trammel with work immediately after recuperating from the knee replacement surgery.[176]

This incentive for an employer to provide an injured employee with work is not available for four years under the decision by the commission. The decision by the appellate commission that an employee has lost a leg by having knee replacement surgery means that compensation must be paid for four years with no reduction for any wages from work during that time.[177]

And delaying the resumption of work for four years may well mean that the injured employee will never again work at the employer where the injury occurred.

The other serious consequence of the decision by the appellate commission is equally real. An injured employee who does resume work may not qualify for any weekly compensation upon losing a toe or even the entire foot from a second injury at work. Though M.C.L.A. sections 418.361(2)(f), (g) and (j) should apply and require weekly workers' compensation for such a loss or losses, the decision by the commission may preclude that. It would be logically impossible to lose a toe or a foot *after* having lost the entire leg. Indeed, the decision by the appellate commission that the loss of a leg occurs when an injured employee has the knee replaced implies that no weekly workers' compensation could be available were an injury during subsequent work to necessitate amputation below the knee because the leg had already been lost. The alternative is that an employee could experience the loss of the same leg over and over again. An employee could experience the loss of a leg for the first time when having knee replacement surgery under the decision

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175. MICH. COMP. LAWS ANN. § 418.301(5)(b) provides:

> If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows: . . . If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

176. *See Trammel*, 2009 Mich. ACO #126, 23 MIWCLR 162.

177. MICH. COMP. LAWS ANN. § 418.361(2)(k) provides:

> In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following: . . . Leg, 215 weeks.

by the commission. The employee could experience the loss of the same leg a second time when having hip replacement surgery necessitated by an injury during later work under the decision by the commission. But the employee could experience the loss of the leg for a third time when an injury at yet later work required an amputation.

XII. CONCLUSION

In sharp contrast to the prior *Survey*, the courts did not revisit the existing case law about one or another statute in the WDCA to clarify, distinguish, or overrule that case law. Instead, the focus of courts during the time of the *Survey* was on the relationship between some statute in the WDCA and a statute or rule from outside the WDCA. The fit that courts established was usually sound. And the fit that courts established have suggested serious consequences that may take little time to become apparent but more time to ameliorate.