WORKER'S DISABILITY COMPENSATION

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I. INTRODUCTION

Each of the workers' compensation cases released for publication between June 1, 2010 and May 31, 2011 involved a procedure for affecting a claim where the courts resolved the matters by distinguishing or extending existing caselaw. Though altogether sound, the decisions have no real consequence.

II. *BENNETT V. MACKINAC BRIDGE AUTHORITY*: NO COMPULSORY JOINDER OF PARTIES

The case of *Bennett v. Mackinac Bridge Authority*[1] involved the procedure required for an employee to recover workers' compensation from someone other than the employer.[2] Ricky S. Bennett first sued his

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1. 289 Mich. App. 616, --- N.W.2d ---- (2011), *appeal denied*, 489 Mich. 858, 795 N.W.2d 8 (2011).

2. *See* MICH. COMP. LAWS ANN. § 418.651 (West 1999).

employer, Allstate Painting, for compensation under the penultimate sentence of M.C.L.A. section 418.651:

> The person so entitled, irrespective of any insurance or other contract, shall have the right to recover the same directly from the employer; and in addition 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.[3]

Bennett then sued the Mackinac Bridge Authority and American Painting for the compensation unpaid by Allstate as principals under the first sentence of M.C.L.A. section 418.171(1): "[T]he principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal."[4] The Bridge Authority and American Painting objected to the sequential claim.[5] The Bridge Authority and American Panting maintained that Bennett was required to join them when first claiming compensation from his employer, Allstate, and as a consequence, the subsequent claim was barred under the ruling of the Michigan Supreme Court in the case of *Gose v. Monroe Auto Equipment Company,*[6] where the court held that the rule of res judicata bars any claim to compensation from an injury sustained by an employee at work that could have been submitted for a decision with a prior claim.[7]

The court of appeals allowed the claim by Bennett to proceed against the Bridge Authority and American Painting by distinguishing *Gose.*[8] One distinction was between the rule of res judicata and joinder of parties.[9] Another distinction was the extra-statutory authority for the rule of res judicata in *Gose* and the particular statutory authority for joining people to a claim for compensation.[10]

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3. *Id.*

4. *Bennett*, 289 Mich. App. at 618-19 (citing MICH. COMP. LAWS ANN. § 418.611 (West 2009)).

5. *Id.* at 619.

6. 409 Mich. 147, 159, 294 N.W.2d 165 (1980).

7. *Bennett*, 289 Mich. App. at 620 (citing *Gose*, 409 Mich. 147).

8. *Id.* at 622.

9. *Id.* at 633 ("Res judicata and party joinder are naturally distinct concepts.").

10. *Id.* at 630 ("[R]es judicata is a 'judicially created' doctrine . . . ."). The court further stated that "[h]ad the Legislature wanted to require the joinder of direct and

These distinctions are entirely sound. The rule of res judicata is inherently different than rules about joining people to a lawsuit for workers' compensation. The rule of res judicata concerns the scope of a decision.[11] But rules about compulsory or permissive joinder of parties concern the personal jurisdiction of a court under *Ward v. Hunter Machine Company*.[12] Certainly, the order holding Allstate Painting liable would have been void for want of personal jurisdiction over all of the parties had Bennett been required to join the Bridge Authority and American Painting in the first claim for compensation.

Further, the distinction between the extra-statutory origin of the rule of res judicata and the statutory origins for joining people to a claim for workers' compensation is sound. Res judicata *is* an extra-statutory rule. There is no provision in the Michigan Worker's Disability Compensation Act ("WDCA") referring to res judicata itself or codifying *Gose*.[13] Yet, there are many provisions in the WDCA about compulsory joinder, permissive joinder, and prohibited joinder. The penultimate sentence of M.C.L.A. section 418.651 *requires* joining the employer in any claim for workers' compensation, but only *allows* joining the compensation insurer.[14] The last sentence of M.C.L.A. section 418.84 allows joining the director of the Workers' Compensation Agency in certain cases.[15] And M.C.L.A. section 418.341 prohibits joining a dependent in a compensation case filed by an employee.[16]

Though well-founded, the decision by the court of appeals that there is no compulsory joinder[17] is likely to have no effect on the administration of compensation cases. The Workers' Compensation Agency itself determines who is the compensation insurer of an employer when an employee files an application for mediation or a hearing to recover compensation, and then joins that compensation insurer to the lawsuit by mailing the application to the employer and insurer.[18] This should not change because of the decision in *Bennett*.

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statutory employers in a single action, it easily could have done so by including language to that effect in the text of § 171." *Id.* at 633.

11. *Gose*, 409 Mich. at 162.

12. 263 Mich. 445, 449, 248 N.W.2d 864 (1933).

13. *See* MICH. COMP. LAWS ANN. §§ 418.1-418.941 (West 1999).

14. *Id.* § 418.651.

15. *Id.* § 418.841 ("The director may be an interested party in all worker's compensation cases in questions of law.").

16. *Id.* § 418.341 ("No dependent of an injured employee shall be deemed, during the life of such employee, a party in interest to any proceeding by him for the enforcement of collection of any claim for compensation, nor as respects the compromise thereof by such employee.").

17. *Bennett*, 289 Mich. App. at 616.

18. *See* MICH. COMP. LAWS ANN. § 418.222.

Similarly, the Workers' Compensation Agency joins the entities from whom special kinds of compensation are sought, such as the second injury fund, by mailing the application for mediation or hearing to the entity.[19] This also should not change because of the decision in *Bennett*. While an employee can sue an employer for compensation and then later sue others as principals under M.C.L.A. section 418.171(1), it is unlikely that an employee will ever actually do so because the employee cannot avoid the time and cost of repeating the hearing of the case against the employer. The court of appeals prohibited Bennett from using the decision against his employer, Allstate Painting, and against the principals, the Bridge Authority and American Painting.[20]

III. *FERDON V. STERLING PERFORMANCE, INC.*: THE TRANSCRIPTS OF ALL HEARINGS ARE REQUIRED ON APPEAL

A party who is disappointed with a decision by the Board of Magistrates can appeal to the Workers' Compensation Appellate Commission.[21] To continue with the appeal, an appellant must file the transcript of the hearing that had been conducted before the Board within sixty days unless he requests an extension of time.[22]

The Michigan Supreme Court first considered this law in the case *Kurtz v. Faygo Beverage, Inc.*[23] There, the court was most concerned with the second sentence of M.C.L.A. section 418.861a(5) because the appellant did not ask for an extension of time when the court reporter failed to provide a copy of the transcript.[24] However, during the time of

19. *See* MICH. COMP. LAWS ANN. § 418.551.

20. *Bennett*, 289 Mich. App. at 636 ("An injured employee may not invoke the doctrine of res judicata offensively against [the] statutory employers in a subsequent proceeding if those statutory employers did not have adequate notice . . . .").

21. MICH. COMP. LAWS ANN. § 418.851 ("Unless a claim for review is filed by a party within 30 days, the order [of the Board of Magistrates] shall stand as the order of the bureau."); MICH. COMP. LAWS ANN. § 418.859a(1) ("Except as otherwise provided for in this act, a claim for review of a case for which an application under section 847 is filed after March 31, 1986 shall be filed with the appellate commission.").

22. MICH. COMP. LAWS ANN. § 418.861a(5) ("A party filing a claim for review under section 859a shall file a copy of the transcript of the hearing within 60 days of filing the claim for review . . . . For sufficient cause shown, the commission may grant further time in which to file a transcript.").

23. 466 Mich. 186, 644 N.W.2d 710 (2002).

24. *Id.* at 193 ("[Counsel for the appellant] explained that the reporter failed to prepare the transcript by the due date. This explanation, however, did not excuse the failure to timely request an extension.").

this *Survey*, the court decided a case concerning the first sentence of section 418.861a(5),[25] *Ferdon v. Sterling Performance, Inc.*[26]

Ferdon only involved the first sentence of M.C.L.A. section 418.861a(5) because the court reporter supplied the appellant with the transcript for all of the hearings that had been conducted before the Board.[27] The question dividing the court concerned the scienter of the appellant. The court concluded that the appellant deliberately withheld the transcript of one of the hearings before the Board.[28] The dissent disagreed, insisting that the appellant did not deliberately withhold the transcript.[29] The court properly resolved the controversy over the scienter, as any determination of fact by the Commission is conclusive on appeal to the court.[30] Rejected evidence does not require acceptance because it was not contradicted as the dissent assumed.[31]

Though properly resolved, the decision by the court is likely to have no consequence. Appellants will continue to ask the court reporter for transcripts of all of the hearings that had been conducted before the Board and then rotely file them with the Commission without assessing the content to establish the issues and arguments to present in a brief. Such a protocol is simply easier than assessing the transcripts to cull one or another as either duplicative of some hearing or as unnecessary to the case before briefing.

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25. MICH. COMP. LAWS ANN. § 418.861a(5).

26. 489 Mich. 877, 796 N.W.2d 46 (2011).

27. *Id.*

28. *Id.* at 877-78 (Markman, J., concurring) ("While there is no evidence of any intention to mislead on the part of [the appellant's] counsel, nonetheless he was required to file the transcript within 60 days of the filing of the appeal pursuant to MCL 418.861a(5), and he did not. That counsel viewed the transcript as irrelevant does not alter the fact that he failed to file it and did so intentionally.").

29. *Id.* at 880 (Kelly, J., dissenting) ("[C]ounsel [for the appellant] had instructed [a secretary] to forward a complete copy of the transcript and that she thought that she did. She said that the omission was her mistake. [T]here was no evidence to rebut this sworn claim. No motive was advanced to explain why counsel's withholding the transcript would have been intentional. Thus, the [Commission] erred by concluding that the transcript was purposefully withheld.").

30. MICH. COMP. LAWS ANN. § 418.861a(14) ("The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive.").

31. *See* Kido v. Chrysler Corp., 1 Mich. App. 431, 433, 136 N.W.2d 773 (1965) ("[George Kido's] testimony . . . was unrebutted but also unsupported. The fact that the board rejected the testimony does not constitute any irregularity in the review process . . . but, indeed, is inherent in the nature of the process.").

IV. *FINDLEY V. DAIMLERCHRYSLER CORP.*: A "TRUE" MAJORITY OPINION

The Michigan Supreme Court ruled in the case of *Aquilina v. General Motors Corporation*[32] that at least two of the three members of the Workers' Compensation Appeal Board must endorse an opinion to actually constitute a decision. There is no actual decision when one panelist subscribes to the opinion while the others "concur in result only" or dissent.[33] The Michigan Court of Appeals considered a question about applying this stricture for the Appeal Board to its successor, the Appellate Commission, in the case of *Findley v. DaimlerChrysler Corporation*[34]

In *Findley*, the court of appeals was presented with two separate opinions from the panel of the three commissioners that had been assigned to the case. Each opinion was endorsed by the author.[35] But one of the two was concurred in "result only."[36]

The court of appeals ruled that there was no opinion that could be reviewed because no two of the three commissioners had endorsed any one opinion on the authority of *Aquilina*.[37] The argument that *Aquilina* only applied to the Appeal Board was dismissed.[38]

While entirely apt because the subject of *Aquilina*—judicial review—remained the same when the Appellate Commission replaced the Appeal Board, the decision by the court of appeals is not likely to be of consequence for two reasons. First, the Michigan Supreme Court has accepted the case for review and decision during the 2011-2012 term.[39] And second, there has not been a subsequent decision by the Commission after the appellate court's decision, which did not require

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32. 403 Mich. 206, 206, 267 N.W.2d 923 (1978).

33. *Id.* at 214 ("[W]e cannot discharge our reviewing responsibilities unless a *true* majority reaches a decision based on stated facts. A decision [by the Appeal Board] is not properly reviewable when some of the majority concur only in the result and do not state the facts upon which that result is based.") (emphasis added).

34. 289 Mich. App. 483, 797 N.W.2d 175 (2010).

35. *Id.*

36. *Id.* at 492-93.

37. *Id.* at 494 (citing *Aquilina*, 403 Mich. at 214).

38. *Id.* at 495-96 ("[O]ur review of the [Commission's] findings remains the same as our previous review of the [Appeal Board's] findings . . . . Accordingly, the true-majority requirement articulated in *Aquilina* continues to be valid.").

39. Findley v. DaimlerChrysler Corp., 488 Mich. 1034, 1034, 793 N.W.2d 237 (2011) ("The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether the Workers' Compensation Appellate Commission is required to render a majority opinion in order to provide a final decision that is reviewable by the appellate courts.").

endorsement by at least two of the three commissioners assigned to a panel, reflecting that the point is dormant.

V. *HARDER V. CASTLE BLUFF APARTMENTS*: PARTIAL WEEKLY COMPENSATION FOR PARTIAL DISABILITY

At the end of the *Survey* period, the Michigan Supreme Court reestablished in *Harder v. Castle Bluff Apartments* that the weekly compensation amount depends on the extent of the disability experienced by an employee at any given time after sustaining an injury at work, not on the amount of the actual earning after an injury.[40] In *Harder*, the court said that the full compensation benefit was available only because William D. Harder had always been totally disabled by an injury that he sustained while working for Castle Bluff Apartments, for he could no longer perform the work he was once qualified to perform.[41] The court added that otherwise, only a partial benefit would have been available based on the difference between what Harder had earned when he had been injured and what he remained capable of earning.[42]

Consequently, full compensation is available only during the time specified by statute for a physical loss;[43] for multiple physical losses;[44] a doctor who bars all work during treatment and recuperation; or a vocational counselor can find no work at all without retraining or requalifying the injured employee.

This also means that only partial compensation is available when a vocational counselor finds work that an injured employee is capable of doing with no further qualification or training. The amount of the partial compensation is based on the difference between the average weekly wage of the employee when injured and the pay for the jobs found by the vocational counselor.[45]

This partial compensation applies *at all times*, including: before any work is actually resumed; during any actual work as the actual pay could be less than the pay an injured employee is capable of earning such as

40. Harder v. Castle Bluff Apartments, 489 Mich. 951, 951, 798 N.W.2d 26 (2011). The author was counsel for defendant-appellant Castle Bluff Apartments.

41. *Id.*

42. *Id.* ("MCL 418.361(1) applies at all times to partially disabled workers, but the magistrate . . . found . . . that [William Harder] did not have the ability to earn wages within his qualifications and training . . . .") (citation omitted).

43. MICH. COMP. LAWS ANN. § 418.361(2)(a)-(l).

44. MICH. COMP. LAWS ANN. § 418.351(1).

45. Lofton v. AutoZone, Inc., 482 Mich. 1005, 1005, 756 N.W.2d 85 (2008).

working part-time when capable of full-time work; and after any actual work ends.[46]

The last two points were confirmed by the Court in *Umphrey v. General Motors Corporation*[47] and *Vrooman v. Ford Motor Company*.[48] William Umphrey did not actually resume work, but the court ordered the workers' compensation appellate commission to decide if he was then totally or partially disabled and, if partially disabled, allow only a partial benefit.[49] Kimberly Vrooman did resume work that accommodated or "favored" the injury that she had sustained working at Ford, but was later laid off.[50] The court ordered the workers' compensation board of magistrates to calculate partial compensation under *Harder* and *Lofton* during the time that she was working and afterwards.[51]

It is almost certain that the pronouncement by the court in *Harder* will continue without change. Indeed, the pronouncement by the court is only an expression of the earlier statement in the case of *Lawrence v. Toys R Us*[52] that "[t]he amount of wages [Victoria] Lawrence is able to earn is neither constrained nor controlled by the wages [that] she actually earned after [her] injury."[53]

Despite the court's divided four-three decisions in the cases of *Harder* and *Lofton*, the later cases of *Vrooman*[54] and *Umphrey*[55] were decided with near-unanimity. Only one Justice—Justice Hathaway—did not agree with the peremptory application of *Harder* in *Vrooman* and *Umphrey*.[56] She thought that the question should simply be fully debated and an opinion issued. In view of this, it is most unlikely that the court will do anything other than to continue to apply *Harder* as it did in *Vrooman* and *Umphrey*.

The Workers' Compensation Appellate Commission has recognized and implemented the court's ruling in *Harder*.[57]

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46. *Harder*, 489 Mich. at 951. Vrooman v. Ford Motor Co., 489 Mich. 978, 978, 799 N.W.2d 17 (2011).

47. 489 Mich. 978, 978, 799 N.W.2d 16 (2011).

48. 489 Mich. 978, 799 N.W.2d 17 (2011).

49. *Umphrey*, 489 Mich. at 978.

50. *Vrooman*, 489 Mich. at 978.

51. *Id.*

52. 453 Mich. 112, 125, 551 N.W.2d 155 (1996).

53. *Id.*

54. *Vrooman*, 489 Mich. at 978.

55. *Umphrey*, 489 Mich. at 978.

56. *See Vrooman*, 489 Mich. at 978; *Umphrey*, 489 Mich. at 978.

57. *See, e.g.*, Nancy B. Doty, Plaintiff, 2011 ACO No. 108, 2011 WL 3990745, at *5 (Mich. Work. Comp. App. Comm'n Sept. 6, 2011).

Lawyers representing employees may respond in three ways. One is to claim that the injury is totally disabling for the longest possible time, if not always. This is accomplished by presenting testimony of a doctor who states that nothing other than rest at home or treatment should be pursued, or by establishing restrictions so extreme and multifaceted that a vocational counselor can find no work at any pay. Another way is to advocate the very highest average weekly wage by including, and then inflating, every emolument of service or so-called fringe benefit, and deflating or excluding such from the remuneration for current jobs in an effort to increase the difference or "spread." Finally, claims may be abandoned after an employee has sought and received unemployment insurance benefits. An employee who has sought and received unemployment benefits cannot be totally disabled because of the employee's declaration about being "ready, willing, and able" to work. Such an employee is partially disabled at most. And any partial compensation is subject to a dollar-for-dollar reduction by the amount of the unemployment insurance received.[58]

Lawyers representing employers and compensation insurance companies may use a forensic vocational assessment to contradict the claim of total disability and reduce the amount of the compensation for an injured employee who cannot return to any job with the employer who had caused the injury.

VI. CONCLUSION

There are two notable features to the decisions by courts about workers' compensation during the *Survey* period. First, there was a dearth of decisions. Second, these decisions, however sound, are largely inconsequential, having involved rare, if not arcane, situations during the hearing or review of a contested claim and having been handily resolved by either extending or distinguishing extant caselaw. These features suggest that the courts have exiled the body of workers' compensation law from active consideration as much as the attention to exceptions to compensation chronicled in the prior *Survey*.

58. *See* MICH. COMP. LAWS ANN. § 418.354.