# WORKERS' DISABILITY COMPENSATION

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## I. INTRODUCTION

The *Survey* period[1] failed to provide much guidance to the bench and bar in the area of Workers Compensation Law. Given the number of cases that were remanded, and the Michigan Supreme Court's decision to address the two most important decisions that were released by the Court of Appeals, the *Survey* period could be described as a prelude of things to come. Nonetheless, the period did produce an analysis of the applicability of the doctrine of laches in a workers compensation proceeding;[2] an illustration of how to get a case into the Court of a second definition of a personal injury;[3] and an examination of a carrier's right to reimbursement from the Logging Fund.[4] It also contained a determination of whether certain settlement proceeds were to be treated as a collateral source;[5] a limitation of the Agency's jurisdiction over out of state injuries;[6] a defining of the phrase "the proximate cause" as applied to death claims;[7] a look at dependency in death claims;[8] a narrowing of the application of the "traveling employee doctrine;"[9] and a review of discovery in workers' compensations proceedings, as well as what constitutes a prima facie claim under *Sington*.[10]

This article analyzes the decisions of the Court of Appeals and the Supreme Court that were issued during the *Survey* period. It emphasizes points to be pondered by those who practice workers' compensation law and/or who have interest in this field.

## II. *CHASE V. TERRA NOVA INDUSTRIES* – EQUITY DENIED

The Court of Appeals had the occasion to examine a wrap-up or owner controlled insurance policy issued pursuant to MCL section 418.623(1)[11] in construction projects lasting less than five years and totaling at least $65,000.000.00[12] in the matter of *Chase v. Terra Nova*

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1. The *Survey* period includes pertinent decisions/orders issued by the Michigan Supreme Court and the Michigan Court of Appeals from June 1, 2006 through May 31, 2007.

2. Chase v. Terra Nova Industries, 272 Mich. App. 695, 728 N.W.2d 895 (2006).

3. Simpson v. Borbolla Constr. & Concrete Supply, Inc., 274 Mich. App. 40, 731 N.W.2d 447 (2007).

4. Jager v. Rostagno Trucking Co., Inc., 272 Mich. App. 419, 728 N.W.2d 467 (2006).

5. Rodriguez v. ASE Industries, Inc., 275 Mich. App. 8, 738 N.W.2d 238 (2007).

6. Karaczewski v. Farbman Stein & Co., 478 Mich. 28, 732 N.W.2d 56 (2007).

7. Paige v. City of Sterling Heights, 476 Mich. 495, 720 N.W.2d 219 (2006).

8. *Id.*

9. Bowman v. R.L. Coolsaet Constr. Co., 275 Mich. App. 188, 738 N.W.2d 260 (2007).

10. Stokes v. DaimlerChrysler Corp., 272 Mich. App. 571, 727 N.W.2d 637 (2006).

11. MICH. COMP. LAWS ANN. § 418.621(3) (West Supp. 2007).

12. *Id.* This section of the Workers' Disability Compensation Act provides in pertinent part:

*Industries*.[13] Due to the infrequency of claims arising under this section of the Act, *Chase* will likely have more relevance to a workers' compensation practitioner in terms of the Court's treatment of the equitable issue presented therein, than any of the Court's pronouncements related to the wrap-up or owner controlled insurance policy.

*Chase* dealt with the appeals of the general contractor and the carrier who issued the wrap-up policy.[14] At issue were several questions, including whether the equitable doctrine of laches was applicable where neither appellant was a party to the initial proceeding wherein the liability for a foot injury was determined.[15] Although the Court reiterated the proposition that it is well established that the WCAC may apply equitable principles in appropriate instances to further the purpose of the Workers' Disability Compensation Act,[16] it declined to apply such relief because the defendants had failed to prove that a lack of diligence on the plaintiff's part resulted in some prejudice to the general contractor and the wrap-up carrier.[17] Specifically, the Court stated that, "[t]he burden was on appellants to establish prejudice, and we find their bald assertion to be insufficient in this regard."[18]

A lesson to be learned form *Chase* is that an employer or carrier who seeks equitable relief must demonstrate through relevant evidence that there is a factual basis to apply the hand of equity.[19] Where the employer/carrier seeks to apply the doctrine of laches, it must establish that something transpired between the time that the claim arose and when it was filed against its interest that negated its opportunity to present a full and meaningful defense.[20] Things such as the death of a significant witness, the inability to find an important witness after a good faith effort and/or the destruction of probative documents through no-fault of the employee/carrier come to mind as examples of fact situations that might persuade the WCAC or its superiors to apply the equitable doctrine of

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Under procedures and conditions specifically determined by the director, a separate insurance policy may be issued to cover employees performing work at a specified construction site if the director finds that the liability under this act of each employer to all of his or her employees would at all times be fully secured and the cost of construction at the site, not including the cost of land acquisition, will exceed $65,000,000.00, and the contemplated period for construction will be 5 years or less.
*Id.*

13. *Chase*, 272 Mich. App. 695, 728 N.W.2d 895.

14. *Id.* at 697-98, 728 N.W.2d at 898-99.

15. *Id.* at 700, 728 N.W.2d at 899.

16. *Id.* at 700 n.1, 728 N.W.2d at 899 n.1. *See also* Solo v. Chrysler Corp., 408 Mich. 345, 292 N.W.2d 439 (1980) (on reh'g); Lulgjuraj v. Chrysler Corp., 185 Mich. App. 539, 544-45, 463 N.W.2d 152, 154-55 (1990); Fuchs v. Gen. Motors Corp., 118 Mich. App. 547, 325 N.W.2d 489 (1982).

17. *Id.* at 701-02, 728 N.W.2d 900.

18. *Id.* at 702, 728 N.W.2d 900.

19. *See Chase*, 272 Mich. App. at 702, 728 N.W.2d at 900.

20. *Id.*

laches and bar a claim. What is readily apparent, predicated upon *Chase*, is that the employer/carrier must be prepared to support its equitable defense and that the mere pleading or contention of some impropriety on the part of the plaintiff will not suffice to warrant the granting of such relief.[21]

*Chase* may also have some value to the workers' compensation practitioner in terms of procuring court review in conjunction with an application for leave to appeal. In this regard, the Court noted that construction of MCL section 418.852(1) was warranted where there were two different reasonable interpretations of this provision of the Act.[22] In this regard, the Appellants argued that the magistrate and the WCAC should never have addressed the issue of coverage under the wrap-up policy because they were not involved in the proceedings at the time of the initial award of benefits.[23] In essence, the Appellants asserted that because they were not involved in the proceedings wherein the initial award of benefits was rendered, consideration of the issue was barred by MCL section 418.852(1).[24]

While the Court concluded that the plain language of MCL section 418.852(1), "at least arguably, supports appellants' position," it noted that reasonable minds could differ as to whether the statute meant this where the carrier's potential liability was allegedly not discovered until after benefits were first awarded.[25] Noting its preference for deferring to the WCAC's interpretation and application of the law and the fact that the WCAC never addressed the appellants' argument regarding MCL section 418.852(1), the Court found it prudent to remand the matter to the WCAC for an initial construct and analysis of this provision of the Act.[26] As a general principle, *Chase* may be used to support the proposition that leave to appeal should be granted where there are two reasonable competing interpretations of the same section of the Act.[27] Otherwise, *Chase* is a good case to keep in mind if the litigator is involved in a wrap-up or owner controlled insurance policy and/or is handling a contractual quagmire.[28] Under either circumstance, *Chase* may be well worthwhile reading.

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21. *Id.*

22. *Id.* at 700-01, 728 N.W.2d at 900.

23. *Id.* at 700, 728 N.W.2d at 899.

24. *Id. See* MICH. COMP. LAWS ANN. § 418.852(1) (West Supp. 2007). MCL section 418.852(1) provides: "The liability of a carrier or fund regarding a claim under this act shall be determined by the hearing referee or worker's compensation magistrate, as applicable, at the time of the award of benefits." *Id.*

25. *Chase*, 272 Mich. App. at 700-01, 728 N.W.2d at 899-90.

26. *Id.* at 701, 728 N.W.2d at 900.

27. *See generally Chase*, 272 Mich. App. 695, 728 N.W.2d 895.

28. *Id.*

## III. *SIMPSON V. BORBOLLA CONSTRUCTION* – A SECOND DEFINITION OF A PERSONAL INJURY WITHIN MEANING OF MCL SECTION 418.301(1)

In *Simpson v. Borbolla Construction*,[29] a long time ironworker, who described his duties as "hard work," was initially injured in 1979, when a chain fell several stories fracturing his left wrist.[30] The fracture went untreated and the condition progressively worsened.[31] Despite the worsening of his condition, the claimant continued to work.[32] On October 23, 2000, the claimant worked for the defendant for one day, inserting reinforcing rods into concrete.[33] This required the claimant to, among other things, carry bundles of rods.[34] Following this single day of employment, the claimant ceased working and filed his Application for Hearing seeking compensation from the defendant.[35]

The Court described his prior work as including post tensioning and welding.[36] Although the Court did note that the defendant had argued that the work plaintiff had performed in its employ was much "lighter" than the work that he had done for the bulk of his career as an iron worker, it did not point out whatever distinctions the defendant had made to justify its contention.[37] Instead, it focused on one aspect of the claimant's duties; namely, lifting 100 to 150 pounds of iron with the possible assistance of a coworker, and determined that this factor was sufficient to uphold the finding of last day of work liability predicated upon an October 23, 2000 personal injury.[38]

When rendering its decision, the Court described a classic split of medical proofs with the plaintiff's expert asserting that the claimant's continued use of his hands as an ironworker after suffering the fracture increased the rate of bone deterioration to the point where the condition precluded him from using his wrists to perform most tasks of an ironworker,[39] and the defendant's expert expressing the opinion that the condition related directly to the fracture and likely developed within two years of the specific event trauma.[40] Apparently, the Court concluded that the testimony of the plaintiff's expert was sufficient to sustain the administration's finding of compensability.[41]

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29. 274 Mich. App. 40, 731 N.W.2d 447.
30. *Id.* at 41, 731 N.W.2d at 448-49.
31. *Id.* at 41-42, 731 N.W.2d at 449.
32. *Id.* at 42, 731 N.W.2d at 449.
33. *Id.*
34. *Id.*
35. *Simpson*, 274 Mich. App. at 41-42, 728 N.W.2d at 448-49.
36. *Id.* at 41, 731 N.W.2d at 448.
37. *Id.* at 47, 731 N.W.2d at 451.
38. *Id.* at 47-48, 731 N.W.2d at 452.
39. *Id.*
40. *Id.* at 42, 731 N.W.2d at 449.
41. *See Simpson*, 274 Mich. App. at 41-42, 728 N.W.2d at 448-49.

The Court noted that the magistrate had found the defendant liable for benefits under MCL section 418.301(1)[42] because October 23, 2000 was the last day on which plaintiff was subjected to the conditions that resulted in disability (lifting heavy weight).[43] When the defendant appealed the magistrate's award, it argued to the WCAC that the magistrate's decision was contrary to *Rakestraw v. General Dynamics Land Systems Inc*,[44] since there was no showing of a "medically distinguishable" condition from any pre-existing injury resulting from the 1979 fracture.[45] The WCAC rejected this argument finding that plaintiff's work on October 23, 2000 was sufficiently similar to his previous ironworking jobs such that October 23, 2000 was the proper date of injury.[46]

This award was challenged at the Court of Appeals, which indicated that this case was factually distinguishable from *Rakestraw* and the Supreme Court's holding in that matter was therefore inapplicable.[47] The Court based this conclusion upon the fact that the pre-existing condition suffered in *Rakestraw* was not work related; whereas in *Simpson*, the plaintiff's initial injury occurred during the course of his employment in 1979.[48] In this regard, the Court wrote:

> The significance of the preexisting condition in *Rakestraw*, was not so much that it was preexisting, but rather that it was not-work-related. The purpose of requiring a 'medically distinguishable,' work-related condition in *Rakestraw* was to establish causation, not to simply distinguish the preexisting condition from a 'new' injury. Because of *Rakestraw's* focus on establishing a causal connection to the workplace, which is not an issue in the instant case, the factual distinctions between *Rakestraw* and the case at bar are significant such that *Rakestraw* is simply inapplicable.[49]

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42. MICH. COMP. LAWS ANN. § 418.301(1) (West Supp. 2007). MCL section 418.301(1) provides in pertinent part:

> Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

*Id.*

43. *Simpson*, 274 Mich. App. at 42-43, 731 N.W.2d at 449.

44. 469 Mich. 220, 666 N.W.2d 199 (2003).

45. *Simpson*, 274 Mich. App. at 43, 731 N.W.2d at 449.

46. *Id.* at 43-44, 731 N.W.2d at 449-50.

47. *Id.* at 46, 731 N.W.2d 451.

48. *Id.*

49. *Id.*

The Court of Appeals conclusion that the Michigan Supreme Court's focus related to establishing causation, was predicated upon the following excerpts taken from its superior's opinion in *Rakestraw*:

> We affirm today that an employee must establish the existence of a work-related injury by a preponderance of the evidence in order to establish entitlement to benefits under section 301(1). A symptom such as pain is evidence of a injury, but does not, standing alone, conclusively establish the statutorily required causal connection to the work-place. In other words, evidence of a symptom is insufficient to establish a personal injury 'rising out of and in the course of employment.'[50]

Where a claimant experiences symptoms that are consistent with the progression of a preexisting condition, the burden rests on the claimant to differentiate between the preexisting condition, which is not compensable, and the work-related condition, which is compensable. Where the evidence of a medically distinguishable injury is offered, the differentiation is easily made and causation is established. However, where the symptoms complained of are equally attributable to the progression of a preexisting condition or a work-related injury, a plaintiff will fail to meet his burden of proving by a preponderance of the evidence that the injury arose 'out of an in the course of employment'; stated otherwise, plaintiff will have failed to establish causation. Therefore, as a practical consideration, a claimant must prove that the injury claimed is distinct from the preexisting condition in order to establish "a personal injury arising out of and in the course of employment" under §301(1).[51]

The problem with the Court of Appeals' analysis is that it would be just as reasonable to read the above passages as focusing on the definition of a personal injury, as opposed to causation, or alternatively to assume that within the context of § 301(1),[52] the Supreme Court was using the term "causation" interchangeably with the phrase "personal injury." Further, it is doubtful that the Supreme Court would provide for two different definitions of the same clause in a single section of the Workers' Disability Compensation Act. That is, if the preexisting condition is not work related, then the claimant "must prove that the injury claimed is distinct from the preexisting condition in order to establish 'a personal injury arising out of and in the course of employment" under §301(1),[53] but does not have to make such a

50. *Id.* at 45, 731 N.W.2d at 450 (citing *Rakestraw*, 469 Mich. at 230-31, 666 N.W.2d at 205).

51. *Simpson*, 274 Mich. App. at 45, 731 N.W.2d at 451.

52. MICH. COMP. LAWS ANN. § 418.301(1) (West Supp. 2007).

53. *Id.*

showing if the preexisting condition is work-related. Presumably, this would reinstate the Law of Symptomatic Exacerbation,[54] a legal theory which required an award of benefits where the employment precipitated disabling symptoms, a theory that was soundly rejected by the Supreme Court in *Rakestraw*.[55]

Perhaps the Court of Appeals felt compelled to negate the applicability of *Rakestraw* because it concluded that the WCAC was on rather shaky ground finding that the work plaintiff had performed for a single day had produced a "medically distinguishable" condition. In this regard, it is significant to note that while the Court of Appeals initially postulated that it disagreed with the defendant's contention that the WCAC had misapplied *Rakestraw*, it ultimately found that *Rakestraw* was inapplicable.[56]

The path of least resistance would have been to rule that there was sufficient evidence to support the WCAC's finding of a "change of condition" attributable to the single day of work and affirm the finding of an October 23, 2000 personal injury. The Court of Appeals chose not to take this path and it will be up to the Supreme Court to clarify whether the bench and bar will be encumbered with two distinguishable definitions of a personal injury triggered by the nature of the preexisting condition.[57] Until then, the precedential value of *Simpson*[58] lies in its support for the premise that the last employment need not be identical to the work that was performed on the previous jobs, only that some feature of the last job was sufficiently similar to the prior work to justify finding a last day of work personal injury.[59]

Whether the Court would have ruled in the same manner if the lifting on Mr. Simpson's last day of work had been limited to 25 pounds or less, is a matter of conjecture. What is clear is that the court concluded that heavy lifting contributed to Mr. Simpson's condition and that lifting between 100 to 150 pounds, with or without the help of a co-worker, was

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54. *See* McDonald v. Meijer, Inc., 188 Mich. App. 210, 468 N.W.2d 27 (1991); Thomas v. Chrysler Corp., 164 Mich. App. 549, 418 N.W.2d 96 (1987).

55. *Rakestraw*, 469 Mich. at 231-32, 666 N.W.2d at 206.

56. *See Simpson*, 274 Mich. App. 40, 731 N.W.2d 447.

57. *See Simpson*, 478 Mich. 875, 731 N.W.2d 756 (granting oral argument in cases pending on application for leave to appeal on June 1, 2007, the Supreme Court directed the clerk to schedule oral argument on whether to grant the application or take other preemptory action in accord with MCR 7.302(G)(1)). The Court's order further provided that:

> At oral argument, the parties shall address whether the Court of Appeals erred in holding *Rakestraw v. General Dynamics Land Systems, Inc.* does not apply where the preexisting condition is work-related. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their applications papers (citations omitted).

*Id.*

58. 274 Mich. App. 40, 731 N.W.2d 447.

59. *See id.* at 43-44, 731 N.W.2d at 449-50.

a condition of employment that resulted in disability. Thus, application of the last day of work or successive injury provision found in §418.301(1)[60] of the Act was appropriate.[61]

## IV. *JAGER V. ROSTAGNO TRUCKING CO., INC.* – LOGGING FUND REQUIRED TO REIMBURSE EMPLOYER FOR AN INJURY SUSTAINED WHILE DELIVERING LOGS

In *Jager v. Rostagno Trucking Co., Inc.*,[62] the Court of Appeals had the occasion to determine whether an injury sustained falling to the ground while removing chains off of a load of logs that the claimant had just transported to a saw mill arose out of and in the course of the logging industry under MCL section 418.531,[63] thus triggering the Logging Fund's obligation to reimburse the Accident Fund for the benefits paid to the claimant.[64] When addressing this question, the Court cited the following portion of section 531(1) of the Act:

> In each case. in which a carrier including a self-insurer has paid, or causes to be paid, compensation for disability or death from silicosis or other dust disease, or for disability or death arising out of and in the course of employment in the logging industry, to the employee, the carrier including a self-insurer shall be reimbursed from the silicosis, dust disease., and logging industry compensation fund . . . [emphasis added in original].[65]

The Court then referenced the definition of "employment in the logging industry" as set forth in MCL 418.501(4).[66] In this regard, the Court noted that this section of the Act provides:

> As used in this chapter, "employment in the logging industry" means employment in the logging industry as described in the section in the workmen's compensation and employers liability

60. MICH. COMP. LAWS ANN. § 418.301(1) (West Supp. 2007). *See also supra* note 42 and accompanying text.

61. Subsequent to the preparation of this article, the Supreme Court vacated the Court of Appeals opinion because the panel had "erroneously held that *Rakestraw v Gen Dynamics Land Sys, Inc.*, 469 Mich 220 (2003), does not apply to the facts of this case. *Simpson v. Borbolla Const. & Concrete Supply, Inc.*, 480 Mich. 964, 741 N.W.2d 519 (2007). The Supreme Court then affirmed the result reached by the Court of Appeals for the reasons stated in the Workers' Compensation Appellate Commission opinion. *See id.* Thus the State of Michigan has returned to a single definition of a personal injury within the meaning of MCL 418.301(1) to be applied to all claims regardless of whether the pre-existing condition is work related or non-industrial in origin. *Id.*

62. 272 Mich. App. 419, 728 N.W.2d 467.

63. MICH. COMP. LAWS ANN. § 418.531(1) (West Supp. 2007).

64. *Jager*, 272 Mich. App. at 420-21, 728 N.W.2d at 469.

65. *Id.* at 422, 728 N.W.2d at 469.

66. *Id. See also* MICH. COMP. LAWS ANN. § 418.301(1) (West Supp. 2007).

> insurance manual, entitled, "logging or lumbering and drivers code no. 2702," which is filed with and approved by the commissioner of Insurance.[67]

The Court then stated that the "'logging or lumbering and drivers code no. 2702' referred to specifics that it '[i]ncludes transportation of logs to mill' among other activities."[68] Against this backdrop the court found, "[a]ccordingly, the Accident Fund was entitled to reimbursement from the Logging Fund if the injuries to Jager arose out of an in the course of his employment in the logging industry, including the transportation of logs to a mill."[69]

As an interesting aside, the WCAC had reached a different result by considering the purpose of the Logging Fund, which it concluded was to protect a threatened industry.[70] Predicated upon this conclusion, the WCAC found that the Logging Fund would be responsible for reimbursement under MCL section 418.531(1)[71] "only . . . if, in addition to the employee being in logging activity at the time of injury, the employer's business is logging and the employer has employees classified under code no. 2702."[72] Given the WCAC's determination that the employer had not paid insurance premium payments based on having its employees classified within code no. 2702, it concluded that reimbursement was not mandated.[73]

The Court noted that this conclusion was improper based upon the WCAC's erroneous belief that the threat to the industry constraints set forth in *Stottlemeyer v. General Motors Corp.*,[74] and *Felcokskei v. Lakey Foundry Corp.*,[75] were controlling herein. As indicated by the Court:

> In contrast to the vague statutory phrase at issue in *Stottlemeyer* and *Felcoskie*, i.e., "other dust disease," the statute at issue here contains a specific definition of what constitutes employment in the logging industry. Given that clear language, which is not subject to interpretation, Jager's injuries arose out of and in the course of his employment in the logging industry under MCL 418.531(1) because, when the accident occurred, he was

67. *Jager*, 272 Mich. App. 422, 728 N.W.2d at 470.
68. *Id.*
69. *Id.* at 423, 728 N.W.2d at 470.
70. *Id.* at 423, 728 N.W.2d at 469-70.
71. MICH. COMP. LAWS ANN. § 418.531(1) (West Supp. 2007).
72. *Jager*, 272 Mich. App. at 424, 728 N.W.2d at 470.
73. *Id.*
74. *See* 399 Mich. 605, 250 N.W.2d 486 (1977).
75. *See* 382 Mich. 438, 170 N.W.2d 129 (1969).

> transporting logs to a mill as specified in code no. 2702 (citations omitted).[76]

Alternatively, if the Court had not rejected the WCAC's reasoning based upon the specific language of the statute, it would have been justified rejecting the internally inconsistent reasoning of the WCAC regarding the legislature's desire to protect the logging industry. That is, one does not protect the logging industry by forcing it to incur the cost of a personal injury sustained while delivering logs. Such a ruling would have eliminated one of the reasons why the WCAC had denied reimbursement, leaving it to the Court of Appeals to then resolve the question of whether the administrative tribunal had properly denied reimbursement predicated upon the employer's under payment of premium to the Logging Fund due to its misclassification of its employees. Ironically, the Court did not address this issue, which was a far better justification for the denial of reimbursement, than protecting the logging industry.

An application for leave to appeal was filed with the Supreme Court. Although that application was denied, Justice Markman caught the importance of WCAC's reference to the lower premium charged by the Logging Fund predicated upon the employer's misclassification of its employees. In this regard, Justice Markman, voting to grant leave, wrote,

> I would grant defendant's application for leave to appeal to consider the following issues (1) with regard to an industry-defined workers' compensation fund, such as the Logging Industry Compensation Fund, by what means is the covered "industry" to be defined; (2) whether "employment in the logging industry" in MCL 418.531 references the nature of the work performed by his or her employer; (3) whether Code No. 2702, as referenced by MCL 418.501, defines what activities are compensable under § 501 or what activities are compensable by § 501 only if one is employed in the "logging industry"; (4) whether the logging fund has a course of action against a business or an insurer that, for purposes of insurance coverage, intentionally or negligently misclassifies the "industry" code of a particular business and thereby causes the fund to rely on such misclassification in setting its rates; and (5) whether the Workers' Compensation Appellate Commission in this case accurately concluded that "to permit recovery from the Fund under the circumstances of this case provides the employer with

76. *Jager*, 272 Mich. App. at 425, 728 N.W.2d at 471.

> a form of double recovery anathema to the compensation system."[77]

Justice Markman's quest to resolve these questions was reasonable and the answers would have been beneficial to the bench and the bar. In particular, the answer to the fourth question posed by Justice Markman; namely, whether the Logging Fund had recourse against the employer for the misclassification of its employees, would have greatly been appreciated by the Logging Fund when "setting its rates."[78] It would have also been appreciated by other employers in the logging industry whose premiums in theory could be favorably affected by higher premiums paid by the employers who had previously misclassified their work force.

Since cases arising under MCL section 418.531(1) are far and few between, it will most likely be incumbent on the Logging Fund to bring an action seeking to recoup the under payment of premium against some employer it suspects of misclassifying its employees before the questions posed by Justice Markman are answered. Whether such a cause of action should be brought in a court of law or presented to the Workers' Compensation Agency is uncertain. As such, the Logging Fund would be well served by bring suit in both forums and then seek to hold one of the claims in abeyance while the jurisdiction issue is resolved before the other tribunal.

## V. *RODRIQUEZ V. A.S.E. INDUSTRIES, INC.* – THIRD PARTY RECOVERY REIMBURSEMENT RIGHT IS A CLAIM AGAINST THE PLAINTIFF AND IS NOT AFFECTED BY WAIVER AGREEMENT BETWEEN THE EMPLOYER AND THE THIRD PARTY DEFENDANT

In the matter of *Rodriquez v. A.S.E. Industries, Inc.*,[79] the principle issue related to whether the trial court was free to conclude that a defendant had actual knowledge that a product was defective under MCL section 600.2949a,[80] even if the jury had found under MCL section 600.2946a(3)[81] that the defendant had not been grossly negligent. After concluding that the statute "clearly and unambiguously establishes two independent bases to avoid application of the damage limitation"[82] set forth in MCL section 2946a(1),[83] the Court went on to address the question of whether the trial court had erred in failing to reduce the

77. *Jager*, 272 Mich. App. 419, 728 N.W.2d 467, *leave denied*, 477 Mich. 1108, 729 N.W.2d 512 (2007).

78. *Id.*

79. 275 Mich. App. 8, 738 N.W.2d 238.

80. MICH. COMP. LAWS ANN. § 600.2949a (West Supp. 2007).

81. MICH. COMP. LAWS ANN. § 600.2946a(3) (West Supp. 2007).

82. *Rodriguez*, 275 Mich. App. at 12, 738 N.W.2d at 241.

83. MICH. COMP. LAWS ANN. § 600.2946a(1) (West Supp. 2007).

judgment that was awarded the plaintiff against the defendant by the amount of workers' compensation benefits already paid to the plaintiff by her employer.[84]

To support its contention that the judgment rendered in the plaintiff's favor and against its interest should be reduced by the amount of the workers' compensation that had already been paid, the defendant argued; (1) that the lien belonged to the employer rather than its carrier and (2) that the employer had waived the lien as consideration to support an agreement that it had reached with the defendant to release all rights of indemnification and/or reimbursement of any kind that they may have against each other.[85] Concluding that the second question provided a "more straight forward analysis," the Court went on to rule that the agreement did not waive any reimbursement right of the employer as against the plaintiff and as such the workers' compensation benefits that had been paid to the injured worker were not collateral source payments and could not be used to offset the judgment against the defendant.[86]

The defendant next argued that all future workers' compensation benefits should have been treated as a collateral source because only those already paid were exempt from treatment as a collateral source.[87] This contention was premised upon the defendants' reading of MCL section 600.6303(4) and its focus on the second sentence in that statute.[88] In this regard, the defendant argued that because future workers' compensation benefits are "receivable," they are a collateral source under the first sentence of section 4, but are not excluded from the definition of a collateral source under the second sentence of that provision because that sentence only excludes benefits that have already been paid.[89] Essentially, the defendant took the position that only benefits that have already been paid at the time of the judgment are excluded from the definition of a collateral source.[90]

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84. *See Rodriguez*, 275 Mich. App. at 13, 738 N.W.2d at 241-42.

85. *Rodriquez*, 275 Mich. App. at 15-16, 738 N.W.2d at 243.

86. *Id.* at 15-17, 738 N.W.2d at 243-44.

87. *Id.* at 17-18, 738 N.W.2d at 244.

88. MICH. COMP. LAWS ANN. § 600.6303(4) (West Supp. 2007) (providing in pertinent part:

> As used in this section, "collateral source" means benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; workers' compensation benefits; or medical benefits. Collateral source does not include life insurance benefits or benefits paid by a person, partnership, association, corporation, or other legal entity entitled by law to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages . . . .")

*Id.*

89. *Id.*

90. *Id.*

The Court rejected this argument based upon the fact that Plaintiff's workers' compensation benefits were not receivable to the extent that she had obtained a judgment against the defendant pursuant to MCL section 418.827(5).[91] This section of the Act provides:

> Any recovery against the third party for damages resulting form personal injuries or death only, after deducting the cost of the recovery, shall first reimburse the employer or carrier for any amounts paid or payable to the 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.

Predicted upon this language the Court concluded that to the extent that the employee has recovered a judgment, future compensation benefits "are not in fact 'payable' because the employer has a credit for the amount recovered by the employee in the tort action. Since those future benefits are not 'payable', they do not constitute a collateral source under MCL 600.6303(4)."[92]

Finally, the defendant argued that that the employer should only be able to assert a lien for 30% of the workers' compensation benefits paid because the jury had found the employer 70% responsible for the accident that gave raise to the payment of those benefits.[93] In its argument, the defendant attempted to distinguish the Court's holding in *Van Hook v. Harris Corp.*,[94] because that decision was rendered prior to the legislature's adoption of the fault allocation provisions.[95]

The Court summarily rejected this contention concluding that the rationale in *Van Hook* was based on the provisions of MCL section 418.827(5), which had not changed.[96] Noting that the language set forth in MCL section 418.827(5) applied to any recovery, the Court quoted the following passage from *Van Hook*, "[t]he legislature no doubt knew that employers are sometimes concurrently negligent. The failure to provide a statutory reduction (for the employer's pro rate share of responsibility) in such circumstances evinces an intent not to do so."[97]

On October 12, 2007, the Supreme Court issued a miscellaneous order granting leave to appeal on grounds other than the "collateral source" issue resolved at the Court of Appeals.[98]

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91. MICH. COMP. LAWS ANN. § 418.827(5) (West Supp. 2007).
92. *Rodriquez*, 275 Mich. App. at 19, 738 N.W.2d at 244.
93. *Id.*
94. Van Hook v. Harris Corp., 136 Mich. App. 310, 356 N.W.2d 18 (1984).
95. *Rodriquez*, 275 Mich. App. at 19, 738 N.W.2d at 245.
96. *Id.*
97. *Id.* at 19-20, 738 N.W.2d at 245.
98. *See* Rodriguez v. A.S.E. Industries, Inc., 480 Mich. 908, 739 N.W.2d 333 (2007).

With the "collateral source" ruling in Rodriquez becoming final, third party defendants stand little, if any, chance of having jury awards reduced by workers' compensation payments. As a practical consideration, given the employer's statutory lien against third party recoveries set forth in MCL 418.827(5), the treatment of workers' compensation benefits as a "collateral source" appears limited to recoveries against the employer; e.g. a civil judgment for an employer intentional tort.[99] This occurs because MCL section 418.827(5) is limited to third party recoveries and does not apply to judgments against the employer, who under the circumstance does not maintain a lien against the recovery proceeds.[100]

## VI. *KARACZEWSKI V. FARBMAN STEIN & CO.* – "PRECISELY WHAT PART OF THE WORD 'AND' IS DIFFICULT TO UNDERSTAND?"

While many criticize the Supreme Court for what is perceived as a conservative agenda designed to make recoveries all but impossible,[101] it is difficult to argue that the Court somehow got it wrong or was

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On order of the Court, the application for leave to appeal the March 22, 2007, judgment of the Court of Appeals is considered, and it is GRANTED, limited to the issues: (1) whether the trial court properly made independent findings in avoidance of the cap on non-economic damages provided for in MCL 600.2946a(1) after the jury had made contrary findings; and (2) if the damages cap applies, whether the trial court properly applied the apportionment of fault between defendant and American Axle before applying the damage cap.

*Id.*

99. MICH. COMP. LAWS ANN. § 418.131(1) (West 1999) provides in pertinent part:
The right to 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. The only exception to this exclusive remedy is an intentional tort. An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was going to occur and willfully disregarded that knowledge.

*Id.*

100. MICH. COMP. LAWS ANN. § 418.827(5) (West 1999) states:
In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his or her dependents or personal representative would be entitled to recover in an action in tort. 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 personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

*Id.*

101. *See* Victor E. Schwartz, *A Critical Look at the Jurisprudence of the Michigan Supreme Court*, 85 MICH. B.J. 38, 41 (Jan. 2006). *See also* Justice Kelly's dissent in Rowland v. Washtenaw Co. Road Comm'n, 477 Mich. 197, 731 N.W.2d 41 (2007).

motivated by such an agenda in the matter of *Karaczewski v. Farbman Stein Co.*[102] If any criticism is due with regard to the rule of law dealt with in *Karaczewski*, it should be directed at the predecessor Court which in the *Boyd v. W.G. Wade Shows*[103] literally read the word "and" out of MCL section 418.845.[104]

Section 845 of the Workers Disability Compensation Act bestows jurisdiction upon the Workers' Compensation Agency over certain out of state injuries. Specifically this section of the Act provides in pertinent part: "The bureau shall have jurisdiction over all controversies arising out of injuries suffered outside this state where the injured employee is a resident of his state at the time of injury and the contract of hire was made in this state."[105]

The Supreme Court used very logical and cogent reasons for rejecting the doctrine of stare decisis in *Karaczewski*, starting with its conclusion that this doctrine is a principle of policy rather than an inexorable command.[106] The Court noted that it saw no legitimate basis to conclude that Boyd has become so fundamental to expectations that "overruling it would produce practical real world dislocations."[107] To this end, the Court pointed out that this section of the Act applied only to out-of-state injuries.[108] The Court then added that its decision would not affect any Michigan resident who was injured out of state.[109] Rather, as the Court stated, reversing *Boyd* would only affect residents of other states who were injured outside of Michigan.[110] The Court continued its attack on *Boyd*, asserting that it saw no reason to believe that persons who neither live in Michigan, nor suffer an injury in Michigan, harbor expectations of receiving Michigan workers' compensation coverage.[111]

The Court referenced its decision in *Robinson v. City of Detroit*[112] throughout its opinion in *Karaczewski*, using the following except taken from *Robertson* to reject any reliance upon *Boyd*:

> Further, it is well to recall in discussing relevance, when dealing with an area of law that is statutory..., that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the

102. 478 Mich. 28, 732 N.W.2d 56.
103. 443 Mich. 515, 505 N.W.2d 544 (1993).
104. MICH. COMP. LAWS ANN. § 418.845 (West Supp. 2007).
105. *Id.*
106. *Karaczewski*, 478 Mich. at 39, 732 N.W.2d at 62.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 39-40, 732 N.W.2d at 62.
112. 462 Mich. 439, 613 N.W.2d 307 (2000).

> statute are clear, the actor should be able to expect, that is, rely that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier Court's misconstruction.[113]

Following this quote, the Court pointed out that the wording of section 845 was perfectly clear to the reader.[114] To emphasize this contention, Justice Corrigan wrote, "[p]recisely what part of the word 'and' is difficult to understand"[115] Noting the legislature's use of the word "and", the court indicated that it was "perfectly clear to any reader that both requirements must be met."[116] Thus for the Agency to capture jurisdiction over out of state injuries, the injured employee had to be a resident of the State of Michigan at the time of the injury and the contract of hire had to have been made in Michigan.

## VII. *PAIGE V. CITY OF STERLING HEIGHTS* – "THE PROXIMATE CAUSE" AS USED IN MCL SECTION 418.375(2) MEANS "THE SOLE PROXIMATE CAUSE"

In *Paige v. City of Sterling Heights*,[117] the decedent, Randall G. Page, suffered a work related myocardial infarction on October 12, 1991, after extracting a three year old girl from an automobile and carrying her to an ambulance.[118] He did not return to work, and in 1993 he was awarded workers' compensation benefits.[119] Although the magistrate found his son, Adam Paige (who was eight years old at the time of his father's personal injury), to be a dependent, he did not determine the extent of his dependency.[120]

Randall Paige suffered a second myocardial infraction on August 15, 2000 and he died in his sleep on January 4, 2001.[121] Thereafter, Adam Paige filed a claim for death benefits pursuant to MCL section 418.375(2).[122] He argued that as a minor, he was dependent upon his father at the time of his personal injury and that the work-related heart

113. *Karaczewski*, 478 Mich. at 41-42, 732 N.W.2d at 63 (citing *Robertson*, 462 Mich. at 467-68, 613 N.W.2d at 322).
114. *Karaczewski*, 478 Mich. at 43, 732 N.W.2d at 64.
115. *Id.*
116. *Id.*
117. 476 Mich. 495, 720 N.W.2d 219 (2006).
118. *Id.* at 499, 720 N.W.2d at 222.
119. *Id.* at 499-500, 720 N.W.2d at 222.
120. *Id.* at 500-01, 521, 720 N.W.2d at 222, 233-34.
121. *Id.* at 500, 720 N.W.2d at 222.
122. MICH. COMP. LAWS ANN. § 418.375(2) (West Supp. 2007).

attack had contributed to his father's death by weakening his heart and thus constituted the proximate cause of his death under *Hagerman v. Gencorp Automotive*.[123] The defendant argued that "*Hagerman* had been overruled by *Robinson*, which held that clause 'the proximate cause' means the sole proximate cause, or in other words, the one most immediate, efficient and direct cause of injury or damage."[124] The defendant also asserted that Adam had not introduced any evidence establishing that he was dependent upon his father.[125]

The magistrate found in Adam's favor on both issues, as did the WCAC.[126] The Court of Appeals denied leave and the Supreme Court scheduled oral argument on whether to grant defendant's application for leave or to take other preemptory action.[127] The Court's order instructed the parties to address "whether *Robinson* overruled *Hagerman*, and whether the WCAC erred by failing to follow *Runnion*[128] and make a factual determination of the extent of Adam's dependency on his father at the time of his injury."[129]

Relying upon *Robinson*,[130] the Supreme Court overruled *Hagerman*.[131] Since the Court had previously defined the phrase "the proximate cause" as used in the governmental tort liability act in *Robinson* as "the one most immediate, efficient, and direct cause of the injury or damage,"[132] it should come as no surprise that it would define this identical language as used by the Legislature in the Workers Compensation Act in the same manner.[133] Nor should its practice of looking to the plain ordinary meaning of the words and phrases used by the Legislature when interpreting MCL section 418.375(2)[134] come as any shock.

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123. *Paige*, 476 Mich. at 501, 720 N.W.2d at 223 (citing Hagerman v. Gencorp Automotive, 457 Mich. 720, 579 N.W.2d 347 (1998)).

124. *Paige*, 476 Mich. at 501-02, 720 N.W.2d at 223.

125. *Id.* at 502, 720 N.W.2d at 223.

126. *Id.* at 501-03, 720 N.W.2d at 223-24.

127. *Id.* at 504, 720 N.W.2d at 224.

128. Runnion v. Speidel, 270 Mich. 18, 257 N.W. 926 (1934).

129. Paige v. City of Sterling Heights, 474 Mich. 862, 862, 703 N.W.2d 800, 800-01 (2005).

130. 462 Mich. at 439, 613 N.W.2d at 307.

131. *Paige*, 476 Mich. at 499, 720 N.W.2d at 221.

132. *Id.*

133. *Robinson*, 462 Mich. at 462, 613 N.W.2d at 307.

134. MICH. COMP. LAWS ANN. § 418.375(2) (West Supp. 2007) provides:

> If the injury received by such employee was the proximate cause of his or her death, and the deceased employee leaves dependents, as hereinbefore specified, wholly or partially dependent on him or her for support, the death benefit shall be a sum sufficient when added to the indemnity which at the time of death has been paid or becomes payable under the provisions of this act to the deceased employee, to make the total compensation for the injury or death exclusive of medical, surgical, hospital services, medicines, and rehabilitation services and expenses furnished as provided in sections 315 and 319, equal to the full amount which such dependents would have been entitled to receive under the

Predicated upon the language used by the Legislature in this section of the Act, the Court ruled that two requirements must be met to trigger an employer's obligation to pay death benefits pursuant to MCL section 418.375(2).[135] First, the work-related injury must be "the proximate cause" of the employee's death; second, the deceased employee must leave dependents who were wholly or partially dependent upon the employee for support.[136] Following reference to MCL section 341[137] of the Act, the Court concluded that "the workers' compensation magistrate must determine whether there were persons dependent on the deceased employee, and the extent of such dependency, by looking at the circumstances at the time of the work-related injury - not the time of death."[138]

Since the WCAC had applied the proximate cause standard that the Court had overruled and there had been no determination of the extent dependency of the decedent's son at the time of his injury, the Court remanded the matter back to the WCAC to determine whether the decedent's work-related injury was "the proximate cause" of his death and to further determine the extent of the dependency of Adam Paige on his father at the time the decedent had suffered the work related injury.[139] Presumably, an award of benefits would be appropriate if the WCAC finds that the work-related injury was "the proximate cause" of the decedent's death. The amount of the award would depend upon the extent of the son's dependency on his father at the time of his personal injury.[140]

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provision of section 321, in case the injury had resulted in immediate death. Such benefits shall be payable in the same manner as they would be payable under the provisions of section 321 had the injury resulted in immediate death.

*Id.*

135. *Paige*, 476 Mich. at 505, 720 N.W.2d at 224-25.

136. *Id.*

137. MICH. COMP. LAWS ANN. § 418.341 (West Supp. 2007) provides in pertinent part: Questions as to who constitutes dependents and the extent of their dependency shall be determined as of the date of injury to the employee, and their right to any death benefit shall become fixed as of such time, irrespective of any subsequent change in conditions except as otherwise provided in sections 321, 331 and 335.

*Id.*

138. *Paige*, 476 Mich. at 521, 720 N.W.2d at 233.

139. *Id.* at 524, 720 N.W.2d at 235.

140. MICH. COMP LAWS ANN. § 418.321 (West Supp. 2007) provides in pertinent part: If the employee leaves dependents only partially dependent upon his or her earnings for support at the time of injury, the weekly compensation to be paid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as 80% of the amount contributed by the employee to the partial dependent bears to the annual earnings of the deceased at the time of injury.

*Id.*

Justice Taylor, writing for the majority, included within his opinion an attack on the politics of Justice Cavanagh.[141] Justice Taylor's opinion was well written and equally well reasoned and there was no need for this commentary. The law is dynamic and in accord with our system of jurisprudence, it is influenced by the decision makers' philosophies, political persuasions and what they perceived as just and proper. The task for the members of the Supreme Court is to put their rulings and the justification for those rulings in writing and then leave it up to the Legislature to take issue with the result if it perceives an impropriety.

The Legislature has demonstrated that it is fully capable of monitoring the Supreme Court's decisions in the area of Workers Compensation Law and take what it perceives as appropriate action if it determines that the Court has engaged in an erroneous or improper interpretation of the Act.[142] To date and despite the on going internal chastising of its own membership,[143] the Legislature has not taken it upon itself to challenge a single ruling by the current Supreme Court that is perceived by the minority to be improper judicial advocacy.

The Legislature's silence speaks volumes in terms of its acceptance of the majority's resolution of controversies. As such, there is no need for the Court to continue its current internal attacks, which in essence make the same points over and over and unduly lengthen its opinions to the chagrin of some readers who are far more interested in the legal principles being resolved, then the respective opinions of the various Justices regarding one another and/or their respective policies and politics.

## VIII. *BOWMAN V. COOLSAET CONST. CO.* – TRAVELING EMPLOYEE DOCTRINE INAPPLICABLE UNDER THE CIRCUMSTANCES

On August 8, 2006, the Michigan Court of Appeals issued a decision in the matter of *Bowman v. Coolsaet Construction Co.*,[144] holding that the traveling employee doctrine is applicable in Michigan.[145] This doctrine provides that employees who are traveling on a business trip are considered to be continuously in the course of their employment for the duration of their trip, except when a distinct departure on a personal errand is shown.[146] The Court then remanded this matter to the WCAC for further proceedings in accord with its decision.[147]

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141. *Paige*, 476 Mich. at 513-21, 720 N.W.2d at 229-23.

142. See MICH. COMP. LAWS ANN. § 418.354(17) (West Supp. 2007).

143. *See Boyd*, 443 Mich. 515, 505 N.W.2d 544.

144. 272 Mich. App. 27, 723 N.W.2d 583 (2006). Please note that the author's firm appeared on behalf of the intervening plaintiff-appellant Auto Club Insurance Association in this matter. *Id.*

145. *Id.* at 28, 723 N.W.2d. at 585.

146. *Id.* at 30-31, 723 N.W.2d at 585-86.

147. *Id.* at 28, 723 N.W.2d at 585.

According to the facts, the claimant, a residence of the City of Big Rapids, Michigan began working for the defendant in Dundee, Michigan, about 200 miles from his home.[148] Plaintiff arranged temporary living arrangements in his travel trailer at a campground near Dundee.[149] Thereafter, on September 14, 2000, heavy rains forced the job site to close early.[150] Plaintiff left work and ran a stop sign on his way to his trailer and striking another vehicle.[151] He became a paraplegic as a consequence of injuries sustained in the motor vehicle accident.[152]

When rendering its decision, the Court of Appeals noted that it found the Michigan Supreme Court's failure to repudiate the "traveling employee" doctrine when reversing its decision in *Eversman*[153] to be insightful and although *Eversman* had no precedential value, it still considered that case persuasive.[154] Later, on December 29, 2006, the Supreme Court issued a miscellaneous order reversing the judgment of the Court of Appeals and remanding the matter back to the lower Court for consideration of the intervening plaintiff's other arguments. Specifically, the Court stated:

> The Court of Appeals erred by adopting the "traveling employee" doctrine under the circumstances of this case. Here, the employee was traveling from his worksite to his home for the time being at the time of his injury. The general rule, that injuries sustained by an employee while going to and from work are not compensable, is applicable even when an employee's residence is temporary because of a particular job assignment.[155]

It is important to note that, although the Supreme Court once again had the opportunity to rule that the "traveling employee' doctrine does not apply in Michigan, it failed to do so. Instead, it simply held that the doctrine was inapplicable under the circumstances of this case (temporary lodging to accommodate a change in the work site). Thus, awards of compensation remain possible to traveling employees who are injured while on a business trip, assuming that they are not engaging in a distinct departure on a personal errand when the injury occurs.

Until the Courts either rule in or rule out the "traveling employee"' doctrine, the claimants' representatives, wherever possible, should

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148. *Id.*

149. *Bowman*, 272 Mich. App. at 28, 723 N.W.2d at 585.

150. *Id.*

151. *Id.* at 29, 723 N.W.2d at 585.

152. *Id.*

153. Eversman v. Concrete Cutting & Breaking, 463 Mich. 86, 614 N.W.2d 826 (2000).

154. *Bowman*, 272 Mich. App. at 32-33, 723 N.W.2d at 587.

155. Bowman v. R.L. Coolsaet Constr. Co., 477 Mich. 976, 976, 725 N.W.2d 49, 49-50 (2006).

develop sufficient facts to justify the application of some other exception to the "going to and from work" doctrine, as well as submit proofs designed to provide for an award of benefits on the basis of the "traveling employee" doctrine. The employer/carriers' counsel should try to qualify the claimant's proofs in such a way so as to be able to argue that what is really at issue is the "traveling employee" doctrine, a doctrine that has never been formally adopted by the Michigan Courts in a binding published decision.

## IX. *STOKES V. DAIMLERCHRYSLER CORP.* – THE RIGHT RESULT FOR THE WRONG REASONS

Although the Michigan Court of Appeals in *Stokes v. Daimlerchrysler Corp.*,[156] concluded that the magistrate's grant of benefits was amply supported by the record, it felt compelled to negate significant portions of the WCAC's opinion when affirming the award.[157] Specifically, the Court ruled:

> Defendant argues that the WCAC committed errors of law in applying *Sington v. Chrysler Corp.*, 467 Mich. 144, 648 N.W.2d 624 (2002), and in concluding that the magistrate had no authority to grant partial discovery. We conclude that the WCAC reached a result in this case-affirming the magistrate's grant of benefits-that is amply supported by the record, and affirm the result. However, because the opinion is overly broad in parts, [footnote omitted] and is capable of being understood as unduly restrictive of *Sington*, *supra*, we vacate the opinion to the extent it is inconsistent with the principles set forth herein.[158]

As framed by the defendant before the WCAC, the case dealt with four issues; namely, (1) whether the magistrate's rulings denied defendant due process of law by precluding it from presenting a viable defense; (2) whether the magistrate legally erred by refusing to order plaintiff to meet with defendant's vocational expert; (3) whether the magistrate erred in defining the parameters of plaintiff's qualifications and training; and (4) whether the magistrate erred as a matter of law by effectively reading the partial disability provisions out of the Workers' Disability Compensation Act.[159] These issues were presented against a factual backdrop that included the magistrate's refusal to grant the defendant's motion to have the plaintiff interviewed by a vocational

156. 272 Mich. App. 571, 727 N.W.2d 637 (2007).
157. *Id.* at 573-74, 727 N.W.2d at 640.
158. *Id.* at 574, 727 N.W.2d at 640.
159. *Id.* at 580, 727 N.W.2d at 643.

expert[160] and his refusal to grant an adjournment of trial to permit the defendant's vocational expert to review plaintiff's trial testimony to extrapolate an occupational profile.[161]

The WCAC ruled that the magistrate did not err in refusing to order the plaintiff to meet with the defendant's vocational expert.[162] It also held that that there was no authority to allow the magistrate to order a party to disgorge information to the other party, except in limited situations, not applicable in the case at hand.[163] Moreover, the WCAC determined that "MCL [section] 418.301(4) contained nothing concerning a transferable skill analysis and that prior post-*Sington* WCAC opinions 'should not be read as requiring the employee to show that such other skills as he may possess actually transfer to the job market.'"[164] The WCAC in essence concluded that the claimant's resume established the employee's qualifications and training and that only jobs actually performed were relevant in assessing his post injury vocational capacity.[165]

Taking issue with the findings of the WCAC, the defendant filed an application for leave to appeal with the Court of Appeals that was granted.[166] In conjunction with its appeal, the defendant presented five arguments to the Court of Appeals. These arguments included:

> (1) the WCAC improperly limited the definition of work "suitable to the plaintiff's qualifications and training" to work that plaintiff had performed in the past; (2) the WCAC erroneously concluded that it was not necessary for plaintiff to prove a causal link between his disability and loss of wages; (3) the WCAC erroneously determined that the defendant-employer bore the burden of disproving disability under *Sington*; (4) the WCAC erred by finding that the magistrate had no authority to order discovery necessary to permit defendant to prepare a defense under *Sington*; and (5) the WCAC erred by finding that the magistrate did not abuse his discretion by refusing to adjourn trial so that defendant's vocational expert could prepare a *Sington*-based defense using the testimony introduced at trial.[167]

When addressing the first argument, the Court of Appeals ruled:

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160. *Id.* at 576, 727 N.W.2d at 641.
161. *Stokes*, 272 Mich. App. at 578, 727 N.W.2d at 642.
162. *Id.* at 581, 727 N.W.2d at 643-44.
163. *Id.* at 582, 727 N.W.2d at 644.
164. *Id.* at 583, 727 N.W.2d at 645.
165. *Id.* at 584, 727 N.W.2d at 645.
166. *Id.* at 573, 727 N.W.2d at 640.
167. *Stokes*, 272 Mich. App. at 585, 727 N.W.2d at 646.

> Nothing in *Sington* or in MCL [section] 418.301(4) suggests that 'work suitable to that person's qualifications and training is limited to the claimant's resume or actual jobs that the [plaintiff] had performed in the past. To the extent the WCAC majority so held, it erred. The language used in *Sington* takes a broad view of an injured employee's "qualifications and training," which is not limited to jobs on the employee's resume, but, rather, includes any jobs the injured employee could actually perform upon hiring.[168]

The Court then wrote:

> On the other hand, to the extent the WCAC addressed the issue from the standpoint of the production of evidence, and held that as a practical matter, an employee's proofs will generally consist of the equivalent of the employee's resume-i.e., a listing and description of the jobs the employee held until the time of the injury, the pay for those jobs, and a description of the employee's training and education-and testimony that the employee cannot perform any of the jobs within his qualifications and training and paying the maximum wage, the WCAC did not err. By producing such evidence, in addition to evidence of a work-related injury causing disability, an employee makes a prima facie case of disability-a limitation in the employee's maximum wage-earning capacity in all jobs suitable to the employee's qualifications and training. The WCAC did not err in concluding that such a showing is adequate to establish disability in the absence of evidence showing that there is in fact real work in within the employee's training and experience, paying the maximum wage, that the employee is able to perform upon hiring,[169]

So long as the Court intended its comments to represent a burden shifting mechanism which both permits the employee to establish a prima facie case upon a showing that he/she cannot go back and perform his/her highest paying pre-injury jobs and then affords the employer the right to rebut that showing by producing evidence of transferable skills and real jobs that would permit the injured worker to generate an income using his other transferable skills, then the Court's reasoning would be appropriate.

*Stokes* stands for the proposition that it is a matter of discretion for the magistrate whether to take transferable skills into consideration when

168. *Id.* at 588, 727 N.W.2d at 647-48.
169. *Id.* at 589, 727 N.W.2d at 648.

determining whether a claimant is disabled. In this regard, the Court wrote:

> Further, to the extent the WCAC held that, as a matter of law, a transferable skills analysis is irrelevant in evaluating the employee's qualifications and training it erred. A transferable skill analysis may yield credible testimony that there is actual employment that the employee's qualifications and training make the employee capable of performing upon hiring, although the employee has never performed it before. On the other hand, a particular transferable skill analysis may reach conclusions that are based on assumptions and speculation, and are not supported by the employee's actual qualifications and training or the realities of the work place. In any particular case, the magistrate should be able to discern the difference. Similarly, the majority did not err in concluding that, in changing the interpretation of disability, *Sington* did not intend to make a transferable skills analysis (or a nontransferable skills analysis) a necessary part of the plaintiff's proofs.[170]

In terms of discovery, the Court ruled that the WCAC had erred in concluding that the magistrate had no authority to order plaintiff to provide discovery to defendant.[171] Its decision turned on the language of MCL section 418.851 which permits the magistrate to make such inquires and investigations as he or she considers necessary, and the Michigan Supreme Court's holding in *Boggetta v. Burroughs Corp.*,[172] a decision that permitted a claimant to submit interrogatories to the employer that were limited in number and scope and designed to procure information that was relevant to the adjudication.

The Court provided for discretionary discovery, opining that the magistrate's authority was not derived from the broad discovery rules set forth in the Michigan Court Rules.[173] Instead, "the authority is limited to "that which is necessary to a proper inquiry into the facts' [quoting *Boggetta*]."[174]

To make it absolutely certain that discovery in workers' compensation proceeding is discretionary, the Court provided:

> While the magistrate has authority to grant relevant discovery that is necessary for defendant to develop a defense under *Sington*, it does not automatically follow that defendant is

170. *Id.* at 590-91, 727 N.W.2d at 649.
171. *Id.* at 593, 727 N.W.2d at 650.
172. 368 Mich. 600, 118 N.W.2d 980 (1962).
173. *Stokes*, 272 Mich. App. at 594, 727 N.W.2d at 651.
174. *Id.*

> entitled to have its vocational expert interview plaintiff [footnote omitted]. What form of discovery is necessary to enable a defendant to investigate an employee's qualification and training and prepare a proper defense under *Signton* is a matter for the magistrate's discretion.[175]

At least the Court did provide some guidance in the footnote omitted above in terms of the nature of the discovery that it envisions the magistrate permitting a defendant to utilize to develop a *Singtон* defense. In this regard, the Court wrote:

> While MCL [section] 418.385 specifically provides for the examination of claimants by the employer's medical examiner, there is no statutory counterpart specifically providing for discovery interviews by vocational experts, and the necessary information will often be available in the employee's records, or obtainable through interrogatories.[176]

While it would have been helpful if the Court had held that the granting of interrogatories that are limited in number and designed to procure sufficient information to permit the employer to develop its defense under *Singtон* is obligatory, it certainly laid the foundation for an abuse of discretion attack where the magistrate fails to compel a recalcitrant claimant to answer meaningful limited interrogatories.

The Michigan Supreme Court issued a miscellaneous order in *Stokes*, directing the clerk to schedule an oral argument on whether to grant the application for leave or to take other peremptory action pursuant to MCR 7.302(G)(1).[177] The Court instructed the parties that at oral argument they were to address the question of whether the burden shifting analysis described by the Court of Appeals relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training as required by *Singtон*.[178]

Counsel who appeared before the Supreme Court to present oral argument pursuant to the above order were asked to provide a summation of any point that they raised during their argument that they believed would be beneficial to the bench and bar. Gerald M. Marcinkoski,[179] who

175. *Id.* at 594-95, 727 N.W.2d at 651.

176. *Id.* at 595 n.5, 727 N.W.2d at 651 n.5.

177. Stokes v. Daimlerchrysler Corp., 477 Mich. 1097, 729 N.W.2d 511 (2007).

178. *Id.* at 1097, 729 N.W.2d at 512.

179. Gerald Marcinkowski is a partner in the law firm Lacey & Jones, located in Birmingham, Michigan. He is the chief appellate attorney at the firm. He also serves as the Executive Secretary of the Michigan Self Insurers Association as well as the associate editor of the state Bar's periodical distributed to all members of the Workers' Compensation Section of the State Bar and has served on the State Bar's Workers' Compensation Council. His credentials also include his appointment as a Special Assistant Attorney General, as well serving on the Board of Law Examiners, which

represented the employer at the oral argument, responded to this request. He noted that the defendant took the position that the Court of Appeals improperly relieved the plaintiff of his burden of making a "prima facie" case of disability under MCL section 418.301(4) and *Sington*.[180] In support of its position, the defendant asked the Michigan Supreme Court to recall its comments in *Rea v. Regency Olds/Mazda/Volvo.*,[181] which it quoted in *Sington*. These comments were, "It is not enough for the claimant claiming partial disability to show an inability to return to the same or similar work."[182]

In light of this pronouncement, the defendant argued that if it is not enough for a claimant claiming partial disability to show an inability to return to the same or similar work, then it most certainly is not enough for a claimant, such as Mr. Stokes who claims a total disability, to show nothing more than that.[183] The defendant asserted that the type of proofs Mr. Stokes offered were not discernibly different from the type of proofs claimants offered under the case overruled in *Sington*; namely, *Haske v. Transport Leasing, Inc.*[184, 185]

The counsel who argued on behalf of Mr. Stokes before the Supreme Court did not respond to the request for a summation of the points that he felt would be beneficial to the bench and bar. It would, however, be reasonable to assume that he asserted that the burden shifting analysis described by the Court of Appeals did not relieve plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training as required by *Sington*. In this regard, he most likely argued that the burden of proof only shifted to the Defendant upon the establishment of a prima facie case. As such, his client was still required to prove that he is disabled pursuant to the definition of disability set forth in *Sington* before the burden of proof shifts as articulated by the Court of Appeals.

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creates, administers and grades Michigan's bar examinations. He has been cited as one of the "Best Lawyers in America," the "Best Lawyers in Detroit," and in Michigan. He co-authored a book with Edward Welch entitled "Michigan Workers' Comp Fundamentals." He has also succeeded Mr. Welch as editor of "Michigan Workers' Comp Reporter," a monthly newsletter of articles and interviews relating to workers' compensation in Michigan and around the country. He is the recipient of the distinguished brief award from Cooley Law School for a Supreme Court brief. Mr. Marcinkowski has represented defendants in a number of workers' compensation claims and has lectured for the Institute of Continuing Legal Education on workers' compensation subjects and is a frequent speaker on workers' compensation issues.

180. Letter from Gerald Marcinkowski to William Evans (Nov. 7, 2007) (on file with author).

181. 450 Mich. 1201, 536 N.W.2d 542 (1995).

182. Supplemental Brief for Appellant at 5, *Stokes*, 477 Mich. 1097, 729 N.W.2d 511 (2007) (No. 132648).

183. *Id.* at 12.

184. 455 Mich. 628, 566 N.W.2d 896 (1997).

185. Supplemental Brief for Appellant, *supra*, note 195, at 5.

*Stokes* has the potential to be a landmark decision in the area of workers' compensation law. The release of the Michigan Supreme Court's decision is anxiously awaited. Hopefully, its contents will provide considerable guidance to the bench and bar in terms of the proper work up and presentation of claims to the Board of Magistrates.

## X. CONCLUSION

With numerous remands and the Supreme Court's decisions in *Stokes*[186] and *Simpson*[187] outstanding, the precedential value of the judicial decisions that were issued during the *Survey* period is limited. Outside of reducing the Agency's jurisdiction over out of state injuries;[188] defining the phrase "the proximate cause" as applied to death claims;[189] narrowing of the application of the "traveling employee doctrine;"[190] and the negation of workers' compensation benefits as a "collateral source" under the circumstances of the case,[191] it remains to be seen what the final outcome will be in the majority of cases that were decided during the *Survey* period.

*Simpson* and *Stokes* bear watching. Either case could result in a landmark decision that will impact the field for years to come.

186. 272 Mich. App. 571, 727 N.W.2d 637.
187. 274 Mich. App. 40, 731 N.W.2d 447.
188. *Karaczewski*, 478 Mich. 28, 732 N.W.2d 56.
189. *Paige*, 476 Mich. 495, 720 N.W.2d 219.
190. *Bowman*, 275 Mich. App. 188, 738 N.W.2d 260.
191. *Rodriguez*, 275 Mich. App. 8, 738 N.W.2d 238.