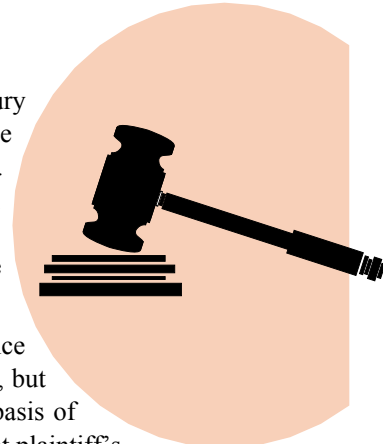


## WORKERS' COMPENSATION



### Police and Fire Fighters' Presumption

In *Price v Bloomfield Township*, \_\_\_ Mich App \_\_\_ (CA No 220285, released 1/26/01), the Court held that its prior decision in *Schave v Department of State Police*, 58 Mich App 178 (1975), had been incorrectly decided.

Both of these cases deal with the presumption found in MCL 418.405(2). This provision states that respiratory and heart diseases suffered by police officers or fire fighters are deemed to have risen out of and in the course of employment "in the absence of evidence to the contrary". In *Schave*, the Court had held that the presumption could not be rebutted by evidence of pre-existing heart disease or by simple medical opinion that the occupation had no effect on a weakened heart muscle. The *Schave* Court held that the presumption obligated the employer to produce affirmative evidence of a non-work-related cause.

In essence, the *Price* Court held that evidence that would rebut a heart claim under the significant contribution standard of MCL 418.301(2) does serve to rebut the presumption of § 405(2). The Court emphasized that the burden of proof at all times rests with the employee. Once "the employer comes forward with evidence by

which a factfinder might conclude that the physical injury did not result from the employment, *i.e.*, 'evidence to the contrary,' the presumption has no continuing effect. Whether the police or fire fighter employee has proved that the injury arose out of and in the course of employment is then tested using the same principles applicable to any other employee."

In this case the defendant came forward with "evidence that plaintiff's physical problems were not work-related, but were instead the result of general risk factors. On the basis of that evidence, a reasonable factfinder could conclude that plaintiff's problems did not arise out of and in the course of work." In terms of applying the significant contribution standard in all heart cases, it bears noting that the non-occupational factors weighed by the magistrate were a multiple-year duration of hypertension, elevated cholesterol, and a genetic predilection toward heart disease.

### Dual Employment Provision

In *Gilbert v Second Injury Fund (Dual Employment Provisions)*, \_\_\_ Mich App \_\_\_ (2001), the Court of Appeals held that the Second Injury Fund was entirely liable for the benefits owing to plaintiff under the Dual Employment Provisions, MCL 418.372.

The facts of the case were that the plaintiff suffered an injury on a date when he held two jobs. The employer with whom he was injured had not reported the plaintiff's wages to the Internal Revenue Service [IRS]. The plaintiff also did not report his wages from that employer to the IRS. The plaintiff made substantially more money at the non-injury employment. That employer had reported the plaintiff's wages to the IRS.

The reporting or non-reporting of wages to the IRS is important for purposes of the Dual Employment Provisions of § 372. The section provides that only IRS-reported wages may be taken into account in calculating the injury-employer's right to reimbursement of a portion of the weekly benefits that the injury-employer must pay the plaintiff. In contrast, the calculation of an "average weekly wage" under MCL 418.371(1) requires the inclusion of all wages, whether reported to the IRS or not.

The Court of Appeals held in this case that since the injury-employer had not reported the wages to the IRS and since non-IRS wages may not be taken into account for dual employment reimbursement purposes, the Second Injury Fund must reimburse the injury-employer all of the weekly compensation payable to the claimant. The result was reached by the statute's math scheme. Under § 371, the plaintiff's average weekly wage in both employments is added together, the appropriate rate on the basis of that total is calculated under the rate tables, and the plaintiff is paid that weekly rate of compensation. The injury-employer then is entitled to reimbursement from the Second Injury Fund under § 372 based on the ratio the wages it paid the employee bear to the employee's total wages. But where the injury-employer's wages are not reported to the IRS, its ratio is zero and the Fund reimburses 100%.

(continued on page 2)

TABLE OF CONTENTS	
Workers' Compensation Decisions . . . .	1
Labor & Employment . . . . .	2
Civil Litigation . . . . .	3
Ask L & J . . . . .	4

(continued from page 1)

The result in this case is bizarre. In effect, the injury-employer is being rewarded by full reimbursement from the Fund for not having reported the employee's wages to the IRS. Nevertheless, the Court of Appeals felt that it was compelled to reach this result because of the specific wording of the Dual Employment Provisions. The Fund has appealed to the Supreme Court.

### **Reimbursement of 70% Benefits From the Fund**

In *Charboneau v Beverly Enterprises, Inc*, 244 Mich App 33 (2000), the Court of Appeals resolved a question relating to whether an employer was entitled to reimbursement of 70% benefits from the Second Injury Fund under MCL 418.862.

Section 862 provides that when an employer loses at the magistrate level, appeals further, and succeeds by reversing or terminating the employee's award of benefits, then the employer is entitled to reimbursement of the 70% benefits paid during the appeal period. The reimbursement comes from the Second Injury Fund.

The question presented in this case was complicated by a confusing procedural history. The employee was initially granted an open award of benefits. The employer contested that on appeal. While

the case was pending on appeal, the employer made the employee an offer of favored work (a/k/a "reasonable employment"). The employee refused it, and the employer felt the refusal was unjustified. Consequently, the employer filed a petition to stop compensation benefits. The magistrate denied that petition to stop, but the employer appealed that decision as well.

Therefore, for a particular stretch of time, there were two appeals pending by the employer: the appeal of the original award and the appeal of the petition to stop. The employer did not prevail on the first appeal, but did prevail by having the magistrate's petition to stop ruling reversed. The employer then sought reimbursement of the benefits paid to the plaintiff during the pendency of these appeals from the Fund.

The Fund resisted reimbursement. The WCAC held that the employer was entitled to reimbursement, the Court of Appeals reversed.

The Court of Appeals held that § 862 only contemplates reimbursing 70% benefits where the *original* award is reduced or rescinded on appeal. The employer has appealed this case to the Supreme Court where it presently pends.

## **LABOR & EMPLOYMENT**

### **Discrimination Based on Sexual Orientation**

In *Mack v City of Detroit*, 243 Mich App 132 (2001), the plaintiff, a female police officer with the City of Detroit, brought a claim against her employer for discrimination under the defendant's City Charter.

The plaintiff alleged that she was subjected to romantic advances of male supervisors, but rebuffed those advances because she was a lesbian. The plaintiff alleged that subsequently she was subjected to adverse employment conditions, *i.e.*, poor work assignments and limited time off, as harassment and discrimination because of her rebuffs of the romantic advances.

The plaintiff's suit alleges a violation of the defendant's City Charter, which prohibited discrimination based on both gender and sexual orientation. The plaintiff did *not* allege a violation of the Elliott-Larsen Civil Rights Act.

The defendant brought a motion for summary disposition arguing that the Elliott-Larsen Civil Rights Act does not protect citizens from discrimination based on sexual orientation and that the City Charter policy against discrimination based on sexual orientation does not create a legal right upon which to bring a civil action. The trial court agreed and granted the defendant's motion. The Court of Appeals, however, in a two to one decision reversed and remanded.

The question before the Court of Appeals, in essence, was whether the defendant's Charter protection against discrimination based on sexual orientation created a private cause of action. While the city adopted the Charter provision, it did not clearly adopt any ordinances or code provisions expressly allowing for a civil action or an award for damages based on a Charter violation.

Although the general rule is that where a new right is created by statute, the remedy provided for enforcement of the right or duty by the statute is exclusive, the courts have found exceptions to this general rule when the rights infringed were civil rights. The Court noted a long history in Michigan of giving civil rights claims the "highest priority". The Court concluded that since the defendant voluntarily extended the protections to be free from discrimination in employment to a new class, those who are discriminated against based on sexual orientation, the plaintiff is entitled to pursue a civil action for damages against the defendant for any wrongful discrimination in her employment based on sexual orientation.

### **Elliott-Larsen Civil Rights Act — Private Statute of Limitations**

In *Timko v Oakwood Custom Coating, Inc*, \_\_\_ Mich App \_\_\_ (CA No 212927, rel'd 1/2/01) the plaintiff brought suit under Michigan's Elliott-Larsen Civil Rights Act for age discrimination. The plaintiff's suit was brought within the Act's three-year statute of limitations period. However, prior to starting with the defendant, the plaintiff signed an agreement as follows:

"I agree that any action or suit against the firm arising out of my employment or termination of employment, including, but not limited to, claims arising under state or federal civil rights statutes, must be brought within 180 days of the event giving rise to the claims or

(continued on page 3)

(continued from page 2)

be forever barred. I waive any limitation periods to the contrary.”

The plaintiff’s suit was filed more than 180 days after his termination. The defendant brought a motion for summary disposition, which the trial court granted.

The Court of Appeals upheld the trial court’s grant of summary disposition to the defendant. The Court concluded that Michigan law allows for shortened periods of limitations as long as they are “reasonable”. A period of limitation “is reasonable if (1) the claimant has sufficient opportunity to investigate and file an action, (2) the time is not so short as to work a practical abrogation of the right of action and (3) the action is not barred before the loss or damage can be ascertained.”

Shortening of the statute of limitations is something that all employers should consider. It is clearly easier to investigate and defend a suit six months after an incident rather than three years. Further, it eliminates a longer period of uncertainty. Any employers interested in looking into such agreements should contact Mike McCann or Dallas Moon of our office.

## CIVIL LITIGATION

### Negligence – Insurance Agents

In *Scarsella Tile & Marble, Inc v Del Sanders, et al*, an unpublished decision decided 12/19/2000, (CA No. 213122), the Court of Appeals examined an insurance agent’s duty to seek out lower priced insurance for its customers, and concluded, as did the trial court, that an insurance agent has no such duty. The plaintiff sought insurance coverage through the defendant agent for its one employee business in 1990. The insurance was placed with the Worker’s Compensation Placement Facility and was renewed annually through 1996, when it acquired another business.

The following year, the plaintiff filed suit, alleging that the defendant breached his duty to try to obtain insurance coverage at a lower premium than what the plaintiff had been charged through the Placement Facility. The plaintiff did not claim in the trial court that there was any special relationship between the customer and the agent that might otherwise expand the duties owed by the agent to the insured. The trial court granted the defendants’ motion for summary disposition on the ground that the agent owed no duty to seek coverage with lower premiums.

The Court of Appeals noted the agent’s limited role of presenting the insurance product and taking orders for insurance. Existing law does not require that an agent advise a potential insured about any coverage, including, as the plaintiff alleged, finding lower cost insurance or periodically reassessing the insured’s needs. Indeed, only a licensed insurance counselor may give insurance advice other than that customarily given by insurance agents. Plaintiff’s claim of special relationship between the customer and the agent was belatedly raised and devoid of factual basis, so that the Court did not consider that argument.

### Negligence – Open and Obvious Danger

The Court of Appeals continues to review the issue of open

and obvious danger. In two unpublished cases, the Court upheld the trial courts’ rulings that the allegedly dangerous conditions confronted by the plaintiffs were open and obvious.

In *Bohlen v Ramco-Gershenson, Inc*, (CA No. 221583, decided 12/5/2000), the plaintiff tripped and fell in a plate-sized pothole in an unoccupied handicap parking spot near the entrance to a store. The plaintiff claimed that she did not observe the defect prior to her fall. The trial court found that the pothole was open and obvious and granted summary disposition to the defendant.

The Court of Appeals affirmed. The plaintiff did not present sufficient evidence to create a question of fact as to whether a person of ordinary intelligence would have observed the pothole on casual inspection and walked around it. The Court also rejected the plaintiff’s argument that even if the pothole was open and obvious, it still presented an unreasonable risk of harm. Had the plaintiff noticed the pothole, she would have walked around it, thereby eliminating any risk of harm.

Similarly, in *Orthman v Oakwood Health Care, Inc*, (CA No 215852, decided 12/19/00), the trial court granted the defendant’s motion for directed verdict at the close of the plaintiff’s proofs on the basis that the alleged uneven dirt and sand in a median of the defendant’s property was open and obvious. The risk of falling on the alleged hazardous median was readily apparent to a reasonable person. In determining whether the risk of harm remained unreasonable, the trial court found that the risk of falling is eliminated by the awareness of the hazard and that there was nothing unusual about the median’s character, location or surrounding conditions. The Court of Appeals concluded that the trial court’s analysis was correct and upheld the grant of a directed verdict.



# Ask L&J

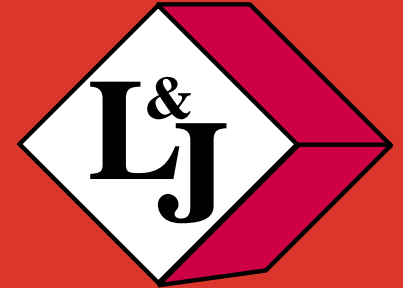
**Q:** What do you see as the cutting-edge questions in workers' compensation at this time?

**A:** There are three areas that would qualify. In no particular order, here they are.

First, many questions remain unresolved on how the "significant manner" work-relationship standard in § 301(2) applies, particularly in mental disability cases. The Courts presently have before them issues relating to such questions as: does work aggravation of just the symptoms of a mental disability, arthritic condition, or heart condition satisfy § 301(2)'s requirement that work contribute "in a significant manner"? Also, an important and lingering question is whether, in mental disability cases, the magistrates and Worker's Compensation Appellate Commission are to consider the employee's predisposition to psychiatric problems in determining whether work events contributed significantly or insignificantly toward the resultant mental problem.

Another area of tension involves § 301(5) [the favored work or "reasonable employment" provision] and the definition of disability in § 301(4), given Supreme Court decisions in both areas. For example, where an employee is laboring at favored work or "reasonable employment" for less than 100 weeks and is prevented from continuing at it because of a non-work-related reason, does the employee automatically prevail under a § 301(5)(e) analysis or can the employer still prevail in some instances under a § 301(4)'s analysis? The Worker's Compensation Appellate Commission has had occasions to delve into this problem and it seems inevitable that the Courts will as well.

Finally, there still remains confusion over the difference between, on the one hand, work avoidance under § 301(4), and, on the other hand, use of vocational experts for vocational rehabilitation under § 319. Confusion seems to arise because vocational experts are used in both situations, but their services and testimony are directed for different purposes. The Worker's Compensation Appellate Commission has addressed this area repeatedly and that has brought some clarity to the area. The Bureau also seems to be recognizing the distinction. The Courts might also visit this area of the law as well.



600 South Adams Road  
Suite 300  
Birmingham, Michigan 48009-6827  
(248) 433-1414  
Fax (248) 433-1241

645 Griswold Street  
Penobscot Building, Suite 3250  
Detroit, Michigan 48226  
(313) 961-6474  
Fax (313) 961-5688

125 Ottawa Avenue N.W.  
Suite 430 Ledyard Bldg.  
Grand Rapids, Michigan 49503-2898  
(616) 776-3641  
Fax (616) 776-3516

Fifth Floor - City Center Building  
Ann Arbor, Michigan 48104  
(734) 761-8358  
Fax (734) 761-3134

[www.laceyjones.com](http://www.laceyjones.com)