I. <u>Recent developments regarding *Stokes v DaimlerChrysler Corporation*.</u>

On April 13, 2007, the Supreme Court issued an order in *Stokes v DaimlerChrysler Corporation* directing oral argument and supplemental briefing on one issue. First, here is some background.

Recall that the Workers' Compensation Appellate Commission had issued an *en banc* decision in this case addressing application of the definition of compensable disability as described by the Supreme Court in *Sington v Chrysler Corporation*, 467 Mich 144; 648 NW2d 624 (2002), including the use of discovery as part of the disability determination. The Commission's *en banc* decision was 3-2 and affirmed the Magistrate's open award of total disability. The defendant filed an appeal to the Supreme Court seeking to bypass the Court of Appeals. The Supreme Court in response stayed the Commission's decision and ordered the Court of Appeals to hear the case and issue a decision by October 2006.

The Court of Appeals issued its decision now found at 272 Mich App 571; 727 NW2d 637 (2006). In the Court of Appeals' decision, the Court reversed or vacated the following points in the Commission's majority's decision:

- The Commission majority had held that work "suitable to [the claimant's] qualifications and training" was limited to jobs the claimant had performed in the past. The Court of Appeals said the Commission erred by so ruling. The Court held that work suitable to the claimant's qualifications and training "is not limited to the jobs on the employee's resume, but, rather, includes any jobs the injured employee could actually perform upon hiring." *Stokes*, 272 Mich App at 588.

- The Commission majority had held that the claimant's transferable skills are irrelevant in evaluating which work constitutes work suitable to the claimant's qualifications and training. The Court of Appeals held

the Commission erred on this point as well. The Court said: "A transferable skills analysis may yield credible testimony that there is actual employment that the employee's qualifications and training makes the employee capable of performing upon hiring, although the employee has never performed it before. *Stokes*, 272 Mich App at 590.

- The Commission majority had held there is no discovery in workers' compensation beyond the exchange of information required by MCL 418.222. The Court of Appeals held that this was error. The Court ruled a "magistrate has authority to grant relevant discovery that is necessary for defendant to develop a defense under *Sington*," such as interrogatories and, at times, interviews with vocational counselors. *Stokes*, 272 Mich App at 594-596.

- The Commission majority had said the words in the partial disability statute "able to earn" contemplate something different than "wage earning capacity." And, the Commission majority had said the claimant is not required to link a loss of wages to a work-related injury. The Court of Appeals said the Commission's "lengthy discussion of the issue was unnecessary and confusing, and is therefore vacated … [including] discussion of the partial disability provisions." *Stokes*, 272 Mich App at 597.

Despite these rulings, a majority of the Court of Appeals affirmed the result in *Stokes* finding that plaintiff had offered sufficient proof to make a *prima facie* case of compensable disability and defendant did not rebut it. The Court of Appeals' dissenter would have reversed and remanded to the Magistrate. The dissent said the result should not be affirmed "because of the numerous legal errors in the WCAC's en banc opinion." *Stokes*, 272 Mich App at 598. And, the dissent disagreed with the majority with respect to the question of whether plaintiff met his burden of proof and whether defendant was given adequate opportunity to present its defense.

The defendant appealed the Court of Appeals' decision to the Supreme Court. On April 13, 2007, the Supreme Court entered an order, the substantive portion of which says:

> We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the burden-shifting analysis described in the Court of Appeals opinion in this case relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training, as required by *Sington v Chrysler Corp*, 467 Mich 144 (2002). *Stokes*, 477 Mich 1097; 729 NW2d 511 (2007).

The parties filed supplemental briefs on June 8, 2007. The case is likely to be scheduled for oral argument before the Supreme Court later this year.

II. <u>Recent developments regarding *Rakestraw v General Dynamics Land Systems*.</u>

In *Rakestraw v General Dynamics Land Systems*, 469 Mich 220; 666 NW2d 199 (2003), the Supreme Court held that to submit a compensable claim Mr. Rakestraw, who brought to the workplace a pre-existing non-work-related condition, had to demonstrate that something "medically distinguishable" from his pre-existing condition had occurred. Recently, in *Simpson v Borbolla Construction & Concrete Supply, Inc*, 274 Mich App 40; 731 NW2d 447 (2007), the Court of Appeals addressed the application of *Rakestraw* in a case where the pre-existing condition was a work-related condition.

The facts of *Simpson* were that plaintiff, an iron worker, suffered a work-related left wrist fracture in 1979. He continued to work through the years for various employers. His last employer was Borbolla Construction where he only worked one day. Plaintiff claimed that his one day of work at Borbolla Construction aggravated his earlier wrist problems and he could no longer continue to work. His doctor testified that the original 1979 work injury had gone untreated and progressed to necrosis of the bone.

Plaintiff filed his claim for a wrist injury exclusively against the last employer. The Magistrate and Workers' Compensation Appellate Commission granted plaintiff an open award based upon his last day of work with Borbolla Construction. Borbolla Construction appealed.

One of Borbolla Construction's arguments to the Court of Appeals was: plaintiff did not satisfy *Rakestraw*'s "medically distinguishable" requirement by virtue of his one day of work at Borbolla Construction. The Court of Appeals responded by

holding *Rakestraw* did not apply. The Court said that *Rakestraw* is "factually distinguishable" because in *Rakestraw* the pre-existing condition was non-work-related, whereas in this case it was a work-related condition. *Simpson*, 274 Mich App at 46. The Court of Appeals said:

> the focus of *Rakestraw* was clearly on causation, i.e., whether the plaintiff's injury arose out of and in the course of employment. [Citation omitted.] 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 injury in *Rakestraw* was to establish causation, not to simply distinguish the preexisting condition from a "new" injury. *Simpson*, 274 Mich App at 46.

In a footnote, the Court of Appeals added that, "even assuming *Rakestraw* is applicable, the medical evidence presented below supports the WCAC's finding that plaintiff's current condition is 'medically distinguishable' from the injury he suffered in 1979." *Simpson*, 274 Mich App at 46 n 4.

Borbolla Construction appealed the Court of Appeals' decision to the Supreme Court. On June 1, 2007, the Supreme Court entered an order, the substantive portion of which says:

> We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the Court of Appeals erred in holding that *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220 (2003), does not apply where the preexisting condition is work-related. (Supreme Court Docket No. 133274, order entered June 1, 2007).

The parties were ordered to file supplemental briefs by July 13, 2007. Oral argument in this case will also likely occur later this year.

III. Decision regarding outstate injuries: *Karaczewski v Farbman Stein & Company*.

On May 23, 2007, the Supreme Court issued a decision with respect to Michigan's jurisdiction over injuries occurring outside the state of Michigan. The case is *Karaczewski v Farbman Stein & Company*, 478 Mich 28; ____ NW2d ____ (2007).

The facts of the case were that plaintiff had been hired by defendant to work in Michigan. At the time of hire, plaintiff was a resident of Detroit and the contract of hire was made in Michigan. Two years later, defendant transferred plaintiff to Florida to assume a position there. Nine years after that, while working for the defendant in Florida, plaintiff fell from a ladder injuring his wrist and knee. At the time of injury, he was a resident of Florida. Plaintiff received benefits under Florida's workers' compensation system for a period of time, until he exhausted his remedies there. At that point, he filed his application in Michigan. The defendant disputed Michigan jurisdiction.

The relevant statute is MCL 418.845. It says that Michigan has jurisdiction over injuries "suffered outside this state where the injured employee is a resident of this state at the time of injury and the contract of hire was made in this state." Although the statute requires residency in Michigan at the time of injury, case law construing § 845 over the years created the controversy addressed in the case.

Originally, the Supreme Court in *Roberts v IXL Glass Corp*, 259 Mich 644; 244 NW 188 (1932) held the residency requirement did not apply because the residency requirement conflicted with a different provision in the Act at the time. In 1943, the Legislature repealed the provision that conflicted with the outstate jurisdiction provision. Thereafter through the years, eight of nine court cases facing the question indicated the

residency requirement did apply to outstate injuries. The Supreme Court then took up the question again 14 years ago in *Boyd v W G Wade Shows*, 443 Mich 515; 505 NW2d 544 (1993).

Boyd held that *Roberts*' holding that Michigan residency at the time of injury is not required for outstate injuries was still good law. *Boyd*'s reasoning was that the Legislature had not explicitly overruled *Roberts*.

The Supreme Court has now overruled *Boyd* in *Karazcewski*. *Karazcewski* says the residency requirement does apply to outstate injuries. *Karazcewski*'s reasoning is "*the law means what it says*" and there had been no need for the Legislature to specifically overrule *Roberts* because in 1943 the Legislature had repealed the statute *Roberts* considered to be in conflict with § 845. Slip op at p 15 (emphasis in original).

Karaczewski concluded by outlining procedurally which cases its rule applies to: "Accordingly, our holding in this case shall apply to all claimants for whom there has not been a final judgment awarding benefits as of the date of this opinion." Slip op at p 18 n 15. The Court's ruling was 4-1-2 with the one Justice (Justice Weaver) concurring with the majority in the overruling of *Boyd* but saying the new rule should only apply to this plaintiff and prospectively.

IV. Injuries sustained while traveling: *Bowman and Auto Club Insurance Association v R. L. Coolsaet Construction Company and Second Injury Fund*.

Last year in a published decision in *Bowman and Auto Club Insurance Association v R. L. Coolsaet Construction Company and Second Injury Fund*, 272 Mich App 27; 723 NW2d 583 (2006), the Court of Appeals had adopted the "traveling employee doctrine" found in Professor Larson's treatise. That original *Bowman* decision held that a person who sustains an injury while traveling as part of his or her employment is essentially covered portal-to-portal, except if the injury is incurred in pursuance of a personal errand or if the claimant is pursuing an activity whose major purpose is social or recreational. The employer and the Fund appealed that decision to the Supreme Court.

The Supreme Court issued an order in response to those appeals, the substantive portion of which says:

> 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 or coming from work are not compensable, is applicable even when an employee's residence is temporary because of a particular job assignment. *Graham v Somerville Construction Co*, 336 Mich 359 (1953). *Bowman*, 477 Mich 976; 725 NW2d 55 (2006).

The Supreme Court then remanded the case to the Court of Appeals to address compensability under the general going-to-and-coming-from-work rule with its exceptions.

In a published decision on remand, the Court of Appeals affirmed the Appellate Commission's denial of benefits. The Court of Appeals held the general rule

applied and plaintiff did not fit the case within any recognized exception to that general rule. *Bowman*, ____ Mich App ____; ____ NW2d ____ (2007) (Court of Appeals Docket No. 258518, entered April 10, 2007). The Court of Appeals' decision has not been appealed by plaintiffs.

The facts of the case were that the claimant, a pipefitter, bid on a job in northern Michigan. The job lasted a number of weeks so plaintiff relocated via his trailer to a campground near the worksite during the project. One day after work was cancelled due to rain at the worksite, plaintiff was driving to his campground trailer when he was struck by an automobile and seriously injured.

The closest questions presented in the case were whether plaintiff fell within the exception to the general rule describing situations where the employer provides transportation and/or within the exception for excessive traffic risks. Here, the employer paid plaintiff for use of plaintiff's truck (with its attached equipment) by means of a separate "rig rental" lease agreement. That agreement included the proviso that the employer would furnish plaintiff with a credit card for use of the purchase of gasoline including gas for personal trips. The Court did not find this exception to the general rule operative here because the agreement between plaintiff and his employer was not part of the employment contract between plaintiff and the employer.

Additionally, the Court of Appeals did not find that plaintiff's employment subjected him to excessive traffic risks, as opposed to risks borne by travelers in general. Therefore, this exception was not found applicable either.

V. Wrap-up policies: *Chase v M.D. Plumbing & Heating Company, et al*.

Any attorney with a case involving a wrap-up insurance policy should review *Chase v M.D. Plumbing & Heating Company, et al.*, 272 Mich App 695; 728 NW2d 895 (2006). In *Chase*, the Court of Appeals addressed a number of complex issues arising under workers' compensation wrap-up policies. The key issues resolved were:

- A carrier who had not been joined to the action "at the time the initial award" was entered may have a viable argument that it cannot be held liable later in the proceeding, given that MCL 418.852(1) says liability can only be assessed "'at the time of the award of benefits.'" *Chase*, 272 Mich App at 701. The Court of Appeals directed the Commission on remand to determine correct construction of § 852(1).

- The wrap-up policy in *Chase* was intended to cover injuries occurring in certain areas. The Court of Appeals remanded the case for resolution of whether the locale of plaintiff's injury was in the area contemplated by the wrap-up policy.

- The wrap-up policy covered all employers on site if the employers had executed certain documents. The case was remanded for determination of whether the necessary documents had been executed and, if not, whether such failure precludes liability being assessed on wrap-up carriers.

VI. The issue of attorney fees on medical expenses before the Court of Appeals.

The question of whether attorney fees can be imposed on employers or carriers under MCL 418.315(1) is before the Court of Appeals in at least three cases: *Petersen v Magna Corporation*, Court of Appeals Docket Nos. 273293 and 273294; *Brackett v Focus Hope and Accident Fund Insurance Company of America*, Court of Appeals Docket No. 274078; and, *Harvlie v Jack Post Corporation and St. Paul Fire & Marine Insurance Company*, Court of Appeals Docket No. 276044. Watch for a ruling in these cases.