



MICHIGAN SELF-INSURERS' ASSOCIATION

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February 22, 2011

Director of Workers' Compensation Agency
Mr. Kevin Elsenheimer
P.O. Box 30016
Lansing, MI 48909

Dear Director Elsenheimer:

I am writing on behalf of the Michigan Self-Insurers' Association [MSIA], which is as you know a group of self insured employers devoted to workers' compensation education and the preservation of viable self insurance for Michigan employers. We are writing with respect to the Governor's proposed budget. More specifically, we are writing with respect to the proposed elimination of the Workers' Compensation Appellate Commission and the suggestion in the budget proposal that henceforth "[e]mployers and employees may appeal Board of Magistrate decisions to the Court of Appeals."

We appreciate the budget concerns that underlie the elimination of the Workers' Compensation Appellate Commission (WCAC), but we respectfully recommend that the appellate function presently performed by the WCAC be performed elsewhere within the workers' compensation system. We believe it can be accomplished with reduced costs. Our reasoning is as follows.

Courts have often emphasized how they could not perform the appellate function of reviewing workers' compensation magistrate decisions. In the following passage, the Michigan Supreme Court described the importance of the appellate function being performed within the workers' compensation appellate system and not by the Courts:

In the particular context of workers' compensation cases, a highly technical area of law, the judiciary lacks the expertise necessary to reach well-grounded factual conclusions. Workers' compensation cases

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typically involve lengthy records replete with specialized medical testimony. These cases require application of extremely technical and interrelated statutory provisions that determine an employee's eligibility for disability benefits. The judiciary is not more qualified to reach well-grounded factual conclusions in this arena than the administrative specialists. Therefore, the Legislature has decided that factual determinations are properly made at the administrative level, as opposed to the judicial level.

Further, the courts simply cannot review the record in every workers' compensation case in the detail required to make conclusions about the sufficiency of the magistrates' decision. Workers' compensation cases are typically fact intensive, involving lengthy deposition testimony and medical documentation. If the courts were to attempt a review of each and every workers' compensation case with an eye toward making detailed factual conclusions, dockets would become impossibly burdened with workers' compensation cases, further delaying the resolution of injured workers' claims for benefits. These considerations – lack of appropriate expertise and resources – demonstrate the practical benefits flowing from the Legislature's creation of a two-tier reviewing process, which delegates to the WCAC the role of ultimate fact finder while limiting the judiciary to the role of guardian of procedural fairness." *Mudel v Great Atlantic & Pacific Tea Company*, 462 Mich 691, 702 n 5; 614 NW2d 607 (2000).

This appreciation of the pivotal appellate function being provided within the workers' compensation system is longstanding. See, e.g., *Magreta v Ambassador Steel Co*, 380 Mich 513, 519; 158 NW2d 473 (1968).

We echo the sentiments of the Michigan Supreme Court. Practical problems will result from the Governor's proposed suggestion. Currently, workers' compensation appeals to the Court of Appeals are from the WCAC and are by leave to appeal. MCL 418.861a(14); MCR 7.203(B)(3). The "by leave" discretionary nature of the appeal allows the Court of Appeals to decline a full review of the case. Since constitutionally there must be a full review of an administrative decision at some appellate level, the Governor's proposal seemingly contemplates an appeal by right to the Court of Appeals. This will significantly increase the number of appeals to the Court of Appeals. And, such appeals to the Court of Appeals would not be the discretionary "by leave" type that can be resolved by means of a one sentence order. An appeal by right to the Court of Appeals necessitates a decision from the three judge panel of the Court that reviews not just the law applied but the facts as well. As the quotation from the Supreme

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Court's decision above indicates, it is doubtful the Court of Appeals is anxious to undertake a task of those proportions.

Nevertheless, we recognize the budget realities of today. Therefore, we would respectfully suggest that the appellate function remain in the workers' compensation system but be undertaken in a less expensive manner than presently performed.

Presently, there are five members of the WCAC. This number has remained the same for approximately eight years, despite a dramatic decrease in appeals (*c.* 60%). The appellate function could now reasonably be performed by three appellate commissioners. And, a complete separate body of just three people seems unnecessary. Folding three appellate commissioners into one adjudicative body along with the trial magistrates is sensible and would reduce administrative costs.

Thank you for the opportunity to express our view on this point. As always, MSIA stands prepared to discuss and provide any other information your office might require.

Very truly yours,

Gerald M. Marcinkoski
Executive Secretary

GMM/mm