The McCroskey Advisor

*Published for the clients and friends of the law firm of McCroskey, Feldman, Cochrane, and Brock, P.C.*

*Serving the injured and the worker since 1949*

Volume 5, Number 2 May 1997

# Workers' compensation benefits often underpaid

**by J. Walter Brock**

It is very common for the employer, or the insurance carrier, to improperly compute the average weekly wage, thereby shorting the injured worker. When mistakes are made you can easily guess who gets shorted.

**No fringe benefits.** The first method of shorting the injured worker is to fail to include discontinued fringe benefits in the calculation of the average weekly wage.

The weekly workers' compensation rate is based upon the average weekly wage during the last year of work before the injury.

Sometimes the fringe benefits (insurance premiums, pension contributions, holiday pay, vacation pay, and bonuses) are simply ignored by the employer when the average weekly wage is calculated.

This can result in a loss of up to 25% of the weekly workers' compensation benefit rate. Other times the fringe benefits continue for a short time after the injury and no one notices that they have been discontinued and that the average weekly wage should be recomputed.

Do not be bashful about asking for a copy of your wage records and a figure representing the value of discontinued fringe benefits. A lawyer can help you make the calculations to determine if you are being shorted.

Note that discontinued fringe benefits are not added to the average week wage of highly paid employees. If your workers' compensation benefit rate exceeds two-thirds of the State average weekly wage, discontinued fringe benefits are not added to the average weekly wage for purposes of determining the weekly worker's compensation rate.

**Ignoring wage increases.** The second method used by employers to short the injured employees is to ignore Section 418.356 of the Workers' Compensation Act which provides that after two years of disability the weekly compensation rate may be increased if it can be shown that the worker would have

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## Attention all smokers!

Tobacco litigation is heating up nation-wide. If you are a long-time smoker with emphysema or lung cancer and you would like information concerning litigation against the tobacco companies, contact McCroskey Law offices for a free consultation. We can help you gain a referral to the law offices of J.D. Lee in Knoxville, Tennessee.

Mr. Lee is putting together a "litigant group", which will make it feasible to bring claims against tobacco companies -- claims which by themselves would be too expensive to pursue.

We believe this type of litigation will be best handled by a litigant group. Individual attorneys lack the expertise and financial resources necessary to tackle this type of complex litigation.

McCroskey Law offices will act as a regional representative in this litigation, and the trial responsibility will be with the national group led by Mr. J.D. Lee.

# *Smoking: the real drug war*

***by J. Walter Brock***

In 1964 the U.S. Surgeon General issued the opinion that smoking is harmful to our health. At that time everyone was smoking, except a few wise mothers, the type who also urged us to eat our vegetables.

*Your mother was right.* Of course you knew this all along, but you ignored her advice anyway.

In 1964 I noticed that physicians were gradually quitting smoking. A few persisted, and, in fact, a very few persist today. But most of those physicians who continued to smoke are today receiving their premature rewards in heaven. A few years later the Bar Association meetings started to become less polluted with cigarette smoke. Eventually the smoke cleared enough that the audience could actually see the speakers.

As of today hardly any lawyers smoke. Those who continued to smoke are reaping their premature reward too, just like doctors, but probably not in heaven.

Now I notice that our union meetings are clearing of smoke. It is certainly a gradual process, this war against smoking. But it appears that it is being won on some levels. Of course, this leads me to wonder about where our loyal union members who continue to smoke will go for their premature rewards.

It appears that the war is not being won among our children. Hopefully they will eventually follow our lead. But for the time being they see smoking as a method of expressing rebellion. -- a time honored tradition of the young.

Somehow we have to convince the young people that smoking is a dangerous and deadly habit, not an expression of rebellion, before they too go to their premature reward.

*Attorney J. Walter Brock specializes in workers' compensation, asbestos litigation, social security, personal*

# Disability affects a quarter of the state

U.S. Census Bureau from 1990 data show nearly a quarter of Michigan residents 16 and older have a disability, with about half of the cases severe enough to prevent the performance of a function and require the use of a wheelchair or some other aid.

The disability rate in Michigan is 24 percent -- about the same as the nation as a whole. Most counties in West Michigan have a slightly higher disability rate. Only Ottawa County, at 18 percent, is lower than the state average.

Muskegon, Mason, and Newaygo counties are all at 28 percent, while Oceana County is at 29 percent.

The most common disability involves difficulty walking or using stairs, with more than 626,000 (9%) Michigan residents 16 and older having trouble with either or both.

More than 600,000 (>9%) have difficulty lifting and carrying things 10 pounds or heavier.

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# Workers' compensation benefits are often underpaid

had an increase in his average weekly wage if there had been no injury.

Thus, if you were injured more than two years ago, and those persons who were in a job similar to your job are now earning more money, you may be entitled to an increase in you average weekly wage.

Here again note that the provision allowing for an increase in the benefit rate after two years of disability applies only to lower wage workers. If the average weekly wage at the time of injury results in a compensation rate more than 50% of the State average weekly wage no increase can be obtained. A lawyer can help you with this calculation.

**Ignoring dual employment.** The third method of shorting the injured worker is to ignore dual employment. If, at the time of injury, the worker is engaged in more than one employment, the average weekly wage is determined by adding together the wages of *all* employment. But the

# Workplace deaths decrease in 1995

According to the Department of Labor, workers in the six Great Lakes states died in occupational incidents at a lower rate in 1995 than the previous year. Workplace deaths were down 8 percent in 1995 to a total of 941 for the region.

Great Lakes states make up 19 percent of the nation's employment, but had only 15 percent of the nation's occupational deaths.

*Workplace deaths, 1995:*

Transportation accidents: 40%

Contact with objects and equipment: 17%

Assaults and violent acts : 16%

Exposure to harmful substances or environments: 12%

Fire and explosions: 11%

Falls: 4%

Other: <1%

***Social Security Disability***

# Determining disability using the GRID system

**by Seymour L. Muskovitz**

The "GRIDS" system is a method of determining Social Security disability benefits. It is a cookbook form of determining disability, based on age, educational experience, and transferability of skills.

Age has become more significant in the numbers of disability cases filed, since the population of the United States over the age of 55 has doubled in the recent past and is expected to continue to increase over the next 16 years.

The GRIDS become important for people that are 50 years of age or older. People 50-54 years old are referred to as "closely approaching advanced age" and people 55-65 are considered "advanced age."

Those that are 55 and over who have no relevant past work history or can no longer perform vocationally relevant past work and have no transferrable skill, especially with the history of unskilled work, would be defined as disabled.

Those individuals who are 50-54 years old may be significantly limited in vocational adaptability especially if they are restricted to sedentary work and do not have transferrable skills.

Those that are 60-64 years old with a severe impairment are thought to be unable to adjust to a new job situation--even sedentary or light work--unless they have skills which are highly marketable.

Those people who are less than 50 years of age have a much more difficult time being able to prove that they are eligible for disability social security benefits, even more so for those who are below age 45.

Between the ages of 45-49 they must be restricted to sedentary work and have no skills or have no transferrable skills, no relevant past work experience, or cannot perform vocationally relevant past work, and are either illiterate or are unable to communicate in English.

Otherwise, they have to be able to prove that they are unable to perform *any* work on an eight hour day, five day week, 50 week year basis.

The question is not whether you can get work. The question is only if you could do the job *if* you had it.

The work can exist anywhere in the State of Michigan, not necessarily near where you live.

It could be a job that you would not be willing to take because of wage rate, distance, etc. The factors do not matter. As stated above, the *only* question is if you could do the job if you had it.

It is with the onset of age 50 that age becomes a vocational factor that is extremely significant when intertwined with other vocational factors in determining disability under Social Security law.

Age is a crucial factor in the concept of transferability of work skills and this is a critical factor in determining eligibility for disability social security benefits.

*Attorney Seymour L. Muskovitz specializes in social security, civil rights law, and workers' compensation.*

# *Justice Riley stepping down from Michigan Supreme Court*

State Supreme Court Justice Dorothy Comstock Riley, chief justice of the high court from 1987-91, announced in April she is resigning effective September 1.

In a letter to Gov. Engler she says she is stepping down for health reasons.

Justice Riley was appointed to the Court in 1982 and elected to the court in 1984. She was reelected in 1992.

Gov. Engler will appoint Justice Riley's successor. The appointee will serve the remainder of her term, which expires January 1, 2001, although he or she will have to run in next year's election to complete the term.

The composition of the court is critically important to the working people of Michigan. The Michigan Supreme Court plays a paramount role in interpreting and applying the state's worker's compensation laws, civil laws, environmental laws, and the Public Employee Relations Act.

# If economy is strong, why are workers struggling?

***Job insecurity is the key, say economists***

Economists have expressed surprise that workers' wages have not improved, despite unemployement being at its lowest sustained level in decades.

According to standard economic theory, workers should be gaining leverage with their employers in such a situation.

In recent Congressional testimony, Federal Reserve Chairman Alan Greenspan offered a number of explanations for this phenonemon, from global competition to the declining power of unions. But he thinks the major reason is job insecurity.

He is surprised by surveys that show that despite the strong economy, twice as many workers fear job layoff now as did during the last recession.

"Unemployment rates are the lowest they've been in a generation. Something is going on here that is different from anything I've seen." said Greenspan.

Greenspan believes the major reason for this job insecurity is fear that their skills will become obsolete. Workers, especially older ones, fear that in an era of rapid technological change in the workplace, their skills might not help them get a new job.

Younger highly skilled workers do not exhibit the same insecurity, said Greenspan.

"They don't sense job insecurity. They expect that they're going to move from one job to the next and that's the normal play of things," he said.

"The skill that they have is what gives them the sense of security, not the particular employer," he added.

Greenspan said he believes very specific on-the-job training by companies is what workers need to get them the skills they need to feel more secure.

Greenspan's statements were echoed by economist Robert Kuttner, who recently addressed the Muskegon Economic Forum.

"My plea is a plea for balance -- balance between the market and other aspects of society to make our country a better place for ordinary people," said Kuttner in Muskegon.

Despite the strong economy, he added, many Americans have been laid off or fired.

In order to restore "balance", certain "moral aspects" of our economic life must be addressed.

"Unless you are fortunate and have a skill that is in high demand, you are only worth what you earn as long as there is not someone on the sidewalk who will do the job for a fraction of the wage," he said.

Kuttner said business should try to provide more education and training to the work force.

*With reports from National Public*

# Congress might expand Family and Medical Leave

Congress is currently considering a bill to expand the Family Medical Leave Act, but the measure is being held up by Republicans, who say it would be an unnecessary burden to business.

The bill is sponsored by William Clay (D-Missouri), and supported by President Clinton.

If enacted into law, the measure would allow eligible employees to take up to 24 hours of unpaid leave to meet family obligations, such as parent-teacher conferences, taking a child to a doctor or dentist, finding child care, or helping an elderly relative with medical appointments.

Workers are allowed to take up to 12 weeks unpaid leave under the existing version of the FMLA. Workers are allowed to take leave if they have a serious health condition, or if they need to care for a child or parent with a serious health condition. Workers are also allowed to take leave for pregnancy, and to care for a newborn child.

The existing FMLA was enacted into law in 1993, despite strong opposition from Republicans and President Bush.

Senate Majority Leader Trent Lott (R-Miss.), says he has no plans to allow the Senate to act on the bill expanding the FMLA.

There are reports that Clinton has suggested that if Congress will pass the FMLA bill, he will sign the GOP's "comp time" bill, which supposedly gives workers the right to choose time off in lieu of overtime.

The McCroskey law firm favors expansion of the FMLA to include 24 hours of leave for family obligations. We urge you to call your representative or senator to voice your support for the legislation.

*See the bottom of the next page for information on how you can register your support for the Family Medical Leave Improvements Act.*

# Business complains, but workers need the FMLA

**by Thomas B. Cochrane**

Businesspeople have a hard time complying with the FMLA. This is one of the main reasons the bill to expand the FMLA has encountered resistance in Congress. (See related story, page 4)

Companies complain that it is difficult and costly to grant employees up to 12 weeks unpaid leave as the FMLA requires.

Despite objections from employers, the FMLA is a good law. Working people need statutory protection to ensure they are able to care for children and relatives.

The alternative is to entrust employers to "do the right thing," and, while there are some employers who genuinely look out for the best interests of their workforce, the sad truth is that many employers could not care less about their employees.

It is this latter group of employers that the FMLA is needed to protect against.

Every day I see examples of how the FMLA protects people who would otherwise be victimized by their employer.

One young man told how he had to take his pregnant wife to the emergency room when she went into labor two weeks before her due date. His supervisor told him it was an unexcused absence because "the FMLA only covers life-threatening diseases, like cancer."

One woman called me to say she was one point away from getting fired because her employer had burned all her points. While she was at work, her son had a severe reaction to a vaccine shot. He had a high fever, he was vomiting, and was turning blue. She left work to take him to the emergency room. Her son spent a week in bed; she missed four days. Her supervisor said it was an unexcused absence.

One women had a problem with her pregnancy. Her doctor told her she could work her regular hours, but she could not work overtime without risking her health or that of her baby. Her employer, however, ordered her to work mandatory overtime and threatened to fire her if she didn't. Her employer told her she had no choice: she had to work overtime or she was fired.

Another woman called to say her mother was critically ill and she needed to help care for her. A two-week strike was just ending at her plant, and she was going back to work. She asked for leave to take care of her mother, but the company refused. Her supervisor said she had to work two weeks before she would be entitled to FMLA, and until then, she had to work full-time or her absences would be unexcused.

In every one of these cases -- and many others I have encountered -- the employer was wrong. The employee *was* entitled to FMLA leave.

Fortunately, these people called a lawyer for help, but how many other workers are suffering the consequences of their employer's indifference to their problems?

It can be difficult for an employer to comply with the FMLA. But without it working people like the ones mentioned above would have no guarantee they could care for sick children or relatives without risking their jobs. The FMLA comes with a cost, but it is a cost everyone -- including business -- should be willing to bear.

*Attorney Thomas B. Cochrane practices employment law, labor relations, and workers' compensation.*

## *Contacting your representative*

*Support the FMLA Improvements Act. Call or write your Congressman below.*

Rep. Dave Camp
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Midland, MI 48640
(800) 342-2455

Rep. Vernon J. Ehlers
166 Federal Bldg.
110 Michigan St. N.W.
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(616) 451-8383

Rep. Pete Hoekstra
42 West 10th St.
Holland, MI 49423
(616) 395-0030

Rep. Nick Smith
81 S. 20th. St.
Battle Creek, MI 49015
(616) 965-9066

Rep. Bart Stupak
1120 E. Front St., Suite D
Traverse City, MI 49686
(616) 929-4711

# Sometimes 'favored work' is not much of a favor

**by Christopher J. Rabideau**

Employers and insurance companies often try to reduce their responsibility for paying weekly workers' compensation benefits by offering injured employees "favored work."

Favored work is work within the employee's medical restrictions--work that the injured worker is physically and mentally capable of doing.

When offering favored work, the employer is required to provide the injured employee with details of the offer, including the specific job, rate of pay, the location, and the physical requirements of the job.

For example, if an employer tells an employee to "come in Monday and we will find something for you to do," the offer is not sufficiently specific.

If an employer does make a job offer that is within the worker's medical restrictions and which includes the details of the job, then the worker must usually accept the job offer or risk losing benefits.

The Workers' Compensation Act allows the employer to discontinue benefits if the injured worker refuses a work offer made by the employer, another employer, or by the Michigan Employment Security Commission.

There are times when an employer's job offer is not reasonable even if it is within the injured employee's medical restrictions. Whether a job offer is unreasonable depends on the effort, risk, sacrifice, or expense required of the employee.

For example, if the offered job is located in Detroit and the injured worker lives in Muskegon, it is unreasonable to expect the worker to move to Detroit to take the job.

Or suppose the injured worker is offered a night job within her restrictions, but she is a single mother who previously worked days while her children were at school. It would be unreasonable to expect her to obtain day care during the evenings so she could go to work.

Unfortunately, the line

## *For more information...*

If you would like more information about anything in this newsletter, or if you have a question about any legal problem, call the law offices of McCroskey, Feldman, Cochrane, and Brock, P.C., for a free consultation.

The McCroskey law firm specializes in automobile accidents and other personal injury cases, workers' compensation, employment law, and labor relations.

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*Serving the injured and the worker since 1949*

McCroskey, Feldman, Cochrane, and Brock, P.C. has five offices in western Michigan. Call any office direct, or dial (800) 442-0237.

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The McCroskey law firm also has offices in Battle Creek, St. Joseph, Holland, and Grand Rapids. Telephone: (800) 442-0237.

Additional copies of this newsletter may be obtained free of charge by contacting the McCroskey law firm.

***Americans with Disabilities Act***

# New Guidance on the ADA and mental disabilities

**By Thomas B. Cochrane**

The Equal Employment Opportunity Commission (EEOC) recently issued a new Guidance on how the Americans with Disabilities Act (ADA) affects employees with mental disabilities.

The Guidance indicates that employees may be protected by the ADA if they are hostile or anti-social, easily distracted, sleep too much or too little, have poor judgment, are chronically late, or are irritable -- if these conditions are caused by a mental disability.

An employee suffering from stress caused by a mental impairment could also be covered, according to the Guidance.

The Guidance is extremely important in determining how to apply the ADA in the workplace. Although it does not have the force of law, it indicates how the Department of Labor thinks the law should be enforced, and courts often rely on the Guidance to resolve questions in litigation.

An employee with a mental impairment may be covered by the ADA if the individual is substantially limited in a "major life activity," such as sleeping, concentrating, or working. The impairment must last more than several months; short term impairments are not covered.

An employer does not have to accommodate an employee unless the employee *tells the employer* he is disabled and *requests an accommodation*. If the employee does both, the employer must take steps to provide accommodation, as long as doing so will not be an "undue hardship."

Previously the EEOC has stated that the ADA may require employers to offer many types of accommodations to disabled employees, including: job restructuring; part-time or modified work schedules; reassignment to a vacant position; modification of equipment; and providing unpaid leave.

The EEOC makes clear that this list is not exhaustive, and that other "similar accommodations" may also be required.

The new EEOC Guidance on psychiatric disabilities offers additional examples of accommodations which may be required, including: providing the employee with a job coach; adjusting the level or method of supervision; providing additional or modified training; rescheduling breaks or providing additional breaks.

The ADA does not protect an employee with a mental impairment who commits misconduct, or whose actions pose a "direct threat" to workplace safety, even if the employee's behavior is caused by the impairment.

The ADA can be a powerful tool enabling employees and employers to help disabled individuals function in the workplace, but it is a very complicated statute, and can be difficult to apply.

The new EEOC Guidance makes clear that if you have a mental disability you can benefit from the ADA -- just like persons with physical disabilities -- but it can't help you unless you take the first step to assert your rights. If you think you may have a disability covered by the ADA and believe ADA accommodation would benefit you in your workplace, contact your union representative or an employment lawyer for advice on how to proceed.

*Attorney Thomas B. Cochrane practices employment law, labor relations, and workers' compensation.*

## *Examples from EEOC's new guidance*

**Example 1.** A retail store does not allow its cashiers to drink while working at checkout. The store also limits cashiers to two 15 minute breaks per eight hour shift. An employee with a psychiatric disability requests that he be allowed to drink water about once per hour to combat dry mouth, a side effect of his psychiatric medication. Under the ADA the store should modify its no-drinks policy, or give more frequent breaks.

**Example 2.** An employee asks for time off because he is "depressed and stressed." Although vague, this statement is sufficient to put the employer on notice that he is requesting ADA accommodation. The employer may be required to grant leave, although the employee may have to provide medical verification of his condition.

**Example 3.** An employee steals money from his employer. Even though he asserts he stole because of a mental disability, the employer may discipline him consistent with its policies, so long as the policy is job-related and

◆ **TOPIC**

# Your Headline