The McCroskey Advisor

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Serving the injured and the worker since 1949

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Courts cripple environmental protection laws

by Eric C. Lewis

The appellate courts of Michigan have decided that the Michigan Environmental Protection Act does not allow attorneys fees to be awarded to citizens who file suit under the Act to protect the environment. The courts' decisions will effectively cripple the citizen suit provisions of our landmark state Environmental Protection Act.

In this Act, our legislature gave each citizen the right to sue to protect the environment from harm. The Act does not allow for the award of damages. It only allows citizens to sue a polluter to get a court order to stop the pollution or to order the defendant to do things differently to protect the environment. The legislature intended that the citizens would be actively involved in filing these suits.

The legislature said in the statute that if the citizens who filed suit were successful, or won, then the court could award "costs" of the action to the citizens. In the early years of the Act, this was interpreted to mean that the court could award the attorney fees incurred by the citizens in bringing the suit.

Now the courts have said that "costs" just means taxable costs, which is nearly nothing and includes no attorney fees. As the result, the only way citizens can file suit under the Act now is if they can find an attorney to do the work for no fee, or if they pay the attorney fee themselves.

These are terrible decisions. The legislature was sloppy again in its draftsmanship, and the courts have used that sloppy writing to deny attorney fees to citizens who file and win environmental suits in Michigan.

A tremendous statute has been largely gutted by the court decisions on this critical part of the Act. The polluters can almost always afford to hire good attorneys. The citizens rarely can. So, these decisions have given industry the upper hand they needed to avoid responsibility for destruction of the environment.

The legislature ought to fix this disaster by amending the Act to clearly say that it intended for citizens to have the opportunity to win their attorney fees if they have the courage to file these suits.

Attorney Eric C. Lewis specializes in personal injury, environmental law, no-fault, and products liability.

Workers' compensation

Employees harrassed over comp

by J. Walter Brock

Employers are presently using two devices to avoid payment of workers' compensation benefits to injured and disabled workers.

Personnel directors attend seminars in these techniques. The first is the use of *psychological pressure* in the workplace. To apply this pressure it is first necessary to get control. This is done by getting the disabled worker back into the workplace where he can be intimidated and harassed.

The second major device is the use of *bogus rehabilitation efforts*. This ploy involves the use of so-called vocational experts to harass and intimidate injured and disabled workers.

These ugly people make their living by pressuring people to apply for work they know they cannot get, by making them go door to door begging to be allowed to file an application for employment. This humiliation is enough to cause many people to settle cheap or give up their claim to workers' compensation.

Return to work. In years past employers were extremely reluctant to allow disabled workers to return to work. The employers could see nothing but trouble with people who could not do a full day's work. Thus disability was a sound basis for a court order for workers' compensation benefits and the employer was forced to rehabilitate the disabled worker, or pay his disability

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Employees harrassed for receiving workers compensation

benefits. Then some hard-hearted SOB discovered a fact of human psychology which has been employed over and over again to hurt and humiliate disabled workers.

As soon as someone is injured everyone else in the workplace seems to become an enemy. Not just the employer, but also fellow workers who become resentful if the employer forces them to assume the extra burden of work which comes their way when a disabled worker is given favored work.

Employers skewer disabled workers by offering them a return to work.

This fact of human psychology is used to skewer disabled workers by offering them a return to work. The work to which they are asked to return is light to non-existent. Sometimes it involves sitting in a cafeteria and wiping off a few tables during an eight hour shift, but no one doing this work is allowed to read or talk with other persons in the cafeteria. The result is horrible: psychological disintegration.

There are a thousand variations on this theme, each more destructive than the other.

The result of the humiliation and abuse by the employer and fellow workers is a so-called voluntary termination by the disabled worker. In other words, the disabled worker leaves the workplace as a result of being ostracized and humiliated. The employer then argues this is a voluntary refusal to work and the Magistrate denies further workers' compensation benefits. This scheme has been upheld by the Courts.

Do not let this happen to you. Seek advice of counsel. Yes, you must return to work if work is offered within your restrictions. Yes, your doctor will probably not be very supportive. But you need not be humiliated. The work offered and the working conditions must be reasonable. Let your lawyer help you determine what is reasonable and *follow your lawyer's advice*.

Workers' Compensation Magistrates who decide these cases are quick to deny benefits if a disabled worker refuses favored work. Often the psychological pressures brought to bear on the disabled worker are not appreciated by the Magistrates. Ask your lawyer about this situation. He has experience with employer's ploys.

Rehabilitation. Michigan's injured workers are entitled to be retrained, making them once again competitive in the job market. I brought the case which firmly established that principal in the Michigan Supreme Court, *Barrett v. Bohn Aluminum*. My client in that case, Danny Barrett, had been severely injured when his hand was crushed in a power press. At the time of the injury he was a high school student and the Company argued that the Act required that Danny be retrained to run another machine at minimum wage.

I argued to the Court that Danny should be retrained so that he would once again be competitive in the job market and could advance into better paying jobs. The Michigan Supreme Court agreed with the argument and the Company lost. This case has been cited over and over again by the lower courts and forms a bedrock for the law of vocational rehabilitation.

You must cooperate with rehabilitation, but you need not humiliate yourself.

With recent legislative backing the vocational rehabilitation provisions of the Act have been turned around. Now, rather than being a positive force for getting disabled workers back into the work force, the rehabilitation provision is used to force disabled workers out of the workers' compensation system causing a forfeiture of benefits.

A few years ago a provision was slipped into the Act which provides that disabled workers must cooperate with rehabilitation efforts or lose their benefits. This is a powerful weapon in the hands of the savages in the insurance industry.

People who are receiving benefits--already disabled and downtrodden--are introduced to vocational experts who are hitmen for the insurance industry. They are forced to go from place to place begging to be allowed to file an application for employment. Eventually they become humiliated and discouraged.

Now emotionally injured, these workers refuse to go through another humiliation and the employer terminates their workers' compensation benefits based upon a refusal to cooperate with rehabilitation efforts. An entire tawdry rehabilitation industry has grown up to do this work.

Do not let this happen to you. Your lawyer can guide you through this quagmire, may-be, but a misstep can be fatal. Seek advice. Be sure the lawyer you talk with takes the time to guide you.

You cannot refuse to cooperate with rehabilitation efforts, and you must be reasonable (in fact, more than reasonable). But you need not humiliate yourself. A lawsuit can be filed to force the employer to use reasonable efforts to rehabilitate you so that you are once again competitive in the job market. But this is time consuming and requires effort. Be ready to fight.

Attorney J. Walter Brock specializes in workers' compensation, asbestos litigation, personal injury, and machine injury accidents.

The myth of America's litigation explosion

by Thomas B. Cochrane

In recent years many people have come to believe that we are experiencing a litigation explosion in our country, that the number of lawsuits filed in U.S. courts has sky-rocketed thanks to a growing culture of greed and victimization, and an army of sleazy lawyers whose only ambition is to collect the biggest fee possible.

Conservative lawmakers, business interests, and insurance companies have eagerly spread this tale, especially since the so-called Republican Revolution of 1994.

Tort reform topped the agenda of many Republican candidates in the recent election. Torts, civil cases to recover money in court for wrongful acts, injuries, or damages, are bleeding our economy dry, they said. Tort suits cost our economy billions of dollars each year, and something must be done.

Remember the McDonald's hot coffee lawsuit?

One of the most widely circulated stories about the alleged "litigation explosion" was the award of $2.9 million to a woman burned by coffee from McDonalds.

Comedians made jokes about the case and business spokespeople pointed to the case as proof the U.S. justice system needs reform.

But the case was rightly decided.

Consumer advocate Ralph Nader testified on the case before Congress in 1995:

"In February, 1992, while sitting in a non-moving car, 80 year old Sheila Liebeck suffered third degree burns over six percent of her body, including her genital and groin areas, after the cup of coffee she was holding spilled into her lap. As a result, she was hospitalized for eight days and underwent skin grafting. Ms. Liebeck sought to settle her claim for a mere $20,000, but McDonald's refused.

"During extensive discovery, Ms. Liebeck's attorney discovered that more than 700 claims had been filed against McDonald's by people burned by its coffee between 1982 and 1992. In addition, McDonald's admitted that it kept its coffee at temperatures almost 40 degrees higher than most food establishments. The jury awarded Ms. Liebeck $200,000 in compensatory damages, which was reduced to $160,000 because the jury found Ms. Liebeck 20% at fault for the spill.

"The jury also awarded Ms. Liebeck $2.7 million in punitive damages, the equivalent of two days of McDonald's coffee sales. The trial court subsequently reduced the punitive award to $480,000 -- three times the compensatory damages.

"Notwithstanding the hysteria surrounding the McDonald's coffee case, the facts demonstrate that punitive damages are not awarded arbitrarily or without just cause, and that awards are subject to review and reduction by trial judges."

The facts tell a completely different story however. The "litigation explosion" is a myth based on distorted anecdotes, inaccurate statistics, and wild exaggerations.

When the Colonists rose up against King George III one of their biggest complaints against the Crown was that he tried to deprive them of the right to trial by jury. When they established the American Nation, they worked hard to ensure that all people had free and equal access to the justice system.

By and large they succeeded. More civil suits were filed per capita in America in 1830 and 1840 than in 1996. The reason? Taking a case to court 150 years ago was easier and less expensive.

Gradually however, corporate interests have made it harder and harder for ordinary citizens to get into court. Today, according to a Rand Corporation Study, only 1 out of 10 people injured ever seek compensation through the legal system, and only two percent actually file a lawsuit. "The problem is not one of too few claims, but one of not enough claims" says consumer advocate Ralph Nader.

If there is a litigation explosion today it is in *business* litigation, businesses suing other businesses. Between 1985 and 1991 business-against-business contract suits comprised nearly half of all federal court cases. One study in Illinois found that business contract lawsuits outnumbered tort suits by 7-to-1.

Businesses and insurance companies claim they are being battered by tort lawsuits. Yet when their claims are considered in perspective, they look decidedly suspicious.

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Workers' Compensation

Hurt your back at work? Report it !

by Kevin J. McCroskey

It is well known that a large majority of workers' compensation cases involve back injuries. What is less well known is that many of these back injuries, which result in significant time off work and/or surgery, begin with what the worker at first perceives to be a relatively minor twinge or sprain.

Often times these twinges of pain occur toward the end of the work day, and the worker, in the interest of getting home to his family, will fail to report them only to find that the next morning he is unable to get out of bed.

The problem is only compounded if the twinge of pain occurs on a Friday afternoon and is unreported, for the simple reason that this gives the employer and the workers' compensation insurance company a built-in defense that the injury occurred over the weekend.

This type of reporting problem crops up frequently in workers' compensation cases. We recommend, particularly in the realm of back injuries and back pain, that you are especially careful to report these twinges when they occur.

Of course, common sense should be your guide in this regard, but if there is any doubt in your mind as to whether or not this is merely a momentary twinge or the beginning of a back problem that may lead to time off work, take a few minutes to complete the necessary reports of injury and file them according to your company's procedures.

If it turns out that what you reported does not result in any time off work, or does not evolve into a severe back problem requiring protracted medical treatment or surgery, there is no harm done.

On the other hand, if what seems to be a relatively minor episode of back pain does evolve into a serious problem resulting in time off work, you may well save yourself a lot of time, trouble, and attorney fees by taking a few minutes to report the incident.

Attorney Kevin J. McCroskey specializes in workers' compensation law and social security.

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. The firm has offices throughout western Michigan. Call (800) 442-0237.

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Past partner named Dean

Professor of Law Suellyn Scarnecchia has been named associate dean for clinical affairs for the University of Michigan Law School.

Scarnecchia is a former partner at McCroskey, Feldman, Cochrane and Brock, P.C. She left the firm in 1987 to join the Michigan Law School faculty.

In her new position, Scarnecchia will oversee operations of the Law School's three clinics and other clinical education programs, trial workshops and related teaching activities.

Scarnecchia's former law partners give her high praise.

"Suellyn was an outstanding trial strategist and orator." says attorney J. Walter Brock. "She won the almost unwinnable cases and distinguished herself as a real champion of her clients' causes. She has been sorely missed by our law firm."

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The McCroskey Advisor is published by the law firm of McCroskey, Feldman, Cochrane, and Brock, P.C. Unless otherwise noted, the material herein is strictly the opinion of the attorneys of the McCroskey law firm. Readers should consult them for advice on all legal issues raised.

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

Taking the bugs out of telephone wiretapping

by Eric C. Lewis

Many people are confused about the laws governing use of recorders or other equipment to intercept or to eavesdrop on telephone calls. The laws vary among the states, and some conduct is legal in one state but a crime in another.

In Michigan, our state statute does not prohibit the secret recording of a telephone conversation, as long as you are one of the parties to the conversation. In other words, you can indeed record a call with another person without informing the other person that you are doing so.

This is the rule according to our Court of Appeals in a 1982 decision. It is at least possible that the Michigan Supreme Court might rule differently, but it has shown no sign that it will.

The federal wiretapping statute also regulates the use of recording devices or telephone eavesdropping in every state. Under the federal statute, the rule is the same as our state law. It is not a crime to record a call as long as you are a party to the call. You need not tell the other person.

Several decisions in Michigan have confirmed that a call secretly recorded by a private citizen, even if it was in violation of state and federal law, can indeed be used as evidence by the prosecutor in a criminal case. In several cases, divorcing spouses have illegally recorded calls of the other spouse with someone else. This is a violation of the state and federal law, because the person doing the recording was not a party to the conversation. Nevertheless, the evidence is admissible in a criminal trial against anyone who made incriminating statements on the phone recording. The government was not involved, so no search warrant was required.

Knowing that one can legally record your calls without your permission ought to make us all be careful of what we say on the telephone. I advise people to assume that their conversation is being recorded. The same is true in a private face-to-face meeting. You should assume that your conversation is being recorded in any sensitive meeting. I think that generally this won't turn out to be true, but it is a good assumption to make. Replace this text with text for your story.

Attorney Eric C. Lewis specializes in personal injury, environmental law, no-fault, and products liability.

Settling your Workers' Compensation Claim

by J. Walter Brock

Worker's Compensation cases are closed or settled by a process called *redemption*. When you settle, you are giving up your claim for cash. In other words, you are "cashing in" your rights just like redeeming a coupon in a store.

All redemptions must be approved by a Magistrate, a judge who specializes in worker's compensation matters. The Magistrate must determine whether or not the settlement is in your best interests. However, sometimes the Magistrate may simply want to dispose of cases on his docket. Before settling your case, *seek the advice of a lawyer*. Occasionally, the amount offered is fair and reasonable. Often, however, the offer will be insufficient and unfair.

Many times people settle simply because they are disgusted with the system which is heavily weighted in favor of employers. Do not consider settlement simply because you are frustrated, humiliated and beat down by the system. *Get legal advice.*

One type of case which can often be settled advantageously is where a person is totally disabled and drawing Social Security benefits. Here a knowledgeable lawyer can be of great help in providing you with a lump sum of money from the settlement and keeping your Social Security benefits intact, or even working out an increase in your Social Security benefits. If you are receiving pension benefits, this situation gets even more complicated -- another reason you should seek advice of counsel.

Where your disability is from a back or joint injury, be aware that your death will end your worker's compensation claim. Your spouse will be left with nothing if you die from a cause unrelated to your disability. If your health is precarious it may be a good idea to discuss settlement. Talk to your lawyer, who can talk to your doctor and plot out a course of action which may provide some security for your spouse.

Attorney J. Walter Brock specializes in workers' compensation, asbestos litigation, personal injury, and machine injury accidents.

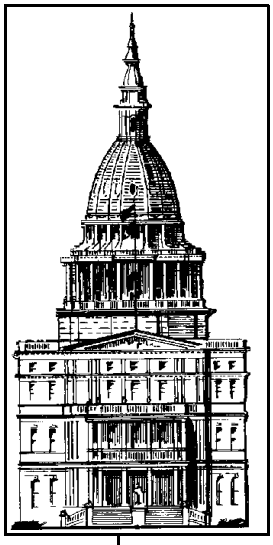
Worker's Compensation

Supreme Court issues new workers' comp decisions

by Gary T. Neal

The Michigan Supreme Court recently decided the method by which weekly workers' comp-ensation benefits are to be reduced by a lump sum pension withdrawal.

Insurance companies and employers had argued to the Court that weekly workers' compensation benefits should be eliminated entirely until the aggregate of the weekly compensation payments equals the lump sum withdrawn.



The Supreme Court, recognizing the unfairness of this method, disagreed.

The Court found that where a lump sum is received on early withdrawal, weekly compensation payments should be reduced by an amount that will amortize, in equal weekly payments, the amount to be offset over the employee's life expectancy.

For example, a 58 year old employee is receiving $300 per week in weekly compensation benefits and elects to take an early pension withdrawal in the amount of $25,000. The employee has contributed $5,000 to the pension and the employer has contributed $20,000. The employee has a 19 year life expectancy. Therefore, the workers' compensation insurance carrier can reduce the weekly compensation payments by $20.42 ($20,000 divided by 19 divided by 52).

The other issue the Court decided was when an employee receives a lump sum pension amount and immediately rolls it over into an IRA. The insurance industry argued to the Court that since the employee technically "received" the pension it was subject to coordination.

The Court held that when an employee puts a lump sum pension in a tax-free rollover IRA it is *not* subject to coordination.

It should also be noted that there is nothing in the worker's comp-ensation act which compels an employee to receive an early lump sum pension withdrawal.

The Supreme Court also recently decided a case involving work-related mental disabilities.

The Court held that whether a claimed mental disability was significantly contributed to, aggravated, or accelerated by employment, should take into consideration the totality of all the occupational factors, the employee's health circumstances, and non-occupational factors.

An employee's preexisting condition does not necessarily bar recovery.

Actual events of employment, even if ordinary, can be injurious to the mental health of a predisposed individual. In one Supreme Court case the employee developed a mental disability as a result of the changes associated with the employer's downsizing.

The Court found the mental disability was work related.

These three cases provide a very brief overview of the recent Supreme Court decisions on workers' compensation.

If you have a specific question about your situation, you should contact an attorney at our office who specializes in workers' compensation law.

Attorney Gary T. Neal specializes in worker's compensation, social security, MESC, and employment discrimination.

Watch Out! OSHA's safety inspections at all-time low

The *Wall Street Journal* reports that the Occupational Safety and Health Administration performed 24,024 inspections in the fiscal year ending September 30, 1996, down 17.5% from 1995 and 43.3% from 1994.

The reasons: a hiring freeze, last year's government shutdown, and the agency's move to cooperate more with businesses rather than penalize them, according to OSHA spokesman Stephen Gaskill.

The trend is "quite troubling," says Peg Seminario, AFL-CIO director of safety and health. Without more enforcement, she adds, OSHA is "no longer a credible threat."

Some union officials hope new leadership at the Labor Department, with Labor Secretary nominee Alexis Herman, will be more responsive.

The National Association of Manufacturers calls the agency's new approach "necessary."

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The litigation explosion myth

The total cost of businesses' products liability insurance premiums accounted for only fourteen one-hundredths (.14) of 1% of product retail sales, according to the National Insurance Consumer Organization. Over the past 10 years insurance companies paid an average of just 560 people per year for injuries caused by defective products.

Total product liability costs to business average less than $4.1 billion. While this may seem like a lot, the average payment of those claims was $3,767.

Business interests point out that the total amount paid in federal and state courts in product defect and medical malpractice suits comes to $7 billion each year.

How much is that? Ralph Nader reports that just one company, General Motors, made $6.5 billion in profit last year after taxes. "We spend $7 billion on dog and cat food." he adds.

Attorney Thomas B. Cochrane's law practice includes employment law, labor relations, and worker's compensation.

Campaign finance reform

Who's really trying to buy our elections?

by Thomas B. Cochrane

In the wake of last year's election fundraising brouhaha, we are hearing calls from all quarters for campaign finance reform. Unfortunately many people in power are not interested in real reform.

Organized labor is the latest target of this phoney "reform" process. The *Wall Street Journal* reported that Republicans are incensed that unions spent $35 million in support of Democrats during the 1996 campaign.

"The Left, led by the union bosses, fully committed its entire arsenal to electing Democrats." cried Republican Party Chair Haley Barbour.

What Barbour and other GOP stalwarts fail to mention is how much money businesses contribute to GOP candidates.

Time reports that for all practical purposes there are no limits whatsoever on the size of election contributions, which means millionaires and corporations are free to spend millions on politics.

And spend they do. Business gave candidates nearly $245 million compared to labor's $35 million, out-spending labor *seven to one*.

In fact, 99.97 percent of Americans don't make political contributions of more than $200. It is .03 percent of the population that has political influence and dominates the time of money-starved politicians.

"American elections are paid for, overwhelmingly, by economically driven industries and by a small handful of individuals who are the wealthiest in American society," says Ellen Miller, director of the non-partisan Center for Responsive Politics.

When Haley Barbour complains about the need to control labor campaign contributions, it shows "he's not concerned about money in politics, he just doesn't want working people to have a voice," says Democratic pollster Geoff Garin.

Labor unions admit that in 1996 they were actively involved in campaign politics, and spent more money than ever before in support of candidates. But compared to their opponents, unions' contribution is just a drop in the bucket.

Working people and their labor organizations are still the underdog in American politics, no matter what any member of the conservative choir may claim.

In the coming months citizens must refuse to be taken in by offers of so-called campaign finance reform which target organized labor, but leave the *real* monied interests -- big business -- untouched.

Attorney Thomas B. Cochrane's law practice includes employment law, labor relations, and worker's compensation.

Labor Council honors attorney

Attorney Darryl Cochrane has recently been honored by the AFL-CIO's West Michigan Labor Council for "untiring devotion and personal sacrifice" in the service of laboring people.

Cochrane, a partner and former president of McCroskey, Feldman, Cochrane, and Brock, P.C., specializes in employment law, labor relations, and workers' compensation.

The Council presented Cochrane with the award at its annual awards banquet on December 5, 1996.

Cochrane was also honored in October by inclusion in the seventh edition of *The Best Lawyers in America*. The book is based on a nation-wide survey of attorneys and is regarded as the legal profession's premier referral guide.

Cochrane has been included in *Best Lawyers* every year since the volume was first published in 1989. Less than one percent of all lawyers in the nation are named in the volume.

◆ **TOPIC**

Your Headline