SPECIAL UNION EDITION

The McCroskey Advisor

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

Serving the injured and the worker since 1949

Volume 5, Number 3 September 1997

Can employees take FMLA for a cold or flu?

Department of Labor says "maybe"

by Thomas B. Cochrane

The Family and Medical Leave Act requires employers to give their employees 12 weeks unpaid leave each year for a serious health condition, or to care for a child, spouse, or parent with a serious health condition.

Employers often misunderstand what "serious health condition" means, and frequently deny leave to employees because they do not think their illnesses are serious enough.

In fact, almost any illness is a serious health condition if it meets certain statutory requirements, even the flu.

The U.S. Department of Labor has recently published an Opinion Letter saying a cold or flu "may be a serious health condition for FMLA purposes, if the individual is incapacitated for more than three consecutive calender days and receives continuing treatment by a health care provider."

The Letter makes clear that "the circumstances surrounding each illness must be evaluated to see if it meets one of the regulatory definitions of a serious health condition."

The Letter surprised many employers, who had assumed illnesses like the flu could not count for FMLA. The final FMLA regulations state that ordinarily conditions like the common cold, the flu, ear aches, upset stomach, and minor ulcers will not qualify as serious health conditions.

However, the Letter makes clear that if any of these conditions meets the serious health condition criteria, for example "an incapacity of more than three consecutive calender days that also involves qualifying treatment," then the FMLA applies.

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

Court sides with injured in new workers comp case

by James T. Haadsma

The Michigan Supreme Court, following two terms of wrestling with the standard of disability in workers' compensation litigation, decided a case on July 30, 1997, of great importance to Michigan workers injured on the job: *Haske v. Transport Leasing.*

By a 4-3 decision, the Supreme Court decided that a partially disabled employee will not be required to demonstrate that he/she cannot perform all work activity within his/her qualifications. The employee only will be required to demonstrate a work-related injury causing disability from a single job within the employee's qualifications.

The employer and the insurance company in *Haske* unsuccessfully asked the Court to reduce the injured worker's wage loss rate by a percentage equal to the injured employee's alleged residual wage earning capacity.

continued at the top of page 2

Supreme Court case sides with injured

continued from the bottom of page 1

Many of my clients' insurance companies arbitrarily reduced their compensation payments during 1993 and 1994, following the Court of Appeals' decision in *Sobotka v. Chrysler Corp.*

Only upon the Michigan Supreme Court's August 1994 reversal of that decision did many clients receive reinstatement of properly calculated wage loss benefits. Many were hostaged by financial necessity to negotiate redemption agreements after *Sobotka*.

Uncertainty continued after the Supreme Court decided *Sobotka* and the workers' compensation Appellate Committee -- appointed by John Engler -- essentially resurrected and revised *Sobotka*. Several of my clients are presently fighting to keep their benefits from being reduced.

With *Haske,* the Supreme Court has taken an important step towards repairing the damage that followed *Sobotka*. *Haske* includes a specific announcement of what *Sobotka* means. Presumably, employees who yet may have the ability to perform some work within qualifications will be able to receive unreduced workers' compensation benefits.

I believe *Haske* will, for the next year or two, allow the workers' compensation Bureau to conduct business as usual, without outrageous defense arguments that rates should be significantly reduced because of the employee's alleged ability to perform hypothetical jobs within the regional labor market. I predict, however, that some defense lawyers will still work to reduce compensation payments.

I also predict that injured workers haven't seen the last of *Sobotka*-style defenses when the injured employee presents proofs in support of disability at trial.

It is vital that union local leadership and injured workers continue to keep your attorneys informed of the actions the employers and insurance companies take so we can continue to resist business interests' encroachment upon the rights of Michigan's working people to workers' compensation benefits.

Attorney James T. Haadsma is based in the law firm's Battle Creek office, and specializes in workers' compensation, social security disability, handi-

Haske is proof that our elections are important

Haske shows just how important the November 1996 election was to Michigan workers. (See story "Court sides with injured," p.1)

The Supreme Court decided *Haske* by a 4-3 margin. Last November, Michigan voters elected Marilyn Kelly, endorsed by the Michigan Democratic Party, the Michigan Trial Lawyers Association, and the McCroskey Law Firm, rather than Hilda Gage, endorsed by the GOP, John Engler, and the Michigan Chamber of Commerce.

Had the voters elected Judge Gage rather than Judge (now Justice) Kelly, *Haske* could very easily have been decided by a 4-3 margin, but with the opposite result: the majority of 4 would have favored significantly cutting workers' compensation benefits and making it more difficult to prove entitlement in the future.

This important swing vote also highlights the importance of the coming 1998 Michigan Supreme Court elections. The loss of a single seat by one of the justices friendly to workers could destroy many workers' compensation claims.

The Michigan Chamber of Commerce will undoubtedly invest hundreds of thousands of dollars in an effort to elect a Michigan Supreme Court justice majority which will rubber stamp the desires of insurers and businesses.

Michigan workers must get to the polls on election day if they wish to defend the rights the current Supreme Court has begun to restore to them.

Man shows toxic laundry killed his wife

A man who claimed that years of washing toxic laundry led to his wife's bladder cancer recently recovered $300,000 in damages for her death.

Velma Wittebort died in 1993 at age 65. Attorney Robert O. Chessman, representing her husband Arthur, said she was exposed to a cancer causing chemical during the 8 years she washed the clothes of two men who worked at Lakeway Chemicals in Muskegon.

Lakeway made benzidine dihydrochloride and other chemicals from 1961 to 1973.

Lakeway's former president responded to the suit by suing his former employees, claiming they were negligent in bringing the tainted clothes home, but the suit was dismissed.

Chessman, the president of McCroskey, Feldman, Cochrane, and Brock, P.C., says the Witteborts "hope other people will learn about what happened at Lakeway so that if anyone else is affected they will seek treatment."

Appeals Court: workers have a right to safety

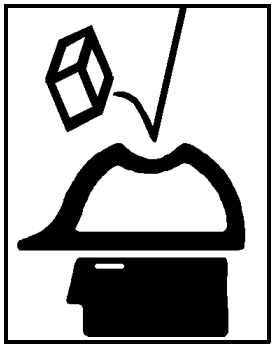
by Eric C. Lewis

The Michigan Court of Appeals has recently upheld a Michigan Department of Labor decision awarding an employee reinstatement, back pay, and interest for a wrongful firing under the safe place to work provisions of MIOSHA.

In this case, the employer had removed safety guards from a machine. When an employee refused to work without the guards, he was fired.

State law has long provided that an employee must be provided a reasonably safe place to work.

Violation of that law does not give the employee a civil action against his employer in the civil justice system, but it does give the employee the right to make an administrative complaint with the Michigan Department of Labor *within 30 days* of the illegal or retaliatory action by the employer.



The statute provides that the employee who complains to the Dept. of Labor cannot be retaliated against for making the complaint. This is very similar to our Whistleblowers statute, but not the same law.

The Whistleblowers statute does not give an employee the right to refuse to work under an unsafe condition. It only protects an employee from being fired for making a complaint to a state or federal agency of illegal activity.

All labor unions and workers should understand the importance of this MIOSHA statute and this Court of Appeals opinion upholding this statute. No worker can be compelled to work in an unreasonably unsafe environment or on an unreasonably unsafe machine. The worker will be most protected when the employer is asking her to do work which is clearly in violation of one or more MIOSHA regulations.

Therefore, if any particular work is clearly unsafe or in violation of the regulations, the employee can legally refuse to do the work. If the company fires her, she is entitled to have the Department of Labor enforce her rights to reinstatement and back pay. But the claim must be made promptly.

If the employee has also made a prior report of the suspicious work assignment or condition to the Department of Labor and notified the employer of that report, then she may also have a Whistleblowers suit if the company fires or retaliates against her. That suit must be filed within 90 days.

McCroskey Law Offices would like to see more of the workers in some of the very dangerous non-union shops become aware of these laws so that the carnage of amputations, disease, injuries and death is reduced.

We will be happy to answer

Hoekstra will chair House investigation of U.S. labor

U.S. Rep. Pete Hoekstra will lead a Congressional study into labor and employment in the U.S., tentatively titled "The American Worker at a Crossroads."

"The purpose of the project is to promote a workplace that provides Americans with security, flexibility, and prosperity," says Hoekstra.

"What we learn will help us make sure the American workforce is prepared to compete and succeed in the global marketplace as we enter the next millennium," he adds.

Some Democrats, however, are mistrustful of Hoekstra.

"This is not about helping working Americans. This is not about helping America's families. This is about trying to intimidate organized labor," said Democratic Reps. Steny Hoyer of Maryland, Sam Gejdenson of Connecticut, and Carolyn Kilpatrick of Michigan in a letter circulated on Capitol Hill.

The Washington newspaper *Roll Call* reports that Hoekstra plans to scrutinize unions, and has singled out the AFL-CIO for a probe of its political activities in the last election.

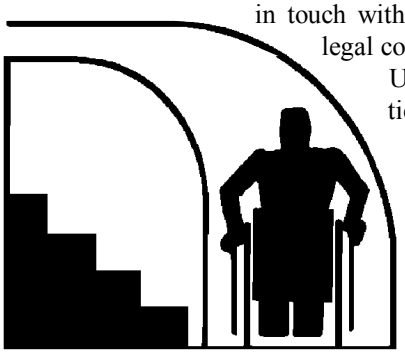
Anyone wishing to contact Rep. Hoekstra with an opinion about this project can do so at the following address:

Rep. Pete Hoekstra
1122 Longworth House Office Bldg.
Washington, D.C. 20515
(202) 225-4401

Unions grappling with impact of ADA on their workplaces

by Thomas B. Cochrane

Employers are struggling to comply with the Americans with Disabilities Act. The McCroskey law firm receives calls daily from employees and union officers with questions about accommodating disabled workers under the ADA.



From their questions it is clear a lot of employers lack even a rudimentary understanding of the statute.

The ADA creates rights for individual employees, not the union, so unions have not often found themselves grieving or arbitrating ADA claims.

In fact, when the law was passed in 1990, there was some concern that it would allow employers to undermine unions by dealing directly with employees on disability issues.

The union is the exclusive bargaining representative of employees, but the ADA obligates employers to discuss employment accommodations directly with the employee.

These fears have not been realized, and today many unions have chosen to involve themselves with ADA issues in the workplace.

Many unions have decided that they can help individual members gain accommodation for a disability.

A worker needing accommodation can make his or her request directly to the company, without going through the union. However, the law requires the disabled employee to request a *specific* change in their work situation or environment, and workers often lack sufficient knowledge of their workplace to make these suggestions.

A union can help an individual collect information, and facilitate discussions with the company.

A union can also put the individual in touch with vocational experts and legal counsel if necessary.

Unions may face difficulties, however, if the disabled worker requests accommodation that requires other employees to take over work he or she can no longer do, or if the employee asks for a job assignment for which he or she does not have the requisite seniority. Unions can end up in the middle of a dispute between several employees, and can even face a lawsuit from the disabled employee.

For this reason, some unions have decided to try to work out ADA policies and procedures with employers *in advance*, before a problem arises.

If a union follows an established procedure and is involved from the outset with an individual's accommodation request, it may avoid serious conflicts down the road.

ADA law is evolving and changing at a rapid pace, and will continue to do so for a number of years.

The legal relationship between the ADA and collective bargaining agreements is one area that has undergone dramatic change in the last few months. The question is whether the ADA can trump a labor contract where the two are in conflict.

The Sixth Circuit, the federal judicial circuit in which Michigan is located, has not issued a clear opinion on this issue yet.

Other circuits have however, and their decisions reveal that the courts have widely diverging views on this issue. Recent opinions from the Seventh Circuit and the District of Columbia Circuit take virtually opposite positions. While neither decision is the law in Michigan, the Sixth Circuit *may* choose to follow one of them when it eventually rules on the issue.

In this extremely confused situation, some unions have determined it is better to be proactive than reactive, and have actively sought to be engaged in workplace ADA issues to ensure that their members enjoy the full protection of the law, and to protect themselves from possible liability if they become embroiled in an employee's ADA claim.

Call McCroskey Law Offices for more information on how the ADA affects your workplace and your union.

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

ADA accommodation is cheaper than a lawsuit

According to employment experts, it is cheaper for employers to accommodate employees with disabilities than it is to litigate discrimination cases.

One recent estimate put the average cost of litigation at $15,000 for cases arising under the Americans with Disabilities Act. By comparison, the median cost for accommodating a disabled worker was $200, and the average cost was $955.

Overtime at record levels, hiring and wages lagging

Employers and labor unions are finding themselves at odds over the long hours employees are working. Average overtime is running at a record high of nearly 5 hours a week in manufacturing, while unemployment is reported to be at a record low.

Conventional economic theory says that this should lead to an increase in workers' wages and greater hiring, but neither is happening. Wages have remained flat, and only about 13,000 new manufacturing jobs have been created since March 1991.

Labor unions have complained manufacturers are working employees longer hours rather than increasing wages to keep overall compensation costs down. Some analysis agree this is the main impetus keeping overtime hours at a high rate.

"We have a fantastically effective economy now," says Audrey Freedman, chief economist for Freedman & Associates in New York. "Part of the reason is we are so adaptable and flexible."

Manufacturers are behaving very cautiously in the current economic boom, and they prefer to work employees longer hours rather than expand employment.

But flexibility and caution come at too great a cost, say representatives of organized labor.

"People are working harder, they are not making more," said David Smith, director of public policy at the AFL-CIO.

Smith said the high level of overtime is probably part of what is holding down regular hourly wages. At 50 percent greater than regular hourly compensation, overtime pay could put budgetary constraints on a company, which, in turn, could keep the lid on regular hourly wages.

Although the unemployment rate slipped to a 24-year low in May, Smith said the Bureau of Labor Statistics reports that if people who are unemployed and gave up looking for work were counted in official statistics, the jobless rate would be about 9 percent.

"The apparent preferences of employers to insist on overtime, rather than hiring people, adds to the numbers," Smith said.

According to Alan Reuther, legislative director for the UAW, the high level of overtime has led to a number of strikes in the automobile industry.

"The union has been concerned about excessive overtime," Reuther said. "We want companies to hire more people, rather than working our people longer hours."

Indeed, the recent UPS strike by the Teamsters may be a signal to management that it may not have as much freedom to hire and use workers in the future as it had in recent years.

Some analysts have said the UPS siuation was atypical in that it was hard for the company to replace its vast number of highly skilled workers. In other industries, where striking workers are easier to replace, management may still hold the upper hand.

Nevertheless, according to Larry Kimbell of the Business Forcasting Project at the University of California, the UPS settlement could mark the beginning of a period of improving settlements for workers, with increases in wages.

Company profits have been on the rise for too long for wages not to rise also, he says.

With reports from the Los Angeles Times and the Bureau of National Affairs.

Working longer hours? Watch for overtime violations

As employees are working more overtime, the number of overtime violations under the Fair Labor Standards Act seems to be increasing. The Bureau of National Affairs reports that the Department of Labor received nearly 35,000 complaints in 1996, and found more than $100 million in back wages due to overtime violations, owing to nearly 170,000 workers.

This is probably a small proportion of actual violations of the overtime laws.

In west Michigan, the McCroskey law firm is receiving an increasing number of complaints about overtime. Many unions are discovering that their employers have been underpaying overtime for years, and owe employees substantial amounts of backpay.

Overtime violations occur in both goods-producing and service-producing industries.

Call McCroskey, Feldman, Cochrane, and Brock, P.C., if you have any questions about your overtime pay.

Compromise is the heart of the workers comp system

by Thomas B. Cochrane

Many workers do not understand Michigan's workers' compensation system. They are often frustrated when they discover that they will only be compensated for medical expenses, lost wages, and rehabilitation, but not pain and suffering or loss of enjoyment of their life's activities, and that their family members cannot be compensation.

They complain that the system does not compensate them for all the damage they have suffered from their injury, and that the law is unfair.

They're right: they aren't fully compensated, and it isn't fair.

But that's the way the system was designed to work.

Before we had a workers' compensation system, workers hurt on the job could sue their employer for negligence, just like a pedestrian today can sue a driver for negligently swerving off the road and running him over.

If the worker could prove the employer's negligence, he would receive any damages the jury saw fit to award, including damages unavailable today under workers' compensation, such as pain and suffering.

Proving negligence was never easy, however. A lengthy and expensive trial was usually required, and the employer could get off the hook if it could show the employee was also negligent.

As a result, a few workers received large sums of money for their injuries, but many went completely uncompensated.

This is why the workers' compensation system was established. The system strikes a compromise: the employee is not required to prove the employer was negligent, nor is he required to show that he was not also negligent. If the injury occurs on the job, it is covered.

In exchange, employers get protection from huge damage awards. Even though the employee may have suffered extensive pain and suffering, as long as the employer did not *deliberately* cause the injury, it will only have to pay for medical bills, lost wages, and rehabilitation.

Is this fair? No, it isn't. But it is a compromise created to help compensate all workers, not just a few who are lucky enough to prevail in a negligence lawsuit.

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

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.

McCroskey, Feldman, Cochrane, and Brock, P.C.
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.

1440 Peck St.
Muskegon, Michigan 49443
(616) 726-4861

31 W. State St.
Battle Creek, Michigan 49017
(616) 968-2215

285 James St.
Holland, Michigan 49423
(616) 399-8317

728 Pleasant St., Suite 101
St. Joseph, Michigan 49085
(616) 983-7131

2922 Fuller Ave, N.E.
Suite 209
Grand Rapids, Michigan 49505
(616) 451-3321

The McCroskey Advisor

Volume 5, Number 3 September 1997

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.

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

Knowing how to use workers comp is first step to recovery

By Christopher J. Rabideau

Union members often rely on their union officers to tell them about their rights to medical treatment when they are receiving workers compensation.

Our system of workers compensation is designed to compensate injured employees for lost wages and medical expenses, and, where possible, to facilitate their return to gainful, dignified employment.

But workers often lose out because they don't understand the basics of the workers compensation system.

Injured employees may ask questions like: "Who pays for the medical care for my injury?" "Are all treatments covered by workers' compensation?" "Do I have to see the company doctor, or may I see my own doctor?" "What if I do not want a certain treatment?"

Answers to these and many other questions may be found in the Michigan Workers' Disability Compensation Act and court opinions construing the Act.

An injured worker is entitled to "reasonable medical treatment" by the employer. The employer is responsible for payment of treatment for the work injury for as long as necessary. This may be for the rest of the injured worker's life in some situations.

Medical treatment includes medicines, surgery, physical therapy and hospital services. Also included are such things as dental care, crutches, artificial limbs, eyeglasses, hearing aids, and any other medical care or appliances necessary to relieve the effects of a work injury.

The injured worker is also entitled to travel expenses to and from the place of medical treatment. Medical services such as chiropractic treatment, acupuncture, and cosmetic surgery *may* also be covered by workers compensation depending on each specific situation.

An injured worker must treat with the employer's chosen doctor for the first ten days after a work injury. After the ten days, the worker can seek the care of her own physician. However, the worker must tell the employer that she wishes to receive care from her own doctor. If the injured worker fails to give notice, then the employer may refuse to pay for such treatment.

The employer may cut workers compensation benefits if an injured worker refuses to follow the treatment of a doctor, if such treatment is likely to improve the worker's condition.

For example, a worker with an injured knee would not, normally, be allowed to collect wage loss and medical benefits while refusing to attend physical therapy.

However, an injured worker may refuse treatment if it poses significant health risks, or if there is a good chance that the treatment will not help. Employers may also have to pay necessary nursing care, even if a family member, such as a spouse, provides the care.

Union officers will always try to help their members who have questions about workers compensation, but they may not always know what to do. If you or one of your union brothers or sisters has been injured on the job and has questions about worker's compensation, contact McCroskey Law Offices for a free consultation.

Attorney Christopher J. Rabideau specializes in workers' compensation, social security disability, and unemployment compensation.

Workplace injuries cost U.S. billions of dollars

by James T. Haadsma

Inadequate workplace health and safety contribute to a significant number of deaths and injuries, and consequential direct and indirect costs significantly exceeding the direct and indirect costs of AIDS, Alzheimers disease, and even heart disease.

A team of San Jose State University researchers, publishing findings in a July 28, 1997 *Archives of Internal Medicine* report, depict a national daily toll of 18 workplace deaths, and 36,000 workplace injuries.

Given such daily carnage, it is no wonder that the researchers concluded that A[o]ccupational injuries and illnesses are an insufficiently appreciated contributor to the total burden of health care costs in the United States.

The researchers distinguished between direct costs, such as medical care for injured employees, and indirect costs, such as wages lost by employees not working due to injuries.

The total direct and indirect costs of work-related deaths and injuries totaled $171 billion for 1992, the year studied by the researchers, compared to the $30 billion in costs associated with heart disease.

This study directs a conclusion that improving workplace health and safety would significantly benefit workers, while also providing a substantial boost to the national economy.

Given the costs associated with workplace deaths and injuries, one wonders about the short-sightedness of business management. Saving a penny or two in health and safety protection causes untold pain and suffering, and costs billions of dollars in health care, lost productivity, and economic growth.

Attorney James T. Haadsma is based in the law firm's Battle Creek office, and specializes in workers' compensation, social security disability, handicappers' discrimination, and civil rights claims.