

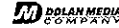
The government's new standards for the underlying supply price can be established under the terms of the recovery doctrine of the U.S. Court of Appeals.

Even though an employer paid the insurance proceeds to the named beneficiary, the estate of the insured is liable to the estate of the beneficiary if the beneficiary is not named in the policy.

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Lawyers help clients bugged by the flu

Employment Law

By Carol Lundberg

One of the symptoms of the dreaded and much-reported H1N1 flu virus is fatigue. And employers are feeling it, even if they haven't had the flu.

To treat the symptom, they're calling on their lawyers to help them ease the tension between how to run their businesses if the flu virus forces a significant number of workers temporarily out of commission — while, at the same time, heeding the advice of health officials who are advising liberal relaxation of attendance policies in the workplace.

"On the one hand, employers have to plan to do business and meet their productivity and output goals, even if there could be a high number of absences," said employment lawyer Linda O. Goldberg, from the Ann Arbor office of Miller, Canfield, Paddock and Stone, P.L.C.

"On the other hand, managing attendance is going to be a challenge while employers are trying to be good citizens and curtail the spread of the disease."

The Centers for Disease Control has issued bulletins stating that employers should encourage employees to stay home when they're sick, and to keep their children home from school when they're sick. "We are being encouraged to

break the culture that says you're being a good soldier if you get sick and come to work anyway," said Goldberg, who will make a presentation for human resources professionals at the firm's upcoming annual employment law seminar.

"And we should listen to the CDC's advice. But we also have to keep in mind that not every recommendation is going to be practical to apply in the workplace on a wholesale level."

FMLA missteps possible

Her clients, even if they're doing the right thing by expanding sick time for workers and sending ill workers home, could inadvertently make Family Medical Leave Act

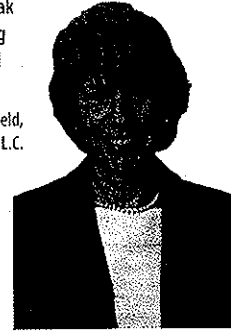
"We are being encouraged to break the culture that says you're being a good soldier if you get sick and come to work anyway."

— Linda O. Goldberg, Miller, Canfield, Paddock and Stone, P.L.C.

(FMLA) missteps if they don't understand who qualifies for leave.

They could run afoul of Health Insurance Portability and Accountability Act (HIPAA) laws if they ask for too much information about sick workers' symptoms. And many employers worry that if

See "Influenza," page 26



"It clarifies what we knew all along — that 'functional use' means functional use. ... The mere fact that you may be able to do something ... is not the same as having functional use of your extremity."

— Brian McKeen, McKeen & Associates, P.C.

Court of Appeals clarifies 'functional use' standard

Medical Malpractice

By Brian Frasier, Esq.

The Michigan Court of Appeals ruled, in a published opinion, that a medical-malpractice plaintiff qualified for the higher non-economic damages cap because he lost "permanent function" of both arms, even though he still had a slight use of them.

According to several medical-malpractice attorneys, it's the first time that an appeals court has tackled the issue of "functional use" in a case involving the loss of the use of an extremity.

In *Shivers v. Schmiede* (Lawyers Weekly No. 07-1322, 15 pages), John Shivers was an otherwise healthy 70-year-old man taken to St. Mary's Hospital in Saginaw for a bladder removal surgery. Complications arose during sur-

gery, and when he awoke, Shivers was suffering weakness in both hands.

According to the decision, Dr. Susan Schmiede was one of the doctors on duty who examined Shivers in the evening and found no evidence of neurological problems. His condition worsened overnight.

In the morning, two other doctors discovered his condition and ordered an emergency MRI and laminectomy to relieve Shivers' condition. He was diagnosed with central cord syndrome, which is caused by trauma and can cause loss of control the arms and hands. He filed suit against the hospital and doctors who examined him after surgery.

Attorneys Karl J. Weyand Jr. and Lawrence J. Acker, from Saginaw and Bloomfield Hills, respec-

See "Med mal," page 27

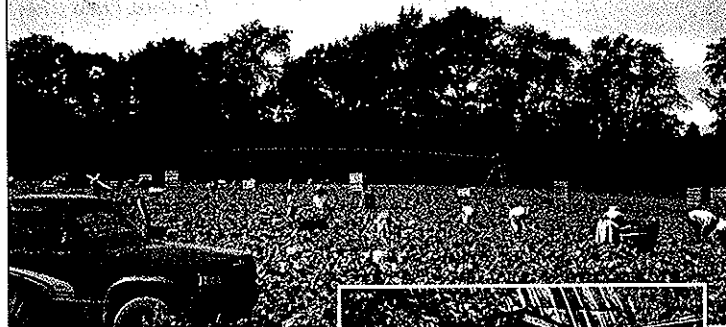
BUSINESS OF LAW

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Living in the shadows

Investigation of migrant worker housing and employment expected to show alarming conditions



By Carol Lundberg

There is a population of Michigan residents so invisible that the rest of Michigan probably can't name any of them. They are migrant farm workers who spend months every year handpicking Michigan produce.

Before the end of the year, the state's Civil Rights Commission will release the findings of an investigation that started in June, into the living and working conditions of those migrant farm workers.

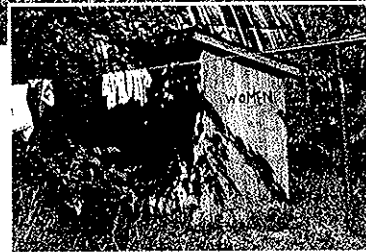
The report is expected to highlight widespread abuses, the most common of which are wage and hour violations.

Other common abuses involve unsafe living and working conditions, and lack of access to services such as health care and education.

"I don't think people will be surprised there are abuses occurring," said Thomas K. Thornburg, managing attorney for Farmworker Legal Services, a federally funded legal aid program in Bangor, a farming community in west Michigan.

"But people in our profession, lawyers, will be surprised that these abuses are allowed to occur without any mechanism to stop even the most egregious of them."

They are legal workers — often with families in tow — who pay taxes, and number approximately 90,000 annually. They are transitory, moving with the harvest seasons, making their way back and forth between Michigan and warmer states such as Texas, Florida and Georgia.



Above: Migrant farm workers harvest pickling cucumbers last summer in west Michigan. Below: The Michigan Civil Rights Commission is investigating living conditions at migrant worker camps.

Yet, very few people understand the conditions in which they live and work.

Mark J. Bernstein of The Bernstein Law Firm in Farmington Hills admits that even though he's served on the Civil Rights Commission for five years, and was even chairman for two, he had no real sense of how bad the conditions would be at migrant worker camps around the state.

"This is our job," he said of the commission's investigation. "These are some of the most vulnerable and dispossessed people in our state."

Change is necessary

He hopes that the results of the investigation will be a catalyst for a change.

See "Migrant workers," page 28

Photos courtesy of Michigan Civil Rights Commission

Migrant workers

Continued from page 1

"There is a window of opportunity to reorganize the state government. We believe that some of these issues are a result of organizational issues," Bernstein said.

"The entities responsible for worker camp conditions are scattered across state government. We have the chance to say it should be the responsibility of community health or another organization, or that it shouldn't be the department of agriculture's responsibility.

"The structure we have is not working." According to Kelvin W. Scott, the Civil Rights Commission director, licensing for the camps was once the responsibility of the state's Department of Public Health (now the Michigan Department of Community Health). In 1996, that responsibility was shifted to the Department of Agriculture. The housing inspections are conducted by licensed sanitarians working in the Migrant Labor Housing Program.

Migrant workers also face bureaucratic obstacles to legal residents, such as the difficulty many migrant workers have in obtaining Michigan drivers licenses because the Secretary of State has delayed issuing regulations and guidance on which documents satisfy the requirement that residents prove that they are "legally present" and eligible to obtain licenses, Thornburg said.

What often results from the lack of regulations is a legal quagmire created by the Secretary of State, said Teresa M. Hendricks, director and senior litigator at Grand Rapids-based Michigan Migrant Legal Assistance Project Inc.

"What happens is, a worker buys a car, but then can't get a driver's license because of the Secretary of State's problems," she said. "So, someone else has to go get the insurance. Then we have insurance in a different name as the owner of the car. And God forbid, you get into an accident.

"Then, district court judges are struggling with what to do with these traffic violations."

Sometimes the barriers to legal residents are even higher and more difficult to clear.

She has one client who has been working in Michigan for 20 seasons.

"He got caught up in the blueberry harvest and was underpaid," she said. "When we were able to recover some money for him, he spent it on a used pickup truck."

But he got picked up by the police. She suspects it was a result of a dispute with the worker's landlord, who called police and said he was undocumented.

While law enforcement agencies were trying to locate the worker's paperwork, the man was detained for a month, without being able to see a lawyer.

"A month later, it was determined that he was here lawfully," Hendricks said. "When he got out, his truck had disappeared, and everything in his hotel room where he was staying had disappeared. He had literally lost everything."



BERNSTEIN

Reorganizing needn't cost more

Though enforcement of the laws we have — such as wage and hour laws, and health codes — could address many of the problems migrant workers face, Bernstein is a realist, and recognizes that the state is in the middle of an economic crisis.

"Of course some of the things that would help might cost money that we don't have. But it doesn't have to cost money to make it better. Reorganizing does not have to be more expensive," Bernstein said.

"But there's also a question of priorities," he added. "There are organizational and execution issues. We have a huge migrant worker population that is all but hidden

and licensing."

Migrant worker housing varies dramatically, he said. Some housing is made up of federally subsidized new developments of tidy, safe and clean apartments, then there is substandard housing, consisting of old one-room cabins and rejects from mobile home parks.

"You never even know how bad it is because most people in the state will never see a camp like this; they just sort of sprout in a field 15 miles outside of town. They can be atrocious," Thornburg said.

"They are often overcrowded, especially in recent years as workers have left other employers in construction and landscaping as jobs evaporated in the recession.



Photo courtesy of Michigan Civil Rights Commission

The Michigan Civil Rights Commission inspected conditions at "escondido" — or "hidden camps" — to assess living conditions for migrant farm workers.

from view, and a substantive number of children are in that population because the harvest season tends to occur during summer.

"Children live in these trailers that are not safe, not sanitary, close to pesticide-drenched fields, some without running water or electricity."

The inspectors are doing their best, Bernstein said. But they just can't inspect all the camps. Further, they are inspected in the wintertime, when no one is living in them, because they require pre-licensing.

"It's not appropriate for us, for the commission, to second-guess the expertise of the people involved," he said. "But it's our job to enforce and educate about the civil rights issues."

Thornburg said it's clear that migrant worker safety has fallen to a dismally and dangerously low priority level in Michigan.

"There are already only five inspectors to inspect more than 800 licensed camps. There are 22,000 occupants in those camps, and those are just the licensed ones. We don't even know how many unlicensed camps there are. It's widely held that there are a lot more," he said. "It's also widely known that occupancy rates are higher than the limits."

"The problem is huge," Thornburg added. "At the same time, a mid-year budget cut to the state's Department of Agriculture, which is responsible for the inspections, threatens to eliminate funding for inspections



At the same time, Michigan had a bumper crop of blueberries this year, so workers returned to Michigan in droves, expecting there to be a shortage of farm workers.

"Those workers came back to farm work, and essentially overwhelmed migrant farm worker housing in the state," Thornburg said.

'Rampant subminimum pay'

The blueberry harvest shone a light on another common problem for farm workers, the compensation.

When an "oversupply" of workers came to Michigan to harvest blueberries, the piece rate for blueberries fell to 32 cents per pound, Thornburg said.

That meant it was impossible to make minimum wage.

"If you picked four 5-pound buckets every hour, you would only be making like \$6.40 an hour," he said. "There was evidence this year of rampant subminimum pay."

Yet, few workers ever complain. Often,

Thornburg said, they don't know where they would even lodge such a complaint — and, they did, they rarely speak English and are uncertain of their ability to navigate the process to do so.

"They also know that there is someone standing in line right behind them willing to take their job," he said.

Even more ominous, recently growers are gravitating to workers who are here on H-2B visas, often as part of a "single-man-on-crew," Thornburg said.

"The growers get the whole crew in a package, and everyone works all day, every day, and if they don't, the grower can just send the whole crew back. They're coming from places like Guatemala and Thailand. And they're taking the work that these workers with families were getting," he said.

When the results of the investigation are released, Bernstein hopes the result will be a reorganization of the structures that ever see migrant workers.

"At the very least, there needs to be enforcement of the laws and regulations we do have," he said.

As a private attorney, he said, the investigation is interesting from a legal perspective.

"Every aspect of it touches some area of the law. There are potential wage and hour cases even if there are very few claims in Michigan. There are environmental law issues, housing law issues, law enforcement issues, and probate and family law issues," Bernstein said.

Michigan Migrant Legal Assistance Project's Hendricks mainly hopes that something practical will come out of the investigation, and she's optimistic that it will. What she needs is something simple: she needs some help.

Her organization takes 400-500 cases per year, and does not receive federal funds from the Legal Service Corp. The project stays afloat due to private donations, grants and some State Bar of Michigan Foundation funding.

She's certain that once her peers understand the scope of the problem, they'll want to be involved.

Her staff of three lawyers, and Farmworker Legal Services' staff of five lawyers, just can't keep up with the bad actors in the industry. Approximately 80 percent of growers are good, abide by the laws, and treat

their workers fairly as required by law. But the other 20 percent create more work than they can handle.

"I'm hoping that other attorneys, those in private firms, will at least be able to take some referrals from us," she said. "Maybe working as co-counsel, they could take some of this on pro bono, and help us with things like depositions and the cost of travel."

Hendricks said she's hopeful that the investigation will grab attention in high places.

"I'm hopeful that shedding light on the horror stories will get people with authority to act on sustainable solutions," she said. "There are some key people in charge of departments in Lansing who, once they see the gamut of what goes on, once they hear the horror stories, won't be able to stand the status quo."

If you would like to comment on this story, please contact Carol Lundberg at (248) 865-3105 or carol.lundberg@ml.lawyersweekly.com.



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