

CHANGES TO THE MICHIGAN WORKERS' COMPENSATION STATUTE

On December 19, 2011, Governor Rick Snyder signed into law a number of changes to the Michigan Workers' Compensation Act ("Act"). These changes were intended to amend and update the Act to account for recent opinions from the courts that were favorable to employers and take into consideration the technological advancements that have been made in medicine. These changes will significantly impact the handling of a workers' compensation claim in a number of ways. The following summary highlights the changes and how they can be applied to a workers' compensation claim.

A. EMPLOYER CONTROL OF MEDICAL FOR 28 DAYS - MCL 418.315(1)

THE PROBLEM - Prior to the amendment of the Act, an employer controlled the medical for only 10 days after the inception of medical treatment for a work injury. Once the 10 days expired, the employee would then be able to seek treatment with a doctor of his or her choosing. Unfortunately, oftentimes the employee would begin treatment with a physician recommended by his or her attorney. This situation created a scenario where a "treating" physician would be treating to increase the value of the claim rather than to help the employee recover with proper medical treatment and return to work.

SOLUTION: The Act was amended to extend the time period of the employer's control of an employee's medical treatment from 10 to 28 days. This potentially delays the scenario discussed above. The extra time allows the Act to do what it was intended to do, i.e. get the employee the best treatment to get back to work as soon as possible, without interference from an attorney or physician with a different agenda.

B. DISABILITY

The Problem: Workers' Compensation was never intended to be a substitute for a pension or a subsidy for a lifestyle choice. But Michigan's wage loss law provided no incentive to return to work.

The Solution: The new changes to the statute, MCL 418.301(4), (5), (6), (7), (8) and (9), impose on the claimant an **affirmative duty** to try to get a job. The prior game played by some claimants of sabotaging any potential job offer, either at the interview or otherwise may not be enough to prevent the termination or reduction in benefits. The key phrase in the new statute which the plaintiff's bar fought so hard but failed to eliminate, is the phrase "**whether or not wages are actually earned.**" An employer may terminate or reduce the wage loss benefits under the new statute based upon what the claimant is capable of earning at jobs reasonably available.

This is particularly important with respect to partial disability cases. The majority of claimants can meet the definition of disability, if that definition is tied to the highest wage they made. This is because with our economy now, no one is making the same kind of money they used to. Moreover, anyone at a new job is not going to be seeing the higher wage which traditionally comes with years of service unrelated to the job performed.

The plaintiff's bar fought hard to claim that reductions could not be made, even though the claimant was able to do a job that paid less than the injury job but chose not to. The new statute makes it clear that if the claimant can do a job, even if it pays less than the injury job, and the job is **reasonably available**, then the employer may reduce the wage loss benefits.

The key to the outcome in any particular case will be whether the claimant can establish that he or she has made a **"good faith effort"** to procure work. The statute does not define how many hours in the day the claimant must work at procuring a job in order to show a **"good faith effort"**.

The best way for an employer to implement the changes in the Act would be to:

- Obtain an **Independent Medical Examination** or an opinion from a treating physician to establish the claimant's capabilities, usually in the form of restrictions;
- Obtain a **Vocational Expert** to explore the claimant's qualifications and training in order to determine reasonably available jobs within the claimant's restrictions;
- Obtain **surveillance** to determine the credibility of the claimant's restrictions and help determine whether or not the claimant is making a good-faith effort to search for employment.

PROVISO: POLICE AND FIRE CARVE OUT

The police and fire obtained a carve out of the "whether or not actually earned" language, MCL 418.302. The definition of "wage earning capacity" for police and fire is the same as others, "wages the employee earns or is capable of earning at a job reasonably available to that employee" but the phrase "whether or not actually earned" does not apply to them. The significance of this will likely depend upon the facts of any particular case.

C. TERMINATION FOR CAUSE

The Problem: Prior to the recent changes in the statute, some claimants were slick enough to realize that getting fired from a post injury job would result in resumption of full workers' compensation benefits. They would engage in bad behavior, get fired, and be rewarded with a full award of benefits. In *Bauman v Bottling Group LLC*, 2008 ACO No 271, a claimant sabotaged his return to work by "improperly touching" the derriere of a business colleague and was fired. However, despite the magistrate finding that the employee engaged in inappropriate behavior that justified his termination from his employment, legally he had to award the employee wage loss benefits.

The Solution: The Act now includes language that allows all wage loss benefits to be denied if it is determined that the employee was terminated from reasonable employment for **fault of the employee**. The Act was amended to prevent the type of situations discussed above, where an employee was

afforded too much protection for inappropriate behavior while performing reasonable employment. This is not simply a temporary suspension of wage loss benefits. The claimant loses all wage loss benefits.

D. INDEPENDENT CONTRACTORS

As of January 1, 2013, the determination as to whether a person is an employee or an independent contractor will be based upon the IRS 20 factor test. An internet search for "20 factor test independent contractor" will produce many articles on the 20 factors. In general the issues include such things as the right to control the manner in which the work is performed, provision of tools and materials, realization of profits or loss, work for multiple unrelated companies, and the right to discharge a worker. If a business is required to withhold Federal income tax for an individual, that is prima facie proof that the individual is an employee.

A business may request a determination from the Michigan Administrative Hearing system as to whether individuals performing service are covered employees versus independent contractors. If the business does this, the determination applies not only to a single individual but to all similarly situated individuals.

WARNING: State and federal governments have a financial interest in the outcome of such a determination. It is easier to collecting income taxes if an individual is determined to be an employee rather than an independent contractor. Also, this may be the camel's nose under the tent regarding unionization in business models that use independent contractors for services that other businesses use employees to perform.

E. PREEXISTING CONDITIONS - MCL418.301(1)

An employer is not responsible for a preexisting condition. To be compensable under the act, the impact of the injury at work must create a pathology that is medically distinguishable from the preexisting pathology. This amendment is simply codification of case law on the subject.

F. DEGENERATIVE ARTHRITIS AND MENTAL DISABILITIES - MCL418.301(2)

Degenerative arthritis is not compensable unless the employment contributed to, aggravated or accelerated the condition "in a significant manner". This too is codification of current case law.

Mental disabilities - The statute already required that the mental disability arise out of actual events of employment and not unfounded perceptions. The new language added the requirement that the employee's perception of the actual event be **reasonably grounded in reality**.

G. SOCIAL SECURITY COORDINATION IS LIMITED MCL 418.354(1)(a)

THE PROBLEM: Some people over age 65 have such low rates of old age social security benefits and are so lacking in other assets that they are compelled to get a job after age 65. When they are then injured at work, under the former statute, coordination of their social security benefit often wipes out the full wage loss benefit leaving this person not only with an inadequate income but now also disabled and unable to supplement that inadequate income. However, leaving an

employer open to full payment of workers' compensation without coordination could have the side effect of discouraging employers from hiring older workers.

THE SOLUTION: The amendment allows coordination of old age social security benefits for these employees but the employee is entitled to at least 50% of the wage loss benefits.

H. TRAMMEL IS OVERRULED! - MCL 418.361(2)

THE PROBLEM: The prior law failed to keep up with medical science. As a result, an employee who missed only 3 months of work for a knee replacement, returned to work and worked until he took his retirement was granted benefits that were **intended for amputation victims**.

Amputation victims are entitled to full benefits for a **specific loss** period of time even if they return to work. Also, coordination of pension and social security benefits does not apply to these victims for the specific loss period. For example, an employee who loses a leg in a work related accident is entitled to 215 weeks (over 4 years) of benefits even if he returns to work and is earning wages. If he retires, his pension is not subject to coordination for the 215 weeks.

THE SOLUTION: The statute has been amended to require that the effect of any joint replacement or implant be considered in determining whether a "specific loss" of the body part has occurred. As a result, a claimant who has knee replacement surgery as a result of a work related injury is not likely to be found entitled to specific loss benefits.

I. 10% INTEREST RATE IS CHANGED – MCL 418.801(6)

THE PROBLEM: No one gets 10% interest on their money these days. Yet the prior workers' compensation statute required payment of 10% per anum on an award of benefits.

THE SOLUTION: The statute was amended to tie the interest rate to the same rate as required by on money judgments in civil cases. As of January 1, 2012, the interest rate is 2.083%. The rate changes at 6 month intervals.

J. REDEMPTION HEARINGS – MCL 418. 836(2)

THE PROBLEM: When a case is settled, the claimant must appear before a magistrate and a hearing is held on the record to allow the magistrate to determine if the settlement is in the best interests of the claimant. This is a time consuming process. Very few settlements are denied.

THE SOLUTION: The amendment allows the parties to stipulate in writing to the findings of facts the magistrate must make and the hearing can be waived.

K. VOCATIONAL REHABILITATION – MCL 418.319(1)

THE PROBLEM – Traditional vocational rehabilitation was, many years ago, a valuable benefit to the employee and a valuable tool for the employer in dealing with a recalcitrant claimant. Unfortunately, some plaintiff attorneys have rendered vocational rehabilitation a complete waste of the employer's time and money. Battle lines became drawn, competing experts were enlisted and the hearing and appeal was so protracted that by the time a final order could be entered, the original vocational rehabilitation plan was out of date and useless.

THE SOLUTION(?) The amendment appears to eliminate one of the steps in the process. Now an order of the director regarding vocational rehabilitation will skip over the magistrate level and will go directly to the appellate level. Whether this stops the gamesmanship by which some plaintiff attorneys sabotaged the rehabilitation process remains to be seen.

L. MEDIATION – MCL 418.223 repealed in Enacting Section 1

The amendment eliminated the mediator position and the process by which claims were assigned to the mediators. This appears to have been based on a cost/benefit analysis. Mediation remains an option if the parties choose it and indeed many claims are mediated by a magistrate who has not been assigned to the trial of the case.

M. SUBPOENAS – MCL 418.853

The attorney of record in a case may now sign a subpoena for witnesses and records.

N. MEDICAL ON APPEAL – 418.862(2)

THE PROBLEM: When a magistrate has issued an award of ongoing benefits and the employer appeals, the employer must pay the medical during the appeal. If it does not, its appeal is dismissed. This has provided certain claimant's attorneys with the opportunity to line the pockets of the medical care providers who have "most favored nation" status with them and to absurdly drive up the cost of the claim in order to increase its value for settlement purposes. The employer was helpless to prevent this because failure to pay would result in dismissal of its appeal. When the award was overturned on appeal, the employer would be entitled to reimbursement from the general fund of the State of Michigan which would be stuck with the tab for the absurd and excessive treatment.

THE SOLUTION: The section which controls medical on appeal was amended to add the phrase "**REASONABLE AND NECESSARY**" to the provision requiring the payment of medical on appeal. As a result, an employer faced with the gamesmanship of a claimant's attorney may dispute the treatment as not reasonable and necessary without risking dismissal of its appeal.

O. PROFESSIONAL ATHLETES – MCL 418.360(20)

THE PROBLEM – Michigan law provides better benefits than the workers' compensation law of some other states. As a result, professional athletes who were injured while temporarily in Michigan would file a claim in Michigan even though their employer had workers' compensation insurance in another state that would cover the injury in Michigan.

THE SOLUTION – The statute was changed to prevent the type of forum shopping that was occurring by team members from other states.

P. EFFECTIVE DATE – Enacting Section 2

The last paragraph of the amendatory act states that it applies to injuries incurred on or after its effective date. Its effective date is December 19, 2011. Many of the changes are simply codification of the current case law and therefore employers should be comfortable using those provisions on claims involving injuries that occurred prior to December 19, 2011.

However, application of the changes to claims involving injury dates prior to December 19, 2011 when the issues is, for example, the specific loss benefits that were intended for amputation victims, is open to interpretation.

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