

NEWSLETTER

Duncan A. McMillan, Editor

Workers' Compensation Update

Michigan's Workers' Disability Compensation Act Is Amended.

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P.A. 266 enacted the Michigan Senate's Substitute Bill for HB 5002. Therefore, prior summaries of HB 5002 will not accurately describe the *final* version of the amendments that became law.

This newsletter will address major provisions of the Amendment.

Shorthand Summary

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even if the employee works less than 100 weeks, see § 301(9)(b), as amended. The Amendment allows for more streamlining of case resolution: it allows redemptions by stipulation, attorneys of record to sign subpoenas, and gave the Appellate Commission authority to acquire evidence. Mediation is still allowed by the parties, but provisions for required mediation were repealed. Also, many documents can now be filed or distributed electronically.

Readers familiar with major Court decisions will recognize the 2011 Amendments follow some and depart from some of these decisions. Although the 2011 Amendment does not refer to these decisions by name, some of the more complex amendments may be easier to understand if considered in light of these decisions:

The 2011 Amendment reflects holdings in some major court decisions.

§ 301(1) – Causation

- *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003), reh den. and *Fahr v General Motors Corp.*, 478 Mich 922 (2007) (causation – an injury must cause a condition medically distinguishable from pre-existing pathology);

§ 301(2) – Mental Disability – Causation

- *Robertson v Daimler Chrysler Corp.*, 465 Mich 732 (2002) (mental disability causation standard - employee’s perception of actual events must be grounded in fact or reality);

§ 301(4) – Disability

- *Sington v Chrysler Corp.*, 467 Mich 144 (2002) (disability- a personal injury must cause or contribute to a limitation of wage earning capacity in all jobs in the universe of work suitable to the employee’s qualifications and training);

§ 301(4) - Wage Loss and amount of wage loss benefits

- *Stokes v Chrysler, LLC*, 481 Mich 266 (2008) (elements for *prima facie* claim of disability; universe of jobs includes consideration of the employee’s transferable skills); and
- *Harder v Castle Bluff Apartments*, S. Ct. No. 142616 and *Lofton v Auto Zone, Inc.*, 482 Mich 1005 (2008) (wages an employee is “able to earn” after an injury affect the amount of wage loss benefits for partially disabled employees).

§ 331 and § 353 – Dependents

- *Romero v Burt Moeke Hardwoods*, 280 Mich App 1 (2008) (an injured employee must prove his or her wage loss was due to a work related disability).
- *Day v WA Foote Memorial Hospital*, 412 Mich 698 (1982) (the provision in MCL 418.353 that the wife of an injured employee shall be conclusively presumed to be a dependent was held unconstitutional; the 2011 amendment repealed this provision and a similar provision in MCL 418.331)

The 2011 Amendment altered the future effects of holdings in other cases. This amendment:

- modified the “reasonable employment” provisions by making an employee’s “fault” an increasingly relevant factor if an employee’s reasonable employment is terminated. This amendment altered the future effect of *McJunkin v Cellasto Plastic Corp.*, 461 Mich 590 (2000) and *Russell v Whirlpool Financial Corp.*, 461 Mich 579 (2000). These cases held MCL 418.301(5)(e) made the employee’s fault irrelevant if an employee’s reasonable employment was terminated before the employee worked 100 weeks in reasonable employment.
- The amendment to MCL 418.361(2) modified the future effect of *Trammel v Consumers Energy*, 2009 ACO #126 (Commission held an employee’s right to specific loss benefits under MCL 418.361(2) must be based on the employee’s uncorrected condition; therefore, surgery that returned the functional use of a joint could not be considered. The Amendment to § 361(2) makes surgical joint replacements, internal implants or similar medical procedures relevant factors in specific loss claims.

The Amendment modified MCL 418.315 (medical benefits) to increase the number of days, from 10 to 28, “from the inception of medical care” an injured employee must treat with physicians of the employer’s choice before the employee may treat with an alternate physician of his or her own choice and receive compensation for such medical treatment under the WDCA.

Persons following the progress of this legislation may also note the final (substitute Senate) Bill removed other provisions that were in the House Bill. The Senate Bill removed:

- the provision in HB 5002 that would have terminated medical benefits (as well as wage loss benefits) for illegal aliens who were confirmed to be illegal aliens by the Federal Bureau of Investigation or the Federal Immigration and Customs Enforcement Bureau, and
- the provision in HB 5002 that said only the employee or a medical provider can be held liable for plaintiff’s attorney’s fees based on unpaid medical bills, MCL 418.315.

2011 Amendment also altered Court and Agency decisions

Reasonable employment

§ 361-Specific loss benefits- *Trammel*

§ 315 – Medical treatment

The Senate Bill removed some proposals from the House Bill

Interest Rate

How all readers (including print subscribers) can obtain a copy of new legislation, including "Enrolled House Bill 5002" enacted as PA 266, and other legislation of interest

The Amendment changed the interest rate a carrier/employer must pay on benefits awarded by a Magistrate, Arbitrator, Appellate Commission or Court. MCL 418.801(6) says the interest rate shall be calculated in the same manner as interest on a money judgment in a civil action under § 6013(8) of the Revised Judicature Act of 1961, 1961 PA 236, MCL 600.6013, rather than at 10% per annum.

You can view and download a copy of the "Enrolled House Bill No. 5002", and other legislation of interest, on the internet at: www.mich.gov. On the left side of the page, click on "Michigan Government". In the drop down choices, click on "legislative branch." Scroll down the next window to the heading **Legislative Links**, click on "Michigan Legislature-Home." In the next window under **Legislative Bill Search**, insert "5002" in the box entitled "Bill Number (current session)." Scroll down to **House Enrolled Bill** and open the .pdf file. You should be able to view the "Enrolled House Bill No. 5002"

The above summary provides only a brief summary to give the reader a shorthand (but far from complete) overview of highlights of this lengthy and complex Amendment. The rest of this newsletter will analyze the Amendment in greater detail. We encourage all persons involved with handling claims for injuries that occur on and after December 19, 2011 to familiarize themselves with the Amendment.

How The 2011 Amendment Affected Individual Sections of the Act

Chapter 1. Coverage and Liability

Section 161-Defines who qualifies as an employee under the Act. § 161(1)(n) normally is used to differentiate an employee from an independent contractor. The 2011 Amendment retained prior language that said:

Sec. 161. (1) As used in this act, "employee" means:

* * *

(n) Every person performing service in the course of the trade, business, profession, or occupation of an

employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act.

The 2011 Amendment added language:

- if the employer is required to withhold federal income tax for the individual, that individual is “prima facie considered to perform service in employment under this act.”
- apparently recognizing a business may not always be able to easily determine whether a person providing service for that business is an employee, the Legislature said a business entity may ask the Michigan Administrative Hearing System to determine whether individuals performing that service for the entity in the State of Michigan are in covered employment. This provision does not require that an injured employee's claim must exist before the business entity can ask for a determination.
- describing factors that must be applied “on an after January 1, 2013,” when assessing what services create an employer-employee relationship for purposes of the WDCA. The fact finder must, on and after 1/01/2013, use “the 20-factor test announced by the Internal Revenue Service of the United States Department of Treasury in Revenue Ruling 87-41, 1 C.B. 296.”

The Amendment added a new **Section 613** that adds some protection for an employer who asks for the determination of what services are covered employment before January 1, 2013. § 613 says:

Sec. 613. If the Agency determines that services are covered employment under Section 161(1)(n) and the Agency received the request on or after the effective date of the Amendatory Act that added this subsection and before January 1, 2013, the employer shall not be subject to penalties or interest on underpayments or other violations before the date of the determination arising from the misclassifications of those services.

§ 161(1)(n) - Services that create employment relationship

Business entities may ask the Michigan Administrative Hearing System for an opinion concerning whether services provided to that entity create an employment relationship, even if no injury or claim exists.

Future factors

Chapter 2. Administration

Section 205 defines the powers and duties of the Director of the Workers Compensation Agency. The Amendment says the Director of the Workers Compensation Agency (Agency) has power to make rules in accord with “the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.328.” The Amendment removed the requirement that an assistant director must be appointed to be in charge of the Detroit Bureau. The Amendment says the Director remains in charge of assigning Agency work to Agency assistants and employees. The Amendment also says cases involving:

- Termination of voluntary payments and
- Petitions to stop or reduce compensation,

“shall be held within 60 days and take precedence over other cases.” This amendment and references to handling “small disputes” appears to be more of a grammatical change than a substantive change.

Section 209, that previously created the Qualifications and Advisory Committee (QAC) and described its powers and duties, **was repealed**. Therefore, the QAC no longer exists. The Amendment also eliminated the duties of the QAC that were previously described in §§ 210, 212(2), 213(1) and (4) and § 274 of the WDCA.

Section 210 describes standards for **appointing Magistrates** to the Board of Magistrates. The Amendment eliminated written exam requirements and input from the QAC (which no longer exists). The Governor has authority to appoint Magistrates if they are members in good standing of the State Bar of Michigan and have been licensed to practice law in the Courts of this State for five years or more.

Section 211, that described appointment and qualifications for hearing referees, **was repealed**. Therefore, **hearing referee positions no longer exist**.

Section 212 requires the Executive Director of the Michigan Administrative Hearing System and the Chair of the Workers’ Compensation Board of Magistrates to **annually** (no longer biannually) **evaluate the performance of each Magistrate**. The Amendment describes criteria for each evaluation. When the evaluations are completed, the Executive Director must submit a written report to the Director of the Department Licensing and Regulatory Affairs (LARA). § 212(3) says the Governor may remove a Magistrate upon recommendation of the Director of LARA based upon

QAC provisions repealed

Governor has authority to appoint Magistrates

Hearing referee provisions repealed

Magistrate performance evaluations

recommendations in the report provided by the Executive Directive, "or upon other neglect of duties."

Section 213 describes the Board of Magistrates. The Amendment assimilated Governor Snyder's Executive Order No. 2011-6 to make the Board an autonomous entity within the Michigan Administrative Hearing System, rather than the no longer existing Department of Labor. The Amendment changes the **number of Magistrates** on the Board, from 30 (in the prior Act) to **17**. The Amendment retains the **4 year terms** of Magistrates, but **eliminates the prior term limit provisions** (12 years) that previously limited the number of years or terms a Magistrate could serve on the Board.

Term limits for Magistrates abolished.

Section 213(4) now gives the Executive Director of the Michigan Administrative Hearing System the power to appoint **temporary Magistrates** to serve for not more than six (6) months in any two year period. Persons selected for these appointments no longer need to be on a list compiled by the QAC and no longer need to be former or retired Magistrates, Workers Compensation Hearing Referees or Administrative Law Judges.

Temporary Magistrates

Section 215 was repealed; this provision had said the "department of administration shall provide suitable space for the bureau in Lansing, Detroit, the Upper Peninsula and such other places in the state as" the Director, in his discretion, believed necessary. **Section 213(10)** replaces § 215; § 213(10) provides "the Department of Licensing and Regulatory Affairs shall provide suitable office space for the Board of Workers' Compensation Magistrates and the employees of the Board" without designating locations where such spaces must be established.

Provisions for Agency hearing sites changed

Section 223 was repealed. § 223 described the types of claims suitable for mediation by the parties or that had to be mediated. **Mediation, however, was still preserved in Chapter 8, § 847(3).**

Mediations

Section 230 describes exemptions of certain confidential records from disclosure under the Freedom of Information Act. The final Senate bill did not contain any amendments to § 230. The omission of any amendment to § 230 means the Senate (and final) version did not adopt language in HB 5002 that proposed to add § 230(8) that would have amended the WDCA to say:

No changes to § 230; House Bill proposal in § 230 regarding undocumented aliens was not adopted.

- (8) A carrier that receives information indicating or giving reason to believe that a claim for benefits under this act has been filed by an undocumented alien may report that information to the Federal Bureau of Investigation or the Federal Immigration and Customs

Enforcement. If either the Federal Bureau of Investigation or the Federal Immigration and Customs Enforcement verify the claimant is an undocumented alien, the Workers' Compensation Agency shall be notified and the carrier may discontinue payment of all compensation and medical benefits to that alien.

The House version of the bill, *if it had been adopted*, would have complemented *Sanchez v Eagle Alloy, Inc.*, 254 Mich App 651; 658 NW2d 510, *appeal granted*, 469 Mich 495; 671 NW2d 874 (2003), *vacated, application denied*; 471 Mich 851; 684 NW2d 342 (2004). In *Sanchez*, the Court of Appeals held an employer was not liable for *wage loss* benefits, once the employer learned the employee was an illegal alien, because of language in MCL 418.361(1) that said an employer is not liable for compensation under Section 351, 361(1) or 371(1) for such periods of time the employee was unable to obtain or perform work because of imprisonment or "commission of a crime." However, *Sanchez* did not terminate an employer's continued liability for medical benefits.

Section 274 described the creation and duties of the (former) Workers' Compensation **Appellate Commission** (WCAC). The 2011 Amendment to § 274 eliminated the former WCAC and much of the prior language in § 274. The Amendment adapted a reduced number of subsections and replaced the language in this section to conform to Governor Snyder's Executive Reorganization Order, No. 2011-6. The Amendment placed the authority of the former WCAC to decide appeals involving workers' compensation cases with the recently formed Michigan Compensation Appellate Commission (MCAC) (nine members with authority to decide appeals concerning workers' compensation and unemployment claims). This Amendment also eliminated the requirement the QAC approve the appointments for the WCAC. The Amendment says LARA shall provide suitable office space for the Commission and its employees.

Appellate Commission
changes conform to
Executive Reorganization
Order, No. 2011-6

Chapter 3. Compensation

The 2011 Amendment retained language in **Subsection 301(1)** that describes the initial elements for proving causation in a chapter 3 claim, i.e., whether or not an employee has an injury compensable under the WDCA. The first sentence of § 301(1) says:

Sec. 301. (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of

the injury, shall be paid compensation as provided in this act.

However, the Amendment added the following 2nd sentence:

A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury.

This sentence conforms to the Supreme Court rulings in *Rakestraw* and the Supreme Court order in *Fahr*. These cases required plaintiffs prove a work incident, to be compensable, caused a medically distinguishable change in pre-existing pathology. A change in symptoms, alone, was not sufficient to prove a compensable injury that arose out of and in the course of employment. The 2011 Amendment made it less likely a future panel of the Michigan Supreme Court will reverse the holdings in *Rakestraw* and *Fahr*.

Subsection 301(2) says mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, are compensable if the employment contributed to, aggravated or accelerated the conditions in a "significant manner". The "**significant manner**" standard is a higher standard than the causation standard in § 301(1). The **2011 Amendment added "degenerative arthritis"** to the heart and cardiovascular conditions listed in § 301(2).

§ **301(2)** also said a mental disability, to be compensable, must arise out of actual events of employment, not unfounded perceptions thereof. The **2011 Amendment added that the employee must prove his or her "perception of the actual events is reasonably grounded in fact or reality."** This Amendment appears to codify the standard the Supreme Court adopted in *Robertson v Daimler Chrysler Corp.*, 465 Mich 732 (2002). In *Robertson*, the Supreme Court said a mental disability claim, to be compensable, requires proof:

- (a) That there has been an actual employment event leading to a disability, that is, that the event in question occurred in connection with the employment and actually took place; and

Amendments to § 301(1) model *Rakestraw* and *Fahr*.

§ 301(2) - Degenerative Arthritis is added to list of conditions subject to "significant manner" standard of causation.

§ 301(2) – Amendments to Mental Disability provisions track *Robertson*.

(b) That the claimant's perception of such actual employment event was not unfounded, that is, that such perception or apprehension was grounded in fact or reality, not in the delusion or imagination of an impaired mind.

Robertson, supra, at 752-753, 762-763.

Section 301(4) defines **disability**. Previously, subsection (4) described disability as:

a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

§ 301(4) - Definition of disability models *Sington and Stokes*

and

adopts wage loss principles consistent with *Lofton and Harder*.

The 2011 Amendment adopted this definition in § 301(4)(a), but added language to this subsection, added 2 more subsections (b) and (c) to § 301(4), and added 2 more subsections, § 301(5)-(6), to further define or describe elements of disability, "wage earning capacity", "wage loss", and distinctions between "total" and "partial" disability. These additions modeled holdings in *Sington*, and *Stokes*, concerning disability, and Supreme Court orders in *Lofton* and *Harder* that required Magistrates to consider a partially disabled employee's ability to "earn wages". Because these amendments will control an injured employee's ability to prove disability and claim wage loss benefits in all future cases, these subsections are included, in this Newsletter, in their entirety, followed by a section by section analysis:

(4) As used in this chapter:

Disability

(a) "Disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease. A limitation of wage earning capacity occurs only if a personal injury covered under this act results in the employee's being unable to perform all jobs paying the maximum wages in work suitable to that employee's qualifications and training, which includes work that may be performed using the employee's transferable work skills. A disability is total if the employee is unable to earn in any job paying maximum wages in work suitable to the

employee's qualifications and training. A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training. The establishment of disability does not create a presumption of wage loss.

(b) Except as provided in Section 302, "wage earning capacity" means the wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned. For the purposes of establishing a limitation of wage earning capacity, an employee has an affirmative duty to seek work reasonably available to that employee, taking into consideration the limitations from the work-related personal injury or disease. A magistrate may consider good-faith job search efforts to determine whether jobs are reasonably available.

(c) "Wage loss" means the amount of wages lost due to a disability. The employee shall establish a connection between the disability and reduced wages in establishing the wage loss. Wage loss may be established, among other methods, by demonstrating the employee's good-faith effort to procure work within his or her wage earning capacity. A partially disabled employee who establishes a good-faith effort to procure work but cannot obtain work within his or her wage earning capacity is entitled to weekly benefits under subsection (7) as if totally disabled.

(5) To establish an initial showing of disability, an employee shall do all of the following:

(a) Disclose his or her qualifications and training, including education, skills, and experience, whether or not they are relevant to the job the employee was performing at the time of the injury.

Wage earning capacity

Wage loss

Proofs necessary to prove or disprove disability follow *Stokes* model.

(b) Provide evidence as to the jobs, if any, he or she is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of the injury.

(c) Demonstrate that the work-related injury prevents the employee from performing jobs identified as within his or her qualifications and training that pay maximum wages.

(d) If the employee is capable of performing any of the jobs identified in subdivision (c), show that he or she cannot obtain any of those jobs. The evidence shall include a showing of a good-faith attempt to procure post-injury employment if there are jobs at the employee's maximum wage earning capacity at the time of the injury.

(6) Once an employee establishes an initial showing of a disability under subsection (5), the employer bears the burden of production of evidence to refute the employee's showing. In satisfying its burden of production of evidence, the employer has a right to discovery if necessary for the employer to sustain its burden and present a meaningful defense. The employee may present additional evidence to challenge the evidence submitted by the employer.

Summary/Analysis Of Disability and Wage Loss Provisions

Subsection 301(4)(a) indicates the injured employee must offer proof he/she is not able to perform "all jobs" that paid his/her maximum wage in work suitable to his/her qualifications and training (Q&T), *Sington*. Subsection (4)(a) includes consideration of the employee's "transferable work skills", *Stokes*. A disability is total if the employee is unable to earn (apparently any wages) in all jobs suitable to the employee's Q&T that pay the employee's maximum wage. A disability is partial if the employee retains "wage earning capacity" (WEC) that is less than his/her maximum wages in work suitable to

Definition of disability considers:

- all jobs suitable to employee's Q & T
- including transferable skills
- that pay maximum wage earning capacity
- total disability
- partial disability

his/her Q&T. In practical terms, this language indicates proving disability requires evidence describing the injured employee's universe of work suitable to this Q&T where he could earn his/her maximum wage level. If he/she cannot earn any wages in that universe, he/she is totally disabled. If he/she can earn wages in that universe, but only at a rate less than his/her maximum wage, he/she is partially disabled. Consequently, if he/she can still earn his/her maximum WEC in work suitable to his/her Q&T (considering his/her transferable skills), he/she is not disabled in the first place.

Subsection 301(4)(b) defines "wage earning capacity" as wages the employee earns or is "capable of earning at a job reasonably available to that employee, whether or not wages were actually earned." This provision indicates evidence of jobs the employee is capable of performing and the wages available in such jobs is relevant if the job is reasonably available to that employee. An employee who is capable of earning wages at a job that is reasonably available to him, but has avoided it or not pursued it, probably will not be able to prove total disability and may not be able to prove disability at all. Subsection (b) says to prove a limitation of WEC, the employee "has an affirmative duty to seek work reasonably available to that employee." This section adds, "A magistrate may consider good-faith job search efforts to determine whether jobs are reasonably available." This provision indicates the legislature intends an employee who can work should try to find work; however, that employee will not be penalized if he makes a good-faith job search effort and proves jobs are not reasonably available to him.

Subsection 301(4)(c) says "wage loss" is the amount of wages lost due to the disability. The second sentence, that says an employee shall establish a connection between the disability and reduced wages in establishing the wage loss, appears to codify the Court of Appeals ruling in *Romero v Burt Moeke Hardwoods, Inc.*, 280 Mich App 1 (2008), *lv den.*, S. Ct. No. 137262. The 2011 Amendment says wage loss may be established "among other methods" if the employee demonstrates he made a good-faith effort to procure work within his or her WEC. The Amendment also says a partially disabled employee is entitled to receive weekly benefits as if he is totally disabled if he establishes a good-faith effort to procure work, but cannot obtain work within his WEC. Again, this provision shows the legislature intended to encourage employees who can work to try to find work, but did not intend to

Wage earning capacity considers wages:

- employee is capable of earning
- that are reasonably available,
- whether earned or not.:

Employee has affirmative duty to look for work

Wage loss must be linked to work related disability.

Employee can support wage loss claim with good faith job search.

Elements for proving disability follow *Stokes* model.

Legislature again encourages employees to look for work.

Formula to calculate total disability benefits

Formula to calculate partial disability benefits

penalize them if work is not reasonably available to them. Logically, an employee who makes no efforts to find work is taking a risk he or she will not be able to prove work-related wage loss.

Subsection 301(5) outlines the elements an employee must prove for a *prima facie* claim of disability. Subsection (5)(a) appears to mirror the four steps for a *prima facie* case of disability the Supreme Court described in *Stokes*. However, subsection (5)(d) re-emphasized the legislature's intent that an employee attempting to show he cannot obtain any job he is capable of performing must introduce evidence of a good-faith attempt to procure post-injury employment if jobs exist that continue to pay the employee's maximum WEC.

Subsection 301(6) describes the added steps the Supreme Court described in *Stokes* concerning the employer's burden of rebutting the plaintiff's *prima facie* case and the opportunity offered the employee to offer evidence challenging the employer's evidence.

Subsections 301(7) and (8) describe formulas for calculating wage loss benefits for totally disabled employees and partially disabled employees. These sections, quoted in their entirety, say:

(7) If a personal injury arising out of the course of employment causes total disability and wage loss and the employee is entitled to wage loss benefits, the employer shall pay or cause to be paid to the injured employee as provided in this section weekly compensation equal to 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate determined under Section 355. Compensation shall be paid for the duration of the disability.

(8) If a personal injury arising out of the course of employment causes partial disability and wage loss and the employee is entitled to wage loss benefits, the employer shall pay or cause to be paid to the injured employee as provided in this section weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury, but not more than the maximum weekly rate

determined under Section 355. Compensation shall be paid for the duration of the disability.

Summary/Analysis Of Wage Loss Calculation Formulas

Subsection 301(7) says an employee who has met his burden of proving “total” disability and a work-related wage loss is entitled to wage loss replacement benefits “equal to 80% of the employee’s after-tax average weekly wage, but not more than the maximum weekly rate determined under Section 355.” Compensation shall be paid for the duration of disability. This section maintains the calculation for wage loss benefits in MCL 418.351 applicable to a totally disabled employee. § 351 was not repealed or, unlike MCL 418.361(1), modified in the 2011 Amendment.

Analysis of total disability formula

Subsection 301(8) maintains the formula for calculating partial disability benefits for a partially disabled employee that was previously in MCL 418.361(1). § 361(1) was modified to remove the formula now contained in § 301(8). Also the phrase “wage earning capacity” in § 301(8) replaces the phrase “wage which the injured employee is able to earn after the personal injury” that was in § 361(1) and applies to injuries *prior* to the 2011 Amendment.

Analysis of partial disability formula

Guidance from the Agency and courts may be necessary to help assess whether or not “after tax value(s)” still apply to the employee’s “wage earning capacity after the personal injury”. Subsection 301(4)(b) says “‘wage earning capacity’ means the wages the employee earns or is capable of earning at a job reasonably available to that employee”, not the after tax value of such wages.

Reasonable employment and establishment of post injury wage earning capacity

Employee fault leading to termination of reasonable employment

Subsection 301(9) appears to replace subsection 301(5) of the pre-existing Act. Because subsection 9 changes pre-existing law concerning "reasonable employment" issues, by making an employee's own fault an increasingly relevant issue, subsection (9) is also included in its entirety, followed by an analysis:

(9) If disability and wage loss are established, entitlement to weekly wage loss benefits shall be determined as applicable pursuant to this section and as follows:

(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan Unemployment Insurance Agency and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is not entitled to any wage loss benefits under this act during the period of refusal.

(b) If an employee is terminated from reasonable employment for fault of the employee, the employee is considered to have voluntarily removed himself or herself from the work force and is not entitled to any wage loss benefits under this act.

(c) If an employee is employed and the weekly wage of the employee is less than that which the employee received before that date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage that the injured employee earns after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

(d) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of that employment.

(e) If the employee, after having been employed pursuant to this subsection loses his or her job through no fault of the employee and the employee is still disabled, the employee shall receive compensation under this act as follows:

(i) If the employee was employed for less than 100 weeks, the employee shall receive compensation based upon his or her average weekly wage at the time of the original injury.

(ii) If the employee was employed for 100 weeks or more but less than 250 weeks, then after exhausting unemployment benefit eligibility, a worker's compensation magistrate may determine that the employment since the time of the injury has not established a new wage earning capacity and, if the magistrate makes that determination, benefits shall be based on his or her average weekly wage at the original date of injury. If the magistrate does not make that determination, the employee is presumed to have established a post-injury wage earning capacity and benefits shall not be paid based on the wage at the original date of injury.

(iii) If the employee was employed for 250 weeks or more, the employee is presumed to have established a post-injury wage earning capacity.

Summary/Analysis of § 301(9), Reasonable Employment and New Wage Earning Capacity

The introduction of subsection 301(9) contains two interesting modifications to the WDCA. First, this section says it applies "if disability and wage loss are established." Previously, § 301(5) only said the employee had to establish disability. Second, subsection (9) contains the added phrase "as applicable." This phrase suggests the legislature did not intend subsection (9) applies in all cases. For example, an employee may be injured and never return to work. In that situation, the "reasonable employment" provisions should not be used to justify an award

§ 301(9)(e) addresses when an employee's benefits are affected by post injury new wage earning capacity.

§ 301(9) is the new § 301(5).

Effect of fault on
reasonable employment
termination issues

of wage loss benefits if the employee does not prove he has a work related disability, loss of wage earning capacity, and work related wage loss.

Subsection 301(9) contains the same language that was in § 301(5)(a) of the pre-Amendment WDCA concerning refusals of "reasonable employment".

A major change arising from the 2011 Amendment concerns an employee's own "fault" if that fault was the reason the employee lost "reasonable employment." The introduction of fault, even for employees who performed reasonable employment for less than 100 weeks, suggests the legislature intended to reverse the holding of the Supreme Court in *Russell v Whirlpool Financial Corp.*, 461 Mich 579 (2000) and *McJunkin v Cellasto Plastic Corp.*, 461 Mich 590 (2000). In *McJunkin* and *Russell*, the Supreme Court held § 301(5)(e) of the prior WDCA provisions entitled an employee to wage loss compensation based on the wage at the original date of injury if the employee stopped performing "reasonable employment" for "whatever reason". A blanket refusal to accept reasonable employment at all, per § 301(5)(a) of the pre-Amendment WDCA, disentitled the employee to wage loss benefits "during the period of such refusal".

Subsection 301(9)(b) says if an employee is terminated from reasonable employment "for fault of the employee" that employee is considered to have voluntarily removed himself from the work force and is not entitled to any wage loss benefits under the WDCA. Subsection 301(9)(b) does not contain the phrase "during the period of refusal" that is in subsection 301(9)(a). That omission suggests an employee who is fired from reasonable employment because of the fault of the employee cannot end the period of refusal and regain entitlement to wage loss benefits. Questions will likely arise concerning what acts by an employee will constitute "fault" that will trigger subsection 301(9)(b). Perhaps, one might consider whether or not the employee's conduct had risen to a level of fault that would prompt an employer to fire the same employee if he was not injured and performing reasonable employment.

Subsection 301(9)(c) says an injured employee who is employed in reasonable employment that pays less than the wages the employee received before the date of injury shall receive benefits equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage the injured employee earns after the date of injury, but not more than the maximum weekly rate of compensation determined under Section 355. This provision suggests that an employee who does accept reasonable employment will be paid differential benefits based on the difference between the after tax values of his pre-injury wage and his actual post injury earnings, if the "reasonable employment" does not provide wages equal to his prior/pre-injury wage.

Subsection 301(9)(d) is essentially the same as the prior subsection 301(5)(c). An employee who earns as much or more in reasonable employment post injury as his pre-injury wage earning capacity is not entitled to wage loss benefits for the duration of that employment.

Subsection 301(9)(e) says an employee who loses his or her job (reasonable employment) through no fault of the employee, regardless of the number of weeks he performed "reasonable employment", shall receive compensation under this section of the WDCA if "the employee is still disabled." This latter phrase suggests an employee who performs reasonable employment and loses that job through no fault of his own, but is *not* still disabled, is *not* entitled to benefits. An employee who is still disabled, and who has not lost the job because of his own fault, is subject to the following:

- If he has been employed for less than 100 weeks, he shall receive compensation based on his average weekly wage at the time of the original injury; in other words, he has not established a new wage earning capacity.
- If he worked for 100 weeks or more, but less than 250 weeks, after exhausting unemployment benefits eligibility, the fact finder must consider whether he proved he did not establish a new wage earning capacity. If he did *not* establish a new wage earning capacity, he should be paid benefits based on his average weekly wage at the original date of injury. If the magistrate does not find he proved he did not establish a new wage earning capacity, the magistrate must presume he has a post-injury wage earning capacity;

Formulas for calculating benefits under "reasonable employment" provisions

When does employee establish new wage earning capacity?

Less than 100 weeks

100 to 250 weeks

under that scenario, benefits shall not be paid based on the wages at the original date of injury. However, subsection 301(9) did not describe what wage rate would apply in this latter scenario. Logically, the magistrate should consider what new wage earning capacity the employee established while performing reasonable employment. That conclusion could reasonably be supported by the phrase in subsection 301(9)(e)(ii) that said "the employee is presumed to have established a post-injury wage earning capacity."

250 weeks or more

- If the employee was employed for 250 weeks or more, he is presumed to have established a post-injury wage earning capacity. However, the Senate (final) version does not say the presumption is "conclusive", as the House version, HB 5002, had proposed.

Separate definition of "wage earning capacity" for designated public safety personnel, such as firemen and police officers

The 2011 Amendment also added an entirely new **Section 302** that applies to specifically described municipal employees, such as members of specifically described fire and police forces. For such persons, § 302 said the phrase "wage earning capacity," in chapter 3 and 4, "means the wages the employee earns or is capable of earning at a job reasonably available to that employee." This amendment says such persons, like other employees, have an affirmative duty to seek work reasonably available to that employee, taking into consideration the limitations from the work-related injury disability. Again, a magistrate may consider good-faith job search efforts to determine whether jobs are reasonably available. This definition of "wage earning capacity," in § 302 appears to be identical to the definition of "wage earning capacity" for other employees in § 301(4)(b), except that it did not contain the phrase "whether or not wages are actually earned."

Medical benefits

The 2011 Amendment amended **Section 315** to alter the number of days, from the inception of medical care, that an employer can control which physicians treat the employee's work-related injury. The amendment to § 315(1) says:

Change in # of days employer controls treatment

After 28 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his

or her intention to treat with the physician.

The prior provision in § 315 said the period of time in which the employer had this control was 10 days; the House version proposed 45 days. As noted, the final version elected 28 days.

The final Senate version of the Amendment did not contain the language proposed in HB 5002 that would have clarified the parties responsible for payment of plaintiff's attorney's fees based on an award of unpaid medical bills. HB 5002 proposed adding the following sentence to § 315(1):

Attorney fees related to medical expenses are chargeable to either the employer or the medical provider, or both, but are not chargeable to the employer or carrier.

The omission of this language in the Senate Bill does not provide this clarification and leaves the parties to ponder how the multiple opinions in *Peterson v Magna Corp.*, 484 Mich 300 (2009) still may affect this issue. The lead opinions in *Peterson* held such fees, if the magistrate, in his or her discretion, found such fees were appropriate, were chargeable only to the employer or carrier. Other opinions disagreed.

The 2011 Amendment modified subsection (2) of **Section 319** (applicable to vocational rehabilitation services and hearings) to say a party may **appeal an order of the Director** issued under § 319(1) **to the Michigan Compensation Appellate Commission** within 15 days after the Order is mailed to the parties. The prior language in § 319 directed the parties to appeal a Director's decision to the Board of Magistrates.

Section 331. The 2011 Amendment also addressed dependency issues involving employees "who were killed by a work injury." The Amendment repealed § 331(a) that said a wife shall be conclusively presumed to be wholly dependent upon a deceased employee if she was living with her husband at the time of his death. The Supreme Court previously found a similar provision in MCL 418.353 unconstitutional, *Day v WA Foote Mem'l Hosp*, 412 Mich 698 (1982). The 2011 Amendment retained the provision that children under the age 16 years or over the age of 16 years, if physically or mentally incapacitated from earning, are conclusively presumed to be wholly dependent for their support

No change in law concerning attorney fees

Vocational Rehabilitation

Dependents:

2011 amendment removes unconstitutional provisions stating wives are conclusively presumed to be wholly dependent on injured husband.

§ 354 – Coordination of benefits

upon the parent with whom they were living at the time of the death of the parent. This Amendment also retained the provision that such children are entitled to the conclusive presumption if they were a child living with the former spouse or child who had been deserted by the deceased employee and the child was under the age of 16 years, or if over age 16, physically or mentally incapacitated from earning.

Section 353(1). The Amendment also removed subsection (a) that had previously created a conclusive presumption for the dependency of the wife of an injured employee, see *Day v WA Foote Memorial Hosp.*, discussed above.

Section 354. The Amendment still allows an employer, required to pay benefits under §§ 301(7) or (8), 351 or 835, to coordinate certain other designated benefits the employee received or is receiving for the same time periods.

Subsection 354(a) still allows an employer/carrier to coordinate 50% of the old age retirement benefits an injured employee receives under the Social Security Act; but, if the employee was receiving these old age insurance benefits *before* the injury date, the employer may not coordinate the old age Social Security benefits to a level that would reduce the benefit rate below “50% of the weekly benefits otherwise payable without the reduction.”

The Amendment also modified **Section 354(1)(d)** to allow an employer/carrier to coordinate pension or retirement benefits to employees who are receiving “total and permanent disability” benefits, a category of benefits not previously subject to § 354 coordination; however, the employee must have reached full retirement age, must be receiving benefits pursuant to a plan or program established or maintained by the same employer from whom benefits are received pursuant to §§ 301(7) or (8), § 351 or § 835, and the employee did not contribute directly to the pension or retirement plan or program. This subsection is subject to subsection 354(12) that says an employer can not compel an employee to apply for early or reduced pension or retirement benefits.

The 2011 Amendment amended **Section 358** (coordination of unemployment benefits) to continue allowing an employer to coordinate 100% of the amount of benefits paid or payable to the injured employee under the Michigan Employment Security Act for identical periods of time in which workers' compensation benefits were due. Under the 2011 Amendment, however, the unemployment benefits no longer have to be "chargeable to the same employer."

§ 358 - Coordination of unemployment benefits

The 2011 Amendment modified **Section 360**, concerning claims of professional athletes, to exempt, from the Michigan WDCA, professional athletes hired under a contract with an out-of-state employer if certain conditions are met, even though the employee was injured while temporarily in Michigan.

§ 360 – Professional athletes hired outside of Michigan

The 2011 Amendment amended **Section 361(2)** (specific loss benefits) to alter the effect of the ruling by the former Appellate Commission in *Trammel v Consumers Energy*, 2009 ACO #126. The Appellate Commission held the plaintiff's internal medical implant could not be taken into account when evaluating whether the employee suffered a specific loss of use of his body part (a knee) despite the fact that surgical correction restored the usefulness of that body part. The Amendment to § 361(2) says:

§ 361(2) -Specific loss benefits – effect of joint replacement surgery

The effect of any internal joint replacement surgery, internal implant, or other similar medical procedure shall be considered in determining whether a specific loss has occurred.

The 2011 Amendment **repealed Section 364** that had required bi-annual studies of the weekly benefits paid under the WDCA.

The 2011 Amendment allows notices required in **Section 381** to be filed and/or distributed **electronically**. § 381 says a proceeding for compensation for an injury under the WDCA must be made to the employer or a written claim must be made to the agency either electronically, as prescribed by the director, or on forms prescribed by the director within two years after the occurrence of the injury.

Chapter 4 was amended to conform to changes in Chapter 3.

Electronic filing

General Fund to guarantee payment to employees of designated interlocal and transportation authorities.

Chapter 4. Occupational Diseases and Disablements

The 2011 Amendment preserved Chapter 4 of the WDCA that applies to occupational diseases and disablements. The Amendment modified numerous subsections of § 401 to conform to the provisions/definitions concerning causation, disability, wage earning capacity, wage loss and reasonable employment that were amended in Chapter 3.

Chapter 6. Security for Compensation

The 2011 Amendment added a new **Section 613**, discussed previously, in relation to § 161(1)(n), that allows a business entity to request a determination of whether the service provided to the entity was a service covered under the WDCA. § 613 provides that if this request is made before January 1, 2013, the entity shall not be subject to penalties or interest on underpayment or other violations before the date of the determination if the benefits arise from the misclassification of those services.

The 2011 Amendment to **Section 625** allows insurers to comply with filing requirements, concerning the issuance of a policy, its termination or notice of an employee name change, by submitted the documents in writing or by using agency approved **electronic filing**.

The 2011 Amendment enacted a new **Section 659** that says the state’s general fund will guarantee payment of workers’ compensation benefits for work-injured employees of designated interlocal municipal and transportation authorities, such as the Suburban Mobility Authority Regional Transportation Authority (SMART), if that authority ceases to operate or is dissolved and a successor agency is not created to assume its assets, liabilities and perform its function, “and if the authority is authorized to secure the payment of compensation under section 611(1)(a) (self insurance).” The guarantee does not flow to a private employer under a contract to perform the functions permitted under the enabling statute for SMART.

Chapter 7. State Accident Fund.

The 2011 Amendment repealed Chapter 7 of the WDCA, in its entirety.

Chapter 8. Procedure.

Section 801(6). The 2011 Amendment changed the 10% interest rate charged to an employer/carrier for payment of benefits ordered by a magistrate, arbitrator board, appellate commission or court to a formula “calculated in the same manner as interest on a money judgment in a civil action under Section 6013(8) of the Revised Judicature Act of 1961, 1961 PA 236, MCL 600.6013.

Interest rate changes

Section 801(7) requires the Director of the Agency, in coordination with the Department of Technology, Management and Budget, to develop comprehensive data and file, with the Secretary of the Senate and the Clerk of the House of Representatives, a report making recommendations for a system utilizing advanced analytics to detect and prevent fraud, waste and abuse in the workers compensation system. The Director must also include information concerning the number of cases filed and the number of employees who had benefits reduced because of a determination of their wage earning capacity.

Section 835 applies to redemptions of liability. **Section 835(2)**, as amended, allows carriers to notify the employer in writing, “which may be **electronically transmitted**” of the proposed redemption agreement not less than 10 business days before a hearing on the redemption agreement.

More electronic filing opportunities

Section 835(4) repealed the sentence that said redemption fees do not apply to proposed redemption agreements involving the uninsured employer’s security fund.

Redemption fees

The amendment to **Section 836(2)** allows parties to redeem cases using stipulations and waive a hearing. § 836(2) says:

- (2) Parties may stipulate in writing to the determinations in subsection (1). If all parties stipulate in writing to those determinations, the stipulation may serve as a waiver of hearing, and the magistrate may approve the redemption agreement. A magistrate may conduct a hearing on a proposed stipulation.

Redemptions by Stipulation

Orders and Applications may be issued and distributed electronically

Section 837(1) continues to say that once the magistrate has approved or rejected a redemption agreement or lump sum application, a party has a right to appeal that decision to the Director of the Agency. The Director's Order may be appealed to the Appellate Commission within 15 days after the Order is mailed to the parties. The **Director's Order may be mailed or distributed electronically to the parties.**

Section 847 describes setting a case for mediation or hearing. § 847(1), as amended, **allows an application to be submitted electronically.** The amendment to § 847(2) says the **order and opinion of the magistrate may be filed and distributed electronically.**

Subsection 847(3) says if the agency or the Michigan Administrative Hearing System determines a case may be resolved by **mediation**, the case may be mediated by the parties. If the matter is not resolved by the mediation, the case shall be set for hearing.

Expanded authority for Appellate Commission

Section 853, as amended, allows the Michigan Compensation Appellate Commission to administer oaths, subpoena witnesses and examine such parts of the books and records of the parties to a proceeding as related to questions in dispute. This provision appears to **allow the Appellate Commission to secure evidence** rather than rely solely on a magistrate to do so.

Attorneys of record can sign subpoenas

Section 853 also allows the attorney of record to sign and issue a subpoena. § 853 says:

A **subpoena signed by an attorney of record** in the action has the force and effect of an order signed by the Worker's Compensation magistrate or arbitrator associated with the hearing.

Stay provisions applicable to medical benefits during appeals are modified.

The Amendment also modified **Section 862(2)** to say an appeal to the Appellate Commission does not operate as a stay of the employer's obligation to pay "reasonable and necessary medical benefits required by the terms of the award." The prior provision in § 862(2) did not contain the phrase "reasonable and necessary."