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Legal Alert

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Governor Snyder Approves Changes to Michigan Workers' Compensation Law

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On December 19, 2011, Governor Snyder signed into law Public Act 266 of 2011 which substantially changes the Michigan Workers' Disability Compensation Act, MCL Section 418.101, *et seq*. The changes to the law are intended to modernize, clarify and stabilize Michigan workers' compensation law in an effort to attract and keep business in the State of Michigan.

The revised law codifies certain recent case law, and seeks to ensure efficiency in the workers' compensation system through certain procedural changes. The new law went into effect on December 19, 2011, and applies to injuries that occur on or after that date.

What has Changed

What constitutes a compensable work injury?

The new legislation defines a compensable injury as follows, "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 is a codification of the Supreme Court's decision in *Rakestraw v General Dynamics Land Systems*. The new language is meant to ensure that pre-existing conditions are not compensable absent a change in pathology.

The Act now also specifies that degenerative arthritis is included among the conditions of the aging process that are only compensable if contributed to or aggravated or accelerated by the employment in a *significant* manner.

The new legislation also clarifies the circumstances that give rise to a compensable mental disability. As before, mental disabilities are compensable if arising out of actual events of employment, and not unfounded perceptions. The amended law goes on to specify that "the employee's perception of the actual events" must be "reasonably grounded in fact or reality".

The definition of disability and partial disability.

The definition of disability is found at Section 301(4)(a) and Section 401(1). These sections of the Act represent a codification of the Supreme Court's decision in *Stokes v Chrysler, LLC*. The Act states, as it did before, that a disability means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training. The amended Act,

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however, goes on to define what is meant by the term "limitation of wage earning capacity". It specifically states that a limitation of wage earning capacity "occurs only if a personal injury... results in the employee 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." The amended Act goes on to specify that the disability is "total" if the employee is not able to "earn in any job paying maximum wages in work suitable to the employee's qualifications and training." Such an employee would be entitled to weekly compensation equal to 80% of the employee's after-tax average weekly wage subject to the statutory maximum.

The new legislation also sets forth the definition of partial disability. Section 301(4)(a) and Section 401(1) state, "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." This applies to wages the employee "*earns or is capable of earning* at a job reasonably available to that employee, *whether or not wages are actually earned*." The sections go on to state that the employee has an "affirmative duty to look for jobs reasonably available to that employee, taking into consideration the limitations from the work-related personal injury or disease." If the partially disabled employee demonstrates a good faith effort to procure work within his or her wage earning capacity and cannot obtain such work, he or she will be entitled to weekly wage loss benefits as if totally disabled. Thus, a partially disabled worker who puts forth a good faith effort to obtain employment, and fails to do so, will be deemed to be totally disabled.

On the other hand, if a partially disabled worker fails to engage in a good faith job search, the employee is entitled 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." This calculation is significantly different from the calculation of partial benefits under Section 301(9)(c), where the employee is actually working at a lower wage. That calculation requires payment of 80% of the difference between the after-tax average weekly wage before the injury and the after-tax average weekly wage the injured employee earns after the personal injury. The new calculation, where the employee is not working or looking for work, subtracts the employee's entire wage earning capacity (as opposed to the after-tax value of it) from the pre-injury rate.

The employee's burden of proof.

Sections 301(5) and 401(3) contain language reflecting further codification of the *Stokes* decision relative to the plaintiff's burden of proof to establish disability. Specifically, the employee must disclose his or her qualifications and training. This includes a disclosure of the employee's education, skills, and experience, whether or not they were relevant to the employee's job being performed at the time of injury. The employee must also "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."

After identifying the jobs that the employee is qualified and trained to perform, the employee must demonstrate that their work injury prevents them from performing those jobs. Finally, if the employee is capable of performing work at a maximum wage job, the employee must show that he or she cannot obtain any of those jobs. Section 301(5)(d) and Section 401(3)(d) both require evidence showing 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."

The employer's burden of proof.

Sections 301(6) and Section 401(4) both indicate that "once an employee establishes an initial showing of a disability", the burden of proof then

shifts to the employer to refute the employee's showing. The sections specifically state that the employer has a right to discovery to refute the employee's showing of disability and to present a meaningful defense. The language in the *Stokes* case indicated that the employer could require that the plaintiff submit to a vocational evaluation. The language in the new legislation grants a "right of discovery" which presumably will not limit employers to only a vocational evaluation, and potentially opens the door to other forms of discovery, such as interrogatories, requests for production of documents, and depositions.

The entitlement to wage loss benefits following subsequent employment.

The new legislation provides that if an employee is terminated from reasonable employment "for fault of the employee," the employee is not entitled to any wage loss benefits. This is true even if the employee had been working in reasonable employment for less than 100 weeks. The former law indicated that if the employee was terminated "for whatever reason" within 100 weeks of subsequent employment, the employee would receive weekly wage loss benefits. This is no longer the case if the employee is terminated for cause.

If the employee is employed for less than 100 weeks in reasonable employment, and loses that job through no fault of their own, the employee is to be paid benefits based upon his or her average weekly wage at the time of the original injury.

If the employee loses reasonable employment, through no fault of their own, between 100 and 250 weeks of subsequent employment, the magistrate may determine whether that employment has established a new wage earning capacity. If it is determined that the subsequent employment has not established a new wage earning capacity, weekly benefits will be paid based on the employee's average weekly wage at the original date of injury.

If the employee loses reasonable employment, through no fault of their own, after 250 weeks of subsequent employment, there is a presumption of a new wage earning capacity. The legislation does not specify, however, that this is a conclusive presumption.

Coordination of benefits.

A. Old age Social Security benefits

If the employee is receiving old age Social Security benefits, his or her weekly benefits must be reduced by 50% of the amount of those benefits. Under the new legislation, however, if the employee was receiving old age Social Security benefits prior to the work injury, then the weekly benefits payable after this reduction cannot be less than 50% of the employee's full weekly benefit rate. For example, an injured worker whose uncoordinated weekly benefit rate is $200, cannot have his or her coordinated rate go below $100 per week, if that worker had been receiving old age Social Security benefits before the date of injury.

B. Pension or retirement payments

Under the prior Act, for pension or retirement payments *received or being received* under a plan or program established or maintained by the employer, the weekly benefits were reduced by the after-tax amount of those payments. Under the new legislation, this applies not only to employees *receiving* pension or retirement payments, but also to employees *who are currently eligible to receive those payments*, so long as that employee has suffered total and permanent disability and has reached full retirement age.

C. Unemployment benefits

Under the prior Act, weekly wage loss benefits were to be reduced by 100% of the amount of unemployment benefits paid to the injured employee for identical periods of time and chargeable to the same employer. Under the new

legislation, this would apply whether or not the benefits are chargeable to the same employer.

Internal implants and specific loss determinations.

Section 361(2) of the new legislation effectively overturns the Supreme Court's decision in *Trammel v Consumers Energy Co*. The Act now requires the effect of any internal joint replacement surgery, internal implant, or other similar medical procedures to be considered in a determination of whether a specific loss had occurred.

Additional noteworthy changes.

A. Medical care

The new legislation allows the employer to direct medical care for 28 days from the start of medical care, as opposed to 10 days under the previous Act.

B. Determination of employment

Section 161(n) of the new legislation specifies that on and after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan Administrative Hearing System determines to be in an employer/employee relationship using the 20-factor test utilized by the Internal Revenue Service. In addition, an individual for whom an employer is required to withhold federal income tax is considered to be an employee under the Act.

C. Police or fire department employees

Under the new Section 302, a separate definition of "wage earning capacity" is set forth for certain qualified firefighters and police officers.

D. Professional athletes

Under certain conditions, professional athletes who were hired under a contract with an out of state employer and injured while temporarily in Michigan, are exempt from the Act.

E. Mediation

The former Section 223 governing mediation of claims, has been eliminated and the reference to "hearing referees" appointed by the Director has been deleted. However, Section 847(3) does indicate that 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.

F. Qualifications for magistrates

The Qualifications Advisory Committee has been eliminated, and under Section 210, the Governor is designated to appoint workers' compensation magistrates. To qualify for the position, the individual must be a member in good standing of the State Bar of Michigan and have been licensed to practice law in the State of Michigan for five years or more. In addition, the 12 year term limit for magistrates was eliminated. Magistrates are to be evaluated annually, rather than biennially.

Procedures.

A. Redemptions

As before, a redemption agreement may be approved only if the magistrate makes certain determinations, including a finding that the agreement serves the purpose of the Act, is just and proper under the circumstances, and is in the best interests of the employee. The new legislation, however, allows the parties to stipulate in writing to those determinations. Such a stipulation would serve as a waiver of hearing, and the magistrate could approve the agreement. The magistrate can conduct a hearing on the proposed stipulations.

B. Subpoenas

Attorneys may sign their own subpoenas with the same force and effect of an order signed by a workers' compensation magistrate.

C. Interest

The new legislation requires interest to be calculated in the same manner as provided for a money judgement in a civil action under the Revised Judicature Act.

D. Vocational rehabilitation appeals

Vocational rehabilitation appeals now go directly to the Michigan Compensation Appellate Commission, and must be filed within 15 days after the order was mailed to the parties.

E. Electronic Filing

The new legislation specifies that documents including Applications for Mediation or Hearing, magistrate's Opinions and Orders, and 10 day notices of proposed redemption agreements, may be filed, submitted and distributed electronically.

Conclusion

The workers' compensation attorneys at Smith, Haughey, Rice & Roegge monitored this legislation very closely – from it's inception to the signing of the bill by Governor Snyder. We have studied the legislation carefully from all sides, and are committed to providing our clients with sound and accurate advice regarding the law's application. Please feel free to contact any of our workers' compensation attorneys to discuss any questions or concerns you may have regarding the handling of claims in the wake of the amended legislation.

To read a complete version of the new law, visit:
http://www.legislature.mi.gov/documents/2011-2012/billenrolled/House/pdf/2011-HNB-5002.pdf

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