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BILL ANALYSIS



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House Bill 5002 (as enrolled)

Sponsor: Representative Bradford Jacobsen

House Committee: Commerce

Senate Committee: Reforms, Restructuring and Reinventing

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CONTENT

The bill would amend the Worker's Disability Compensation Act to do the following, with respect to injuries incurred on or after the bill's effective date:

- Require an injury to be "medically distinguishable" from an employee's prior condition in order to be compensable.
- Require an employee's perception of actual events to be grounded in reality, for a mental disability to be compensable.
- Provide that a limitation of wage earning capacity would occur only if an employee were unable to perform all jobs paying the maximum wages in work suitable to his or her qualifications and training.
- Include wages an employee earns or is capable of earning in the definition of "wage earning capacity", and provide that an employee would have an affirmative duty to seek reasonably available work.
- Add a separate definition of "wage earning capacity" for certain police officers and fire department employees.
- Allow wage loss to be demonstrated by an employee's good-faith effort to find suitable work.
- Require an employee to demonstrate certain conditions in order to establish an initial showing of disability and wage loss.
- Provide that an employer would bear the burden of refuting an employee's initial showing of disability and wage loss.
- Include pension or retirement payments that an employee was entitled to receive, among amounts that must be deducted from weekly benefits.
- Allow an employee to be treated by his or her own physician after 28 days, rather than 10 days, from the start of medical care.
- Require the effect of medical treatment to be considered in a determination of whether the loss of a specific body part had occurred.
- Exempt from the Act a professional athlete who was hired under a contract with an out-of-State employer and injured while temporarily in Michigan, if certain conditions were met.
- Revise the calculation of interest on weekly compensation.
- Delete provisions under which a wife is presumed to be dependent on her husband for support.
- Allow the parties to stipulate to certain determinations regarding a redemption agreement.
- Allow claims to be made either electronically or on written forms.
- Allow an application for a hearing or mediation to be submitted electronically, and a magistrate's opinion and order to be submitted and distributed electronically.
- Require magistrates to be evaluated annually, rather than biennially.

- **Require the director of the Worker's Compensation Agency to report to the Legislature by April 1, 2012.**
- **Provide that the State would guarantee the payment of claims for benefits against certain self-insured authorities if an authority were to dissolve.**

The bill also would delete provisions concerning the Qualifications Advisory Committee, and would repeal Section 209 of the Act, which creates the Committee. The bill would transfer responsibilities of the committee or its chairperson to the Michigan Administrative Hearing System (in the Department of Licensing and Regulatory Affairs) or its executive director.

In addition, the bill would repeal Section 211, which provides for the appointment of hearing referees.

Personal Injury

The Act provides for the payment of compensation to an employee who receives a personal injury arising out of and in the course of employment by an employer who is subject to the Act at the time of the injury, or who experiences an occupational disease or disability that limits his or her wage earning capacity.

Under the bill, a personal injury covered by the Act would be compensable if work caused, contributed to, or aggravated pathology so as to create a pathology that was medically distinguishable from any pathology that existed before the injury.

Currently, mental disabilities and conditions of the aging process, including heart and cardiovascular conditions, are compensable if contributed to or aggravated by the employment in a significant manner. The bill would include degenerative arthritis as a condition of the aging process.

Currently, mental disabilities are compensable if they arise out of actual events of employment, "not unfounded perceptions thereof". The bill also would require that the employee's perception of the actual events be reasonably grounded in fact or reality.

Disability

The Act defines "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.

Under the bill, a limitation of wage earning capacity would occur only if a personal injury covered under the Act resulted in the employee's being unable to perform all jobs paying the maximum wages in work suitable to his or her qualifications and training, including work that could be performed using the employee's transferable work skills.

A disability would be total if the employee were unable to earn in any job paying maximum wages in work suitable to his or her qualifications and training. A disability would be partial if the employee retained 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.

Except as provided below for certain fire department employees or police officers, the bill would define "wage earning capacity" as 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 would have an affirmative duty to seek work reasonably available to him or her, taking into consideration the limitations from the work-related personal injury or disease. A magistrate could consider good-faith job search efforts to determine whether jobs were reasonably available.

To establish an initial showing of disability, an employee would have to do all of the following:

- Disclose his or her qualifications and training, including education, skills, and experience, whether or not they were relevant to the job the employee was performing at the time of the injury.
- Provide evidence as to the jobs, if any, he or she was qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of the injury.

- Demonstrate that the work-related injury prevented the employee from performing jobs identified as within his or her qualifications and training that paid maximum wages.
- If the employee were capable of performing any of the identified jobs, show that he or she could not obtain any of them.

The last showing would have to include evidence of a good-faith attempt to procure post-injury employment if there were jobs at the employee's maximum wage earning capacity at the time of the injury.

Once an employee established an initial showing of disability, the employer would bear the burden of producing evidence to refute the employee's showing. In satisfying this burden, the employer would have a right to discovery if necessary. The employee could present additional evidence to challenge the evidence presented by the employer.

The bill would define "wage loss" as the amount of wages lost due to a disability. The employee would have to establish a connection between the disability and reduced wages in establishing the wage loss. The employee could establish wage loss, 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 established a good-faith effort to procure work but could not obtain work within his or her wage earning capacity, would be entitled to weekly benefits as if totally disabled.

If a personal injury arising out of the course of employment caused total disability and wage loss and the employee were entitled to wage loss benefits, the employer would have to pay or cause to be paid to the employee weekly compensation equal to 80% of his or her after-tax average weekly wage, but not more than the maximum weekly rate determined under the Act.

If the personal injury caused partial disability and wage loss, the employer would have to pay or cause to be paid weekly compensation equal to 80% of the difference between the employee's after-tax average weekly wage before the injury and his or her wage earning capacity after the injury, but not more than the maximum weekly rate.

In the case of total or partial disability, compensation would have to be paid for the duration of the disability.

Police or Fire Department Employee

The bill would define "wage earning capacity" as the wages the employee earns or is capable of earning at a job reasonably available to that employee if he or she is a member of a full paid fire department of an airport run by a county road commission in a county of 1.0 million population or more or by a State university or college or of a full paid fire or police department of a city, township, or incorporated village employed and compensated on a full-time basis, a county sheriff or the deputy of a county sheriff, a member of the State Police, a conservation officer, a motor carrier inspector of the Michigan Public Service Commission, or any employee of an authority, district, board, or any other entity created by the authorization of one or more cities, counties, villages, or townships, who is engaged as a police officer, or in firefighting or subject to the hazards of such employment.

For the purposes of establishing a limitation of wage earning capacity, the employee would have an affirmative duty to seek work reasonably available to him or her, taking into consideration the limitations from the work-related injury or disease. A magistrate could consider good-faith job search to determine whether jobs were reasonably available.

Entitlement to Weekly Wage Loss Benefits

Under the Act, if disability is established, entitlement to weekly wage loss benefits must be determined according to various factors, including whether an employee receives a bona fide offer of reasonable employment and refuses that employment without good and reasonable cause. If that occurs, the employee must be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits during the period of refusal.

The bill also provides that if an employee were terminated from reasonable employment for his or her fault, the employee would be considered to have voluntarily removed himself or herself from

the work force and would not be entitled to any wage loss benefits.

Currently, if an employee is employed and his or her average weekly wage is less than the employee received before the date of injury, the employee must receive weekly benefits equal to 80% of the difference between his or her after-tax weekly wage before the injury and the after-tax weekly wage earned after the date of injury. Under the bill, this would apply if an employee were employed and his or her weekly wage (rather than average weekly wage) were less than he or she received before the injury.

The bill would rewrite provisions concerning the payment of compensation to an employee who has been employed and loses the job through no fault of his or her own, and the determination of whether a new wage earning capacity has been established. Under the bill, benefits would have to be based on the employee's average weekly wage at the original date of injury, rather than the wage paid at that time.

Reduction for Pension Payments

Section 354 of the Act requires an employee's weekly benefits to be reduced by all or a portion of old-age insurance benefits under the Social Security Act, payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the same employer, or pension or retirement payments under a plan or program of the employer, made for the same time period as the weekly benefits.

If the employee is receiving old-age insurance benefits under the Social Security Act, his or her worker's compensation payments must be reduced by 50% of the amount of those benefits. Under the bill, however, if the employee had been receiving the old-age benefits before the date of the personal injury or work-related disease, then the weekly worker's compensation benefits payable after this reduction could not be less than 50% of the weekly benefits otherwise payable without the reduction.

Currently, for pension or retirement payments received or being received under a plan or program established or maintained by the same employer, the weekly benefits must be reduced by the after-tax amount of

those payments. Under the bill, this also would apply to payments that the employee was currently eligible to receive if he or she had suffered total and permanent disability and had reached full retirement age. These reductions would be subject to a provision in that Act stating that nothing in Section 354 may be considered to compel an employee to apply for early Federal Social Security old-age insurance benefits or to apply for early or reduced pension or retirement benefits.

Reduction for Unemployment Benefits

Currently, weekly benefits or lump sum benefits payable under the Worker's Disability Compensation Act must be reduced by 100% of the amount of benefits paid or payable to the injured employee under the Michigan Employment Security Act for identical periods of time and chargeable to the same employer.

Under the bill, this would apply whether or not the benefits were chargeable to the same employer.

Provision of Medical Care

The Act requires an employer to furnish, or cause to be furnished, reasonable medical, surgical, and hospital services and medicine, as needed, to an employee who receives a personal injury arising out of and in the course of employment.

After 10 days from the start of medical care, an employee may be treated by a physician of his or her own choice. The bill would allow this after 28 days from the start of medical care.

Specific Loss of Body Part

The Act prescribes a specific loss schedule for the loss of a particular finger or toe, or a limb, hand, foot, or eye. A person's disability must be considered to continue for the period specified in the schedule, and compensation must be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under the Act.

The bill would require 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.

Rehabilitation Dispute

The Act allows an injured employee to receive medical rehabilitation services as well as vocational rehabilitation services, under conditions described in the Act, and allows the director of the Worker's Compensation Agency to issue certain orders.

If a dispute arises between the parties concerning the application of these provisions, any party may apply for a hearing before a hearing referee or a magistrate. The bill would delete this provision.

The bill would allow a party to appeal an order of the director to the Michigan Compensation Appellate Commission within 15 days after the order was mailed to the parties.

Professional Athlete

Under the Act, a person who suffers an injury arising out of and in the course of employment as a professional athlete is entitled to weekly benefits only if his or her average weekly wages, when he or she applies for benefits and subsequently, are less than 200% of the State average weekly wage.

The bill also provides that a professional athlete who was hired under a contract with an employer outside of this State would be exempt from the Act if all of the following conditions applied:

- The athlete sustained a personal injury arising out of the course of employment while he or she was temporarily in this State.
- The employer had obtained worker's compensation insurance coverage under the law of another state that covered the injury in Michigan.
- The other state recognized the extraterritorial provisions of the Act and provided a reciprocal exemption for professional athletes whose injuries arose out of employment while temporarily in that state and were covered by the worker's compensation law of Michigan.

Under these conditions, the benefits and other remedies under the worker's compensation law of another state would be the exclusive remedy against the employer.

Interest

Currently, when weekly compensation is paid pursuant to an award of a worker's compensation magistrate, an arbitrator, the Board of Magistrates, the Appellate Commission, or a court, interest on the compensation must be paid at the rate of 10% per annum from the date each payment was due.

Instead of this rate, the bill would require interest to be calculated in the same manner as provided for a money judgment in a civil action under the Revised Judicature Act.

Redemption Agreement

Under the Act, subject to the approval of a worker's compensation magistrate, the parties to a claim may enter into a redemption agreement under which the employer's liability will be "redeemed" by the payment of a lump sum. 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 injured employee.

The bill would allow the parties to stipulate in writing to those determinations. If all parties did so, the stipulation could serve as a waiver of hearing, and the magistrate could approve the agreement. A magistrate could conduct a hearing on a proposed stipulation.

Mediation

Under the bill, if the Worker's Compensation Agency or the Michigan Administrative Hearing System (MAHS) determined that a case could be resolved by mediation, the case could be mediated by the parties. If the matter were not resolved by the mediation, the case would have to be set for hearing.

The bill would repeal Section 223 of the Act, which requires certain claims to be mediated and contains procedural requirements.

Determination of Employment

The Act's definition of "employee" includes every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of 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 services to the public, and is not an employer subject to the Act.

Under the bill, on and after January 1, 2013, services would be employment if they were performed by an individual whom the MAHS determined to be in an employer-employee relationship using the 20-factor test announced by the Internal Revenue Service in Revenue Ruling 87-41, 1 C.B. 296. An individual for whom an employer was required to withhold Federal income tax would be prima facie considered to perform service in employment under the Act. If a business entity requested the MAHS to determine whether one or more individuals performing services for the entity in this State were in covered employment, the MAHS would have to issue a determination of coverage of service performed by those individuals and any others performing similar services under similar circumstances.

If the agency determined that the services were covered employment and received the request on or after the bill's effective date and before January 1, 2013, the employer would not be subject to penalties or interest on underpayments or other violations before the date of the determination arising from the misclassification of those services.

State Guarantee of Payment

Under the bill, the State would guarantee the payment of claims for benefits under the Act against any of the following authorities if it ceased to operate or were dissolved and a successor agency were not created, and if the authority were authorized to secure the payment of compensation by self-insuring: the Suburban Mobility Authority Regional Transportation authority, an authority created by interlocal agreement under the Urban Cooperation Act, an authority created under the Public Transportation Authority Act, a metropolitan council established under the Metropolitan Councils Act, an authority or a municipal corporation that had entered into an intergovernmental contract

to provide transportation services under Public Act 35 of 1951 (which provides for such contracts between municipal corporations), or an authority created under Public Act 55 of 1969 (which allows a city with a population not over 300,000 to create a mass transportation system authority).

Payment of claims would have to be made from the General Fund. The State would be entitled to a lien that would take precedence over all other liens on its portion of the assets of the authority in satisfaction of the payment of claims for benefits.

These provisions could not be construed to permit the use of State funds for the payment of private obligations. If an entity described above delegated to a private employer or contracted with a private employer for the performance of any of the functions permitted under its enabling statute, the private employer could not be included under the authorization granted to the entity to self-insure.

Report to the Legislature

The bill would require the director of the Worker's Compensation Agency, by April 1, 2012, to coordinate with the Department of Technology, Management, and Budget on the development of comprehensive data, and to file with the Secretary of the Senate and the Clerk of the House of Representatives a report making recommendations to the Legislature on a system using advanced analytics for the detection and prevention of fraud, waste, and abuse in the worker's compensation system. The director also would have include information on the number of cases filed, and the number of employees who had benefits reduced as a result of a determination of their wage earning capacity.

Qualifications Advisory Committee; Magistrates

The Qualifications Advisory Committee (QAC) and the Board of Magistrates were created under the Act and transferred to the Michigan Administrative Hearing System by Executive Order 2011-4.

The bill would repeal Section 209, which creates the Qualifications Advisory Committee, and would delete provisions

requiring the QAC to create a written examination for applicants for the position of magistrate and requiring it to interview and recommend applicants.

The bill would require MAHS executive director and the chair of the Worker's Compensation Board of Magistrates, rather than the QAC, to evaluate the performance of magistrates. Magistrates would have to be evaluated annually, rather than every two years, according to criteria listed in the Act. One of these criteria is productivity, including reasonable time deadlines for disposing of cases. The bill also would refer to adherence to established productivity standards.

The Act requires the QAC, after completing an evaluation, to submit a report to the Governor. The bill would require the MAHS executive director to submit a report to the Director of the Department of Licensing and Regulatory Affairs (LARA). The report may make certain recommendations, including promotion. The bill would refer instead to retention.

The Act allows the Governor to remove a magistrate for good cause, which may include lack of productivity or other neglect of duty. Under the bill, the Governor could remove a magistrate upon recommendation by the LARA Director, based upon recommendations in an evaluation report.

The Act allows the QAC chairperson to select temporary magistrates in the case of an extended leave or absence or disability. Under the bill, the MAHS executive director could select temporary magistrates under these circumstances or in the event of a significant increase of caseload.

The bill provides that a subpoena signed by an attorney of record in an action would have the force and effect of an order signed by the magistrate or arbitrator associated with the hearing.

MCL 418.210 et al.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would limit worker's compensation liability in certain ways for employers in Michigan. This limit in liability also would

extend to State and local governments as well as public educational institutions. To the extent that the bill would result in fewer worker's compensation claims, these entities could save an indeterminate amount on those costs.

Additionally, the bill would guarantee payments from the General Fund to injured employees of certain interlocal authorities in the event that an authority ceased to operate or was dissolved. If this were to happen, the bill would provide the State with a lien on the dissolved authority's assets that would supersede other liens that would be placed on the authority's assets. Any money obtained through these liens would be used to pay these benefits. It is possible that if such an authority were dissolved and had insufficient assets to meet its worker's compensation liabilities, the State General Fund would be liable for payment of these benefits.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.