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House Bill 5002 (Substitute H-2 as passed by the House)
Sponsor: Representative Bradford Jacobsen
House Committee: Commerce
Senate Committee: Reforms, Restructuring and Reinventing

Date Completed: 11-8-11

CONTENT

The bill would amend the Worker's Disability Compensation Act to do the following:

- 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 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.
- Allow wage loss to be demonstrated by an employee's reasonable, 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 45 days, rather than 10 days, from the start of medical care.
- Specify that attorney fees related to medical expenses would not be chargeable to an employer or carrier.
- Require the effect of medical treatment to be considered in a determination of whether the loss of a particular 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.
- Allow a carrier to discontinue the payment of benefits to a person who was verified to be an undocumented alien.
- 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.

- **Provide 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.**
- **Require the director of the Worker's Compensation Agency to report to the Legislature by April 1, 2012.**

The bill also would delete provisions concerning the Qualifications Advisory Committee, and would repeal Section 209 of the Act, which creates the Committee, and would transfer its responsibilities to the Department of Licensing and Regulatory Affairs (LARA).

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.

Under the bill a personal injury covered by the Act would be compensable if it caused, contributed to, or aggravated pathology in a manner that was medically distinguishable from the employee's prior condition.

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 also 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.

The bill would define "wage earning capacity" as the wages the employee earns or is capable of earning at a job reasonable available to that employee, whether or not actually earned. For the purposes of establishing wage earning capacity, an employee would have an affirmative duty to seek work reasonably available to him or her. A magistrate could consider good-faith job search efforts to determine whether jobs were reasonably available.

To establish an initial showing of disability and wage loss, 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 and wage loss, 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. Wage loss could be established, among other methods, by demonstrating the employee's reasonable, good-faith effort to procure work suitable to his or her wage earning capacity. The employee would have to establish a connection between a work injury and reduced wages in establishing the wage loss.

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.

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.

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.

Under the bill, this also would apply if an employee were terminated from reasonable employment for his or her fault.

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. The bill would refer to the employee's after-tax "average" weekly wage before and after 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.

Pension or Retirement 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.

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 *eligible* to receive at normal retirement, subject to the following provision.

The Act states 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. Under the bill, Section 354 could not be considered to compel an employee to apply for those benefits "to avoid a reduction in wage loss benefits".

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 45 days from the start of medical care.

The bill provides that attorney fees related to medical expenses would be chargeable to either the employee or the medical provider, or both, but would not be chargeable to the employer or carrier.

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 Appellate Commission within 15 days after the order was mailed to the parties.

Loss of a Body Part

The Act requires a person's disability to be considered to continue for a period specified in a schedule, and requires compensation to be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under the Act. (The schedule sets a number of weeks of

disability for a particular finger or toe, or a limb, hand, foot, or eye.)

The bill would require the effect of any joint replacement surgery, implant, or other medical procedures to be considered in a determination of whether a loss had occurred.

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 and is just and proper under the circumstances.

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

Undocumented Aliens

Under the bill, if a carrier received information indicating or giving reason to believe that a claim for benefits had been filed by an undocumented alien, the carrier could report that information to the FBI or the Federal Immigration and Customs Enforcement. If either of those entities verified that the claimant was an undocumented alien, the Worker's Compensation Agency would have to be notified and the carrier could discontinue payment of all compensation and medical benefits to that alien.

Report to the Legislature

The bill would require the director of the Worker's Compensation Agency, by April 1, 2012, to file with the Secretary of the Senate and the Clerk of the House of Representatives a report making recommendations to the Legislature on the detection and prevention of fraud, waste, and abuse in the worker's compensation system.

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 (in LARA) 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 LARA, rather than the QAC, to evaluate the performance of magistrates.

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.

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.