

WORKER'S COMPENSATION AMENDMENTS

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House Bill 5002 (Substitute H-2)
Sponsor: Rep. Bradford Jacobsen
Committee: Commerce

Complete to 11-1-11

A SUMMARY OF HOUSE BILL 5002 AS REPORTED FROM COMMITTEE

House Bill 5002 would provide numerous amendments to the Worker's Disability Compensation Act. The following describes the changes section-by-section.

Sections 210- 213 (Magistrates)

Currently, the act says that the Governor can only appoint as a worker's compensation magistrate an applicant who is determined to be qualified by the Qualifications Advisory Committee. The bill would instead say the Governor can appoint any individual who is a member in good standing of the State Bar of Michigan and has been licensed to practice as an attorney in the courts of the state for five years or more. The section that creates the Advisory Committee would be repealed and other language referring to the committee would be struck from the statute.

At present, the Qualifications Advisory Committee is charged with evaluating the performance of each magistrate at least once every two years. This would now be the responsibility of the Department of Licensing and Regulatory Affairs (LARA), as would other duties of the Advisory Committee.

Section 301

This section of the act says that an employee who receives a personal injury arising out of and in the course of employment by an employer subject to the act at the time of the injury is to be paid compensation as provided in the act. The bill would amend this section in several ways.

- The bill would specify that a personal injury covered under the act is compensable if it causes, contributes to, or aggravates pathology in a manner that is medically distinguishable from the employee's prior condition.
- The act says that mental disabilities and conditions of the aging process, including heart and cardiovascular conditions, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. The bill would specifically include "degenerative arthritis" as a condition of the aging process.

- Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions. The bill adds that mental disabilities are compensable if the employee's perception of the actual events is reasonably grounded in fact or reality.
- The term "disability" is defined in the act to mean a limitation on 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 bill would add to this definition that a limitation of wage earning capacity occurs only if a personal injury covered under the act results in the employee's being unable to perform all jobs paying the historical maximum wages in work suitable to that employee's qualification and training, including work that may be performed using the employee's transferable work skills. A disability will be considered total disability if the employee is unable to earn in any job suitable to the qualifications and training of the employee. A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her historical maximum wages in work suitable to his or her qualifications and training.
- The bill defines "wage earning capacity" as the wages the employee earns or is capable of earning, whether or not actually earned. For the purposes of establishing wage earning capacity, an employee has an affirmative duty to seek work reasonably available to that employee. A magistrate could consider good-faith job search efforts to determine whether jobs are reasonably available.
- The term "wage loss" means 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.
- To establish an initial showing of disability and wage loss, an employee would have to do all of the following:
 - Disclose his or 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.
 - 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.
 - 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.
 - Show, if the employee is capable of performing any of the jobs identified in the paragraph above, that he cannot obtain any of those jobs. The evidence would 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.

- Under the bill, once an employee establishes an initial showing of a disability and wage loss under the provisions cited above, the employer bears the burden of production of evidence to refute the employee's showing. In satisfying its burden of evidence, the employer has a right to discovery if it is necessary for the employer to sustain its burden and present a meaningful defense. The employee could present additional evidence to challenge the evidence submitted by the employer.
- The bill specifies that if a personal injury that arises out of the course of employment causes *total disability* and wage loss, and the employee is entitled to wage loss benefits, the employer must pay the injured employee 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. The employee would be entitled to compensation for the duration of the disability.
- If a personal injury that arises out of the course of employment causes *partial disability* and wage loss, and the employee is entitled to wage loss benefits, the employer must pay the injured employee 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. The employee would be entitled to compensation for the duration of the disability.
- Currently, if an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan Employment Security Commission and the employee refuses that employment without good or reasonable cause, the employee is considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits. The bill changes the reference to the Unemployment Insurance Agency and adds a provision prohibiting wage loss benefits if the employee is terminated from reasonable employment for fault of the employee.
- The bill would revise provisions that address instances where an employee who is considered disabled loses subsequent employment through no fault of his or her own and is still disabled.
 - It specifies that if the employee had been employed in the subsequent position for less than 100 weeks, then the employee would receive compensation based on his or her wage at the time of the original injury.
 - If the employee was employed for 100 weeks or more but less than 250 weeks, then after exhausting unemployment eligibility, a worker's

compensation magistrate may determine the employment since the time of the injury has not established a new wage earning capacity and, if the magistrate makes that determination, benefits will be based on the 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 will not be paid based on the wage at the original date of the injury.

- if the employee was employed for 250 weeks or more, the employee is conclusively presumed to have established a post-injury wage earning capacity.

Section 315

Section 315 requires employers to provide reasonable medical, surgical, and hospital services to an employee injured in the course of employment. Currently, after ten days from the inception of medical care, the employee can choose to treat with a physician of his or her choice by providing the employer with the name of the physician and the intent to seek care from that individual. This bill would increase that time period to 45 days (meaning that the employer chooses who provides medical care for the first 45 days).

Employers are also responsible for providing dental service, crutches, artificial limbs, and other appliances necessary to cure and relieve the effects of the injury. If the employer fails, neglects, or refuses to do so, a worker's compensation magistrate could order that the employee be reimbursed for reasonable expenses paid by the employee or order payment be made in behalf of the employee to persons to whom unpaid expenses are owed. The magistrate could prorate attorney fees at the contingent fee rate paid by the employee. The bill specifies that attorney fees related to medical expenses are chargeable to the employee or his or her medical provider, or both, but not to the employer or carrier.

Sections 331 and 353

Section 331 describes individuals that are conclusively presumed to be wholly dependent for support upon a *deceased* employee. The bill would eliminate a provision that says a wife is considered wholly dependent for support on a husband with whom she lives at the time of his death or from whom she was living apart for justifiable cause or because he had deserted her. Section 353 describes who is conclusively presumed to be dependent for support upon an *injured* employee. The bill removes from this section the wife of an injured employee living with the employee at the time of the injury.

Section 354

This section of the act describes how weekly benefits are to be reduced when other benefits are received, such as old-age insurance benefits under Social Security. The act requires the deduction of certain pension or retirement benefits received or being received

by the employee. The bill would add, "or which the employee is *eligible* to receive at normal retirement age."

Section 360

Currently under the act, a professional athlete injured in the course of employment can collect weekly benefits only when that person's average weekly wage in all employments at the time of application for benefits is less than 200% of the state average weekly wage. This bill would add a provision specifying that a professional athlete who is hired under contract with an employer outside of Michigan is excepted from the provisions of the act if all of the following conditions apply:

- The athlete sustains a personal injury arising out of the course of employment while the professional athlete is temporarily within the state.
- The employer has obtained worker's compensation insurance coverage under the worker's compensation law of another state that covers the injury in Michigan.
- The other state recognizes the extraterritorial provisions of the act and provides a reciprocal exemption for professional athletes whose injuries arise out of employment while temporarily in that state and are covered by the worker's compensation law of Michigan.
- The benefits and other remedies under the worker's compensation laws of another state are the exclusive remedy against the employer. A certificate from the duly authorized officer of another state certifying that the employer is insured in that state and has obtained extraterritorial coverage insuring the employer's athletes in Michigan is *prima facie* evidence that the employer has obtained insurance meeting the requirements for the exception to coverage in the act.

Section 361

The bill would require the effect of any joint replacement surgery, implant, or other medical procedure to be considered when determining whether a loss has occurred.

Section 401

The bill as first introduced would have repealed all of Chapter 4, which deals with the occupational diseases and disablements. The H-2 substitute would instead leave that chapter in place. It also would amend provisions in Section 401 to make that section consistent with Section 301.

Section 801

The act currently calls for interest to be paid at a rate of 10 percent per annum from the date each payment is due in cases when weekly compensation is paid under an award of a magistrate, an arbitrator, the board, the appellate commission, or a court. The bill would change the amount of interest to be paid. Interest would be calculated in the same manner as provided for in a money judgment in a civil action under Section 6013(8) of

the Revised Judicature Act. In that section currently, the interest rate is calculated at six-month intervals from the date of filing the complaint at a rate of interest equal to *one percent plus the average interest rate paid at auctions of five-year United States treasury notes* during the six months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually.

This section would also be amended to require, by April 1, 2012, the worker's compensation agency to procure and implement a system utilizing advanced analytics inclusive of predictive modeling, data mining, social network analysis, and scoring algorithms for the detection and prevention of fraud, waste, and abuse.

Sections 835-853

The bill allows for the electronic submission of various notices, applications, orders and opinions in these sections.

Section 835 allows, after six months' time has elapsed from the date of a personal injury, any liability resulting from the injury to be redeemed by the payment of a lump sum by agreement of the parties subject to the approval of a worker's compensation magistrate. Section 836 lists the findings required of a magistrate for a redemption agreement to be approved. The bill would specify that the parties can stipulate in writing to those determinations, and if they do, then the stipulation will serve as a waiver of hearing, and then magistrate can approve the redemption agreement.

Section 853 says that "Process and procedure under this act shall be as summary as reasonably may be." The section says that the director, magistrates, arbitrators, and the board have the power to administer oaths, subpoena witnesses, and examine books and records of parties to a proceeding. The bill would add to this section that 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.

FISCAL IMPACT:

HB 5002 would have a fiscal impact on state and local budgets to the extent that the bill reduces certain liabilities for employers affected by the Workers' Disability Compensation Act (1969 PA 317).

The state government, local governmental units, and public educational organizations constitute the largest employers within the state. HB 5002 would amend various provisions of the act and, generally, limits liability for employers regarding specific benefit provisions and calculations. The magnitude of the cost reductions would be dependent upon the number of people employed by state and local units of government and the amount paid for workers' compensation claims.

According to the Civil Service Commission¹, the State of Michigan directly employed a total of 50,048 employees at the quarter ending June 30, 2011. In the FY 2011-2012 budget, appropriations for workers' compensation claims and reserves throughout all state departments totaled \$35,017,100.

According to the US Census Bureau², aggregate local governments (including school districts & community colleges) employed a total of 331,309 FTEs and state higher education (public universities) employed 74,299 FTEs in 2010.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

¹ Michigan Civil Service Commission, Thirty-Second Annual Workforce Report - Fiscal Year 2010-11, Third Quarter, accessed at http://www.michigan.gov/mdcs/0,4614,7-147-6879_9329_48076-251456--,00.html on 10/04/2011.

² US Census Bureau, 2010 Annual Survey of Public Employment and Payroll Methodology, accessed at <http://www.census.gov/govs/apes/> on 10/04/2011.