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WORKERS' COMPENSATION ALERT

TO: **Our Clients and Friends**

FROM: **Bleakley, Cypher, Parent, Warren & Quinn, P.C.**

RE: **Supreme Court Issues Order in *Lofton*; Significant *En Banc* Decision from the Workers' Compensation Appellate Commission Regarding Specific Loss; WCAC Chairperson to Resign**

DATE: **July 21, 2009**

Supreme Court *Lofton* Order

The much anticipated Supreme Court decision in the *Lofton v AutoZone* case has now been issued. By Order dated July 15, 2009, the Supreme Court remanded the case the Appellate Commission for further proceedings, but failed to offer any further guidance on the issues of disability or wage loss.

Historically, you will recall that the Supreme Court issued a remand order on October 1, 2008 that required specifically that even if the plaintiff was found disabled consistent with MCL 418.301(4) and the disability was only partial, the magistrate must also compute wage loss benefits under MCL 418.361(1), based upon what the plaintiff remains capable of earning. The Supreme Court retained jurisdiction, which was unusual, and it was anticipated that following the magistrate's decision, the Supreme Court would issue a decision that would further articulate the disability standard, as well as the wage loss requirement. As noted above, the initial remand was issued on October 1, 2008, and in the interim, Chief Justice Clifford Taylor lost his bid for re-election and was replaced by Diane Hathaway. That significantly altered the ideological makeup of the court, and one can only speculate as to whether that played a role in the court's decision to issue only an Order remanding the case to the Appellate Commission for further proceedings and evaluation of the magistrate's order following remand.

Regardless, the order did not offer any further clarification of the wage loss requirement or disability standard, and did not contain any specific instructions to the Appellate Commission regarding same. The court only indicated that the case was to be remanded to the WCAC for any challenges the parties may have to the magistrate's

decision pursuant to the appropriate standard of review. Presumably, that includes whether the magistrate utilized the correct applicable legal standard set forth in the *Stokes*' decision regarding disability and also whether the magistrate's decision is supported by competent, material, and substantial evidence on the whole record.

Once an additional decision has been issued by the Appellate Commission we will most certainly keep you advised.

Significant *En Banc* Decision from the Workers' Compensation Appellate Commission Regarding Specific Loss

The Workers' Compensation Appellate Commission consists of five commissioners. Typically cases are heard by a panel of three commissioners and decided accordingly. However, either by motion, or in cases where the commission deems the issue presented of sufficient merit, the commission may hear the case *en banc*. When a case is heard on en banc, that means the entire five person commission sits on the panel and decides the case. There is full participation in *en banc* cases and often times cases are heard in such fashion to create binding precedent on future panels on particular legal issue.

The Commission did just that in the recent case of *Trammel v Consumer's Energy Company*, 2009 ACO #126, which was decided on June 8, 2009.

At issue in that case was whether the plaintiff suffered a specific or scheduled loss in light of the fact that he had a total knee replacement.

The plaintiff argued that he lost all usefulness of his leg prior to the total knee replacement and therefore qualified for a scheduled loss. Further, that a specific/scheduled loss is to be evaluated based up an "uncorrected" standard and therefore his status post knee replacement was irrelevant. The employer concurred that the standard was an uncorrected one; however, the defendant relied upon the Court of Appeal precedent, *Tew v Hillsdale Tool & Manufacturing Company*, 142 Mich App 29 (1985), that corrective aids such as knee replacements which are implanted and become part of the body do not actually constitute a "correction" for purposes of evaluating whether a specific loss has occurred. In other words, a knee replacement is distinguishable and not at all like an external device such as a brace, and therefore an

important distinction must be made when evaluating scheduled losses in cases where implants have become part of the body.

The issue is somewhat novel and plaintiffs have not typically made a claim that a specific loss has occurred in cases involving joint replacements.

That being said, the full commission, i.e., all five members, found that the specific loss section of the act makes no distinction between an external device or implantation, such as a joint replacement, and therefore regardless of whether the implantation becomes part of the body and maintains usefulness, a person can still have a specific loss.

The commission's decision appears to break from the previously-established rule of law, because when one closely looks at prior case law including the *Tew* case, it is evident that the Court of Appeals considered whether a scheduled loss could occur when an implant was utilized.

When the issue first arose as to whether a person could establish a specific loss outside of an amputation, i.e. loss of usefulness (at the time the standard was loss of industrial use), the employer specifically argued that it would be a slippery slope and employees would be making claims for specific loss in cases where implants were utilized and the court specifically made reference and discussed the issue when they allowed specific loss for loss of usefulness (loss of industrial use at the time). The Court explained in *Tew*, in 1985, that their decision did not go so far as to allow for a specific loss in cases involving implants that actually become part of the body and that there was a distinction to be made between devises and medical technology that would allow for a limb to regain its usefulness without external aid. In essence, they explained that there would be <u>no</u> specific loss available in cases involving joint replacement.

Unfortunately, the Appellate Commission with its decision on *Trammel* found that the previous cases evaluating and discussing the distinction between an external device versus an implant were not binding precedent and found the Supreme Court's decision in *Cain I* and *Cain II* [*Cain vs Waste Management, Inc.*, 465 Mich 509 (2002); *Cain vs Waste Management, Inc.*, (after remand), 472 Mich 236 (2005)], is the law.

The Appellate Commission's decision in *Trammel* now represents binding precedent upon all future Appellate Commission panels that specific loss may be

available in cases where a joint replacement has taken place, if a loss of usefulness can be established prior to the implantation.

The practical impact of the *Trammel* decision is that it may significantly increase exposure as specific loss benefits are due and owing regardless of whether a general disability has occurred. For example, a leg (in perhaps in the case of a knee replacement), amounts to 215 weeks and an arm is 215 weeks of benefits under the Scheduled Loss Provisions.

The *Trammel* decision has been appealed to the Court of Appeals, and we will keep you apprised if any further decision is issued in the matter. For now however, please be aware that we may see increased claims of specific loss in the future in light of the *Trammel* decision, and exposure will need to be evaluated accordingly.

If you have any further questions regarding this decision or its impact on the daily administration of claims, please feel free to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, PC.

Workers' Compensation Appellate Commission Chairperson to Resign

Within the next several weeks, the Chairperson of the Workers' Compensation Appellate Commission, Martha Gasparovich, will be resigning to accept a post as a Social Security Administration Judge. It is uncertain at this time, who will be appointed by the governor to replace her and the Appellate Commission will operate with four members until an appointment has been made.

We will keep you apprised of all developments in that regard.

As always, if you have any questions or would like to discuss any of the above, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn directly. We hope you are enjoying your summer, and we will keep you apprised of all developments.