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WORKERS' COMPENSATION ALERT

TO: **Our Clients and Friends**

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

RE: **Partial Disability and the Potential for Retroactive Applicability**

DATE: **January 16, 2012**

We at Bleakley, Cypher, Parent, Warren & Quinn would like to provide you with an additional update and analysis of the new Michigan Workers' Disability Compensation Act, particularly as it applies to the partial disability analysis and the argument that it was intended to be given retroactive intent and apply to all injuries on or after June 30, 1985.

The Revised Bill that was ultimately signed by Governor Snyder on December 19, 2011, and given full legislative effect on December 28, 2011, contains language that suggests that Section 301 and 401 (personal injury disability and wage loss) may have retroactive applicability. In particular, the partial disability analysis *may apply to all injury dates on or after June 30, 1985.* (MCL 418.301(14)). Practically speaking, that means that employers and insurance carriers *may* be able to use the partial disability analysis to seek reimbursement for past paid benefits and diminish future benefit payments to partially disabled workers.

Section 301(4)(a) defines partial disability as an "employee who 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." Section 301(8) and 301(9)(c) then provides an "offset" for employers and carriers based on the existence of a partial disability. This offset is calculated in two ways: (1) if an injured worker is only partially disabled and could work within their partial disability but has refused or failed to seek employment, or (2) an offset when an injured worker who is partially disabled is working within the residual wage earning capacity.

As it stands, it is uncertain, and will undoubtedly become fodder for future argument, whether or not the partial disability analysis will be given retroactive

effect. Originally, the "old" Workers' Disability Compensation Act contained a similar effective date whereby former Section 301 applied to personal injuries and work related diseases occurring on or after June 30, 1985. The original House Bill 5002 introduced into the House of Republican's proposing changes to the Workers' Compensation Act eliminated the language applying those provisions to injuries and work related diseases occurring on or after June 30, 1985. The Senate's revisions reintroduced the June 30, 1985, language into House Bill 5002. By reincorporating the 1985 language into the current Act, it can be argued that this evidences legislative intent to give the partial disability analysis retroactive effect.

To the contrary, the Plaintiff's bar will likely argue that the partial disability analysis was not intended to be given retroactive effect, and if given so, would amount to an *ex post facto* law and violate the United States Constitution. The United States Constitution prohibits the enacting of *ex post facto* laws in Article 1, Section 9 and Article 1, Section 10 (specifically prohibiting states from passing *ex post facto* laws). That being said, subsequent case law has determined that there are some exceptions to the unconstitutionality of an *ex post facto* law.

Or, quite simply, it could be argued that it was a mistake and the entire revised Act was meant to be applicable to injuries only on or after its effective date (12/28/2011).

At this point, it is unclear how this provision will be interpreted. There are plausible arguments to be made on both sides regarding the effective date of the partial disability analysis. We can expect that this issue will be hotly litigated and we will keep you apprised of all new updates in that respect.

Regardless of whether the partial disability analysis is given retroactive effect, the ramifications of this addition to the Workers' Disability Compensation Act are significant and warrant further exploration. As detailed, there are two potentially different scenarios with different mathematical equations for the determination of an employer/carrier's offset.

Partial Disability Analysis When an Injured Employee is Not Working

When it has been established than an injured worker has only a partial disability and that they could be working, but have failed to obtain subsequent work,

the new Act provides a specific calculation to be used to evaluate the employer/carrier's offset. According to 301(8), the "employer shall pay or cause to be paid to the injured employee as provided in this section 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 . . . ." More simply, the employer or carrier will be obligated to pay 80% of the difference between the pre-injury *after-tax average weekly wage* and the residual *wage earning capacity* after the personal injury. The implications of this provision are significant and could theoretically eliminate an employer/carriers obligation to pay ongoing wage benefits altogether.

This provision provides the employer/carrier the benefit of utilizing the residual wage earning capacity to factor the offset. The new Act departs from the "old" Act which would have called for a "rate" versus "residual rate" calculation. Depending on which side of the coin you view this from, this is either an incentive for the partially disabled employee to seek subsequent employment within their current abilities or a punitive provision intended to punish an employee for not seeking available employment.

Partial Disability Analysis When an Injured Employee is Working

In situations when an injured employee has obtained subsequent employment paying less than what they were making before their injury, the Act has provided specific calculations to determine the residual indemnity benefits due and owing to the injured employee. According to 301(9)(c) "If an employee is employed and the weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act *equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage that the injured employee earns after the date of injury* . . . ." This provision permits an employer/carrier to offset their indemnity obligations by 80% of the difference of the pre-injury *after-tax weekly wage* against the post-injury *after-tax weekly wage*.

In both of these scenarios it is important to realize that the calculations are not being made with the standard workers' compensation rate. Instead, the specific derivatives will depend on whether the partial disability analysis falls under the purview of 301(8) or 301(9)(c), i.e. has the employee returned to work or not.

At Bleakley, Cypher, Parent, Warren & Quinn, PC, it is our recommendation that all cases where ongoing indemnity benefits are being paid be reviewed for potential reimbursement and offset rights consistent with the new legislature.