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WORKERS' COMPENSATION ALERT

TO: **Our Clients and Friends**

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

RE: **House Committee Votes on Revised Bill that Proposes Amendments to the Michigan Workers' Disability Compensation Act**

DATE: **October 28, 2011**

We at Bleakley, Cypher, Parent, Warren & Quinn would like to update you on the status of the legislative Bill that proposes various amendments to the Workers' Disability Compensation Act.

PROPOSED STATUTORY AMENDMENTS

As we discussed in our last Newsletter, a Bill (HB 5002) was introduced in the Michigan House of Representatives on September 22, 2011, that proposed amendments to various portions of the Act. We can now report that the House Commerce Committee has debated the Bill, revised the Bill, and voted it to the House floor on October 26, 2011. The Bill now sits before the House for debate and voting, where it is anticipated that the Bill will be passed as recommended by Committee. As currently drafted and proposed, the Bill makes multiple changes to the Act that would benefit employers and insurance carriers.

PARTIAL DISABILITY AND BENEFIT REDUCTION

Perhaps most notably, the Bill allows for employers and carriers to use a claimant's post-injury wage earning capacity to reduce his/her wage loss benefits. Specifically, the Bill draws a distinction between total disability—where the employee is unable to work in any job suitable to his/her qualifications and training—and partial disability—where the employee retains a wage earning capacity at a pay level less than his/her maximum wages in suitable work. In the revised Bill, wage earning capacity is defined as the wages an employee earns or is capable of earning in a job that is reasonably available to that individual, whether or not actually earned. Employers and carriers would then be allowed to pay partially disabled employees the difference between their pre-injury AWW and their post-injury wage

earning capacity. The use of the phrase "reasonably available" was added as a revision to the initial Bill, which was at first silent as to the extent to which the employer/carrier must establish that post-injury jobs are available, or the extent to which the partially disabled employee must show that he looked for post-injury work. "Reasonably available," therefore, is a middle ground between actual post-injury work obtained and hypothetical earning ability.

MEDICAL TREATMENT

In our last Newsletter, we also reported that the proposed Bill would extend from 10 days to 90 days the time period that an employer/carrier can control medical treatment following a work injury. The revised Bill has adjusted this number to 45 days. Despite the revision, this represents a significant benefit to employers and carriers as compared to the current Act, as employees will be unable to treat with physicians of their choice until 45 days from the onset of treatment following a work injury.

PATHOLOGIC AGGRAVATION

Multiple amendments proposed in the initial Bill that aimed to codify Michigan Supreme Court decisions also survived the Committee process and made it to the House floor unrevised. Notably, the now-pending Bill codifies *Rakestraw* by clarifying that a personal injury is compensable if it "causes, contributes to, or aggravates pathology in a manner that is medically distinguishable from the employee's prior condition." This standard has been used since it was enumerated in the *Rakestraw* decision, but the Act currently does not discuss pathologic aggravation.

DISABILITY

In addition, the Bill codifies the *Stokes* decision regarding disability. Like *Rakestraw*, workers' compensation attorneys and Magistrates have relied heavily on the framework and principles of *Stokes*, but those principles are not part of the existing Act.

WAGE LOSS

The revised Bill also proposes that the Act include a definition of "wage loss" that comports with recent case law on the issue. Since the Supreme Court addressed this issue, workers' compensation attorneys and Magistrates have accepted that an

employee is not entitled to wage loss benefits where it can be shown that the employee's wage loss is due to something other than his work injury. The Bill, therefore, seeks to codify this principle in the portion of the statute that addresses an employee's right to weekly wage loss benefits, by making receipt of wage loss benefits conditioned on proof that the wage loss is attributable to the work-related disability. While this has been the practical application for some time, the Act as currently written engendered much debate over the issue. The proposed Bill would allow the employee to establish a wage loss ("among other methods") with a "reasonable, good-faith effort to procure work suitable to his or her wage earning capacity." In other words, the employee's effort to look for work is part of the wage loss analysis.

SPECIFIC LOSS

While the proposed amendments discussed above aim to codify principles previously enumerated by the Supreme Court, the revised Bill also proposes amendments that would overrule the legal reasoning of several decisions, as it relates to scheduled/specific loss. Most notable is the rule of law (*Trammel v. Consumers*) that directed Magistrates to make specific loss determinations in joint replacement cases by analyzing the pre-replacement function of the joint. The revised Bill directs Magistrates to consider the positive effect of a joint replacement surgery when determining whether an employee has suffered a specific loss. This should certainly reduce the number of compensable specific loss claims.

ATTORNEYS' FEES

In addition, the revised Bill would overturn *Peterson*, where the Supreme Court held that attorney fees on medical bills were chargeable to the employer or carrier. Currently, the Act states that a Magistrate can charge attorney fees on medical expenses, but the Act is silent on who is responsible for those fees. This silence created the need for the *Peterson* decision. The new Bill, however, would amend this portion of the Act to explicitly clarify that such fees can be chargeable to the employee or medical provider, but not to the employer or carrier.

Ultimately, the Bill passed by the House Committee and now pending on the House floor would add to the Act various employer- and carrier-friendly provisions that should produce significant cost savings by way of reduced benefit rates, more

control over medical treatment, and changes in legal standards and thresholds that may reduce the number of compensable claims. It would also add to the Act numerous employer- and carrier-friendly Supreme Court decisions. Of course, the revised Bill is not yet enacted legislation, and still must be voted on by the House and passed through the Senate, where it may be revised further. However, it is likely that the most substantial revisions occurred in the House Commerce Committee, and that the Republican-controlled House and Senate will not alter the Bill significantly. We will keep you updated.

This Newsletter is merely a brief update regarding the status of the Bill that seeks to change the Michigan Workers' Disability Compensation Act. If you have any questions or would like to discuss in more detail any portion of the Bill, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, P.C., directly.