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WORKERS' COMPENSATION ALERT

TO: **Our Clients and Friends**

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

RE: **NEW AGENCY FORMS 105A AND 105B; ADA AMENDMENT; MISCONDUCT AND WAGE LOSS; RICO ACT**

DATE: **November 21, 2008**

We at Bleakley, Cypher, Parent, Warren & Quinn would like to provide you an update with regard to several cases that have recently been decided by the Michigan Supreme Court and Court of Appeals that impact the daily administration and handling of workers' compensation claims.

In recent weeks, the courts have issued numerous decisions surrounding the disability inquiry including wage loss, average weekly wage, etc.

The Supreme Court in the case of *Stokes v Chrysler, LLC*, 481 Mich 266 (2008), made it abundantly clear that the parties are entitled to discovery under appropriate circumstances to investigate the issue of disability. That being said, employees, employers, claims professionals, and attorneys were left with little guidance as to the general parameters of necessary and attainable discovery information, other than a general proclamation that a magistrate has the authority to require discovery when necessary.

In that context, in an effort to facilitate the discovery process the Agency, in conjunction with the cooperation and assistance of the above parties, has created two new forms to assist in the discovery process. Those forms will be identified and discussed below.

Also addressed in this newsletter is an amendment to the Americans with Disabilities Act that was signed on September 25, 2008, and is scheduled to take effect on January 1, 2009. The amendment significantly broadens the definition of "disability" defined by the ADA, and may very well increase the burden of an employer to reasonably accommodate any disability. It may also increase overall exposure and value of workers' compensation claims.

Lastly, we would like to bring to your attention a recent case decided by Magistrate Barnes on April 28, 2008, by the name of *Kuikstra v Challenge Manufacturing Company*, wherein the magistrate denied *Kuikstra's* claim for wage loss benefits based upon his voluntary removal from the employment setting and violation of company policy.

NEW FORMS

As you are aware, one of the first and foremost steps in evaluating the issue of disability is to determine an employee's qualifications, skills, training, and prior work experience. Often that information will allow employers to determine whether an employee has any transferrable skills, and whether jobs exist in the ordinary marketplace that the plaintiff is capable of performing.

To aid in the exchange of that information the Agency has created the Form 105A, which is a voluntary form an employer or its representative may submit to the employee that requests the employee to identify in detail his qualifications, training, and prior work experience. From a qualification standpoint, it requests information regarding education, computer skills, certifications of any kind, etc. As to prior work experience, it request dates of employment, rate of pay, and nature of prior job activities. While the form is not all encompassing, it does provide a good starting point.

In addition to the Form 105A, it is often necessary to utilize other means of discovery including subpoenas, interrogatories, or vocational assessments. For instance, the form does not require the employee to identify if the employee has actually looked for work in the ordinary marketplace and/or any jobs the plaintiff has applied for post injury date. That is information that is certainly relevant to the disability inquiry, and again, other methods are potentially available to obtain other information not contained on the Form 105A.

The Form 105B, Employer Disclosure Questionnaire, is also a voluntary form that may be used to facilitate the exchange of information consistent with the disability inquiry in *Stokes*. The Form 105B requests information from the employer regarding the duration of employment, wage earned, and fringe benefits. It also requests information regarding the claimant's actual job description and duties. Further, it requests whether the type of employment performed by the employer required any special license, training or certification. Lastly, it requests whether any offer of employment has been issued to the employee post date of injury. For the most part, the Form 105B does not require any information that is not routinely exchanged throughout the course of litigation and is not a substantial change in the discovery process.

If you have any questions regarding the Form 105A or Form 105B, please contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn.

ADA AMENDMENT

Recently, on September 25, 2008, congress signed into law an amendment to the Americans with Disabilities Act that broadens the definition of disability. Purportedly, Congress was concerned that the definition had been too narrowly interpreted by the courts, such that a number of employees with physical and mental illnesses were improperly restricted from coverage under the ADA.

Under the ADA, any impairment that "materially restricts" a person from performing any major life activity constitutes a disability. If it is determined that someone is disabled, an employer has an obligation to "reasonably accommodate their disability." In other words, make a reasonable attempt to provide accommodations so that a disability does not preclude the employee from ongoing employment.

Major life activities will now include immune system activity, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The new amendment also brings under the umbrella of the ADA episodic conditions and conditions in remission if they substantially limit a major activity.

Previously court decisions had interpreted the ADA and the definition of disability to include only those cases of severe or permanent long term conditions. Also, previously, the court indicated that mitigating measures were be taken into account before the determination of disability was made. In other words, medication could be a mitigating factor and if medication controlled the

condition, an individual would not necessarily be disabled. The amendment prohibits a number of mitigating measures and arguably intends to provide for a disability analysis prior to the application of mitigating factors rather than after.

Again, the new law is scheduled to take effect on January 1, 2009, and as a reminder the ADA Act only applies to employers with 15 or more employees, but will also now include part time and temporary workers for at least 20 weeks in the current or previous year.

From a practical standpoint, because the amendment broadens the definition of disability, presumably, it will add merit and validity to additional claims under the ADA that previously would have been excluded because the claim did not meet the disability standard set forth by the ADA, per prior court decisions. Because workers' compensation settlements typically involved the waiver of any and all State and/or Federal claims, in addition to claims under the Workers' Disability Compensation Act, the increased likelihood that additional claimants will have viable ADA claims may make it more difficult to obtain a complete and comprehensive waiver of any and all claims in conjunction with a redemption agreement. We may very well see increased demands for any settlement that would include waiver of the potential ADA claim. Once the law takes effect in January and case precedent is set under the new amendment, we will be in a better position to advise you as to the amendment's practical impact on the administration of workers' compensation claims. We will most certainly keep you apprised of all developments. At present, if you have any questions regarding the ADA amendment, please do not hesitate to contact us.

MISCONDUCT AND WAGE LOSS

This case represents a quintessential example of the concept of wage loss that has been the subject of numerous court decisions, newsletters, and litigation in the past.

In the case of *Kenneth Kuikstra v Challenge Manufacturing Company*, Magistrate Barnes determined that the plaintiff suffered a rotator cuff tear to his left shoulder as a result of his employment activities.

Company policy at Challenge Manufacturing Company required any injured employee to submit to a drug screen, and further provided that a positive drug screen for a medication for which the employee does not have a valid prescription is grounds for termination.

Ultimately, it was determined that the plaintiff utilized Valium without a prescription for same in violation of company policy. As such, Mr. Kuikstra was terminated based upon a violation of company policy.

While the magistrate did find that the claimant suffered a work-related injury and awarded reasonable and necessary medical related to his left shoulder injury, she determined that the plaintiff was not entitled to wage loss benefits because his wage loss was due to a violation of company policy and not a result of his work-related injury.

It is noteworthy that the magistrate did not discuss or utilize the "100 week rule" as part of her decision.

In addition to the wage loss concept, this case does support, in our opinion, the additional defense of "constructive refusal of employment." In other words, if an employee's intentional and willful misconduct and/or violation of company policy results in a termination, we have the legitimate defense that the plaintiff has voluntarily or constructively refused post injury employment and therefore is not entitled to ongoing wage loss benefits. Obviously that position is

often at odds with the so called "100 week rule;" however, the issue and concept of wage loss is becoming more prevalent and the above-mentioned decision is representative of that fact.

RICO ACT

While everyone has most likely heard of the Federal Racketeer Influence and Corrupt Organizations Act, the question everyone probably has, is what does that have to do with the administration of workers' compensation claims in the Workers' Compensation Act.

On October 23, 2008, United States Court of Appeals for the 6th Circuit (which encompasses Michigan), in the case of *Brown, et al v Captain Transport Company, et al*, issued a decision that could potentially impose liability on employers who, in conjunction with insurers, deny claims.

Specifically, the Court of Appeals ruled that the plaintiff (a workers' compensation petitioner) could proceed against an employer on a claim that the employer violated the Rico Act. In particular, the plaintiffs alleged that the employer and third-party administrator deliberately colluded to obtain fraudulent medical opinions that would support denial of workers' compensation benefits and made fraudulent communications amongst themselves to the plaintiffs by mail and wire. Initially the District Court dismissed the claim because the court did not feel that the allegations made by the plaintiff constituted a pattern of racketeering activity. Rico states that "a pattern of racketeering activity requires at least two acts of racketeering activity."

The Court of Appeals explained the District Court's focus was improper and that it should have looked at that pattern of the defendant's alleged scheme against the plaintiff, rather than the number of predicate acts allegedly committed against each victim.

The Court of Appeals did not find that the employers committed a violation of the Rico Act, but rather the Court of Appeals ruled on procedural grounds that the plaintiff had alleged sufficient acts to potentially qualify under the Rico Act, and the plaintiffs were entitled to a trial on the merits of their claims.

As a general proposition, the Court of Appeals decision provides that it is possible an employer and insurers fraudulent denial of workers' compensation benefits could constitute a violation of the Rico Act.

We here at Bleakley, Cypher, Parent, Warren & Quinn do not expect a rash of claims against employers and insurers under the Rico Act, but do feel it is noteworthy to point out the Court of Appeals' liberal interpretation of the Rico Act encompasses fraudulent conduct involved in the administration of the Workers' Disability Compensation Act. It goes without saying that the intention of the Rico Act was to fight organized crime, not impact the administration of the Workers' Disability Compensation Act.

We will continue to follow the court case and will update you once a decision has been issued by the Federal District Court, following the 6th Circuit's remand for a trial on the merits.

If you have questions regarding any of the above cases or any other issues, please feel free to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, P.C.