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WORKERS' COMPENSATION ALERT

TO: **Our Clients and Friends**

FROM: **Bleakley, Cypher, Parent, Warren & Quinn**

RE: **Recent Michigan Supreme Court Decision regarding Jurisdiction**

Federal Court Cases Regarding the Application of RICO (The Federal Racketeer Influence and Corrupt Organizations Act) to Workers' Compensation Litigation

DATE: **May 11, 2010**

We at Bleakley, Cypher, Parent, Warren & Quinn strive to provide the best legal services available with respect to workers' compensation matters in Michigan and, consistent with that goal, we would like to provide you with an update regarding several recent cases that impact the administration and defense of workers compensation claims.

JURISDICTION UNDER THE WDCA

In 2007, the Michigan Supreme Court tackled the issue of jurisdiction in the case of *Karaczeweski v Farm & Stein Company*, 479 Mich 28 (2007). The Supreme Court determined that the Workers' Compensation Act conferred jurisdiction on out of state injuries when, 1) the employee was a resident of Michigan when the injury occurred and 2) the contract of hire was made in Michigan. The Court made it clear that, based upon their interpretation of the Act, both elements needed to be met.

In response, the Michigan legislature amended Section 845 and provided for jurisdiction when only one of the above elements is met. The amendment went into effect on January 13, 2009. In other words, the Workers' Compensation Act affords jurisdiction over any out of state injury if either the employee was a resident of Michigan at the time of injury or the contract of hire was made in the State of Michigan. As of January 13, 2009, both requirements were no longer necessary, as the legislature definitively increased the jurisdictional limits of the Workers' Disability Compensation Act. The question left unanswered was whether the amendment applied retroactively to injury dates that occurred before the amendment took effect.

The Michigan Supreme Court answered that question on May 10, 2010, when it issued the decision of *Brewer v. A.D. Transport Express, Inc.* (docket #139068). The Court determined once and for all that the amendment applies to only those dates of injury that occur after January 13, 2009. Thus, dates of injury that fall before the effective date of the amendment must meet both requirements (residency and contract of hire) in order to meet the jurisdictional requirements of the Workers Compensation Act.

To reiterate, for dates of injury after January 13, 2009, there is jurisdiction over an out of state injury if either the employee was a resident of Michigan at the time of injury or the contract of hire was made in the State of Michigan.

RICO ACT

As you are aware, litigation often does not end with the decision by the trial court. As a result, it is often impossible to determine the true effect of a case or statute until it has been put through the appellate process and subsequently applied.

Previously, on October 23, 2008, the United States Court of Appeals for the Sixth Circuit (which encompasses Michigan), issued a decision in the case of *Brown, et al v Cassens Transport Company, et al*. The court's decision stood for the general proposition that it was possible that an employer and insurers fraudulent denial of workers' compensation benefits could constitute a violation of RICO (Federal Racketeer Influence and Corrupt Organizations Act).

The decision was interesting because, on its face, the intent of the RICO act was to fight organized crime, not impact the administration of the Michigan Workers' Disability Compensation Act. Of course, that begs the question as to whether the *Brown* decision has had an impact regarding claims against employers and insurers under the RICO Act.

Recently, in the Eastern District of Michigan, the Court had an opportunity to provide some guidance. The following two cases were recently decided by the federal trial court and they may be instructive on how RICO allegations will be dealt with in the future.

***Jackson v. Sedgwick Claims Management Services, Inc.*, 24 MIWCLR 28 (E.D. MICH. 2010)**

In *Jackson*, multiple employees alleged that the defendant employer, its third party administrator, and independent medical examiner, Dr. Paul Drouillard, violated RICO by scheming to fraudulently deny plaintiffs' workers' compensation benefits. All three defendants filed motions to dismiss plaintiffs' claims and the trial court ultimately did so.

The Court determined that a plaintiff may not use RICO as an "end run" around the WDCA and that the particular Plaintiffs in this litigation failed to state a claim for relief under RICO by failing to plead the required elements of (a) conduct (b) of an enterprise (c) through a pattern (d) or racketeering activity.

The *Jackson* trial court appears to have all but ignored the Appellate Court's decision in *Brown* and seemingly fashioned its decision specifically to diminish the potency of *Brown* by setting a high threshold for employees to file a viable RICO claim arising from their Michigan workers' compensation litigation.

***Lewis v. Drouillard*, 24 MIWCLR 29 (E.D. MICH. 2010)**

In *Lewis*, multiple employees alleged the defendant employer, insurance company, and physician collectively partook in activity in violation of the RICO Act. The physician, Dr. Drouillard, sought dismissal of the claims against him, arguing that the doctrine of witness immunity shielded him from civil liability relating to his performance of IME's and subsequent issuance of written reporting.

The trial court denied Dr. Drouillard's motion for dismissal, holding that extension of absolute immunity only applies to actual testimony in a judicial/administrative court proceeding and does not extend to IME reports, which are non-testimonial and documentary in nature. In other words, absolute witness immunity does not protect a witness from non-testimonial acts (i.e., falsification of an IME report) committed before a witness testifies at trial or by deposition, even if his testimony is consistent with the report.

The *Lewis* Court's analysis did not involve examination of the validity or adequacy of the alleged RICO violations and, as a result, the decision does not shed light on the seemingly high screening threshold set by *Jackson,* as discussed above.

It appears that the trial courts may be reluctant to embrace the *Brown* decision, which can make it difficult for employees to pursue RICO claims. We will keep you apprised of all developments regarding the viability of RICO claims against employers and insurers.

In the interim, please feel free to contact any of our attorneys at Bleakley, Cypher, Parent, Warren & Quinn should you have any questions.