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WORKERS' COMPENSATION ALERT

TO: **Our Clients and Friends**

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

RE: **Commission issues Opinion on partial disability wage and rate calculations; Commission imposes sanctions on insurance carrier; Possible statutory changes**

DATE: **September 12, 2011**

We at Bleakley, Cypher, Parent, Warren & Quinn would like to update you on recent developments in the Workers Compensation arena, including recent Opinions from the Appellate Commission regarding benefit rates and post-injury earning capacity for partially disabled employees, as well as sanctions for insurance carriers and employers.

WAGE AND RATE CALCULATIONS IN PARTIAL DISABILITY CASES

The Michigan Workers' Disability Compensation Act contains a partial disability provision that applies to claimants who retain some wage earning ability following a work injury. MCL 418.361(1). Since the *Stokes* decision, which discusses disability as the inability of a claimant to earn his maximum pre-injury wage, Magistrates have struggled with the interpretation and application of the partial disability provision as it relates to wage loss issues in cases where the claimant retains some, but not maximum, post-injury wage earning ability.

In our June 6, 2011, newsletter, we discussed the recent Michigan Supreme Court Order in *Harder v. Castle Bluff Apartments*, which provided some guidance regarding how the Court views the issue of partial disability. There, four of the seven justices joined an Order that stood for the proposition that partial disability analysis under MCL 418.361(1) was relevant in all cases where the claimant retained some post-injury wage earning ability. In doing so, the Court cited to its 2008 decision in *Lofton v. Autozone, Inc*, a case in which the Court remanded to the Appellate Commission and suggested that a calculation of wage loss benefits in partial

disability cases must take into account the amount that the claimant remains capable of earning.

Harder's language, as well as its reference to *Lofton*, suggested that the Court was requiring Magistrates and the Commission to calculate compensation rates in partial disability cases by explicitly reducing the claimant's rate by the amount he remains able to earn after his injury. But because *Harder* was only an Order without a corresponding Opinion to provide further guidance, the impact of *Harder* on Magistrates and the Commission was unknown.

Recognizing this, the Commission has issued two recent decisions that clarify how Magistrates should address residual earning capacity and calculate weekly wages and rates in light of *Harder's* directive. In both *Brackenrich v. Sun Chemical Corp*, 2011 ACO #106, and *Doty v. General Motors Corp.*, 2011 ACO #108, the Commission was presented with a defendant who raised a wage loss issue on appeal. Specifically, both defendants asked the Commission to find that the claimant's residual wage earning capacity should serve as a "credit" or set-off for wages earned that would operate to reduce the benefit rate.

In both Opinions, the Commission expressly cited *Harder* and *Lofton*. Specifically in *Doty*, the Commission stated that the Supreme Court Orders have directed Magistrates "to calculate benefit rates that provide credit for wages that injured workers are able to earn in accordance with MCL 418.361(1)." In offering further guidance, the Commission said that *Stokes'* principles for establishing a claimant's wage earning capacity as part of disability analysis are equally applicable for establishing a claimant's residual wage earning capacity as part of wage loss analysis. In application, this means that pursuant to *Brackenrich* and *Doty* the Magistrate is now required to determine whether the claimant has <u>any</u> post-injury wage earning capacity in all jobs within his/her qualifications and training, not just those under *Stokes* that pay his/her maximum wage. The Magistrate must then determine whether the claimant adequately searched for these potential jobs. If not, the residual wage earning capacity could operate to reduce the claimant's benefit rate.

Previously, the Michigan Supreme Court Orders implied that a claimant's weekly wage and rate could be reduced by his post-injury earning ability. These new

Commission Opinions go further by establishing that the Supreme Court Orders require Magistrates to consider residual wage earning capacity when calculating benefit rates, and by providing specific principles for Magistrates to follow in doing so.

Ideally, we would be able to establish in each case that the claimant remains able after his/her injury to earn his/her maximum pre-injury wages, so that he/she is not disabled under *Stokes*. But now more than ever, it is important to present evidence in each case that the claimant can still perform some type of post-injury employment, regardless of the wage, as it appears such evidence will now allow for a rate reduction if the claimant does not look for that employment.

SANCTIONS

Pursuant to statute, Magistrates and the Commission have the discretion under MCL 481.861b to issue sanctions upon parties for pleadings and other claims that it deems grossly unfair or lacking proper purpose, such as for reasons of delay or harassment. Although historically this has been a little used provision, the Commission has made clear recently in its decision of *Hile v. Grupo Antolin Michigan*, 2011 ACO #87, that it will not hesitate to sanction insurance carriers and employers when it feels that it is appropriate.

In *Hile*, the Magistrate ordered in June 2010 that the defendants pay for the claimant's reasonable and necessary work-related medical treatment. The defendants then filed a claim for review, which the claimant asked to be dismissed because the defendants had not paid certain medical bills as ordered by the Magistrate. In reply, the defendants submitted an Affidavit swearing that it had processed the bills that the claimant felt were unpaid, and that the bills were no longer an issue. However, the claimant filed a second motion several months later, again alleging that those same bills remained unpaid. This time in response, the defendants claimed that it "will process" the bills and they will soon no longer be an issue. The Defendants' second response—that it will pay the bills—signaled to the Commission that the first response—that the bills had been paid—was untrue. The Commission made clear that sanctions are a possibility whenever "a party proceeding before the Commission makes representations which are untrue." The Commission also referenced the fact

that the defendants made no effort between its responses to pay the bills. As a result, sanctions were imposed in the amount of $500.00.

While the facts in *Hile* may be extreme, the Opinion shows that the Commission is not afraid to impose sanctions upon parties, and that it will use sanctions to promote efficiency and weed out claims and arguments that lack merit or are not made in good faith.

POSSIBLE STATUTORY AMENDMENTS

As many of you may have heard, it is rumored that the Legislature will soon make statutory changes to the Workers' Disability Compensation Act. There is apparently discussion to amend the statutory provisions regarding, among other things, disability, post-injury earning capacity, scheduled loss as it relates to joint replacement operations, attorney fees, coordination with old age social security benefits, etc. At the time of this newsletter, no concrete information was known regarding specific changes. We will be sure to keep you updated as we learn more about potential changes to the statute.

As always, if you have any questions or concerns, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, P.C., directly.