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WORKERS' COMPENSATION ALERT

TO: Our Clients and Friends
FROM: Bleakley, Cypher, Parent, Warren & Quinn, P.C.
**RE: RECENT COURT DECISIONS INVOLVING INTENTIONAL,
WILLFUL MISCONDUCT AND WAGE LOSS**
DATE: August 1, 2008

We at Bleakley, Cypher, Parent, Warren & Quinn would like to update you on several cases that have recently been decided by the Michigan Supreme Court and Workers' Compensation Appellate Commission that we believe will have a far-reaching impact on the daily administration and handling of workers' compensation claims.

In the first case of *Brackett v Focus Hope, Inc.*, (decided by the Michigan Supreme Court on July 30, 2008), the rule of law bars the receipt of workers' compensation benefits when an employee's injury is the result of intentional and willful misconduct. Specifically, the Court provided necessary clarity regarding what type of circumstances constitute intentional and willful misconduct.

The case of *Todor v Northland Farms, LLC*, 2008 ACO#153, was decided by the Workers' Compensation Appellate Commission on July 28, 2008. Our firm proudly represented the interests of Northland Farms, LLC, and Farm Bureau Insurance Company. We believe the wage loss requirement articulated in *Todor* will have a significant impact on the defense of workers' compensation claims in Michigan.

**MICHIGAN SUPREME COURT TACKLES
INTENTIONAL AND WILLFUL MISCONDUCT**

In the interesting case of *Brackett v Focus Hope, Inc.*, the Supreme Court tackled the issue of whether an employee's refusal to attend a mandatory event constituted intentional and willful misconduct, thereby barring the receipt of workers' compensation benefits under MCL 418.301(5).

Historically, plaintiff Patricia Brackett was hired by Focus Hope as a full-time employee in January of 2001. The cofounder and executive officer of Focus Hope explained to the plaintiff at the time of hiring that the primary mission of Focus Hope is to seek racial equality and reconciliation. As part of that mission and goal, it was explained to the plaintiff that the most important function of the year for Focus Hope was the Martin

Luther King, Jr., birthday celebration and that each employee was expected to attend that event. If the employee had a legitimate reason for not attending, the employee was to inform the human resources department.

Ordinarily, the King-day event was held in Detroit, but in 2002 the CEO decided to hold the event in Dearborn. The plaintiff refused to attend the event because she did not feel comfortable, as an African American, attending the event in Dearborn based upon the history of race relations which she believed was not consistent with Dr. King's aspirations.

The plaintiff was docked one day pay for her failure to attend the event. Subsequently there was an exchange of memos between the claimant and the CEO regarding her failure to attend the King-day event and a reduced confidence in the plaintiff's commitment to Focus Hope's goals. The plaintiff was not terminated, but it was made clear to her that her failure to attend the event did not reflect highly upon her commitment to Focus Hope and its mission.

The plaintiff ultimately claimed that the CEO's alleged comment regarding her disappointment and lack of confidence in her traumatized her and caused a mental disability. The Magistrate, Appellate Commission, and Court of Appeals granted the plaintiff wage loss and rejected the employer's argument that the plaintiff's misconduct barred her recovery of benefits. While the Magistrate found that the plaintiff's alleged reaction to the event was "excessive bordering on outlandish," the Magistrate did not feel that the plaintiff's conduct rose to the level of intentional and willful misconduct.

DEFINITION OF INTENTIONAL AND WILLFUL MISCONDUCT

The Supreme Court first explained that conduct is "intentional and willful misconduct" if it is "improper" and done "on purpose" despite the knowledge that it is against the rules. Further, intentional means done with the aim of carrying out the act. Willful misconduct is defined as a deliberate disregard by an employee of the employer's interests, including its work rules and standards of conduct. The Court noted in past decisions that it had defined "willful misconduct" as an employee's "obstinate or perverse opposition to the will of the employer."

Of importance, the Supreme Court made it clear that there is no sliding scale regarding what constitutes intentional and willful misconduct and there are not degrees of intentional and willful misconduct. In doing so, the Supreme Court specifically determined that there is no "moral turpitude" requirement and the statutes simply exclude benefits when the injuries arose by reason of the employee's intentional and willful conduct. In

other words, when an employee's disability flows directly from an employer-imposed discipline for misconduct, the employee is not entitled to benefits consistent with §301(5).

The Court ultimately determined that the plaintiff's refusal to follow her employers clearly expressed rule constituted an "obstinate or perverse opposition to the will of the employer" and she was disciplined for her misconduct. Her disability resulted from employer-imposed discipline for misconduct and, as such, she was barred from receiving workers' compensation benefits.

CONCLUSION

In conclusion, the Supreme Court in *Brckett* made it clear that there are no varying degrees of intentional and willful misconduct. The conduct either is or is not intentional.

From an employer's perspective, it provides a glimmer of hope in today's liberal climate that employee misconduct can be dealt with in an appropriate fashion without the repercussions of a costly workers' compensation claim.

This Supreme Court's decision stands for the proposition that when an employee violates a fundamental company policy or rule, it may represent intentional or willful misconduct. Further, if the employee is disciplined for the intentional and willful misconduct, and an injury or disability flows directly from the employer-imposed discipline, it does not necessarily constitute a compensable disability under the Workers' Disability Compensation Act.

WAGE LOSS

While the issue and definition of disability has been addressed by the Michigan Supreme Court ad nauseam (most recently in the *Stokes v Daimler Chrysler* decision) the Court has not yet specifically addressed the issue of wage loss.

Under the wage loss concept, an employee is not entitled to wage loss benefits to the extent that actual jobs exist in the ordinary marketplace. Wage loss is a separate and distinct requirement from the establishment of disability. In other words, even if the claimant establishes a compensable disability, a claimant must also establish a wage loss. The wage loss concept has not been uniformly accepted by all lower tribunals to date and remains a hotly litigated topic.

The import of the wage loss issue is that even if a claimant establishes the inability, due to a work-related injury, to perform all jobs that pay at the maximum earning capacity,

and thus establishes a disability, if jobs exist that pay less, then the employer should arguably be entitled to a credit/offset represented by the actual jobs that are available in the ordinary marketplace. Furthermore, the concept of wage loss requires a causal connection between any work-related injury and wage loss. Thus, to the extent that an employee's wage loss is not caused directly by the work-related injury, but due to some non-work related issues such as non-work related degenerative disc disease or cancer, their entitlement to benefits could be reduced accordingly.

While the Supreme Court in the *Stokes* decision did not specifically address the issue of wage loss, it did specifically indicate that it is an entirely separate issue and requirement apart from the establishment of disability.

As noted above, this issue has been hotly contested over the last several years and we are pleased to report that the law firm of Bleakley, Cypher, Parent, Warren & Quinn has received a favorable decision from the Workers' Compensation Appellate Commission regarding the issue of wage loss in the case of *Todor v Northland Farms, LLC, and Farm Bureau Insurance Company*, 2008 ACO#153.

Thomas Todor suffered a work-related rotator cuff tear that prevented him from performing all jobs within his qualifications and training with the exception of a prior job that he performed at Zelenka Nursery. The Magistrate specifically found that the only reason the plaintiff did not perform his job at Zelenka Nursery was because of a non-work related degenerative disc disease.

That being said, because the claimant established a compensable disability due to a shoulder injury, the Magistrate awarded the claimant wage loss benefits, despite the fact that the claimant's shoulder injury did not prevent him from performing the job at Zelenka Nursery. Essentially, the Magistrate did not address the issue of wage loss and determined that the claimant was disabled because the job at Zelenka paid less than his maximum earning capacity.

On appeal, we argued that the plaintiff was not entitled to wage loss benefits as he did not establish a work-related wage loss because his inability to perform the job at Zelenka was not due to any work-related injury, rather a non-work related degenerative disc disease. The Appellate Commission reversed the decision of the Magistrate, remanded for further analysis, and specifically required the Magistrate to determine the amount of wage loss attributable to his shoulder injury.

In other words, to the extent that lesser paying jobs exist in the ordinary marketplace that are available and that the plaintiff is not precluded from performing by

any work-related injury, then the claimant has not established a compensable wage loss and is not entitled to wage loss benefits in that amount.

The *Todor* decision is an extremely important decision because the Commission acknowledged and enumerated the requirement that a claimant must establish wage loss in addition to and apart from the establishment of disability.

The concept of wage loss and the *Todor* decision will have far-reaching impact in that wage loss covers a broad spectrum of issues including the residual earning capacity argument (i.e. jobs that pay less), wage loss due to non-work related issues, and subsequent intervening non-work related incidents.

Application of the *Todor* decision and the wage loss issue can be used effectively as a mitigation tool and we urge you to contact us if you have cases that involve potential non-work related issues as a causative factor of wage loss.

Also, it is important to note that the Appellate Commission did not preclude assessment of wage loss issue under the guise of the “100 week rule,” which has been often utilized by several of the liberal commissioners.

If you have questions regarding either of the above cases, or any other issues for that matter, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren, & Quinn for further explanation, discussion, or application.

As always, we will continue to keep you apprised of all developments.