



Legislature Overhauls Workers' Compensation Act

Foster Swift Workers' Compensation Update

April 2012

PRACTICE AREAS

Workers' Compensation

A flurry of House and Senate hearings, beginning in October and ending in November, led to the first major overhaul of the Workers' Compensation Act in 42 years. Certain amendments codify existing case law while others led to substantive changes altering both common law and procedure. The changes set forth in Public Act 266 of 2011 are below:

- Revision of the factors and method for determining whether a worker is an "employee." Section 161(1)(l) and (n); *McKissic v Bodine*, 42 Mich App 203 (1972); IRS Revenue Ruling 87-41, 1 C.B. 296.
- Requirement that an injury be "medically distinguishable" from an employee's prior condition in order to be compensable. Section 301(1). *Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220; 666 NW2d 199 (2003).
- Requirement that an employee's perception of actual events be grounded in reality, for a mental disability to be compensable. Section 301(2). *Robertson v Daimler Chrysler*, 465 Mich 732 (2002).
- Provision delineating the elements required for a finding of disability -- a "limitation of wage earning capacity." Section 301(4)(a).
 - Disability is "partial" where the employee retains a wage earning capacity in reasonably available work suitable to his qualifications and training. *Id. Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002); *Stokes v Daimler Chrysler LLC*, 481 Mich 266 (2008).
 - Disability is total where the claimant cannot perform any work for which he is qualified and trained. *Id.*
- Inclusion of a provision dealing with wages an employee earns or is capable of earning in job(s) reasonably available to that employee when determining the definition of "wage earning capacity." *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002); *Stokes v Daimler Chrysler LLC*, 481 Mich 266 (2008); *Harder v Castle Bluff Apartments*, 489 Mich 951 (June 3, 2011); *Lofton v Autozone, Inc.*, 482 Mich 1005 (2008).

- Provision requiring that an employee must make a good-faith effort to find suitable work when determining extent of disability and amount of compensable wage loss. Section 301(4)(b)
- Provision giving an employer the right to produce evidence refuting an employee's initial showing of disability and wage loss. Section 301(6). *Sington; Stokes, supra*.
- Significant modification of favored work ("reasonable employment") provisions making employee fault a critical factor whenever employee loses or is terminated from favored work -- even during the first 100 weeks. Section 301(5). See e.g., *Russell v Whirlpool*, 461 Mich 579 (2000); *McJunkin v Cellasto Plastics*, 461 Mich 579 (2000); *Perez v Keeler Brass*, 461 Mich 602 (2000).
- Provision allowing employer to direct medical care for the first 28 days, rather than the first 10 days. Section 315(1).
- Requirement stating the effect of medical treatment is to be considered when determining whether the plaintiff has suffered a specific loss of a body part. Section 361(2). *Trammel v Consumers Energy*, 2009 ACO #126.
- Revision of the interest rates used for calculation of accrued weekly compensation. Section 801(6).
- Deletion of certain unconstitutional provisions pursuant to which a wife was presumed to be dependent on her husband for support. Sections 331 and 353. *Day v Foote Memorial Hospital*, 412 Mich 698 (1982).
- A change in the way old age social security is coordinated in cases where the claimant was in receipt of old age social security prior to his date of injury. Section 354(1)(a).
- A provision allowing coordination with all unemployment benefits, even those not chargeable to the same employer. Section 358.
- Provision allowing pension or retirement payments that an employee was entitled to receive to be used for coordination. Section 354(1)(d).

NEW PROCEDURAL AND QUALIFICATIONS CHANGES

- Provision allowing parties to stipulate to certain determinations regarding a redemption agreement.
- Provision allowing claims to be made either electronically or on written forms.
- Provision allowing application for a hearing or mediation to be submitted electronically, and a magistrate's opinion and order to be submitted and distributed electronically.
- Requirement that magistrates be evaluated annually, rather than biennially.
- Elimination of term limits for magistrates.
- Elimination of certain standards for appointment as a magistrate.
- Director's right to appoint temporary magistrates without legislative approval. Sections 210-213.
- Provision for elimination of the Qualifications Advisory Committee. Section 209.
- Provision repealing mandatory mediation and eliminating the mediation process and mediators. Section 223.



- Provision eliminating the former Workers' Compensation Appellate Commission and creating the Michigan Compensation Appellate Commission (combining the appellate bodies for unemployment claims and workers' compensation claims. Section 274).

There is already significant disagreement between plaintiffs and defendants over what the statutory changes actually require and how they are to be implemented. Over the next several months, we anticipate increased litigation as parties try to determine the meaning of this new legislation.

We will continue to keep you apprised of how the magistrates and the Appellate Commission interpret the new provisions. If you have questions about any of the statutory amendments or require greater detail, please feel free to contact us.

