

LEGAL ADVISORY



KOPKA PINKUS DOLIN & EADS, PLC

CHANGES TO MICHIGAN'S WORKERS' COMPENSATION ACT

written by Jerry R. Newman

The Michigan Legislature has enacted major changes to the Workers' Compensation Act which were recently signed by the Governor.

The changes are presented below, with comments when appropriate.

DEFINITION OF A SELF-EMPLOYED PERSON

As of January 1, 2013, services provided by an individual will be considered employment if the person is determined to be in an employer-employee relationship using the 20-factor test of the IRS. The determination is to be made by the Michigan Administrative Hearing System.

If an employer is required to withhold Federal income tax for an individual, that is prima facie proof the individual is considered an employee.

A business will be able to ask the Michigan Administrative Hearing system whether one or more individuals performing service for the business in Michigan are engaged in covered employment. The hearing systems are required to issue a determination on the issue.

Comment: It is unclear at this time if the determination will be made by a Workers' Compensation Magistrate or some other person.

SELECTION OF MAGISTRATES

The Qualifications Advisory Committee has been abolished, as has the written examination for the position of Magistrate. The requirement of 5 years experience practicing workers' compensation law in the state is also abolished.

The new requirement is now that a Magistrate simply needs to be an attorney for 5 or more years for appointment by the Governor. The 12 year limit on serving as a Magistrate has been eliminated.

Each Magistrate will now be reviewed each year by the Executive Director of the Administrative Hearing System and the Chief Magistrate. A new measure of review is the adherence to establish productivity standards.

The Governor can remove a Magistrate upon recommendation of the Department of Licensing and Regulatory Affairs based upon a written report of the annual evaluation.

There will be a maximum of 17 Magistrates, each term is for 4 years.

Legal Advisory

DEFINITION OF INJURY

A personal injury is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury.

Degenerative arthritis is compensable if contributed to or aggravated or accelerated by the employment in a significant manner.

Mental disabilities are compensable if they arise out of actual events of employment, not unfounded perceptions, and if the employee's perception of the actual events is reasonably grounded in fact or reality.

MEDICAL TREATMENT

Injured workers must now wait 28 days before treating with a provider of their choice.

DEFINITION OF DISABILITY

Disability still means a limitation of wage earning capacity.

A limitation of wage earning capacity occurs only if a personal injury covered under this act results in the employee's being unable to perform all jobs paying the maximum wages in work suitable to that employee's qualifications and training, which includes work that may be performed using the employee's transferable work skills. A disability is total if the employee is unable to earn in any job paying maximum wage in work suitable to the employee's qualifications and training. A disability is partial if the employee retains a wage earning capacity at a pay level less than his or her maximum wages in work suitable to his or her qualifications and training. The establishment of disability does not create a presumption of wage loss.

"Wage earning capacity" means the wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned. For the purposes of establishing a limitation of wage earning capacity, an employee has an affirmative duty to seek work reasonably available to that employee, taking into consideration the limitations from the work-related personal injury or disease. A Magistrate may consider good-faith job search efforts to determine whether jobs are reasonably available.

"Wage loss" means the amount of wages lost due to a disability. The employee shall establish a connection between the disability and reduced wages in establishing the wage loss. Wage loss may be established, among other methods, by demonstrating the employee's good-faith effort to procure work within his or her wage earning capacity. A partially disabled employee who establishes a good-faith effort to procure work but cannot obtain work within his or her wage earning capacity is entitled to weekly benefits as if totally disabled.

To establish an initial showing of disability, an employee shall do all of the following:

- (a) Disclose his or her qualifications and training, including education, skills, and experience, whether or not they are relevant to the job the employee was performing at the time of the injury.
- (b) Provide evidence as to the jobs, if any, he or she is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity at the time of the injury.

Legal Advisory

- (c) Demonstrate that the work-related injury prevents the employee from performing jobs identified as within his or her qualifications and training that pay maximum wages.
- (d) If the employee is capable of performing any of the jobs identified in subdivision (c), show that he or she cannot obtain any of those jobs. The evidence shall include a showing of a good-faith attempt to procure post-injury employment if there are jobs at the employee's maximum wage earning capacity at the time of the injury.

Once an employee establishes an initial showing of a disability under subsection (5), the employer bears the burden of production of evidence to refute the employee's showing. In satisfying its burden of production of evidence, the employer has a right to discovery if necessary for the employer to sustain its burden and present a meaningful defense. The employee may present additional evidence to challenge the evidence submitted by the employer.

If a personal injury arising out of the course of employment causes total disability and wage loss and the employee is entitled to wage loss benefits, the employer shall pay or cause to be paid to the injured employee as provided in this section weekly compensation equal to 80% of the employee's after-tax average weekly wage, but not more than the maximum weekly rate determined under Section 355. Compensation shall be paid for the duration of the disability.

If a personal injury arising out of the course of employment causes partial disability and wage loss and the employee is entitled to wage loss benefits, the employer shall pay or cause to be paid to the injured employee as provided in this section weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury, but not more than the maximum weekly rate determined under Section 355. Compensation shall be paid for the duration of the disability.

Comment: These sections are a codification of recent court decisions.

TERMINATION FROM REASONABLE EMPLOYMENT

If an employee is terminated from reasonable employment by his or her own fault, the employee is considered to have voluntarily removed themselves from the work force and is not entitled to any wage loss benefits.

SUBSEQUENT EMPLOYMENT AND BENEFITS

If the employee was employed for less than 100 weeks, the employee shall receive compensation based upon his or her average weekly wage at the time of the original injury.

If the employee was employed for 100 weeks or more but less than 250 weeks, then after exhausting unemployment benefits eligibility, a Workers' Compensation Magistrate may determine that the employee since the time of the injury has not established a new wage earning capacity and, if the Magistrate makes that determination, benefits shall be based on his or her average weekly wage at the original date of injury. If the Magistrate does not make that determination, the employee is presumed to have established a post-injury wage earning capacity and benefits shall not be paid based on the wage at the original date of injury.

Legal Advisory

If the employee was employed for 250 weeks or more, the employee is presumed to have established a post-injury wage earning capacity.

REHABILITATION ORDERS AND APPEALS

All rehabilitation orders will now come from the Director of the Workers' Compensation Agency. All appeals of these orders must now be filed within 15 days of the mailing date directly to the Appellate Commission.

SPECIFIC LOSS

The effect of any internal joint replacement surgery, internal implant, or other similar medical procedure shall be considered in determining whether a specific loss has occurred.

Comment: This language eliminates prior case law which basically held that a person with a successful prosthesis could still be considered disabled or have suffered loss of use of a body part.

INTEREST ON AWARDS

Interest on awards will now be calculated as a money judgment in a civil case.

Comment: Previously, the interest on awards was 10%. The current rate in civil cases is 3.007%.

REDEMPTIONS

Ten day letters can now be sent electronically to the insured.

The parties can stipulate in writing to the findings required to be made by a Magistrate and it may serve as a waiver of a hearing and the Magistrate may approve the redemption. A Magistrate can conduct a hearing on a proposed stipulation.

Comment: It is not recommended this procedure be used with an unrepresented injured worker, or in a case in which Medicare is involved. In these situations, a full hearing on the record should be held.

ELECTRONIC FILINGS

Redemption orders can be served electronically. Applications for benefits can be filed electronically. Magistrate Opinions and Order may be filed and distributed electronically.

MEDIATION

The position of Mediator has been eliminated. Any future mediations can be mediated by the parties.

Comment: There is no procedure at this time for how these new mediations will take place, which brings up the questions of why it is in the statute at all.

SUBPOENAS

Legal Advisory

Subpoenas now only need to be signed by one of the attorneys in the case.

Comment: This will allow for quicker issuance and service of subpoenas for medical records, and reduce appearance costs. However, many Magistrates have taken the position that until the Agency changes the subpoena form, Magistrate signatures are still required.

MEDICAL BENEFITS DURING APPEAL

Reasonable and necessary medical benefits required by a Magistrate's award are to be paid while a case is on appeal.

Comment: The term "reasonable and necessary" has been added to the Act. Before the change, all medical benefits were required to be paid during an appeal

EFFECTIVE DATE

The changes apply to injuries incurred on or after December 19, 2011.

Comment: While it is clear the portions of the Act dealing with definitions of disability and how it is to be proven at trial affect new injures, it would seem the procedural and administrative changes should pertain to any cases in the system as of December 19, 2011.

Please feel free to share this report with your team. If you would like a copy of the new law, please call Jerry Newman at 248-324-2620. As always, we are available to discuss any aspect of the changes with you and your team. Also, if you would like to arrange a meeting with your team to review and discuss the changes please call Jerry.

**For more information on the details of this advisory contact
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