WORKERS' COMPENSATION LAW SECTION
Respectfully submits the following position on:

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Workers' Compensation Law of Michigan

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The Workers' Compensation Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Workers' Compensation Law Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Workers' Compensation Law Section is 851.

The position was adopted after an electronic discussion and vote. The number of members in the decision-making body is 13. The number who voted in favor of the positions is listed in the attached report. The number who voted opposed the positions is listed in the attached report.

Report on Public Policy Position

Name of section:
Workers' Compensation Law Section

Contact person:
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Regarding:
Workers' Compensation of Michigan, in connection with the recently introduced bill: HB 5002 (Jacobsen) Worker's compensation; definitions; definition of disability and conditions on compensation for covered injuries; modify. Amends secs. 301, 315, 331, 353, 354, 360, 361 & 801 of 1969 PA 317 (MCL 418.301 et seq.) ; adds sec. 306 & repeals ch. 4 of 1969 PA 317 (MCL 418.401 - 418.441).

Date position was adopted:
September 26, 2011

Process used to take the ideological position:
Position adopted after an electronic discussion and vote.

Number of members in the decision-making body:
13

Number who voted in favor and opposed to the position:
Section 418.331 - Dependency in death cases
8 Voted for position
2 Voted against position
2 Abstained from vote

Section 418.353(1)(a)(1) - Dependency of spouse presumed
7 Voted for position
3 Voted against position
2 Abstained from vote

Section 418.315 - Attorney fees on medical bills. Prohibits charging to employer or carrier
11 Voted for position
0 Voted against position
1 Abstained from vote

Section 418.801(6) - Change interest to state civil statute from 10%
6 Voted for position

5 Voted against position
1 Abstained from vote

Section 418.222 - Exchange of information
7 Voted for position
4 Voted against position
1 Abstained from vote

Section 418.301(5)(e) - Loss of job before 100 weeks after return to work
9 Voted for position
2 Voted against position
1 Abstained from vote

MCL 301(4) - Definition of disability
6 Voted for position
4 Voted against position
2 Abstained from vote

Section 318.401(1)(4) - Definition of disability in occupational diseases
6 Voted for position
3 Voted against position
3 Abstained from vote

MCL 301(5)(b) - Partial wage loss after return to work
6 Voted for position
3 Voted against position
3 Abstained from vote

MCL 361(1) - Partial wage loss after return to work
5 Voted for position
4 Voted against position
2 Abstained from vote

Section 354(1) - Old Age Social Security coordination
7 Voted for position
2 Voted against position
2 Abstained from vote

Section 418.319 - Voc. Rehab
6 Voted for position
3 Voted against position
2 Abstained from vote

Section 853, Subpoenas
7 Voted for position

0 Voted against position
0 Abstained from vote

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://legislature.mi.gov/doc.aspx?2011-HB-5002

Explanation of the position, including any recommended amendments:
See attached report.

WORKERS' COMPENSATION SECTION COUNCIL PROPOSALS

DEPENDENCY OF SPOUSES IN DEATH CASES

Current: 418.331 The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) a wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, a worker's compensation magistrate shall find the wife was living apart for justifiable cause or because he had deserted her.

Revision: (a)A spouse who lived with the deceased worker at the time of that worker's death, or, if living apart, the magistrate shall make a finding that such separation was for justifiable cause or desertion.

Comment: The current provision has been held unconstitutional by the Michigan Supreme Court. See *Day v W A Foote Memorial Hospital*, 412 Mich 698 (1982). The court remedied the situation by ruling that neither a husband nor a wife shall be presumed dependent upon the other. A spouse must, therefore, prove that he or she was factually dependent on a deceased worker (Workers' Compensation in Michigan: Law and Practice).

The revision makes a spouse living with the deceased worker a presumed dependent.

DETERMINATION OF DEPENDENCY

Current: MCL 418.353(1) For the purposes of section 351 to 361, dependency shall be determined as follows: (a) The following shall be conclusively presumed to be dependent for support upon an injured employee: (*i*)

The wife of an injured employee living with such employee as such wife at the time of the injury.

Revision: (*i*)The spouse of an injured employee living with such employee as such spouse at the time of injury.

Comment: Makes a spouse of an injured employee a presumed dependent.

ATTORNEY FEES ON MEDICAL BILL AWARDS

Current: 418.315(1) If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the workers' compensation magistrate. The workers' compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

Revision: If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the workers' compensation magistrate. The workers' compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee. *Attorney fees on medical expenses are chargeable either to the employee or the medical provider or both. Attorney fees are not chargeable to the employer or carrier.*

Comment: Current law allows a carrier or employer to charged with attorneys fees. Revision prohibits charging employers or carriers.

INTEREST

Current: MCL 418.801(6) When weekly compensation is paid pursuant to an award of a worker's compensation magistrate, an arbitrator, the board, the appellate commission, or a court, interest on the compensation shall be paid at the rate of 10% per annum from the date each payment was due, until paid.

Revision: MCL 418.801(6) When weekly compensation is paid pursuant to an award of a worker's compensation magistrate, an arbitrator, the board, the appellate commission, or a court, interest on the compensation *shall be calculated at 6 month intervals from the date of filing the application for hearing at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5 year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer.*

Note: Changes 10% interest to interest rate on civil money judgments, MCL 600.6062(8).

EXCHANGE OF INFORMATION

Current: MCL 418.222

Sec. 222. (1) After March 31, 1986, the bureau, upon receiving a completed application for mediation or hearing from a claimant, shall forward a copy of the application to the employer and carrier. Within 30 days of receiving a completed application for mediation or hearing from the bureau, the carrier shall file a written response to the application with the bureau upon a form provided by the bureau. Any application for mediation or hearing or any written response which is determined by the bureau to be incomplete shall be returned with an explanation of the additional information needed.

(2) At the time of filing an application for hearing or mediation, the claimant shall also provide the carrier with any medical records relevant to the claim that are in the claimant's possession. At the time of filing the written response, the carrier shall also provide the claimant with any medical records of the carrier or employer concerning the employee that are relevant to the claim and in existence at the time of filing. The parties shall submit proof of compliance with this subsection with the bureau.

(3) The application for mediation or hearing shall be as prescribed by the bureau and shall contain factual information regarding the nature of the injury, the date of injury, the names and addresses of any witnesses except employees currently employed by the employer, the names and addresses of any doctors, hospitals, or other health care providers who treated the employee with regard to the personal injury, the name and address of the employer, the dates on which the employee was unable to work because of the personal injury, whether the employee had any other employment at the time of, or subsequent to, the date of the personal injury and the names and addresses of the employers, and any other information required by the bureau.

(4) The written response of the carrier shall be as prescribed by the bureau and shall specify any legal grounds supporting its position, any factual matters that

are disputed, whether there was a medical examination of the claimant and who performed it, and any other information required by the bureau.

(5) The claimant shall notify the carrier of the intention to call witnesses who are currently employed by the employer.

(6) The willful failure of a party to comply with this section shall prohibit that party from proceeding under this act.

Proposed Revision: (2)only

(2) Within 60 days of the pre-trial hearing, the claimant and the carrier shall exchange any medical records relevant to the claim that are in the claimant's or the carrier's possession. Within 60 days of the pre-trial hearing, the carrier should provide the claimant with copies of the wage records and fringe benefit information necessary to calculate the average weekly wage of each date of injury pled by the claimant. Any party who subpoenas medical records shall provide the opposing party copies of any records produced within 30 days after receipt of said records. The parties shall submit proof of compliance with this subsection with the Agency.

Comment

No one is sending the carrier medical records upon filing. By making exchange of info within 60 days of the PT, it is more realistic and provides both side adequate time to obtain medical records. Providing a continuing duty to produce subpoenaed medical records keep both sides informed of new information. This section may duplicate a rules proposal.

Provision of the AWW info within 60 days of the PT would promote prompt resolution of claims.

LOSS OF JOB BEFORE 100 WEEKS AFTER RETURN TO WORK

Current: MCL 418.301(5)(e)

(5) If disability is established pursuant to subsection (4), entitlement to weekly wage loss benefits shall be determined pursuant to this section and as follows:

(a) If an employee receives a bona fide offer of reasonable employment from the previous employer, another employer, or through the Michigan employment security commission and the employee refuses that employment without good and reasonable cause, the employee shall be considered to have voluntarily removed himself or herself from the work force and is no longer entitled to any wage loss benefits under this act during the period of such refusal.

(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

(c) If an employee is employed and the average weekly wage of the employee is equal to or more than the average weekly wage the employee received before the date of injury, the employee is not entitled to any wage loss benefits under this act for the duration of such employment.

(d) If the employee, after having been employed pursuant to this subsection for 100 weeks or more loses his or her job through no fault of the employee, the employee shall receive compensation under this act pursuant to the following:

(i) If after exhaustion of unemployment benefit eligibility of an employee, a worker's compensation magistrate or hearing referee, as applicable, determines for any employee covered under this subdivision, that the employments since the time of injury have not established a new wage earning capacity, the employee shall receive compensation based upon his or her wage at the original date of injury. There is a presumption of wage earning capacity established for employments totalling 250 weeks or more.

(ii) The employee must still be disabled as determined pursuant to subsection (4). If the employee is

still disabled, he or she shall be entitled to wage loss benefits based on the difference between the normal and customary wages paid to those persons performing the same or similar employment, as determined at the time of termination of the employment of the employee, and the wages paid at the time of the injury.

(iii) If the employee becomes reemployed and the employee is still disabled, he or she shall then receive wage loss benefits as provided in subdivision (b).

(e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her job for whatever reason, the employee shall receive compensation based upon his or her wage at the original date of injury.

Revision: 418.301(5)(e)

(e) If the employee, after having been employed pursuant to this subsection for less than 100 weeks loses his or her <u>job through no fault of his/her own</u>, the employee shall receive compensation based upon his or her wage at the original date of injury.

Comment:

Echoes 301(5)(d). Allow employers to cut off claimants who are at fault for losing their job.

DEFINITION OF DISABILITY

Revision: Definition of disability

Current: MCL 301(4)

(4) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

Revision:

(4)(a) As used in this chapter, "disability" means a limitation of an employee's ability to perform his or her job at the time of injury as well as any other job held by the employee in the 15 years before the date of injury, if the prior job paid as much or more than the job at the time of injury.

(b) An employee making claim for wage loss benefits shall, upon request of the employer, disclose the name and addresses of the employers known to him for the 15 years prior to the date of injury, and for each employer, provide the wage rate, and a brief description of the job duties and exertional level. The employee shall, if requested by the employer, authorize prior employers to release the same information. All employers subject to this act shall , upon written request, promptly complete and return to the requesting employer and the employee the requested information on the agency approved forms designed to disclose this information. If the employee is unable to provide all the names or addresses of the prior 15 years' employers, or if the employer requests, the employee shall authorize the Social Security Administration to release earnings records for the prior 15 years to the employer.

(c) Pursuant to section 221, the Director of the Agency shall create whatever forms are deemed necessary to facilitate the disclosure of the information in subsection 4(b).

Comment:

This definition of disability simplifies the determination of disability, yet retains the Sington requirement that wage loss is not payable if the employee retains the capacity to perform jobs that would equal or exceed the average weekly wage at the time of injury. Social Security uses 15 years in their determination of past relevant work. See 20 CFR 404.1565(a). The revised definition eliminates the need for vocational testimony in determining disability. The person either has the history of equal or higher paying jobs or not. The employer retains the right to initiate vocational rehabilitation and job search to mitigate their obligation to pay wage loss.

Current: MCL 318.401(1):

Sec. 401. (1) As used in this chapter, "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.

Revision: (same as section 301(4) above)

Section 401. (1) (4)(a) As used in this chapter, "disability" means a limitation of an employee's <u>ability to perform his or her job at the time of injury as well as any other job held by the employee in the 15 years before the date of injury, if the prior job paid as much or more than the job at the time of injury.</u>

<u>(b) An employee making claim for wage loss benefits shall, upon request of the employer, disclose the name and addresses of the employers known to him for the 15 years prior to the date of injury, and for each employer, provide the wage rate, and a brief description of the job duties and exertional level. The employee shall, if requested by the employer, authorize prior employers to release the same information. All employers subject to this act shall , upon written request, promptly complete and return to the requesting employer and the employee the requested</u>

information on the agency approved forms designed to disclose this information. If the employee is unable to provide all the names or addresses of the prior 15 years' employers, or if the employer requests, the employee shall authorize the Social Security Administration to release earnings records for the prior 15 years to the employer.

(c) Pursuant to section 221, the Director of the Agency shall create whatever forms are deemed necessary to facilitate the disclosure of the information in subsection 4(b).

Comment: Follows definition in Section 301(4).

PARTIAL WAGE LOSS AFTER RETURN TO WORK

Current: MCL 301(5)(b)

(b) If an employee is employed and the average weekly wage of the employee is less than that which the employee received before the date of injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax weekly wage before the date of injury and the after-tax weekly wage which the injured employee is able to earn after the date of injury, but not more than the maximum weekly rate of compensation, as determined under section 355.

Revision:

(b) If an employee is employed and the weekly wage of the employee is less than the average weekly wage the employee received before the date of injury as a result of the work-related injury, the employee shall receive weekly benefits under this act equal to 80% of the difference between the injured employee's after-tax average weekly wage before the date of injury and after-tax weekly wage which the employee actually earns after the date of injury, but not more than the maximum weekly rate of compensation, as determined in section 355.

Comment:

Eliminates theoretical residual wage-earning capacity from the calculation of partial disability benefits after the employee returns to work.

Current: MCL 361(1)

Sec. 361. (1) While the incapacity for work resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax average weekly wage before the personal injury and the after-tax average weekly wage which the injured employee is able to earn after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

Revision:

Sec. 361. (1) While the <u>wage loss</u> resulting from a personal injury is partial, the employer shall pay, or cause to be paid to the injured employee weekly compensation equal to 80% of the difference between the injured employee's after-tax <u>(eliminate average)</u> weekly wage before the personal injury and the after-tax average weekly wage which the injured employee <u>actually earns</u> after the personal injury, but not more than the maximum weekly rate of compensation, as determined under section 355. Compensation shall be paid for the duration of the disability. However, an employer shall not be liable for compensation under section 351, 371(1), or this subsection for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime.

Comment: Same as Section 301(5) above

Vocational Rehabilitation

Current: MCL 418.319

Sec. 319. (1) An employee who has suffered an injury covered by this act shall be entitled to prompt medical rehabilitation services. When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, the employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to useful employment. If such services are not voluntarily offered and accepted, the director on his or her own motion or upon application of the employee, carrier, or employer, after affording the parties an opportunity to be heard, may refer the employee to a bureau-approved facility for evaluation of the need for, and kind of service, treatment, or training necessary and appropriate to render the employee fit for a remunerative occupation. Upon receipt of such report, the director may order that the training, services, or treatment recommended in the report be provided at the expense of the employer. The director may order that any employee participating in vocational rehabilitation shall receive additional payments for transportation or any extra and necessary expenses during the period and arising out of his or her program of vocational rehabilitation. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than 52 weeks except in cases when, by special order of the director after review, the period may be extended for an additional 52 weeks or portion thereof. If there is an unjustifiable refusal to accept rehabilitation pursuant to a decision of the director, the director shall order a loss or reduction of compensation in an amount determined by the director for each week of the period of refusal, except for specific compensation payable under section 361(1) and (2).

(2) If a dispute arises between the parties concerning application of any of the provisions of subsection (1), any of the parties may apply for a hearing before a hearing referee or worker's compensation magistrate, as applicable.

Revision: Change enforcement procedure

Sec. 319. (1) An employee who has suffered an injury covered by this act shall be entitled to prompt medical rehabilitation services. When as a result of the injury he or she is unable to perform work for which he or she has previous training or experience, the employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him or her to useful employment. If such services are not voluntarily offered and accepted, the director on his or her own motion or upon application of the employee, carrier, or employer, after affording the parties an opportunity to be heard, may refer the employee to an Agency-approved facility for evaluation of the need for, and kind of service, treatment, or training necessary and appropriate to render the employee fit for a remunerative occupation. Upon receipt of such report, a magistrate may order that the training, services, or treatment recommended in the report be provided at the expense of the employer. A magistrate may order that any employee participating in vocational rehabilitation shall receive additional payments for transportation or any extra and necessary expenses during the period and arising out of his or her program of vocational rehabilitation. Vocational rehabilitation training, treatment, or service shall not extend for a period of more than 52 weeks except in cases when, by special order of the director after review, the period may be extended for an additional 52 weeks or portion thereof. If benefits are being paid voluntarily, and there is an unjustifiable refusal to accept rehabilitation according to a written opinion of an Agency-approved facility, then the employer may terminate weekly benefits pending an order of a magistrate. If there is an unjustifiable refusal to accept rehabilitation pursuant to a decision of the director, the magistrate may order a loss or reduction of compensation in an amount determined for each week of the period of refusal, except for specific compensation payable under section 361(1) and (2).

(2) If a dispute arises between the parties concerning application of any of the provisions of subsection (1), any of the parties may apply for a hearing before a worker's compensation magistrate.

Comment: Changes enforcement from director to magistrate. Specifically authorizes employers to terminate wage loss benefits for a refusal to accept rehabilitation. Eliminates "hearing referee" in subsection 2.

OLD-AGE SOCIAL SECURITY COORDINATION

Current: MCL 418.354(1):

Sec. 354. (1) This section is applicable when either weekly or lump sum payments are made to an employee as a result of liability pursuant to section 351, 361, or 835 with respect to the same time period for which old-age insurance benefit payments under the social security act, 42 U.S.C. 301 to 1397f; payments under a self-insurance plan, a wage continuation plan, or a disability insurance policy provided by the employer; or pension or retirement payments pursuant to a plan or program established or maintained by the employer, are also received or being received by the employee. Except as otherwise provided in this section, the employer's obligation to pay or cause to be paid weekly benefits other than specific loss benefits under section 361(2) and (3) shall be reduced by these amounts:

(a) Fifty percent of the amount of the old-age insurance benefits received or being received under the social security act.

Revision:

Add subsection (22):

(22) Section 354(1)(a) shall not apply to any employee receiving Social Security old-age benefits before their date of injury and whose date of hire was after their receipt of old-age social security benefits. This section only applies to dates of injury after the effective date of this section.

Current: MCL 357(1):

Sec. 357. (1) When an employee who is receiving weekly payments or is entitled to weekly payments reaches or has reached or passed the age of 65, the weekly payments for each year following his or her sixty-fifth birthday shall be reduced by 5% of the weekly payment paid or payable at age 65, but not to less than 50% of the weekly benefit paid or payable at age 65, so that on his or her seventy-fifth birthday the weekly payments shall have been reduced by 50%; after which there shall not be a further reduction for the duration of the employee's life. Weekly payments shall not be reduced below the minimum weekly benefit as provided in this act.

(2) Subsection (1) shall not apply to a person 65 years of age or over otherwise eligible and receiving weekly payments who is not eligible for benefits under the social security act, 42 U.S.C. 301 to 1397f, or to a person whose payments under this act are coordinated under section 354.

Revision: New subsection(2)

<u>(2) Subsection (1) shall not apply to any employee age of 65 or over who received Social Security old-age benefits before their date of injury and whose date of hire was after their receipt of old-age social security benefits. This section only applies to dates of injury after the effective date of this section.</u>

Comment:

Reduction of wage loss benefits to workers already drawing their social security old-age benefits is unfair, even cruel, since the workers in this age group are working because they cannot survive on their old-age social security benefit alone.

At the time the original provision was drafted, Social Security deducted earnings dollar for dollar against old-age benefits. This was changed in 1993, when most deductions for earnings were eliminated.

Last sentence makes the revision prospective only.

Subpoena Procedure

Current: Section 853

Process and procedure; oaths; subpoenas; examination of books and records; contempt; application to circuit court.

Sec. 853. Process and procedure under this act shall be as summary as reasonably may be. The director, worker's compensation magistrates, arbitrators, and the board shall have the power to administer oaths, subpoena witnesses, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Any witness who refuses to obey a subpoena, who refuses to be sworn or testify, or who fails to produce any papers, books, or documents touching any matter under investigation or any witness, party, or attorney who is guilty of any contempt while in attendance at any hearing held under this act may be punished as for contempt of court. An application for this purpose may be made to any circuit court within whose jurisdiction the offense is committed and for which purpose the court is given jurisdiction.

Revision:

Sec. 853. Process and procedure under this act shall be as summary as reasonably may be. The director, worker's compensation magistrates, arbitrators, and the board shall have the power to administer oaths, subpoena witnesses, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. <u>An attorney representing a party to a matter pending before the Workers' Compensation Board of Magistrates shall have</u>

the power to sign a subpoena calling for the production of records for the matter pending before the Workers' Compensation Board of Magistrates. Any witness who refuses to obey a subpoena, who refuses to be sworn or testify, or who fails to produce any papers, books, or documents touching any matter under investigation or any witness, party, or attorney who is guilty of any contempt while in attendance at any hearing held under this act may be punished as for contempt of court. An application for this purpose may be made to any circuit court within whose jurisdiction the offense is committed and for which purpose the court is given jurisdiction.

Comment: Empowers attorneys to issue subpoenas for production of records on their own signature, as allowed in Michigan Court Rules.