SUMMARY OF WORKERS' COMPENSATION REFORM BILL

By, Gerald (Jerry) Marcinkoski

On December 19, 2011, Governor Snyder signed the workers' compensation reform bill. Technically, it is known as 2011 PA 266, which is enrolled house bill #5002. It went into effect on December 19, 2011. In general, it applies to injuries occurring on and after that date.

The types of changes made in the new legislation can be divided into two broad categories: substantive changes and procedural changes. In general, the substantive changes are codifications of favorable Supreme Court case law and "corrections" of other cases and prior legislative inconsistencies. The procedural changes are changes to streamline and modernize the statute.

SUBSTANTIVE CHANGES

(1) Codification of *Sington/Stokes/ "Lofton"/Romero*

The Legislature has placed into the statute the Michigan Supreme Court's interpretations of the definition of disability, wage loss, and partial disability as had been described in *Sington v Chrysler Corp,* 467 Mich 144; 648 NW2d 624 (2002), *Stokes v Chrysler, LLC,* 481 Mich 266; 750 NW2d 129 (2008), *Lofton v AutoZone, Inc,* 482 Mich 1005; 756 NW2d 85 (2008); see also, *Romero v Burt Moeke Hardwoods, Inc,* 280 Mich App 1; 760 NW2d 586 (2008). More specifically:

- The definition of disability is now fleshed out to reflect *Sington's* interpretation of the definition. *Sington* said that in order to prove a limitation of wage earning capacity, an employee must demonstrate the inability to perform all maximum paying jobs suitable to the employee's qualifications and training. The Legislature adds that this includes

consideration of the employee's "transferable work skills," as had been implied in *Stokes*. [Section 301(4)(A)].

- The Legislature also now provides a specific definition of "wage earning capacity," an important term in the definition of disability and throughout the Act. The definition includes a job search requirement. Section 301(4)(B) now defines "wage earning capacity" as follows:

> "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 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.

- The Legislature also now provides a specific definition of "wage loss," another important term. The wage loss definition also contains a job search requirement. And, a partially disabled person might collect total disability benefits if a good-faith job search proves fruitless. Section 301(4)(C) now defines "wage loss" as follows:

> "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 ESTABLISHED A GOOD-FAITH EFFORT TO PROCURE WORK BUT CANNOT OBTAIN WORK WITHIN HIS OR HER WAGE EARNING CAPACITY IS ENTITLED TO WEEKLY BENEFITS UNDER SUBSECTION (7) AS IF TOTALLY DISABLED.

- The Legislature places into the statute in Section 301(5) the step-by-step *Stokes* analysis for proving disability. The employee must do all of the following to make a threshold claim of disability:

  -Disclose his or her qualifications and training, including educations, skills, and experience, whether or not they are relevant to the job the employee was performing at the time of the injury.

  -Provide evidence of the work he or she is qualified and trained to perform within the same salary range as his or her maximum wage earning capacity.

  -Demonstrate that the work injury prevents the employee from performing those jobs identified as within his or her qualifications and training that pay maximum wages.

  -If the employee is capable of performing *any* such jobs, then the employee must show that he or she cannot obtain those jobs. Again, the evidence "shall include a showing of a good-faith attempt to procure post-injury employment" assuming there are jobs at the employee's maximum wage earning capacity.

-If the employee establishes all of the above, then the burden of proof switches to the employer to refute the employee's showing. "The employer has a right to discovery if necessary," meaning the employer has the right to pre-trial inquiries into the employee's qualifications, training, experience, job searches, and the like.

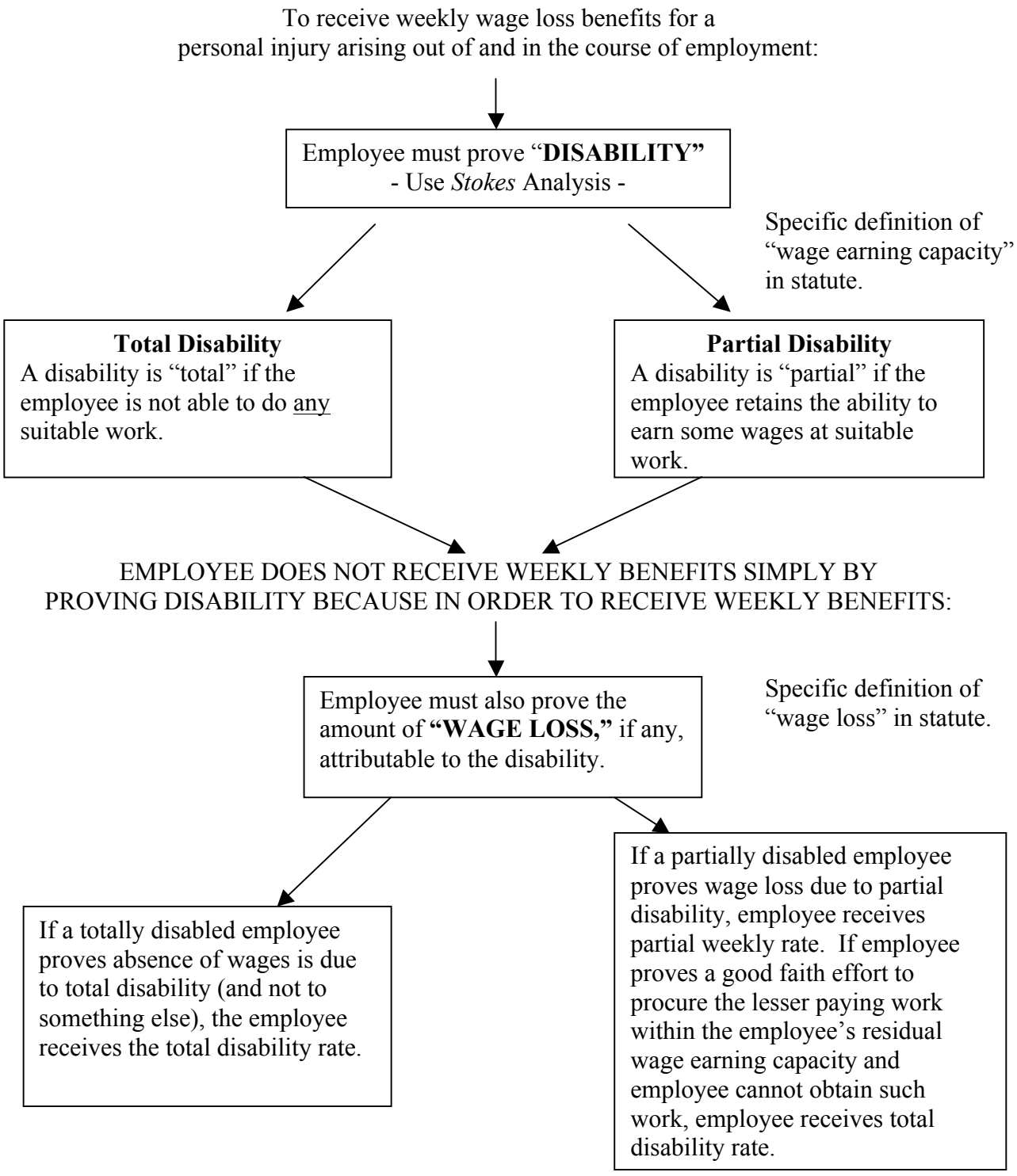
- The Legislature clearly delineates the difference between "total disability" and "partial disability" as follows:

  A DISABILITY IS TOTAL IF THE EMPLOYEE IS UNABLE TO EARN IN ANY JOB PAYING MAXIMUM WAGES IN WORK SUITABLE TO THE EMPLOYEES 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. [Section 301(4)(A)].

- Sections 301(7) and (8) describe how to calculate total and partial disability and their respective rates. If the employee proves total disability, then the employee is entitled to a weekly workers' compensation rate equal to 80% of the employee's after tax average weekly wage subject to the annual maximum. On the other hand, if the employee is only partially disabled by the work injury, then the employer pays 80% of the difference between the employee's after-tax average weekly wage before the injury "and the employee's wage earning capacity after the personal injury," again subject to the annual maximum.

  ATTACHED IS A FLOW CHART ON THE STEPS RELATING TO "DISABILITY."

DISABILITY FLOW CHART



(2) Actual Returns To Work Post-Injury and the Consequences of Such

If an employee actually returns to work post-injury at "reasonable employment" (which has a very specific meaning), certain rules are triggered. First, it is necessary to appreciate what "reasonable employment" is and what it is not. The definition of "reasonable employment" has not changed. "Reasonable employment" is essentially make-work, *i.e.,* work unsuitable to the employee's qualifications or training. It is a lesser paying job suitable to the employee's qualifications and training. An example of the latter is an employee who is injured and can no longer work as many hours as he or she had been able to prior to the injury. The most important changes in the "reasonable employment" provisions are the following:

> -If an employee is terminated from reasonable employment through *fault* of the employee, the employee is considered to have voluntarily removed himself or herself from the work force and is not entitled to *any* wage loss benefits under the Act. This represents a change in the law insofar as under prior law, if the employee lost a "reasonable employment" job within the first 100 weeks, then benefits are reinstated no matter what the reason for the termination. In other words, before this statutory change, even a termination for cause resulted in a reinstatement of benefits.
>
> -As for employees who work 100 or more weeks at "reasonable employment," in general, the employee is presumed to have established a post-injury wage earning capacity unless a magistrate determines otherwise.

Rakestraw Codified

The Legislature has codified the interpretation of "personal injury" described by the Supreme Court in *Rakestraw v General Dynamics Land Systems, Inc,* 469 Mich 220; 666 NW2d

199 (2003); and *Fahr v General Motors Corp,* 478 Mich 922; 733 NW2d 22 (2007). *Rakestraw/Farr* say that employees with a pre-existing problem who only demonstrate that work provoked the symptoms of that problem do not satisfy the "personal injury" requirement so as to be entitled to workers' compensation benefits. Instead:

> A PERSONAL INJURY UNDER THIS ACT 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. Section 301(1)

Mental Disabilities and Degenerative Arthritis

The Legislature has codified the Supreme Court's interpretation of the mental disability provision as articulated in *Robertson v DaimlerChrysler Corp,* 465 Mich 732; 641 NW2d 567 (2002). And, the Legislature has added "degenerative arthritis" to the list of condition requiring a higher work standard:

> –Regarding mental disabilities, the Legislature keeps the current mental disability language and adds that for a mental problem to be compensable "THE EMPLOYEE'S PERCEPTION OF THE ACTUAL EVENTS [AT WORK] [MUST BE] REASONABLY GROUNDED IN FACT OR REALITY." (bracketed words added)
>
> -Regarding degenerative arthritis, under the old law, mental disabilities and "conditions of the aging process including but not limited to heart and cardiovascular conditions" require the claimant to prove not just some work aggravation but work aggravation "in a significant manner." Section 301(2). The

Legislature kept that language but now adds the condition of "DEGENERATIVE ARTHRITIS" to the list of conditions. Therefore, the cases based on degenerative arthritis now require the higher work contribution standard, *i.e.,* the aggravation in a "significant manner" standard.

Legislature overrules *Trammel v Consumers Energy*

In the "specific losses" category of benefits, Section 361(2), the Supreme Court in *Trammel v Consumers Energy Co,* 486 Mich 975; 782 NW2d 776 (2010) had ruled that internal implants – such as knee and hip replacements – cannot be considered in evaluating the usefulness of an injured employee's limbs. Therefore, Mr. Trammel, for example, was awarded specific loss benefits for the loss of a leg even though an internal knee replacement had restored the usefulness of his leg. The Legislature has now overruled *Trammel* by adding the following language to the specific loss section:

> THE EFFECT OF ANY INTERNAL JOINT REPLACEMENT SURGERY, INTERNAL IMPLANT, OR OTHER SIMILAR MEDICAL PROCEDURES CAN BE CONSIDERED IN DETERMINING WHETHER A SPECIFIC LOSS HAS OCCURRED.

PROCEDURAL CHANGES

The changes in the new bill that are more procedural in nature include the following:

- Who is an "employee"? The workers' compensation statute only covers "employees." It does not cover "independent contractors." Therefore, making the differentiation between the two is important. Through the years, the courts have used "economic realities tests" and, more recently, a three pronged criteria. This will change as of January 1, 2013. As of that date, magistrates will resolve the employer-employee relationship question

"USING THE 20 – FACTOR TEST ANNOUNCED BY THE INTERNAL REVENUE SERVICE" in the Internal Revenue Code. And the Legislature has said that:

> "AN INDIVIDUAL FOR WHOM AN EMPLOYER IS REQUIRED TO WITHHOLD FEDERAL INCOME TAX PRIMA FACIE CONSIDERED TO PERFORM SERVICE IN EMPLOYMENT UNDER THIS ACT." A business entity can request that the hearing system determine whether an individual is an employee or an independent contractor and the magistrate shall issue a determination of coverage. [Section 161 (1)(n)].

- Under the old law, the employer had 10 days from the inception of medical care to provide exclusive treatment for a work injury. The Legislature has now extended the time to 28 days. [Section 315(1)].
- The 10% interest rate on accrued weekly compensation has been changed to the interest rate that applies in civil money judgments. This is an interest rate that periodically changes as interest rates change over the years. [Section 801(6)].
- Coordination of 50% of an employee's old age social security benefits poses a special problem when the employee is already receiving the old age social security benefits *before* the work injury. Addressing that limited situation, the Legislature says that when that occurs, "IN NO EVENT SHALL THE WEEKLY BENEFITS PAYABLE AFTER THE REDUCTION PROVIDED BY THIS [COORDINATION] SUBDIVISION BE LESS THAN 50% OF THE WEEKLY BENEFITS OTHERWISE PAYABLE WITHOUT THE REDUCTION." [Section 354 (1)(a)].
- The Legislature has added a specific provision addressing where professional athletes can bring their workers' compensation claim under certain circumstances. [Section 360(2)].

This provision mirrors provisions in other states. It is designed to prevent forum-shopping for professional athletes whose work may frequently take them across state lines.

- Attorneys can now sign subpoenas. [Section 853].
- Parties may stipulate in writing to waive a redemption hearing and, if so, a magistrate may approve a redemption agreement without such a hearing. [Section 836(2)].
- Certain forms may now be filed electronically with the Workers' Compensation Agency and certain documents from the state, such as decisions, can now be transmitted electronically. [Section 847(1) and (2); Section 381(1); Section 835; Section 837(3); Section 625].
- Term limits for magistrates are eliminated. [Section 213(2)].
- The Qualifications Advisory Committee [QAC] has been eliminated by the Legislature. [Section 210 and Section 212]. Now, the Executive Director of the Michigan Administrative Hearing System will make the recommendations for magistrates and commissioners to the Governor.
- Appeals of vocational rehabilitation rulings by the Director now go to the Michigan Compensation Appellate Commission, rather than to the magistrates. [Section 319(2)].
- While an employer cannot compel an employee to apply for early old age social security or early reduced pension benefits, the after-tax amount of such payments received by the employee "OR WHICH THE EMPLOYEE IS CURRENTLY ELIGIBLE TO RECEIVE IF THE EMPLOYEE HAS SUFFERED TOTAL AND PERMANENT DISABILITY AND HAS REACHED FULL RETIREMENT AGE" may be coordinated. [Section 354(1)(d)].

- Conclusive dependency of wives has been eliminated from the statute for both death and injury cases because the Michigan Supreme Court had ruled decades ago that it violates the equal protection clauses of the Constitution. [Former Section 331(a) and Section 353(a)(a)(i)].
- The Director will report to the Legislature on such matters as fraud, waste, and abuses of the system. [Section 801(7)].

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