

HB 5002

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HB 5002

- Is ***not*** a mere codification of existing workers' compensation law.
- It would ***dramatically alter*** many well-settled principles.
- It would be ***poor public policy***.

Definition of disability

- ***Current law*** defines “disability” as “a limitation of an employee’s wage-earning capacity in work suitable to his or her qualifications and training.”
- ***The proposed bill*** defines “disability” as the inability “to perform all jobs ***paying the historical maximum wages*** in work suitable to that employee’s qualifications and training.”
- This would ***change*** current law and create confusion.

Definition of disability

- Does “***the historical maximum wages***” refer only to the injured worker—or to only some employers, or to all employers?
- If employers are included, would it include only Michigan employers, or would it be applied nationally—or even internationally?
- How far back in time would “***the historical maximum wages***” look—1 year, 5 years, 10 years or more?

Definition of disability

- Doctors and rehabilitation experts now testify in workers' compensation cases.
- To identify "***the historical maximum wages***" labor market "expert witnesses" would be required.

Definition of disability

- Addition of more “expert witnesses” would make workers’ compensation cases even more complex.
- “***The historical maximum wages***” concept would ***prolong litigation*** and ***increase costs*** for employers, insurers, and employees.
- “***The historical maximum wages***” concept is ***not*** a codification of current law.

Definition of wage-earning capacity

- Current law allows an injured employee who earns no post-injury wages to receive full weekly benefits.
- ***The proposed bill*** defines “wage-earning capacity” as wages the employee “is capable of earning, ***whether or not actually earned.***”
- This “***theoretical job***” concept has ***never*** been in the Worker’s Disability Compensation Act since its enactment in 1912.

Definition of wage-earning capacity

- The “***theoretical job***” definition would allow an adjuster to say “I believe you can earn wages” and to reduce the injured employee’s weekly benefits ***even if there is no job available to the employee!***
- This would ***punish*** the employee for being injured in today’s economy when unemployment is high and jobs are unavailable—***a circumstance completely outside the employee’s control.***

Definition of wage-earning capacity

- Current law encourages the employer to return an injured employee to work ASAP to minimize its weekly benefit obligation by offering reasonable employment.
- The “***theoretical wages***” definition would eliminate the employer’s incentive to offer reasonable employment.

“Actual wages earned for post-injury job”

example

- Assume an employee sustains a back injury in 2011 while performing physically demanding work.
- The employee earned \$700 per week.
- Post-injury, the employee does less physically demanding work for his or her employer and actually earns \$320 per week.

“Actual wages earned for post-injury job”
example

Current law entitles the worker to \$213.14 per week in workers compensation:

- \$ 421.93 (benefit based on \$700 wage when injured)
- \$ 208.79 (benefit based on \$320 wage actually earned after injury)
- \$ 213.14 (weekly benefit)**
- Total weekly income = \$533.14**

“Theoretical wages”

example

- The same employee also has the ***theoretical*** capability of earning \$500 per week.
- The capability is ***theoretical*** because the work has not been offered and is likely unavailable in today’s difficult job market.
- Would the employee be entitled to benefits?

“Theoretical wages” example

- The ***“theoretical wages”*** concept would ***significantly reduce benefits***:
 - \$ 421.93 (benefit based on \$700 wage)
 - \$ 312.86 (benefit based on \$500 theoretical wage)
 - \$ 109.07 (weekly benefit)***
 - Total weekly income = \$109.17***

Definition of wage-earning capacity

- Self-insured employers, such as General Motors, Chrysler, Ford and others, have **not** reduced benefits based on the “***theoretical wages***” concept.
- The “***theoretical wages***” concept is **not** a codification of current law. It would be a ***punitive change*** of the law.

Ramifications of “theoretical wages” concept

- Injured employees denied benefits under the “***theoretical wages***” concept will apply for unemployment benefits, Medicaid and other State programs.
- The “***theoretical wages***” concept shifts workers’ compensation liability from employers and insurance companies ***to the State’s general fund.***
- There is no sound reason to shift workers’ compensation liability ***to State taxpayers.***

Ramifications of “theoretical wages” concept

- At present, 16,826 employees are receiving voluntarily-paid weekly benefits.
- If the proposed bill is enacted, the self-insureds and insurance companies will claim that they have overpaid weekly benefits.
- They will seek recoupment of allegedly overpaid benefits during the 52-week period immediately preceding the request for recoupment.
- They will reduce weekly benefits by 50% to recoup the alleged overpayments.

Employer's right to select treating physician

- Currently, **30 states** now allow the injured employee to choose his or her treating physician ***immediately after an injury***.
- Current Michigan law requires the employer to provide medical care to an injured employee and allows the employee to select a treating doctor after **10 days**.
- The proposed bill would increase the 10-day period to **90 days**.

Employer's right to select treating physician

- The quality of initial medical care greatly influences the eventual outcome.
- Adjuster-selected physicians may be under financial pressure to withhold desirable but costly treatment.
- Adjusters often choose to send injured employees from industrial clinics to doctors located outside the community (i.e., Oakland County resident sent to doctors in Monroe or Grand Rapids).
- If employee lacks transportation or cannot drive due to injury, adjusters reply, "take public transportation."
- There is little if any suitable public transportation between distant cities.

Employer's right to select
treating physician
example

- The adjuster's physician prescribes an older and less-effective generic drug rather than a newer and more effective drug.
- The generic drug is ineffective and ***the employee's health does not improve.***

Employer's right to select treating physicians

- Injured employees often returns to work in less than 90 days.
- ***The proposed bill*** would ***completely deny*** these employees their basic right to receive ***any*** medical care for their injuries from their doctors.

Employer's right to select treating physicians

- Would *you* accept 100% of your treatment *for 90 days* from a doctor—
- *about whose credentials you know nothing;*
- *with whom you do not wish to treat (woman may prefer female doctor);*
- *who discusses your condition with the adjuster but not with you;*
- *who will withhold his or her test results and reports from you;*
- *who may not specialize in the type of care that you need;*
- *who is located miles away from your community, and*
- *whom you may not be able to understand?*
- Injured employees have learned to live with the **10-day** rule, but the proposed **90-day** rule would be highly objectionable and unworkable because an adjuster can send an injured employee to a doctor located anywhere in Michigan.

Employer's right to select treating physicians

- Many Michigan employees work for the State, counties, cities, villages and townships, as well as school districts.
- The proposed increase from **10 days** to **90 days** would significantly increase government involvement in the lives of these employees when they are injured. This is **more government intervention** and not less.
- This is **not** a codification of current law.

Specific loss benefits

- ***Current law*** authorizes payment of specific loss benefits for a fixed time period when a statutorily-enumerated body part (such as a hand) has been lost.
- These benefits are payable during the fixed time period—even if the employee can earn wages during that period.
- After the fixed time period ends, the employee can receive weekly benefits if he or she cannot earn wages.

Specific loss benefits

- ***Current law*** allows payment of these benefits to employees who undergo joint replacements without consideration of the surgery's outcome, i.e., successful or unsuccessful result.
- ***The proposed law*** would change the Supreme Court's *Trammell* order by requiring the magistrate to consider the effect of the surgery, i.e., a "corrected" test.

Specific loss benefits

- ***The proposed bill*** says that “the ***disability period*** for the loss shall be considered as follows:”
- This would ***change the law*** by denying benefits after the end of the fixed time period.

Specific loss benefits example

- Assume an employee's hand is traumatically amputated in a punch press.
- Under **current law** the employee receives benefits for a fixed time period of 215 weeks, even if he or she returns to work in less than 215 weeks.
- After 215 weeks the employee will receive benefits if he or she cannot earn wages.

Specific loss benefits example

- ***The proposed bill***'s phrase “disability period” limits the employee’s specific loss benefits to a maximum of 215 weeks—even if the employee cannot earn wages after that time.
- This is contrary to the Supreme Court’s opinion in *Hlady* and is ***not*** a codification of current law.

Attorney fees on medical benefits

- ***Current statutory law*** requires employers and insurers to pay the cost of an injured employee's reasonable and necessary medical care.
- Adjusters often deny medical care that the magistrate later finds to have been reasonable and necessary, and to have been unjustifiably denied.
- If the magistrate orders the employer or insurer to pay for the disputed care, ***current Supreme Court caselaw (Petersen)*** permits the magistrate to order the employer or insurer to pay attorney fees to the employee's attorney because the employee's attorney's established at trial that the disputed care was both necessary and reasonable.

Attorney fees on medical benefits

- ***The proposed bill*** would limit attorney fee liability to the injured employee and/or his or her health care providers.
- This would be extremely detrimental to injured employees in many cases.
- The employee cannot afford to pay the medical bills or the attorney fee.

Attorney fees on medical benefits

- The health care providers file suit against the employee seeking payment.
- The employee often cannot obtain legal representation because the attorney fee and expenses exceed the amount sought.
- In a nutshell, the employee wins at trial yet winds up being sued by the health care providers for unpaid bills.

Attorney fees on medical benefits example

- ***The proposed bill*** would expose injured employees to a liability that ***current law*** imposes on employers and insurers.
- ***The proposed bill*** would effectively deny payment to health care providers when the cost to the provider of hiring a separate attorney to seek payment exceeds the amount of the medical bills owed.

Attorney fees on medical benefits example

- ***The proposed bill*** would encourage health care providers to ***decline to treat*** injured workers.
- ***The proposed bill*** would ***not*** codify existing law.
- ***The proposed bill*** would ***punitively change*** the law.

Firefighters/police officers proposed change in law

- 306(2), applicable to firefighters and police officers, would change present law's "**deemed** to arise out of and in the course of employment" to "**considered** to arise out of and in the course of employment" language concerning respiratory and heart diseases, and illnesses resulting from them, that manifest themselves while the firefighter or officer is in active service. This **increases** the firefighter/police officer's burden of proof.

Proposed sections that would change current law

- 301(1) would narrow definition of “personal injury” by requiring application of Supreme Court’s *Rakestraw* opinion in ***all*** cases.
- 301(2) would expand definition of “conditions of the aging process” by including degenerative arthritis.
- 301(2) would limit compensability of mental disabilities by introducing comparative concept of “***day-to-day mental stress and tension that all employees experience.***”

Proposed sections
that would change current law

- 301(4) would narrowly redefine “disability” by including “**historical maximum wages**” concept.
- 301(4) would restrictively redefine “wage earning capacity” to include wages not actually earned [“**theoretical wages**”].
- 301(6) would deny partial disability benefits based on **post-injury wages never earned**.

Proposed sections that would change current law

- 301(7)(a) would deny benefits to an employee fired “for fault” from post-injury reasonable employment, i.e., arriving late for work due to unforeseeable traffic accidents.
- 301(7)(d)(ii) would ***shift burden of proof from employer to employee*** to show a lost wage earning capacity if the employee works post-injury between 100 and 250 weeks. ***Current law*** requires the employer to show that the employee has a new wage earning capacity.

Proposed sections that would change current law

- 301(7)(d)(iii) would add ***conclusively-presumed wage earning capacity*** if employee works post-injury 250 or more weeks.

Proposed sections that would change current law

- 315(1) would ***expand employer's right to control health care*** to 90-day period after injury.
- 315(1) would ***reverse Supreme Court's Petersen opinion*** by shifting liability for attorney fees on unpaid medical bills from employers to employees and/or health care providers.
- 354(1)(d) would permit employer to coordinate pension or retirement benefits that employee is eligible to receive ***but is not actually receiving***.

Proposed sections that would change current law

- 801(6) would change interest rate on benefits to rate payable on civil action money judgment under Revised Judicature Act [MCL 600.6013(8)].

HB 5002 is not a mere “housekeeping” bill

- Those supporting HB 5002 claim that it merely codifies many long-standing principles of workers’ compensation law.
- HB 5002 would be a ***significant change*** of Michigan’s workers’ compensation law.
- The Committee should ***decline*** favorable reporting of HB 5002 in its present form.
- The Committee should consider additional input and proposed amendments from additional parties.