SFA BILL ANALYSIS

Senate Fiscal Agency • Lansing, Michigan 48909 • (517) 373-5383

Senate Bill 67 (Substitute S-3 as passed by the Senate)
Sponsor: Senator Frederick Dillingham
Committee: Human Resources and Senior Citizens

Date Completed: 4-16-87

RATIONALE

Despite numerous amendments to the Worker's Disability Compensation Act over the last several years, some people contend that the workers' compensation system has remained plagued with problems and is in need of additional reform. Issues that many feel need to be addressed include the definition of disability, clarification of the exclusivity of compensation remedy, clarification of the "coordination of benefits" provisions, expansion of the Act's provision for entitlement to a supplemental payment, alternative compensation systems, revision of the calculation of an employee's average weekly wage, and establishment of the Accident Fund as an independent mutual insurer.

Many believe that the Act's definition of disability ("a limitation of an employee's general field of employment resulting from a personal injury or work related disease") is too broad and, thus, allows an individual to remain designated as "disabled" even though the individual could work in another capacity for which he or she was trained and qualified but which was not "in the employee's general field of employment".

Some view an exclusive remedy provision as essential to any constructive, workable disability compensation system. The idea behind a workers' disability compensation system is to provide a means for addressing workplace accidents without resorting to the unpredictable, time-consuming, and potentially expensive tort system. Without a strong exclusive remedy provision, these people contend, a workers' compensation system is duplicative. A recent development in Michigan case law has affected this issue and, consequently, some believe that the Act's exclusive remedy provision should be clarified [see BACKGROUND].

The 1981 amendments to the Act provided for "coordination of benefits" and supplemental payments to some injured workers. Many feel that the coordination of benefits provision either was written ambiguously or was misinterpreted by the courts, and, consequently, should be revised [see BACKGROUND]. In addition, some feel that supplemental payments should be offered to more injured workers.

In addition, some people believe that the Worker's Disability Compensation Act should be merely one alternative system of compensation. They contend that a free-enterprise society should encourage interaction between employers and employees and, to that end, a voluntarily agreed upon contract of compensation (outside of the Act's parameters) should be permitted.

Some feel that the Act's method of determining an employee's average weekly wage is too generous. By including such things as overtime pay and cost of living adjustments, and basing the average on the highest paid 39 weeks of the last year, the current calculation method yields an inaccurately high figure, these people contend.

Finally, the Accident Fund was created in 1912 by the predecessor to the Worker's Disability Compensation Act, "to provide workmen's compensation insurance for employers under the supervision of the commissioner of insurance". It has operated over the years as a mutual insurer and has a board of directors consisting of elected policyholders/members. A 1976 ruling of the Attorney General stated that the Accident Fund is a State agency and is subject to the constitutional and statutory restrictions imposed on State agencies and to the control of the Legislature and the supervisory control of the Insurance Commissioner. This and other issues are the subject of pending litigation. Some people feel that the Accident Fund should be designated statutorily as a private mutual insurer and that the chapter of the Act dealing with the Accident Fund should be repealed. [See the SFA bill analysis of Senate Bills 110-114 for further information on the Accident Fund issue.]

CONTENT

Senate Bill 67 (S-3) would amend the Worker's Disability Compensation Act to do all of the following:

- **Specify that each workers' compensation case would be decided on its merits and not on the liberal construction of common law.**
- **Alter the definitions of "disability", "personal injury", and "reasonable employment".**
- **Provide an exception to the exclusivity of the compensation remedy for intentional injuries, and specify that the filing of a claim or receipt of benefits under the Act would preclude the pursuit of other remedies, and filing a civil claim would preclude pursuing any claim under the Act.**
- **Alter the way the Act treats "coordination of benefits" to prevent recoupment of overpayments of compensation in some cases and to specify a minimum level of coordinated benefits for some workers.**
- **Expand the Act's provision for entitlement to a supplemental payment to cover more workers and extend the period during which a percentage change for purposes of such an adjustment would be computed.**
- **Provide for "utilization review" of vocational rehabilitation services.**
- **Specify exceptions to the definition of "employee".**
- **Allow employers and employees to agree voluntarily to create their own workers' compensation system through a contractual agreement.**
- **Expand eligibility and requirements for authorization to be self-insured.**
- **Specify conditions under which a disability would not be compensable under the Act.**

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- Establish the standard of proof that would have to be met by an employee who sought compensation.
- Revise the calculation of an employee's average weekly wage.
- Make other provisions pertaining to: compensation rates for an employee who, subsequent to disablement, had established a new wage earning capacity; medical records in the possession of attorneys; reduction of workers' compensation benefits for benefits payable under unemployment insurance; and the maximum amount payable by an employer for burial expenses.
- Repeal the sections of the Act that pertain to the Accident Fund (MCL 418.701-418.755).
- Provide an effective date of May 15, 1987.

Workers' Compensation Cases

The bill specifies that the Act would have to be implemented, enforced, and interpreted to assure the "quick and efficient" delivery of benefits at a reasonable cost to the employers subject to the Act. Each case would have to be decided solely on its merits and "the common-law rule of liberal construction based upon the remedial aspect of worker's compensation" could not apply. The bill further specifies that the Act would be "based upon a mutual renunciation of common-law rights and defenses by both employers and employees". The rights and interests of employers and employees would be considered equal and those of one could not be favored over those of the other.

Definitions

Currently, the Act defines "disability" as a limitation of an employee's wage earning capacity in "the employee's general field of employment resulting from a personal injury or work-related disease". The bill would change the definition to mean a limitation of an employee's wage edrning capacity in "work suitable to his or her qualifications and training resulting from a personal injury or work-related disease". (The definition would be amended both in section 301 and in section 401, which provide for compensation for personal injury and occupational disease, respectively.)

"Personal injury", under section 401 language that the bill would replace, includes a disease or disability due to causes and conditions "characteristic of and peculiar to the business of the employer" and that arise "out of and in the course of employment". The bill would change the definition to mean "a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of employment, results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner than the public in general".

Under the Act, if an employee receives a bona fide offer of reasonable employment and refuses that employment without good cause, the employee is ineligible for benefits. "Reasonable employment" is defined with reference to the employee's capacity to perform, and the Act specifies that an employee's capacity to perform may not be limited to "jobs in his or her general field of employment". Under the bill, however, an employee's capacity to perform could not be limited to "work suitable to his or her qualifications and training".

Exclusivity

The Act provides that the right to recovery of benefits under the Act is the employee's exclusive remedy against the employer. The bill would apply the exclusive remedy provision to all claims "for damages resulting from an injury, disease, disability, or death, regardless of cause". The bill would create an exception to this provision for "a civil claim for damages resulting from disease, disability, or death where the employer deliberately intended both the act that proximately caused the disease, disability or death and deliberately intended the resultant disease, disability, or death". Such a claim would have to be filed within one year after the death, or the date on which the employee knew or should have known of the disease or disability, whichever occurred first.

The bill also provides, however, that the filing of a claim for, or receipt of, any benefits under the Act would preclude an employee, or an employee's spouse, dependents, or estate, from maintaining any civil claim for damages against the employer for the same injury, disease, or death; and that the filing of a civil claim for damages resulting from any injury, condition, disease, disability, or death would preclude maintaining any claim for compensation or benefits under the Act for the same injury, condition, disease, disability, or death.

Under the bill an architect, professional engineer, or land surveyor would be considered an employer of another employer's employee who received a personal injury while working on a construction project for which the employee was entitled to benefits under the Act, and for which the architect's, engineer's, or surveyor's act or omission was the partial or total cause. The injured employee, however, would not have a cause of action against the architect, engineer, or surveyor for civil damages as a result of the act or omission. The actual employer in such a case could enforce a right of contribution against the architect, engineer, or surveyor for benefits paid by the employer under the Act. An architect, engineer, or surveyor would not be required to pay benefits under the Act or other civil damages for an injury incurred by another employer's employee except as described above.

Coordination of Benefits

"Coordination of benefits" refers to the Act's provision that benefits payable under the Act are reduced by certain specified amounts if the injured employee receives old-age insurance benefits or certain employer-paid benefits during the time period he or she is eligible to receive benefits under the Act.

The bill specifies that after May 15, 1987, "payments made to an employee before October 7, 1985 resulting from liability...for a personal injury occurring before March 31, 1982, that were not coordinated . . . [could] not be considered to have created an overpayment of compensation benefits subject to reimbursement to the employer or carrier after May 15, 1987", except for payments made pursuant to an order of a hearing referee or the appeal board or pursuant to a court order. (An employer or carrier who received reimbursement before May 15, 1987, would not be subject to this provision.)

In addition, the bill specifies that coordinated benefits payable after May 15, 1987, arising from an injury occurring before March 31, 1982, could not reduce the employee's total income after the date of injury below 100% of the employee's after-tax weekly wage before the date of injury.

Supplement to Weekly Compensation

The Act provides for a supplement to weekly compensation for employees or dependents of deceased employees who are receiving or are entitled to receive maximum benefits for injuries that were incurred between September 1, 1965, and December 31, 1979. The bill would extend these provisions to include employees or dependents of deceased employees who are receiving or are entitled to receive maximum benefits for injuries that were incurred between January 1, 1980, and December 31, 1931. In addition, the

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percentage change for purposes of such a supplemental adjustment would be computed from the base year through December 31, 1983, rather than through December 31, 1981.

Vocational Rehabilitation Services

The Act entitles an employee who suffers an injury covered by the Act to "vocational rehabilitation services". Such services may include retraining and job placement, "as may be reasonably necessary to restore . . . [the employee] to useful employment".

The bill would provide for a process of "utilization review" of the vocational rehabilitation services. The standards for the review would have to be established by rules promulgated by the Department of Management and Budget (DMB). The Director of the DMB would have to appoint "an advisory committee to aid and assist in establishing the schedules of maximum charges" payable under the bill's provisions. Reviews would be conducted by the vocational rehabilitation section of the Bureau of Workmen's Disability Compensation. ("Utilization review" would mean "the initial evaluation by a carrier, employer, or injured worker of appropriateness in terms of both the level and the quality of vocational rehabilitation services provided an injured employee, based on industry accepted standards".)

All fees and charges for vocational rehabilitation services would be subject to the rules promulgated by the Director of the DMB, which would have to establish schedules of maximum charges and would be reviewed annually. A vocational rehabilitation service provider would be paid the lesser of its customary charges or the maximum fee established under the rules. The proposed rules would have to be sent to the legislative committees that consider workers' compensation issues for their review before submission to the Joint Committee on Administrative Rules. The rules would have to be promulgated by May 15, 1988.

Under the bill, a carrier, employer, or employee could determine that a rehabilitation service provider had made excessive charges or required unjustified service, and could withhold payment for such services (or seek repayment for fees already collected). The DMB could review the records and billings of a provider who was determined to be out of compliance with the schedule of charges or to have required unjustified services. A vocational rehabilitation service provider could appeal a determination of overutilized or improperly rendered services, or of inappropriate costs of services, to the DMB in the manner provided in the Administrative Procedures Act.

A vocational rehabilitation service provider who had accepted payment under the bill's provisions would be "considered to have consented to submitting necessary records and other information concerning any vocational rehabilitation services provided for utilization review". A provider who submitted false or misleading information would be guilty of a misdemeanor, punishable by a fine of up to $1,000 or one year's imprisonment, or both.

Employee Exceptions

The bill specifies that anyone who satisfied all of the following conditions would not be considered an employee under the Act:

- Pursuant to a contract, operated a truck for purposes of transporting goods.
- Owned or leased the truck.
- Was compensated on the basis of miles driven rather than hours worked.
- Was not considered an employee under the Internal Revenue Code.

In addition, the bill would permit an employer to file an application to be excluded from the Act with respect to an employee who was conscientiously opposed to acceptance of the compensation and benefits of any public or private insurance that made payments in the event of death, disability, old age, or retirement, or toward the cost or provision of medical services. The application would have to include a written waiver of all compensation and benefits under the Act and an affidavit by the employee that he or she belonged to a recognized religious sect whose tenets or teachings opposed the acceptance of the Act's compensation or benefits. The application would have to be approved by the Director of the Bureau of Workmen's Compensation upon receipt and determination that the employee was a member of such a sect and that it was the practice of the sect to provide for its dependent members. If the employee were a minor, his or her guardian could provide the waiver and affidavit. A waiver would remain in effect unless the sect ceased to provide for its dependents.

Workers' Compensation Contracts

The bill expressly states that it would be the Legislature's desire "to foster the freedom of contract between employers and employees or their authorized representatives to voluntarily agree to create their own system of workers compensation".

The bill would allow an employer to contract with his or her employees to be excluded from the Act and, instead, to provide for their own system of workers' compensation. The contract would have to be signed by the employer and each covered employee or by the employees' authorized collective bargaining representative. The contract would have to specify all of the following:

- Eligibility for, and the amount and method of payment of benefits, as well as the insurance coverage obtained by the employer to ensure the payment of benefits, and provisions to govern the possible insolvency of the employer and how benefits would be paid in the event of insolvency.
- The manner and method for reporting work-related injuries to the Bureau and provisions for medical treatment and rehabilitation.
- Procedures for resolving disputes over eligibility for, and payment of, benefits (which could include arbitration or joint employer-employee panels); and provisions for the manner of reimbursement of legal fees to the prevailing party in a dispute, if the employer and employees considered such a provision necessary.
- Whether all or only certain classes of employees were covered under the contract; the length of time in which the contract would remain in effect; and the rights of the contracting parties after the termination date of the contract (e.g., the continuation of benefits).

The contract would have to be submitted to the Director of the Bureau of Workmen's Compensation at least two months before its effective date and the Director would determine if the contract met the bill's minimum standards and any additional standards that the Director had prescribed by rule. If the Director disapproved of a contract, he or she would have to outline the reasons for disapproval in writing to the employer and the employees or their authorized representative. The employer or the employees could appeal the ruling in the manner provided in the Administrative Procedures Act.

Employers and employees could bring an action for breach of contract in the same manner as any other contract action, or they could agree to enforcement methods within the contract itself. The section of the bill that provides for workers' compensation contracts would take effect on May 15, 1988.

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Self-Insurance

The bill would permit an employer to furnish a surety bond or a treasury note or bond, if the Director of the Bureau of Workmen's Disability Compensation determined it to be necessary, to demonstrate the employer's solvency and ability to pay compensation and benefits in order to receive authorization to be self-insured.

Currently, the Act allows some employers, under certain conditions, to pool their liabilities for the purpose of qualifying as self-insurers. The bill would permit the pooling of assets and liabilities, and would add to the list two or more employers "located in the same city, township, or county with net worth of $5,000,000.00 or more, and sponsored by a bona fide business association which . . . has been in existence for at least 2 years and is engaged in substantial activity for the benefit of its members other than the sponsorship of a group self-insurance program".

The bill would require a self-insurance group comprised of employers who are not in the same industry to maintain actuarially appropriate loss reserves. These would have to include reserves for known claims and associated expenses, claims incurred but not reported and associated expenses, and additional costs associated with loss development on known claims. Such a self-insurers' group would be required to contract with a consulting actuary to provide an annual report to the Bureau on the adequacy of loss reserves. The report would have to comment on the adequacy of current reserves; a factor for incurred, but not reported, claims; and a recommendation on sufficient funding to ensure the availability of money to cover the group self-insurance program's losses.

Noncompensable Disabilities

The Act provides that a disability is compensable if it resulted from a personal injury that arose out of and in the course of employment by an employer subject to the Act at the time of the disability. The bill specifies that a disability resulting from an injury that occurred during the course of employment but did not arise out of that employment would not be compensable under the Act.

The bill also would exempt an employer from liability for compensation, benefits, or damages if an employee suffered a personal injury or work-related disease that was purposely self-inflicted or was caused by the employee's intoxication or use of a controlled substance not prescribed by a physician, if the intoxication or influence of the controlled substance were the proximate cause of the injury.

A disability incurred while an employee was traveling would be compensable only if the employee were engaged in an "actual employment activity", and activity directly related to his or her employment, or any other activity at the direction of the employer. An injury that occurred during, or as the result of any deviation from the route or employment activity, "however slight", that was not authorized by the employer, would not be compensable.

Under the bill, if disability were established and an employee lost a subsequent job through his or her own fault, the employee would be considered to have voluntarily removed himself or herself from the work force and would no longer be entitled to any benefits under the Act.

The Act provides that compensation is not payable for a disability resulting from an occupational disease if the employee "wilfully and falsely" represents in writing that he or she previously had not suffered from the disease that was the cause of the disability or death. The bill would delete "wilfully and falsely" and add, "and the employee knew or should have known that he or she had previously suffered from the disease or condition".

Standard of Proof

In order for an employee to receive disability compensation, the bill would require that the employee establish by a preponderance of the lay and medical evidence either that the personal injury occurred during or as the direct result of the performance of an actual employment activity and would not have occurred but for the performance of that activity; or that such a personal injury was aggravated, accelerated, or contributed to directly and primarily because of an accident or other incident or exposure of significant variation from ordinary exposure incurred in the performance of the work. Compensation would continue only for the duration of such an aggravation, acceleration, or contribution, and employment causes or contributions would have to be established as factual. An employee's perception of work contribution would not be admissible to determine the basis of a work related disability.

If an employee received notice of a pending layoff that would cause a wage loss due to economic reasons, and the employee subsequently filed for benefits under the Act, there would be a rebuttable presumption arising at the time of receipt of the layoff notice that the employee was laid-off and not disabled. To rebut the presumption successfully, the employee would have to show by "clear and convincing evidence" that he or she suffered from a "work-related disability which significantly interferes with his or her ability to obtain work within his or her qualifications, training, or experience". The presumption would not apply to employees who received benefits under the Act or performed restricted or favored work as the result of a work related injury or occupational disease within the year preceding the loss of employment.

Average Weekly Wage

The bill would alter the formula for calculation of the "average weekly wage". The current formula includes overtime, premium pay, and cost of living adjustments; the bill specifically would exclude those factors. The Act bases the average on the wages paid in the highest paid 39 weeks of the 52 weeks preceding the injury. The bill would base the average on all of the preceding 52 weeks.

Other Provisions

The Act provides for the compensation of a disabled employee who, after having been employed for 100 weeks or more, loses his or her job through no fault of his or her own. The bill provides that if, after the exhaustion of the employee's unemployment benefit eligibility, a hearing referee or workers' compensation magistrate determined that employment since the time of injury had established a new wage earning capacity, the employee would receive compensation equal to 80% (instead of all) of the difference between the normal and customary wages paid to persons performing similar work and wages paid at the time of injury.

The Act requires claimants and employers or carriers to provide each other with relevant medical records in their possession at the time of application for a hearing of mediation. The bill would require attorneys for the respective parties also to provide medical records in their possession to claimants, employers, or carriers.

Under the Act, net weekly benefits or lump sum benefits must be reduced by 100% of the amount of unemployment insurance benefits payable for identical time periods and chargeable to the same employer. The bill would refer, instead, to 100% of the "after-tax" amount of unemployment insurance benefits payable reduced by the

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prorated weekly amount that would have been paid under the Federal Insurance Contributions Act, State income tax, and Federal income tax.

The bill would increase from $1,500 to $2,500 the maximum amount payable by an employer for the burial expenses of an employee who died as the result of an injury. The bill is tie-barred to Senate Bills 110-114, which deal with the Accident Fund.

MCL 418.131 et al.

BACKGROUND

Definition of "Disability"

One of the biggest controversies concerning workers' compensation has centered on the definition of "disability". Before the 1981 amendments to the Act, the statute contained no definition specifically applicable to personal injuries. The current definition (now contained both in Section 301 and in Section 401, dealing with personal injuries and occupational diseases, respectively) was provided by Public Act 200 of 1981.

Exclusive Remedy

On December 23, 1986, in the case of Beauchamp v Dow Chemical Company the Michigan Supreme Court ruled that an "action by an employee for an intentional tort by an employer is not barred by the exclusive remedy provision of the workers' compensation act. Whether a tort was intentional is to be determined by applying the substantial certainty standard, i.e., whether the employer intended the act that caused the injury and knew that the injury was substantially certain to occur". Ronald Beauchamp brought the action against Dow Chemical, seeking damages for physical and mental injuries suffered while employed by Dow as a result of exposure to "agent orange". The Court ruled that an employee's remedy for intentional torts by an employer was not affected by the Act because the Act addressed accidental and not intentional injuries.

Coordination of Benefits

"Coordination of benefits" refers to the Act's provision that benefits payable under the Act are reduced by certain specified amounts if the injured employee receives old-age insurance benefits or certain employer-paid benefits during the time period he or she is eligible to receive benefits under the Act. Public Acts 201 and 203 of 1981, which became effective on April 1, 1982, amended the Worker's Disability Compensation Act to allow employers to coordinate benefits. (Some contend that the Legislature intended the coordination of benefits provision to apply only to workers injured after March 31, 1982, but the Act does not specify whether that is the case.)

On October 7, 1985, in a series of decisions, Chambers v General Motors Corporation, Gomez v General Motors Corporation, and Franks v White Pine Copper Division, the Michigan Supreme Court held that the coordination of benefits provisions established by the 1981 Acts could be applied to all workers' compensation payments made after March 31, 1982 (including payments to workers injured before that date).

FISCAL IMPACT

On the whole, the bill would decrease workers' compensation costs for both State and local governments by an indeterminate amount. The proposed limitation on coordination of benefits potentially could reduce cost savings that otherwise would result from the bill. It is difficult to predict the extent of the cost savings from the bill due to a lack of detailed data. Actual State expenditures for workers' compensation in FY 1985-86 were $17.8 million. To date, the State has not attempted to coordinate benefits for workers injured prior to March 31, 1982. The extent to which local governments have attempted to coordinate benefits for these workers is not known.

The bill would increase State expenditures for supplemental benefits by increasing the number of workers eligible for such benefits and extending the end of the adjustment period from December 31, 1981, to December 31, 1983. Based on supplemental benefits of $20.1 million in 1985 and Department of Labor estimates of weekly benefits for claimants with injury dates in 1980 and 1981, the total amount of the increase on an annual basis would be $13.2 million GF/GP. Approximately 10%, or $1.3 million, would be in the form of direct payments to self-insured municipalities, the remainder would be in the form of tax credits granted against the Single Business Tax or the premium tax on foreign insurers. In the short-run, the annual cost of the bill could increase as a backlog of contested cases are processed through the system. In the long-run, the cost of the bill would decline as there was attrition of claimants receiving supplemental benefits.

The bill also would increase State expenditures by an indeterminate amount for the Bureau of Workmen's Disability Compensation to regulate private workers' compensation contracts. The magnitude of the increase would depend on the number of contracts submitted for approval and the extent of the review of each contract by the Bureau.

The bill also would increase State expenditures by an indeterminate amount by requiring the Department of Management and Budget to review the utilization of rehabilitation services and the fees charged for those services by providers. The magnitude of the increase would depend on the number of cases reviewed, the extent of the reviews, and the number of compliance actions taken.

The bill also could increase by an indeterminate amount, revenues to and expenditures from the Self-Insurers' Security Fund by increasing opportunities for employers to participate in group self-insurance arrangements. The Fund collects fees from all self-insurers and pays benefits to disabled employees of insolvent self-insurers. It is not possible to determine the precise amount of the increase in the Fund because of the lack of information on employers that would self-insure as a result of this bill.

ARGUMENTS

Supporting Argument

It is essential to Michigan's economic climate that our workers' compensation costs be made more competitive. According to a 1984 poll of the Michigan Manufacturers Association membership, workers' compensation was the number one disincentive to doing business in Michigan. Michigan's costs are among the highest in the nation and appear particularly unfavorable when compared with other Great Lakes states. According to the report of Professor Theodore J. St. Antoine (appointed by the Governor to review the Workers Compensation System), Michigan's insurance rates remain about 18% higher than the average of the rest of the Great Lakes states (excluding Indiana, because the inadequacy of its benefit levels would distort any meaningful comparisons). By addressing the definition of "disability", strengthening the exclusive remedy provision, permitting private workers' compensation contracts, and adjusting the formula for calculating average weekly wage, the bill significantly would enhance Michigan's economic prospects by decreasing workers' compensation costs.

Eligibility for benefits, and thus employers' costs, hinge directly on the definition of "disability", and adoption of

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the bill's definition is critical if we are to achieve any real reform. In his 1984 report to the Governor's Cabinet Council on Jobs and Economic Development, Professor St. Antoine himself stated that, if he were to write on a clean slate, he would prefer to see the Michigan definition brought closer into the mainstream of American law by adopting the "qualifications and training" language that is contained in the bill. Professor St. Antoine went on to say that such a change could reassure those who believe that the State's definition of "disability" is a major flaw in our compensation system. Similar definitions have been adopted by a number of other states, and the attendant case law could be adapted to Michigan. As things stand now, however, we are operating blindly under a definition adopted in 1981. Litigation over the previous change is slowly wending its way toward the Michigan Supreme Court, and it could be years before this issue is finally resolved.

Further, redefining "disability" would send an important message to the business and manufacturing community that Michigan is serious about reforming its system and reducing employer costs. It would make a positive change in the perception others have of our law, its impact on employers, and our intentions to mitigate that impact. Having the same definition as other states would help us argue our competitive position and send a signal that Michigan is capable of responding constructively to changes in the economy.

Response: It is by no means settled that the definition should be altered. In fact, doing so could do far more harm than good, especially in view of the concession by at least one major Michigan corporation (Ford Motor Company) that it "is not certain a change in the definition of disability will have a major impact on the workers' compensation system". What a new definition would do, though, is superimpose over the previous amendments a completely new set of changes that would require entirely different interpretations for a separate period of time. Rather than clarifying and expediting the implementation of our law, the result would be far greater confusion and additional delay. It is not enough to say that other states already have a body of case law, since Michigan's system is based on the relatively uncommon "wage loss" approach. Even if the various systems were compatible, there is no guarantee that our courts would be the least bit influenced by other states' precedent.

Further, while Professor St. Antoine would prefer a different definition were he to start anew, he also points out that the "qualifications and training" definition probably would be of "small practical consequence". As his report states, the "current statutory language was the product of a hard-fought battle, with give and take on all sides. There is something to be said for letting the contending parties rest with their respective gains and losses, at least until we have a considerably clearer picture of just what those may be."

Supporting Argument

In order to be effective any system of workers' disability compensation must rely on an exclusive remedy provision. Workers' compensation systems are alternatives to the tort system. They rest on the belief that in an imperfect world, there are going to be workplace accidents and that seeking retribution through tort law may or may not fairly and adequately resolve such situations — for there may be no clear "fault" involved. A workers' compensation system, then, provides a means for replacing wages that may be lost due to disablement. If other remedies are permitted (i.e., civil claims through tort actions) then the principle behind the workers' compensation system is defeated. Thus, the bill not only would allow the pursuit of civil claims as an alternative to the workers' compensation system in extreme cases (i.e., "deliberate intent" of both the act or omission leading to injury and the result of the act or omission), but also would ensure the workability and usefulness of the system by specifying that the Act would be an exclusive remedy in all other situations.

Response: The bill itself would not "grant" the exception to the exclusive remedy provision. The Michigan Supreme Court has ruled that the Act is not an "exclusive remedy" when "the employer intended the act that caused the injury and knew that the injury was substantially certain to occur". The exclusivity provision of the bill merely represents an attempt to restrict the rights of injured workers to seek damages against employers. The bill would limit injured workers to one system or the other even in cases of intentional acts or omissions. Moreover, the choice of which avenue to pursue would have to be made within only one year, while tort law allows a two-year statute of limitations on assault and battery actions, and a three-year limitation in other cases of injury or death. Far from attempting to ensure a workable and effective system of workers' compensation, the bill would seek to skew that system drastically in favor of employers.

Supporting Argument

By permitting an alternative to the Act's workers' compensation system, the bill would do much to foster a positive perception of the business climate in Michigan. Allowing employers to negotiate a workers' compensation system with their employees would provide a more desirable atmosphere for existing and potential employers. Rather than being subjected to a State-imposed system, employers could be more flexible in providing a compensation system. Also, such negotiations could contribute to developing better relationships between management and labor by providing an additional forum for discussion. Any privately negotiated compensation systems would have to reflect at least the level of benefits of the Act's system, because the employer's system would be in competition with the one established in statute. In fact, the bill would require any negotiated system to meet certain specified minimum standards so that the welfare of the employees would be assured.

Response: The so-called "opt-out" provision of the bill simply proposes an attempt to circumvent the Act. The minimum standards that would be required by the bill are very vague. They simply would require certain issues to be addressed in a contract, not assured. In addition, such a system would be susceptible to widespread abuse. Domineering employers potentially could mandate the terms of a disability compensation contract, and overzealous employees or employee groups could force compliance through intimidation tactics. Rather than promoting positive relationships between management and labor, privately negotiated workers' compensation systems likely would be a divisive force in the workplace.

Supporting Argument

The bill would help to hold down workers' compensation costs by revising the formula used to calculate the average weekly wage. The current formula yields a misleading "average" figure because it includes such variables as overtime pay, premium pay, and cost of living allowances. In addition, the current formula does not reflect a true "average" because it uses the highest paid 39 weeks of the 52 previous to the injury. Including the lowest paid 13 weeks along with the other 39 would decrease employers' workers' compensation costs and would reflect a true average wage.

Response: The proposed revision in the calculation of the average weekly wage represents just another attempt

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to benefit employers at the expense of injured workers. Overtime pay, cost of living adjustments, and the like rightfully belong in the formula that determines the average wage. The injured worker would be receiving those incentives if he or she were able to perform the work, so they must be considered a part of any "wage loss" for which the system compensates disabled workers.

Supporting Argument

In addition to taking measures to decrease employers' costs, the bill would benefit disabled workers in several ways. First, it would prohibit any recoupment of benefits that the employer or insurance carrier had overpaid to workers due to the Chambers decision regarding coordination of benefits. In addition, for employees injured before March 31, 1982, the bill would not allow coordination of benefits to decrease the employee's total income below 100% of his or her after-tax wage at the time of disablement. Third, the bill would extend entitlement to a supplemental wage to include workers injured between January 1, 1980, and December 31, 1981, and to expand the base period during which such adjustments are determined. Also, the bill would increase the maximum burial expense that could be provided by the employer if the injured worker had died as a result of the injury.

Response: These provisions are thinly disguised as benefits for the injured workers. In reality, they are small concessions that are long overdue. The coordination of benefits provision of the Act should not have applied to workers injured before March 31, 1982, at all. The Legislature did not specify that exception when it adopted the 1981 reforms, however, and the Supreme Court held that the Act is silent with respect to those injured before that date. The bill would not correct the situation — coordination still would be allowed. The minimum limit of 100% of after-tax wages at the time of injury is merely symbolic — the people to whom it would apply were injured years ago and their wages at the time of injury amount to very little in today's economy. Also, if other benefits, to which any worker was entitled (e.g., old-age Social Security benefits) amounted to at least 100% of after-tax wages at the time of injury, then full coordination of benefits would continue. (According to testimony before the Senate Committee on Human Resources and Senior Citizens, one worker, injured in 1977, was receiving $132 per week before coordination of his benefits. After the Chambers decision, his benefits were "coordinated" to $6.41 per week because he is receiving Social Security retirement benefits and pension benefits; and he was charged almost $4,000 for "overpayment of benefits" for the time that had elapsed between the Chambers decision and coordination of his benefits.)

The supplemental entitlement that the bill would grant to workers injured between January 1, 1980, and December 31, 1981, should have been enacted long ago. The 1981 reforms of the Act provided a supplemental benefit payment to workers injured before January 1, 1980, and a benefit level increase to workers injured after December 31, 1981, thus leaving behind those injured during this two-year period.

Supporting Argument

One aspect of a workers' compensation system that has not drawn much attention is that of "compensating" the worker with another job rather than strictly with payments. Such a "job rehabilitation" approach to workers' compensation would be constructive in that it might enable employers to hold down their costs, while allowing injured workers to remain productive. The proposed definition potentially could foster an environment for a job rehabilitation approach to workers' compensation. The "qualifications and training" language could make employer-sponsored retraining programs more palatable to both employers and employees.

Opposing Argument

The bill is a blatant pro-business measure and is blind to the plight of the injured workers. Its reforms are aimed strictly at generating profits by cutting employers' costs. The bill would accomplish this profit-motive at the expenses of those least capable of helping themselves — disabled workers. While it is true that providing "tighter" definitions of such terms as "disability", "personal injury", and "reasonable employment", could hold down costs to business, it is also true that such measures would force some injured workers to continue working in pain or to enroll in public assistance programs. Expanding the scope of noncompensable disabilities and imposing more restrictive formulas for determining compensation levels, as the bill proposes, could only be detrimental to disabled workers.

Opposing Argument

In addition to favoring employers generally, the bill would establish a favored class of employers. This group would include architects, professional engineers, and land surveyors, whom the bill would exempt from any claim for damages other than those provided for in the bill. Even then, architects, engineers, and surveyors would not be considered employers under the bill, but would only be subject to an enforceable right of contribution on the part of employers with whom they had contracted. Also in this favored class would be trucking companies, because under the bill many truck drivers would not be considered employees.

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