SB 708 and HB 5002

Analysis and proposed amendments

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SB 708

- 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."
- ***SB 708 § 301(4)(A)*** defines "disability" as the inability "to perform all jobs ***paying the historical maximum wages*** in work suitable to that employee's qualifications and training" [Section 301(4)(A) of enacted HB 5002 defines "disability" as the inability "to earn in any job paying maximum wages in work suitable to the employee's qualifications and training."].
- ***SB 708 § 301(4)(A)*** would ***change*** current law and create confusion.

Definition of wage-earning capacity

- Current law allows an injured employee who earns no post-injury wages to receive full weekly benefits.
- ***SB 708 § 301(4)(B)*** defines "wage-earning capacity" as wages the employee "is capable of earning, ***whether or not actually earned***." [Enacted HB 5002 defines "wage-earning capacity" as wages the employee "is capable of earning at a job reasonably available to that employee, ***whether or not actually earned***."]
- The "***theoretical wages***" concept has ***never*** been in the Worker's Disability Compensation Act since its enactment in 1912.

Definition of wage-earning capacity

- Doctors and rehabilitation experts now testify in workers' compensation cases.
- The need for more "expert witnesses" to testify about "***theoretical wages***" would make workers' compensation cases even more complex.

Definition of wage-earning capacity

- The "***theoretical wages***" 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***.

Ramifications of "theoretical wages"

- 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 to an injured worker.
- The following example illustrates why.

"***Actual wages vs theoretical wage***"
(an actual case scenario)

- Thomas J. Kocsis sustained an back injury in 2009 while performing physically demanding work.
- He earned $497.84 per week.
- The workers' compensation carrier said that he also had the ***theoretical*** capability to earn $482.69 per week delivering pizzas, based on statistics from the US Department of Labor.
- The capability was ***theoretical*** because the work was never offered.

Theoretical wage reduction in Thomas J. Kocsis' case

<u>$497.84 when injured in 2009</u>

$ 310.50 (benefit based on $497.84 wage when injured)

$ <u>310.50</u> (weekly benefit under current law)

Total weekly compensation should be $310.50

<u>$497.84 when injured in 2009</u>

$ 310.50 (benefit based on $497.84 wage when injured)
- <u>303.26</u> (benefit based on $482.69 theoretical wage delivering pizzas)

$7.24 (weekly benefit under "theoretical wage")

Total weekly compensation is $7.24 (when he should receive $310.50)

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

- 16,826 employees now receive 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 their requests to recoup.
- They will reduce weekly benefits by 50% to recoup the alleged overpayments.

Employer's right to select treating physician

- ***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***.
- ***SB 708 § 315(1)*** would increase the 10-day period to ***90 days*** [§ 315(1) of enacted HB 5002 would increase the 10-day period to ***45 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 the 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 return to work in less than 45 days.
- ***Enacted HB 5002 completely denies*** 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 45 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 ***45-day*** rule in § 315(1) of enacted HB 5002 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 ***45 days*** [in § 315(1) of enacted HB 5002] 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 ***under current law*** during the fixed time period—even if the employee can earn wages during that period.
- After the fixed time period ends, ***current law*** allows the employee to receive weekly benefits if he or she cannot earn wages.

Specific loss benefits

- ***SB 708 § 361(2)*** 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

- ***SB 708 § 361(2)***'s phrase "the 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, ***the Supreme Court's opinion in*** **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 ramifications of SB 708

- ***SB 708 § 315(1)*** would limit liability for an attorney fee on medical benefits 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 ramifications of SB 708

- The health care providers will file suit against the employee seeking payment.
- The employee will often be unable to obtain legal representation because the attorney fee and expenses will exceed the amount sought.
- In a nutshell, the employee who wins at trial will wind up being sued by the health care providers for unpaid bills.

Attorney fees on medical benefits ramifications of SB 708

- ***SB 708 § 315(1)*** would expose injured employees to a liability that ***current law*** imposes on employers and insurers.
- ***SB 708 § 315(1)*** 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 ramifications of SB 708

- ***SB 708 § 315(1)*** would encourage health care providers to ***decline to treat*** injured workers.
- ***SB 708 § 315(1)*** would ***not*** codify existing law.
- ***SB 708 § 315(1)*** would ***punitively change*** the law.

Firefighters/police officers ramifications of SB 708

- ***Current law*** provides that when firefighters and police officers develop respiratory and heart diseases, or illnesses resulting from those diseases, the disease or illness is "***deemed*** to arise out of and in the course of employment."
- ***SB 708 § 306(2)*** would ***change the law*** by providing that those diseases and illnesses would be "***considered*** to arise out of and in the course of employment." [The substitute to HB 5002 lacks this provision].
- ***SB 708 § 306(2)*** would ***increase*** the firefighter/police officer's ***burden of proof***.

Sections of SB 708 that would change current law

- § 301(1) would narrow the definition of "personal injury" by requiring application of the Supreme Court's *Rakestraw* opinion in ***all*** cases.
- § 301(2) would expand the definition of "conditions of the aging process" by including degenerative arthritis.
- § 301(2) would narrow the compensability of mental disabilities by introducing the comparative concept of "***day-to-day mental stress and tension that all employees experience***." [Section 301(2) of enacted HB 5002 lacks this concept].

Sections of SB 708 that would change current law

- § 301(4)(A) would narrowly redefine "disability" by including the "***historical maximum wages***" concept [Section 301(4)(A) of enacted HB 5002 defines "disability" as the inability "to earn in any job paying maximum wages in work suitable to the employee's qualifications and training."].
- § 301(4)(B) would expansively 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***.

Sections of SB 708 that would change current law

- § 301(7)(a) would deny benefits to an employee fired "for fault" from post-injury reasonable employment, such as arriving late for work due to an unforeseeable traffic accident.
- § 301(7)(d)(ii) would ***shift the burden of proof from the employer to the 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.

Sections of SB 708 that would change current law

- § 301(7)(d)(iii) would add a ***conclusively-presumed wage earning capacity*** if the employee works post-injury 250 or more weeks.
- § 315(1) would ***expand employer's right to control health care*** to a 90-day period after injury [45-day period under § 315(1) of enacted HB 5002].
- § 315(1) would ***reverse the Supreme Court's*** **Petersen** ***opinion*** by shifting liability for attorney fees on unpaid medical bills from employers to employees and/or their health care providers.

Sections of SB 708 that would change current law

- § 354(1)(d) would permit employer to coordinate pension or retirement benefits that the employee is eligible to receive ***but is not actually receiving***.
- § 801(6) would change interest rate on benefits to rate payable on civil action money judgment under Revised Judicature Act [MCL 600.6013(8)].

SB 708 is ***not*** a mere "housekeeping" bill

- Those supporting SB 708 say it merely codifies many long-standing principles of workers' compensation law. ***But this is untrue.***
- SB 708 would ***significantly change*** Michigan's workers' compensation law.
- The Committee should ***decline*** favorable reporting of SB 708 in its present form.
- The Committee should consider additional input and proposed amendments from additional parties.

Suggested amendments
to
Worker's Disability Compensation Act

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Section 331(a)

Section 331(a) should be amended so that it is gender-neutral. The proposed amended text is:

"The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee:

(a) A spouse upon a deceased employee with whom the spouse lives at the time of the deceased employee's death, or from whom, at the time of the deceased employee's death, a worker's compensation magistrate shall find the spouse was living apart for justifiable cause or because the deceased employee had deserted the spouse."

Section 357(2)

Section 357(2) should be amended to prevent the current benefit reduction under § 357(1) in the case of an employee who is hired and injured after receiving Social Security retirement benefits. The proposed amended text is:

"(2) Subsection (1) shall not apply to an employee 65 or more years of age who received Social Security old-age benefits before the date of injury and who was hired after having received old-age Social Security benefits."