



Attorneys & Counselors

# MOTOR VEHICLE ACCIDENTS AT WORK

**WORKERS'  
COMPENSATION**

**MEETS**

**NO-FAULT  
PIP**

**WHO PAYS WHAT?  
HOW MUCH? AND WHEN?**

Detroit

Mt. Clemens

Lansing

Chicago

Toledo

# INTRODUCTION

## Francisco Lozano

Licensed in 2015

Michigan and Federal District Court-Eastern District MI

Magna Cum Laude, Cooley Law School

Experience on both sides of the “V”

Second-chair for Federal Employment

Discrimination/Retaliation case to

a successful jury verdict

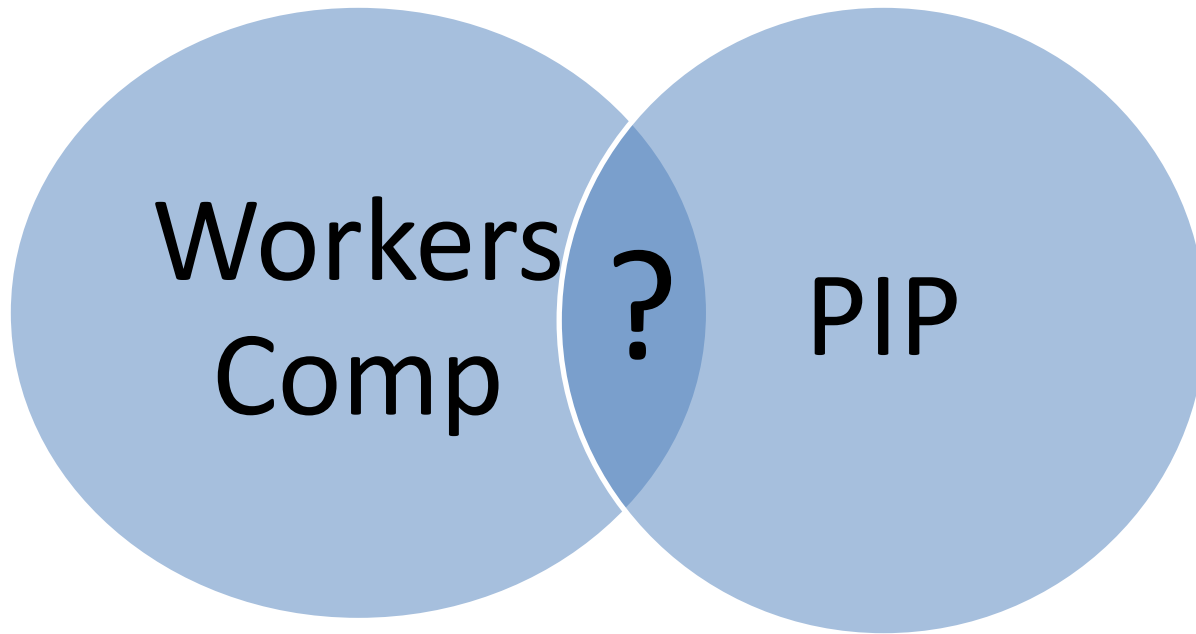
Extensive federal administrative

employment discrimination experience



# The Conflict

Workers' Compensation | No- Fault PIP



A Michigan employee who is injured in a motor vehicle accident while in the course of employment, may be entitled to medical and wage benefits from Workers' Compensation and No-Fault PIP insurance simultaneously. Yet, the law prohibits the duplication of these benefits

# The Conflict

Workers' Compensation | No-Fault PIP

So who's paying?



# MEDICAL COVERAGE

## Workers' Compensation

## NO- FAULT PIP

Workers' Compensation Provides Unlimited Medical Coverage!

MCL 418.315(1) of the WC Act provides that the employer must furnish reasonable medical treatment to an injured worker, including “medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this state as legal, when they are needed.”

So Does PIP, sometimes!

2019 Amendments to the No-Fault Act provides differing levels of coverage as to medical (Allowable expenses):

- \$250,000
- \$500,000
- Unlimited

Auto policies can be coordinated with health insurance and short-, long-term disability

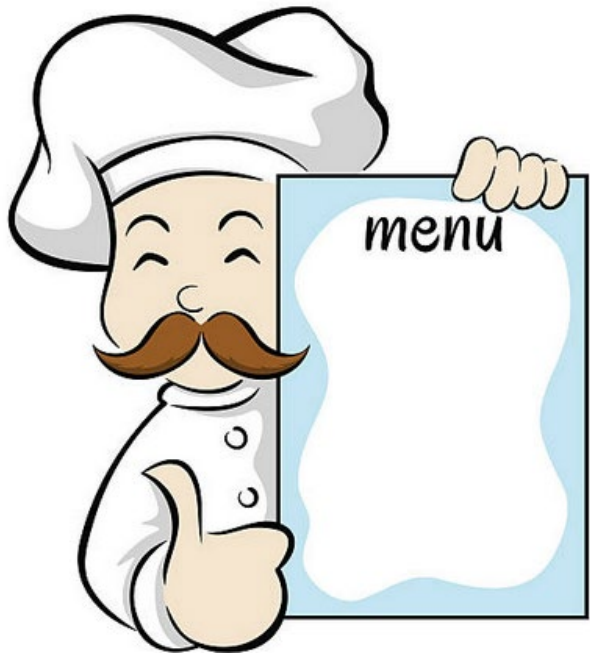
Auto carriers are provided a statutory set-off for benefits mandated by government (like WC!)

# MEDICAL COVERAGE

Workers' Compensation

NO- FAULT PIP

Actual Fee Schedule to limit exposure, disputes on charges



Cost Containment provision tied to Medicare reimbursement rates or 2019 rates of provider. Leaves door open to “reasonable charge” disputes.



# WAGE LOSS

## Workers' Compensation | NO- FAULT PIP

### The WCA

- Weekly wage loss benefits for an injured worker who suffers a **disability**.
- Disability is a limitation of a worker's maximum *wage-earning capacity*, considering physical restrictions because of the work injury.
- Wages are based on 80% of the after tax value of his average weekly waged based on the 39 highest weeks of the 52 weeks prior to the claimant's alleged injury date
- No time limit as long as worker remains disabled.

### The NFA

- The claimant is entitled to 85% of his or her lost gross wages (to account for taxes).
- Benefits are to replace wage loss for actual loss of earnings, not *loss of capacity*. No "I could've earned" claims
- Injured person has a duty to mitigate damages once the disability has ended.
- Only liable for three-years of wage loss per statute

# ATTENDANT CARE

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## Workers' Compensation | NO- FAULT PIP

Attendant care is available under the Workers' Compensation Act, *but* Section 315(1) provides, “Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee’s spouse, brother, sister, child, parent, or any combination of these persons.”

NFA Incorporated this provision with the 2019 Amendments. Can contract for more.



# REPLACEMENT SERVICES

## Workers' Compensation | NO- FAULT PIP

There is NO provision for replacement services under the WCA.



Under the NFA, replacement services benefits are limited to three years and up to \$20 per day. (\$21,900)

- The claimant is required to show that he or she actually incurred a \$20 daily expense for someone to perform household services.
- Only for the chores the injured person was responsible for prior to accident

# BENEFITS PAYABLE

## Workers' Compensation | NO- FAULT PIP

Comp covers expenses where the claimant can show a medically distinguishable change in the medical condition, i.e. change in pathology not aggravation/exacerbation.

PIP covers expenses that are (1) reasonable & necessary; (2) reasonable charge; and (3) incurred. Includes aggravation / exacerbation

- Easier to obtain benefits in PIP
- If WC benefits are not being paid, PIP benefits must be paid (Unreasonable to deny on this basis, opens up attorneys' fees)
- PIP can subrogate against WC or file a lien in the comp case
  - PIP Carrier entitled to actual benefits paid regardless of WCA limits
  - Unless there is an independent reason to dispute PIP benefits

# NO-FAULT RIGHT TO INTERVENE

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Workers' Compensation | NO- FAULT PIP

**But, an insurer may initiate a Workers Comp action on the employee's behalf to recover expenses paid.**

... Or intervene in a current action to seek reimbursement.

*Russel v Welcor*, 157 Mich App 351

Form C – Application for Mediation or HearingS

# HANDLING THESE CLAIMS

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## Workers' Compensation | NO- FAULT PIP

- When a No-Fault insurer has paid benefits, it may intervene in a Workers' Compensation action to seek reimbursement. *Russell v Welcor, Inc*, 157 Mich App 351, 403 NW2d 133 (1987).
- In addition, to obtain the credit to which it might be entitled, a No-Fault automobile insurer may initiate an action for Workers' Compensation benefits if an injured employee does not. *Dowd-List v Hagler Bailly*, 2006 ACO #112; *Lingane v Community Centre/HCM Corp*, 1993 ACO #29.
- The Court of Appeals has suggested that a lien does not arise automatically and that the No-Fault carrier may have the obligation to intervene in order to perfect and protect that lien. *Allstate Ins Co v Sentry Ins Co*, 175 Mich App 157, 437 NW2d 338 (1989); *see also Norman v Ferndale Foursquare Church*, 2013 ACO #101.

# COMMON REASONS WORKERS' COMPENSATION BENEFITS ARE DENIED

- Insufficient medical records relating to the purported injuries
- Injury occurred outside of the course of employment
- Preexisting injuries or medical conditions without proof of medical distinguishable change
- Independent medical examination report
- No disability (relative to wage loss claims)

# WC CARRIER DISPUTES BECAUSE OF IME

- If the workers' compensation carrier disputes benefits because of a favorable independent medical examination report, the PIP carrier may rely upon the same report in issuing a denial of PIP benefits.
- However, insurer beware that different standards apply to injuries in the workers' compensation and PIP contexts.
- NFA requires matching board certs

# EMPLOYEE v INDEPENDENT CONTRACTOR

Workers' Compensation | NO- FAULT PIP

**Employers will often claim that an individual is an “independent contractor” rather than an employee.**

**Prove it**

- The PIP carrier has a right to intervene or initiate a claim even if the claimant’s employer alleges he was an independent contractor, even if the employer says the claimant was an independent contractor and he has documents to prove it. Section 151(1)(n) adopts the IRS 20 factor test on employment status for injury dates on or after January 1, 2013.
- The PIP carrier has a right to intervene or initiate a claim Determination of employment status for purposes of WC benefits can be very contentious. Circuit courts have jurisdiction to determine employment status. *Sewell v Clearing Machine Corp.*, 419 Mich 56; 347 NW2d 447 (1984).

# EMPLOYEE v INDEPENDENT CONTRACTOR

## Workers' Compensation | NO- FAULT PIP

The WCA uses a 20 part test to determine whether an individual is an employee or independent contractor. The Court of Appeals uses a similar factor-based test (*McKissic* and *Adanalic* factors). *Duckworth v Cherokee Ins Co*, 333 Mich App 202, 213-14; 963 NW2d 610 (2020). The distinction is important because if an individual is a contractor, WC is not liable and the No-Fault carrier owes the full amount.

Both tests can be distilled to three broad categories:

1. Behavioral control over employee
2. Financial control – Addresses the business's right to control the business aspects of the worker's job
3. Relationship of Parties – Looks at the employment contract, permanency of the position, and extent of services



# REDEMPTION OF WC CLAIMS

- Generally, redemption frees the auto carrier from liability. *Gregory v Transamerica*, 425 Mich at 628, “redemption precludes the plaintiff from recovering from the no-fault insurer any amount for which the workers' compensation carrier was primarily liable.”
- In situations where the injured party may be required to pay back benefits or redeemed with a waiver of that requirement, the no-fault carrier may still be on the hook.

# REDEMPTION OF WC CLAIMS

- *Sibley v. DAIE*, 431 Mich 164 (1988), held that the statutory set-off is for benefits that serve the same purpose. Further held because FECA required repayment of benefits for a third-party, tort recovery, the no-fault carrier was liable for those repaid benefits.
- *McCain v Auto-Owners Ins Co*, 223 Mich App 327, 566 NW2d 629 (1997), held that the no-fault carrier was not entitled to a set-off for wage loss due to the WC waiver of third-party recovery in exchange for redemption because they represented a share of that third-party recovery not the wage loss benefit.

# SPECIFIC-LOSS BENEFITS WORKERS' COMPENSATION

- Specific-loss benefits are an set-off against No-Fault wage loss benefits in the same manner as general Workers' Compensation benefits because that is their major function, *Kuty v DAIE*, 140 Mich App 310, 364 NW2d 315 (1985).

# “LIKE BENEFITS”

- “Like benefits” are also set off against No-Fault automobile insurance benefits, just like Workers' Compensation benefits. In *Krygel v Detroit*, 135 Mich App 187, 353 NW2d 116 (1984), a police officer was injured in an automobile accident. He received like benefits under the city charter. The Court of Appeals held that these benefits were to be offset.

# SURVIVORS' LOSS/DEATH BENEFITS

## WORKERS' COMPENSATION

### ECONOMIC (WAGE LOSS) BENEFITS

- 500 Weeks of Work Comp Benefits @ Comp Rate (80% of After Tax AWW)
- Minimum rate of 50% of the State AWW
- Exclusive Remedy Against Employer

### NON-ECONOMIC BENEFITS

- Not Available

### FUNERAL EXPENSE BENEFITS

- \$6,000.00 Burial Allowance

## NO-FAULT

### ECONOMIC (WAGE LOSS) BENEFITS

- Up to 3 years of PIP Wage Loss Rate (85% of gross)
- Fringe Benefits Available to Decedent
- Other contributions of tangible “things of economic value”

### NON-ECONOMIC (R/S) BENEFITS

- Replacement Service Expense Benefits, up to three years

### FUNERAL EXPENSE BENEFITS

- Up To \$5,000.00 Funeral and Burial Expense (Shall not be less than \$1,750.00 – Can be contracted for by Policy)

All benefits aggregated across all survivors subject to Monthly Maximum No Fault Cap (\$6,811 per month for the period of October 1, 2023, through September 30, 2024). Set-Offs for benefits payable by law.

# DEPENDENCY STATUS

In both No-Fault and WC, there are individuals that are conclusively determined to be dependents of the decedent, and those who can qualify by proving a factual basis for dependency

## WORKERS' COMPENSATION

### Conclusive Dependents

- Children Under 16 (wholly)

### Factual Basis

- Spouse at time of death (determined by evaluating other sources of income, decedent contribution)
- Children Over 16 may be considered wholly dependent if they are physically or mentally incapacitated from earning and living with the parent at the time of death; may also be entitled to continuing benefits until child reaches age of 21 under certain circumstances.

Burial Allowance is payable to an Estate of the decedent.

## NO-FAULT

### Conclusive Dependents

- Spouse at the time of death (Benefits terminate in the event of remarriage or death of surviving spouse)
- Children Under 18
- Children Over 18 Living with decedent or receiving regularly receiving support at time of death if they are mentally or physically incapacitated from earning.

### Factual Basis

- In all other cases, whether the individual qualifies as a dependent and the extent of the dependency are determined by the facts as they exist at the time of death.
- Funeral / Burial Expense Benefits are payable to an Estate of the decedent

# SURVIVOR'S LOSS BENEFITS SOCIAL SECURITY

- If a worker receives both Workers' Compensation and Social Security Survivor's Loss benefits, the No-Fault insurer may reduce benefits by the amount of both types of benefits. *Root v LC Ins Co*, 214 Mich App 106, 542 NW2d 318 (1995).

# MEDICAL BILLS PAID OUTSIDE OF WC

- If a claimant pays medical bills himself or herself, he or she is later entitled to full reimbursement from the Workers' Compensation carrier, without regard to the cost containment rules
- In *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 658 NW2d 460 (2003), the Supreme Court held that the insurer stood in the shoes of the worker and was therefore entitled to full reimbursement as the worker would have been.
- Liability to auto carrier lessened with cost containment.



# SUBSEQUENT CAR ACCIDENT DURING PERIOD OF DISABILITY

- Very case specific relative to type of injury (same vs new)
- In *Lockridge v State Farm Mut Auto Ins Co*, 240 Mich App 507, 618 NW2d 49 (2000), plaintiff was off work due to a disabling work-related injury and receiving Workers' Compensation benefits at the time he was involved in an automobile accident, and continued to receive WC benefits until he returned to work. Plaintiff claimed that he would have gone back to work only a few days after the auto accident if the accident had not occurred entitling him to no-fault wage loss benefits, despite receiving WC benefits for the same period of time. The court disagreed, saying, “By accepting workers’ compensation disability benefits in the period following the automobile accident, plaintiff effectively admitted that his continuing inability to work was attributable to the 1991 industrial accident.” *Id.* at 512. The court held that he was therefore not entitled to No-Fault automobile benefits.

# SINGLE IDENTIFIABLE EVENT

- PIP benefits are not compensable from long term trauma or aggravation. For example, in *Wheeler v Tucker Freight Lines Co*, 125 Mich App 123 (1983), a truck driver attempted to obtain PIP benefits for a back injury as result of long term driving and alighting from his truck. The court concluded at that if the injury cannot be traced to a single accident at a specific time and location, plaintiff was not entitled to No-Fault coverage.

# PRIORITY FOR EMPLOYER FURNISHED VEHICLES

- General rule to look to your own, a spouse's, or a resident relative's policy.
- MCL 3114(3) – Exception to the general rule for an employee, spouse or resident relative who is injured while occupying a vehicle owned/registered by employer. Can seek no-fault benefits from insurer of vehicle
- **Claimant need not be engaged in employment activities**
- 3114(3) applies to self-employed/independent contractor claimants

# REASONABLE EFFORTS TO OBTAIN AVAILABLE BENEFITS

- No-Fault claimant must make reasonable efforts to collect workers' compensation benefits. *Perez v State Farm* 418 Mich 634 (1984) However, if the benefits are not available beyond employee's control, the insurer may not make a setoff
- Reasonable effort does not call for a lawsuit

# PIP PARKED VEHICLE EXCLUSION

## (Don't worry, we're all confused)

- **500.3106 Accidental bodily injury arising out of ownership, operation, maintenance, or use of parked vehicle as motor vehicle; conditions.**

Sec. 3106.

(1) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:

(a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

(b) Except as provided in subsection (2), the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or property being lifted onto or lowered from the vehicle in the loading or unloading process.

(c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle.

**(2) Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the worker's disability compensation act of 1969, Act No. 317 of the Public Acts of 1969, as amended, being sections 418.101 to 418.941 of the Michigan Compiled Laws, or under a similar law of another state or under a similar federal law, are available to an employee who sustains the injury in the course of his or her employment while doing either of the following:**

**(a) Loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from, or secured to, as cargo or freight, a motor vehicle.**

**(b) Entering into or alighting from the vehicle unless the injury was sustained while entering into or alighting from the vehicle immediately after the vehicle became disabled. This subdivision shall not apply if the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from or secured to, as cargo or freight, a motor vehicle.**

# PIP PARKED VEHICLE EXCLUSION

- Under MCL 500.3106 (2), three conditions to deny coverage:
- First, the vehicle must be parked. Some exceptions (unreasonably parked, physical contact with mounted equipment, i.e. a ramp, while alighting).
- Second, benefits must be "available to an employee" under the worker's compensation statute or similar legislation of another state or the federal government.
- Third, the employee must be loading or unloading the vehicle, performing mechanical work, or entering into or alighting from the vehicle when injured, unless the injury is due from the operation of another vehicle.

# INDEPENDENT CONTRACTOR EXCLUDED FROM 3106

For no-fault carrier to not be liable WC  
Benefits Must Be Available:

- What is available?
- Simply denying the benefits does not render the benefits “unavailable.”
- Determination that injured person was not an employee and did not qualify for workers’ compensation benefits in the first instance = unavailable. *Adanalic v. Harco Nat. Ins. Co.*, 309 Mich.App. 173.

# 3106 EXCLUSIONS

## OTHER CONSIDERATIONS

### Scope of Exclusion:

- However, the exclusion applies only to parked motor vehicles. *Trasti v. Citizens Ins. Co.*, 181 Mich App 191.
- Loading and unloading should be broadly construed to include preparation for load/unloading. *Bell v. F.J. Boutell Driveaway Co.*, 141 Mich App 802.
- Mechanical work phrase also liberally construed. *Dowling v. ACIA*, 147 Mich App 482. Maintenance included walking to get parts and tools. Finding of maintenance opens the door to no-fault benefits regardless of parked vehicle exclusion.
- Unhitching a trailer from a tractor is not part of the loading/unloading process and also is not considered mechanical work. *Cobb v. Liberty Mut.* 164 Mich App 66.



# PRIORITY OF INSURER

- Pursuant to *Adanalic v. Harco Nat'l Ins. Co.*, 309 Mich.App. 173, in a priority dispute between a no-fault carrier and a workers' compensation carrier, it is unreasonable for the no-fault carrier to refuse to pay benefits until the dispute is resolved. The no-fault carrier's sole option is to pay benefits and then subrogate against the worker's compensation carrier upon favorable resolution of the priority dispute.
- Does not apply if there are other, independent justifications for denial. (IME finding, unreasonable charges, etc.)

# COURSE OF EMPLOYMENT

- MCL 418.301 of the Workers' Compensation Act provides benefits to an employee who receives a personal injury “arising out of and in the course of employment.”

# GOING TO AND COMING FROM WORK

- As a general rule, injuries occurring while a worker is going to or coming from work are not within the course of employment. Coverage starts when the worker is on the employer's premises. *Simkins v. GMC*, 453 Mich 703 (1996).
- Therefore, injuries occurring on the employer's premises will tend to bring it within the course of employment. *Upton v. GMC*, 124 Mich App 61

# GOING TO AND COMING FROM WORK CONTINUED

- If an individual drives coworkers to or from work, this may bring the trip within the course of employment. Depends on circumstances of carpool. Is it employer-sanctioned, organized, paid? Does employer own the vehicle? Benefit to employer?
- In *Torres v. Armond Cassil Co.*, 115 Mich App 690, benefits were awarded for an injury on the way to work when a supervisor drove injured employee to work on a daily basis and in the employer-furnished vehicle.

# BUSINESS TRAVEL

In determining whether business travel is compensable, the court set forth the following factors:

1. Whether the employer paid for or furnished the transportation;
2. Whether the injury occurred during work hours;
3. Did the employer derive a special benefit from the employee's activity; and
4. Whether the employment subjected the employee to excessive exposure to traffic risks.

# PAYMENT FOR TRAVEL

- The employer paying for or providing transportation to the employee has the tendency to bring travel, even to and from work, within the course of employment. *Collier v. JA Fredman, Inc.* (on remand), 183 Mich App 156.
- Payment must be related to the travel. In *Forgach v. George Koch & Sons Co.*, 167 Mich App 50, the plaintiff was given a daily driving allowance of \$2.50 per day, irrespective of driving distance. The court held the allowance was not directly related to the travel because it had no relation to how far the worker commuted.

# ACTIVITIES THAT BENEFIT THE EMPLOYER

- If an employer derives a benefit from the employee's activity, this may bring the incident within the course of the employment even though it would otherwise be excluded. Weigh the personal benefit of the employee against the employer benefit.
- In *Thomas v. Certified Refrigeration, Inc.*, 392 Mich 623, an employee was injured while driving an employer's truck while on the way to work. The court held that because the employer derived the benefit of advertising on the truck and also allowing the truck to be taken home by the employee and "cared for", there was enough of a benefit to the employer for the injury to be compensable.

# LUNCH HOURS

- In *Simkins v. GMC*, 453 Mich 703, the Supreme Court held that off-premises lunch hours should be treated the same as “going to and coming from” work cases.
- However, injuries occurring on the employer’s premises during a lunch period are generally compensable.



# DEVIATIONS

- Injuries may be compensable even if they occurred during a deviation, so long as the deviation was reasonable and tacitly permitted by the employer. *Thomas v. Certified Refrigeration, Inc.*, 392 Mich 623.
- Although, in *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich 135, the court held that when a deviation is slight in relation to the length of the trip, the injury during the deviation is compensable, despite the fact that the deviation was not authorized.

# What are WC Rights Against a 3<sup>rd</sup> Party Auto Carrier?

- Workers' compensation carriers are not entitled to reimbursement from an injured employee's recovery for *noneconomic* losses from the tortfeasor. *Great American Ins. Co. v. Queen*, 410 Mich 73.
- However, also per *Great American Ins. Co. v. Queen*, a WC carrier is entitled to recoupment of benefits which do not substitute for no-fault benefits, because they exceed them in amount or duration.
- With PIP policy caps, claims for excess benefits should be recoverable by the WC carrier.

# So, what to do?

- In our experience, the best course of action is communication and coordination amongst the carriers.
- Some ability to stall in no-fault cases based on discovery violations, needing IMEs before making reimbursement decisions, legitimate coverage issues, etc.
- Take advantage of the **free** WC facilitation mechanism and resolve all claims at once with redemption.
- Passive approach opens up further liability.

# QUESTIONS?

Thank you for having me!

Contact information:

[Francisco.Lozano@kitch.com](mailto:Francisco.Lozano@kitch.com)

586-493-4471 (Direct)

248-860-6745 (Cell)