MSIA MICHIGAN SELF-INSURERS' ASSOCIATION

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MSIA SPRING CONFERENCE
Boyne Mountain Resort, Boyne, MI
May 30, 2024

Dawn M. Drobnich
Executive Secretary, MSIA

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AGENDA

I. Introduction: MSIA Today
II. Recognition of Board of Managers/Chairperson's Council
III. Legal Updates: Caselaw updates
IV. Status of Proposed Workers' Compensation Legislative Bill(s)
V. Closing Remarks

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I. INTRODUCTION: MSIA TODAY

* Membership more important than ever!

(A) Strong involvement in legislative issues
(B) Watchdog over self-insured/employer interests
(C) Membership events

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MSIA MEMBERS

Ability Assessments PC
Advantage OT
Athletico Physical Therapy
Bridge Excess Solutions
Buie, William (Conklin Benham PC)
CAMComp Workers' Compensation Plan
Cannon Cochran Management Services, Inc.
City of Grand Rapids
CompOne Administrators, Inc.
Consumers Energy
County of Midland
County Road Association Self-Insurance Fund
Data Surveys, Inc.
Digistream Investigations, Inc.
Drobnich, Dawn (Lacey & Jones, MSIA Secretary)
DTE Energy
Entech Medical Staffing
Elder, Russ (Hewson & Van Hellemont PC)
ExamWorks
FireKeepers Casino Hotel
Ford Motor Company
Geroux Barrett, Carrie (Lacey & Jones, LLP)
Hannon, Donald (Humphrey Hannon Ruedisueli P.C.)
Henry Ford Health Systems
Hickey, Leonard (Hickey Combs PLC)
Infoquest Information Services, Ltd
Insight Service Group, Inc
Kelly Services
Lacks Enterprises
LeVasseur, Denice (LeVasseur & LeVasseur, P.C.)
Lovernick, Richard (Conklin Benham PC)
Mackinaw Administrators, LLC
Marathon Petroleum
Maxim Healthcare Services
Meijer Great Lakes LTD
MES Solutions
Michigan Association of Timbermen Self-Insurer's Fund
Michigan Bankers Workers Compensation Fund
Michigan IME, LLC
Michigan Sugar Company
Midwest Employers Casualty
Noeske, Walter (Conklin Benham PC)
O'Brien, John (Blake, Kirchner, Symonds, Larson, & Smith, P.C.)
Occupational Care Services
OCS OT & Case Management Services
OMPT Specialists, Inc
O'Neill, J Patrick (Lacey & Jones, LLP)
Optum
Orlowski, Robert (Lacey & Jones, LLP)
Plymouth Physical Therapy Specialists
PMA Management Corp.
Powers, Sean (Lacey & Jones, LLP)
Ranta, James (Charfoos Reiter Hebert)
Read, Lauri (Keller Thoma)
Rehab Without Walls
ReviewWorks
Safety National
Sedgwick
Semco Energy
SET SEG
Sherwin-Williams
Shoreline Orthopaedics
SpartanNash
Spectrum Health
Stellantis, Inc.
Team Rehabilitation
The ASU Group
Trinity Health
University of Michigan
Wayne County Airport Authority
Wayne State University

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II. RECOGNITION OF BOARD OF MANAGERS 2024

* Remembering Kate Rychlinski – University of Michigan Board Member/Chair

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II. RECOGNITION OF BOARD OF MANAGERS 2024

A. 2024 BOARD MEMBERS

City of Grand Rapids-Erik Von Hatten
Consumers Energy-Darla Walz
Corewell Health-Lindsay Pierce
Detroit Public Schools Community District–Denice Pretzer
DTE Energy-Jerome Hooper
Firekeepers Casino Hotel-Roxanna Perez
Ford Motor Company-Katie Dominguez
General Motors-Cynthia Parker
Henry Ford Health-Sam Vogel
Ilitch Holdings-Michael Niehaus
Marathon Petroleum–Courtney Quilter
Meijer–Theresa Hileman
SpartanNash- Andromeda Matz
Trinity Health-Sandra DiCicco
University of Michigan-Heather Banules
Wayne County Airport Authority-Lynda Racey
Wayne State University-Pam Galloway

Executive Secretary- Dawn Drobnich

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B. 2024 MSIA OFFICERS

Chair	Katie Dominguez, Ford
First Vice Chair	Sam Vogel, Henry Ford Health
Second Vice Chair	Roxanna Perez, Firekeepers Casino Hotel
Treasurer	Mike Niehaus, Ilitch Holdings
Executive Secretary	Dawn Drobnich

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C. 2024 CHAIRPERSON'S COUNCIL

FCA US LLC	Debra White
Human Service Association	
Workers' Compensation Fund	Mary Penz
MacArthur & Associates	Danielle Susser
Michigan Chamber of Commerce	Wendy Block
Michigan Manufacturer's Association	Dave Worthams

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III. LEGAL UPDATES: CASELAW UPDATES

A. WASHINGTON V EUCLID INDUSTRIES, 2023 ACO #9

- *UIA MUST PRODUCE ALL RECORDS*

PROCEDURAL HISTORY

1. Magistrate Smith denied the UIA's Motion to Quash Defendant's subpoena demanding production of records.

2. WDCAC affirms Magistrate decision.

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FACTS

1. Defendant subpoenaed the unemployment records pertaining to benefits paid by UIA as the Worker's Comp Act allows coordination of those benefits; **AND**

2. Defendant also subpoenaed "**all**" records in the UIA's possession as the information in that file "*might affect a claim for worker's compensation benefits.*"

3. Requirements of the UIA to disclose information are determined by MCL 421.11(b) of the Michigan Employment Security Act (MESA).

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ISSUE

1. Are UIA records protected by the confidentiality clause in MESA?

2. Is Defendant's request for "all" unemployment records "overly broad, burdensome and not relevant?

DECISION

1. WDCAC cites *Kollinger v Miller Broach*, 2023 ACO #8, finding UIA records are not exempt from disclosure; Defendants entitled to all records they requested.

2. Any contrary result would ignore clear language in the statute stating that "information in the unemployment agency's possession that might affect a claim for worker's compensation benefits, **must** be available to interested parties."

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TAKEAWAY

* WDCAC authored four decisions at end of 2023, (ACO #9 – #12), all dealing with this same issue.

* UIA records are important and should always be obtained pursuant to subpoena. Not only can you take a direct offset of unemployment benefits paid against potential work comp benefits owed for the same time, the *entire* employment file has information that may directly impact your case:

**Credibility* determinations

*Did the employee portray himself as "***ready and able to work***" to get the unemployment benefits at the same time he is alleging he cannot RTW in worker's comp lawsuit?

*What information did he write on that unemployment application regarding any barriers to employment, ie. ***what restrictions, if any.***

B. LEWIS V PECKHAM VOCATIONAL INDUSTRIES, 2023 ACO #13

- *After a finding of a "work injury," the next question becomes is there "disability?"*

PROCEDURAL HISTORY

1. Magistrate Sims found plaintiff had a work related injury, but found plaintiff *failed to prove "disability"* within the requirements of the Worker's Disability Compensation Act.

2. WDCAC affirms.

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FACTS

1. Plaintiff's job was to train mentally challenged individuals to do janitorial work.

2. She was injured when trying to move a stuck chair (with wheels) when she felt a **pop in her left knee** and later found to have a partial tear lateral collateral ligament.

3. Employer accommodated work restrictions for a time, but she went off on FMLA and was medically terminated after that was exhausted.

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FACTS CON'T.

4. Dispute in medical testimony as to whether non-work related chronic back condition was responsible for her pain, or her knee injury. Treater, Dr. Sina, totally disabled her for both conditions.

5. Defendant's IME, Dr. Salama, found significant back issues dating back 10 years causing radiating pain and knee swelling before date of injury. Testified her partial ligament tear was degenerative.

6. Plaintiff did not present voc testimony but rather relied on her own testimony.

FACTS CON'T.

7. Defendant offered rebuttal testimony from voc expert Michael Fontaine who testified plaintiff made $16.35, had a master's degree, proficient in computer work, stated he found jobs that exceeded that wage and were within the treater's sedentary restriction. Plaintiff told him she had not looked for work since the injury.

ISSUE

Was Plaintiff entitled to wage loss benefits by proving: (a) she had a work injury and (b)this injury resulted in disability and wage loss as required by the Act?

DECISION

1. WDCAC acknowledges evidence of pre-existing conditions affecting the knee, but affirms Magistrate's finding of a work-related injury of a partial ligament tear.

2. However, WDCAC finds even though there was an "*injury, there was no proof of a disability*."

3. WDCAC states: "Plaintiff's argument fails to acknowledge a very important fact: "*vocational expert Fontaine utilized restrictions that plaintiff's expert, Dr. Sina, would impose, even though those restrictions took into account ALL of plaintiff's conditions, knee and back, work and non-work related, and still found there were suitable, maximum wage jobs plaintiff could perform*."

DECISION CON'T.

4. MCL 418.301(5)(d) required her to make a **good faith** attempt to procure work, and there was no evidence provided by plaintiff that she attempted to seek work after her last day of work with employer.

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TAKEAWAY

* CURRENT LAW is very clear, and this case is a good refresher. An employee has the burden of not only proving there was an INJURY, but that injury lead to a DISABILITY, as defined by the Worker's Compensation Act.

* To get wage loss benefits, the plaintiff CURRENTLY has the burden of proof to show what his or her qualifications and training is, to include education and experience, and to demonstrate that the work-related injury prevents the employee from performing those jobs identified, and that they made a good faith effort to obtain post-injury employment.

*This current definition of disability is the biggest point of contention regarding any proposed legislative changes.

C. RIERSON V SECURITAS SECURITY SERVICES, 2024 ACO #1

- *When is going to or coming from work compensable, and what are the exceptions?*

PROCEDURAL HISTORY

1. Magistrate Woons found plaintiff's injury occurred in the course of his employment and was compensable.

2. WDCAC writes a lengthy opinion affirming the Magistrate, but disagrees with her legal assessments.

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FACTS

1. Plaintiff's Plaintiff was employed as a "flex" security officer. He was required to be available on all shifts and to respond within four hours of receiving notice of an assignment.

2. Plaintiff received call at 9:30pm for a "temporary special assignment" at 11pm in East Lansing, 44 miles away from his home. Job required him to travel to a fraternity house for a "fire watch," monitoring the building for fire issues because the alarm at the building was not working properly.

FACTS CON'T.

3. Plaintiff would be paid mileage (although he did forget to make the mileage reimbursement request), and his pay would begin when he arrived at the location.

4. Plaintiff had difficulty locating the fraternity house. He stopped and walked around, calling the fraternity at 11:21pm and learned he was 2 miles away. He crossed the street to go back to his car and that's the last thing he remembered. He was hit by a car and never made it to jobsite which is when his pay was to begin.

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ISSUE

Does one of the exceptions apply to the general rule that injuries "going to and coming from" work are **not** compensable?

DECISION

1. WDCAC found that while the general rule continues to be that going to and coming from work is not covered under the act, the rule is "riddled with exceptions," including:

(a) EE is on a *special mission*;
(b) Employer derived a *special benefit* from EE activities at time of injury
(c) Employer paid for or *furnished transportation*
(d) Travel comprised of a *dual purpose* combining the employment required business needs with the personal activity of the EE
(e) Employment subjected the EE to *excessive exposure to the common risk* such as traffic risks
(f) The travel took place as a result of a *split shift* working schedule or employment required an irregular nonfixed working schedule.

* Just one of the exceptions is sufficient to establish an injury occurred "in the course of employment."

DECISION CON'T.

2. Analysis: (a) NO special mission
   (b) YES special benefit
   (c) YES paid for transportation
   (d) NO dual purpose
   (e) YES excessive exposure to traffic risks
   (f) YES irregular working schedule

3. WDCAC affirms the decision and plaintiff found to have suffered injury in course of his employment.

TAKEAWAY

*If an employee is told to do something by employer, he does it without deviation or misconduct, and was injured while doing so, he will be found to be injured in course of employment.

D. GROHMAN V GROHMAN ELECTRIC COMPANY, 2024 ACO #2

- *Proper age reduction of worker's comp benefits*

PROCEDURAL HISTORY

1. Magistrate Ognisanti found Defendant had properly reduced plaintiff's weekly benefit rate pursuant to MCL 418.357.

2. WDCAC affirms.

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FACTS

1. Plaintiff was awarded benefits and paid weekly at the rate of $798 until 11-1-19, plaintiff's 65th birthday.

2. Plaintiff's worker's compensation benefits were then reduced by the 5% reduction, "old age social security reduction."

3. Plaintiff argued that if MCL 418.357 does apply, it should not do so until he reaches "full retirement age," which he states would be age 66 for him.

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ISSUE

Did the Magistrate err by applying the term "65 and over" as the age when MCL 418.357 can be applied rather than at age 66 when plaintiff's began receiving full social security retirement benefits?

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DECISION

1. WDCAC affirms and states: "*We do not have the authority to amend MCL 418.357. We are not authorized to create and apply a different age factor than the legislature elected to use to describe when MCL 418.357 is triggered*."

2. The phrase "full retirement benefits" does not appear in MCL 418.357, and plaintiff did not produce any legal support that is what the legislature intended.

3. Commissioner Ries wrote a separate decision concurring in part, and dissenting in part stating: "MCL 418.357 is not the product of a master class in legislative drafting."

DECISION CON'T.

4. Commissioner Ries states that "although it has often been thought that the age 65 reduction occurs at the moment the employee turned 65, the actual language fails to confirm this."

5. Commissioner Ries states the since the statute does not utilize the precise date of the employee's 65th birthday, he agrees with plaintiff that the reductions begin when plaintiff attained 66 years of age because that is the *year following his 65th birthday and the only way to obtain a result dictated by the last part of Sec. 357 that says on his or her 75th birthday, the reductions will be complete."*

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TAKEAWAY

*This is a 2-1 opinion and the lead opinion does indicate coordination is proper at age 65, for a 5% reduction until age 75, but this issue demonstrates why the drafting of legislation is very important, even more important now that there may be some new legislative changes coming.

*Proposed legislative changes would eliminate this coordination completely at any age.

E. BROWDER V ENDEAVOR AIRLINES, 2024 ACO #3

- *Proper analysis after injury established to determine disability and wage earning capacity*

PROCEDURAL HISTORY

1. Magistrate Colombo granted plaintiff an open award.

2. WDCAC affirms in part, reverses in part and remands to the Magistrate to complete the required analysis.

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FACTS

1. Plaintiff was a flight attendant stationed in Detroit but residing in Alabama, and commuted using complimentary flights.

2. While helping a passenger put a bag into the overhead bin, the bag became stuck and when she yanked on it, fell to floor injuring shoulder. She never returned to work as a flight attendant.

3. Treating doctor found a work related rotator cuff strain and non-work related AC joint arthritis. Placed restrictions and said could never be flight attendant again.

FACTS CON'T.

4. Magistrate found plaintiff's job with defendant was the "*highest paying job*" she ever had at $30 per hour, and efforts to find employment within her restriction were unsuccessful; finds "*total disability*."

5. Defendant argued plaintiff, if anything, should been found to be only "partially disabled" per MCL 418.301 (4)(c).

DECISION

1. WDCAC found magistrate offered "no analysis as to whether lesser-paying jobs were reasonably available." She focused solely on maximum wage jobs. Plaintiff's own voc expert, Barb Feldman found plaintiff capable of performing jobs paying lesser wages.

2. Analysis should be:

   (a) magistrate first determines that there is a work-related injury;
   (b) whether plaintiff is capable of performing jobs post-injury regardless of their pay rate;
   (c) if she is capable of working, whether such jobs were reasonably available to her;
   (d) if no, then a determination of her residual wage earning capacity must be made, and her rate reduced to reflect that fact (partial disability).
   (e) if yes, she did make a good faith effort to obtain reasonably available jobs but was unsuccessful, her rate is determined as if she were totally disabled.

TAKEAWAY

*An inability to earn wages in jobs paying maximum wages represents only an initial showing of disability and is not the end of the analysis. A plaintiff may be only *partially disabled if she retains a wage earning capacity in lesser-paying jobs.*

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IV. PROPOSED LEGISLATIVE BILL(S)

A. SENATE/HOUSE BILL 04043-04044'23

1. Section 131- Guts the exclusive remedy/intentional tort provision

2. Section 301 and 401- Guts disability and work search provisions

*Took away major defenses: partial disability, wage earning capacity, pre-existing conditions, degenerative conditions, reasonable employment, unfounded perceptions in mental cases not based on actual events, and medically distinguishable conditions.

*Aggravation of mere symptoms wins

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SENATE/HOUSE BILL 04043-04044'23 CON'T.

3. Section 354- Coordination mostly eliminated

4. Section 161- Independent contractor almost eliminated, most would be employees

5. Section 319-Voc Rehab, increased from 52 to 208 weeks

6. Section 801-Penalty Provisions, greatly increased, only way to not pay a claim immediately after the injury would be if "bona fide dispute."

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B. MAY BE INTRODUCED……IF/AND WHEN

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V. CLOSING REMARKS

- MSIA WILL CONTINUE TO BE THE WATCHDOG AND VOICE OF THE SELF-INSURED COMMUNITY
- MEMBERSHIP GREATLY APPRECIATED

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MARK YOUR CALENDARS – 2024 FALL CONFERENCE

October 3, 2024

LAUREL MANOR, LIVONIA, MI