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MICHIGAN

1. Citation for the state's workers' compensation statute.

Worker's Disability Compensation Act, 1969, Public Act 317 of 1969; Michigan Statutes Annotated 17.237 (101-941); Michigan Compiled Laws Annotated 418.101-941; as amended by Act No. 266, Public Acts of 2011, Effective December 19, 2011.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for the purposes of workers' compensation?

"Every" employee is subject to the Act except as otherwise provided. Mich Comp Laws Ann §418.111. Exclusions exist for small employers; the burden is on the employer as an affirmative defense to show it is excluded. Mich Comp Laws Ann §418.115(a) and (b); *Alford v. Pollution Control Industries of America,* 222 Mich. App 693 (1997). Exclusions also exist for certain agricultural employers, Mich Comp Laws Ann §418.115(d) and (e), certain household domestic servants, Mich Comp Laws Ann §418.118, and certain real estate salespersons or brokers. Mich Comp Laws Ann §418.119. Partners, family members and certain managers or officers of small corporations may be individually excluded. Mich Comp Laws Ann §418.161(2)-(5).

The basic test is that an employee is "in the service of another, under any contract of hire." Mich Comp Laws Ann §§418.151(b), 418.161(1)(l). The "economic reality" test is no longer used to decide questions about employee status for the purposes of workers' compensation benefits. *Hoste v. Shanty Creek Management, Inc.,* 459 Mich. 561 (1999).

Beginning on or after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan Administrative hearing system determines to be in an employer-employee relationship using the "20-factor test" announced by the IRS of the United States department of treasury in Revenue Ruling 87-41, 1 C. B. 296. An individual for whom an employer is required to withhold federal income tax is prima facie considered to perform services in employment under this act.

3. Identify and describe any "statutory employer" provision.

A principal is liable to pay benefits to the "employee" of a subcontractor if that subcontractor is not subject to the Workers' Compensation Act or has not complied with the provisions of the Act relative to obtaining insurance coverage. The principal may seek indemnity from the contractor. Mich Comp Laws Ann §418.171 (1)(2); *Williams v. Lang (after Remand),* 415 Mich 179 (1982). If a principal willingly acts to circumvent the Act, forcing employees to pose as contractors, would be subject to criminal prosecution under Section 641. Note an injured employee may maintain a civil action against his direct employer without adding the statutory employer.

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4. What types of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" claims.

A personal injury must arise out of and in the course of the employment with the employer who is subject to the Act at the time of injury. A personal injury is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury. Time of injury or date of injury under the Act for cases not involving a single event shall be the last day of work in the employment in which the employee was last subjected to conditions that resulted in the disability or death. Mich Comp Laws Ann §418.301(1). Disability is defined as a limitation of the employee's wage earning capacity in work suitable to his or her qualifications and training, resulting from a personal injury or work-related disease. Mich Comp Laws Ann §418.301(4).

In *Sington v. Chrysler Corp,* 467 Mich. 144 (2002), the Supreme Court defined disability as a limitation in "wage earning capacity" in work suitable to the employee's qualifications and training under Mich Comp Laws Ann §418.301(4). The Court explained that a condition that rendered an employee unable to perform a job, paying the maximum salary, given the qualifications and training of the employee, but leaving the employee free to perform an equally well-paying position suitable to the qualifications and training of the employee would not constitute a disability. 467 Mich 144, 155.

The Supreme Court further defined *Sington* in the case of *Stokes v DaimlerChrysler LLC,* 481 Mich 266 (2008). The Court held that the employee must make a good faith attempt to procure post-injury employment if there are jobs at the same salary or higher that he or she is qualified and trained to do. The employee must also prove that all jobs in the same "salary range" suitable to his or her qualifications and training cannot be performed as a result of the work injury or are not reasonably available. The injured worker must disclose his qualifications and training, including education, skills, experience and training. If the employee is capable of performing any of the jobs identified, he or she must show that job cannot be obtained. The burden shifts to the employer to refute the *prima facie* case of the employee. In order to meet its burden, the employer is entitled to some limited discovery. The employee may then come forward with evidence to refute the evidence of the employer.

In *Lofton v Autozone, Inc,* 482 Mich 1005 (2008), *appeal after remand, remanded,* 483 Mich 1133 (2009), the Supreme Court issued an order, which held that if the plaintiff is disabled, but the limitation in wage earning capacity is only partial, the magistrate must compute wage loss benefits under Mich Comp Laws Ann§ 418.361(1) based on what the employee remains capable of earning.

In *Rakestraw v. General Dynamics Land Sys, Inc.,* 469 Mich 220 (2003), the Supreme Court held that "a claimant attempting to establish a compensable work-related injury must adduce evidence of the injury that is medically distinguishable from the preexisting nonwork-related condition in order to establish the existence of a 'personal injury' by a preponderance of the evidence under MCL § 418.301(1)." 469 Mich 220, (2003).

The above cases have all been codified into law under the recent amendments of 2011.

B. Occupational disease (including respiratory and repetitive use).

Occupational disease and/or disabilities which are due to causes and conditions characteristic of and peculiar to the business of the employer, and which arise out of and in the course of the employment are compensable. Ordinary diseases of life, which the general public is exposed to, are not compensable. Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. A hernia, to be compensable, must (1) be recent in origin, (2) result from a strain arising out of and in the course of the employment and (3) be promptly reported. Mich Comp Laws Ann §§418.401(1) and (2).

5. What, if any, injuries or claims are excluded?

Generally, injuries incurred while going to and from work are excluded. An injury in the pursuit of an activity the major purpose of which is social or recreational is not covered. Mich Comp Laws Ann §418.301(3); *Eversman v. Concrete Cutting Co.,* 463 Mich 86 (2000). If an employee is injured by reason of intentional and wilful misconduct, a claim is barred. Mich Comp Laws Ann §418.305; *Daniel v Department of Corr,* 468 Mich 34 (2003). Injuries incurred during employment related travel may be excluded if occurring while on a deviation. *Bush v. Parmenter, Forsthye, Rude & Dethmers,* 413 Mich 444 (1982). Other areas of exclusion would be horseplay, *Crilly v. Ballou*, 353 Mich 303 (1958) and *Petrie v. GMC*, 197 Mich App 198 (1991). Another area of exclusion would be fights that occur at work, particularly arising from personal issues. *Brady v. Clark Equipment* 72 Mich App 274, 400 Mich 806, *Devault v. General Motors*, 149 Mich App 760. The other area would be area of idiopathic falls, which occur at work, *Ledbetter v. Michigan Carton Company*, 74 Mich 330 and Hill v. *Faircloth Manufacturing Company*, 245 Mich App 710, 465 Mich 949. (Note: See also Answer 9.)

In *Brackett v Focus Hope, Inc,* 482 Mich 269 (2008), the Supreme Court in a significant departure from the past case law held that "misconduct" as defined by Mich Comp Laws Ann §418.305 is not limited to "moral turpitude" type behavior. Such conduct is "intentional and willful misconduct" if it is "improper" and done "on purpose" despite the knowledge that it is against company rules. The rules must be clearly established, understood and consistently enforced for the violation to meet the statutory requirements. *Daniel v. Department of Corrections*, 468 Mich 34 (2003)

6. What psychiatric claims or treatment are compensable?

Psychiatric disabilities are compensable if contributed to, aggravated or accelerated by the employment in a "significant manner". Mental disabilities are compensable only when they arise out of "actual events of the employment", not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality. Mich Comp

Laws Ann §§418.301(2) and 418.401(2) (b); *Robertson v. DaimlerChrysler Corp.,* 465 Mich 732; (2002). Acts of discipline are considered actual events of employment. *Calovecchi v. Michigan,* 461 Mich 616 (2000). Emotional reaction to the loss or termination of a job is not compensable because it does not arise out of or in the course of employment. *Robinson v. Chrysler Corporation,* 139 Mich App 449 (1984). *Gardner v. Van Buren Public Schools*, 445 Mich 23.

7. What are the applicable statutes of limitations?

There is no statute of limitations per se. The claim for compensation must be made either orally or in writing within two years after the occurrence of the injury, disability or death. Mich Comp Laws Ann §§418.381 and 441. Retroactive payment of benefits is limited by the one and two year back rules. Mich Comp Laws Ann §§418.381(2), 381(3) and 833(1).

8. What are the reporting and notice requirements for those alleging an injury?

The employee must provide notice of injury to the employer within 90 days after the happening of the injury or within 90 days after the employee knew or should have known of the injury or disability. However, failure to give notice to the employer is excused unless the employer can prove prejudice. Mich Comp Laws Ann §418.381 (1).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

There is no specific provision regarding self-inflicted injuries. However, Michigan courts have found suicides compensable when they arise from a compensable mental injury or disability. *Hammons v. Highland Park Police Dept.,* 421 Mich 1 (1984). In construing *Hammons*, the courts have stated that the principals of causal relationship or psychiatric cases as laid out in *Garnder v. Van Buren Public Schools*, must be considered.

B. “Wilful misconduct”, “horseplay,” “fights” etc.

If an employee is injured by reason of his or her <u>intentional and wilful misconduct</u>, a claim is barred. Mich Comp Laws Ann §418.305. *Brackett v. Focus Hope, Inc*. 482 Mich 269 (2008). An important factor is the extent to which the misconduct or <u>horseplay</u> is tolerated by the employer. *Crilly v. Ballou,* 353 Mich 303(1958); *Petrie v. General Motors Corp.,* 187 Mich App 198 (1991); *Shepard v. Brunswick Corp.,* 36 Mich App 307 (1971). An employee injured as the aggressor in a <u>fight</u> cannot recover. Generally, when a <u>fight</u> is unconnected to the employment and motivated by personal reasons, it is not compensable. *Brady v. Clark Equipment Co.,* 72 Mich App 274 (1976), *rev’d* 400 Mich 806 (1977); *Devault v. General Motors,* 149 Mich App 765 (1986); *Morris v. Soloway,* 170 Mich App 312 (1988). Injuries occurring in the pursuit of an activity the major purpose of which is “social or recreational” are excluded. Mich Comp Laws Ann §418.301(3). See also *Daniel v. Dept of Corrections,* 468 Mich 34 (2003)

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C. **Injuries involving drugs and/or alcohol.**

There is no specific provision for injuries occurring as a consequence of drugs and/or alcohol, but cases generally have turned on the issue of whether the action constituted a rule violation and whether the rule was strictly enforced. Mich Comp Laws Ann §418.305. In *Pierce v. General Motors Corp,* 443 Mich 137 (1993), the Supreme Court held that alcoholism is not a personal injury under Chapter 3, and compensation should not be awarded.

10. **What, if any, penalties or remedies are available in claims involving fraud?**

The Act contains a provision pertaining to fraudulent representations in the employment application. Mich Comp Laws Ann §418.431. See Answer 11. The Act contains few specific references to fraud. Generally, proof of fraud in either the procurement of benefits or in the defense of a claim may be subject to litigation and ruling by the Magistrate. *E.g., Fuchs v. General Motors Corp.* 118 Mich App 547 (1982) (employer misrepresented the average weekly wage and employee was paid benefits at an incorrect rate; based upon equitable estoppel, the recoupment of benefits by the employee was not limited by the two year back rule.). The newly amended act provides for the Director to coordinate a mechanism to analyze and detect and prevent fraud, waste and abuse of the WC system to be implemented by April 1, 2012. The director is to provide information on number of employees who had benefits reduced as a result of determination of wage earning capacity. Mich Comp Laws Ann § 418.801(7).

11. **Is there any defense for falsification of employment records regarding medical history?**

Compensation for occupational disease is denied if the employee, upon entering the employment, willfully and falsely represents in writing that he or she has not previously suffered from the disease which is the cause of the disability or death. However, if an occupational disease is aggravated by the employment or another disease or infirmity, leading to disability or death, it may be compensable. Mich Comp Laws Ann §418.431. *Dressler v. Grand Rapids Die Casting Corp.,* 402 Mich 243 (1978); *DeVores v. Ford Motor Corp.* 171 Mich App 354 (1988); *Leach v. Detroit Health Corp.,* 156 Mich App 441 (1987).

12. **Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?**

The "arising out of and in the course of" test is satisfied when such activities occur on the employer's premises during lunch or a recreation period incidental to the employment, or if the employer expressly or impliedly requires participation, or if the employer derived a substantial direct benefit from the activity. *Bayerl v. Badger Mfg. Co.,* 169 Mich App 444 (1988). However, if the 'major purpose' of the activity is found to be "social or recreational," it is no longer covered under the Act. Mich Comp Laws Ann §418.301(3). *Nock v M & G Convoy, Inc (On Remand)*, 204 Mich App 116 (1994); *Eversman v Concrete Cutting & Breaking*, 463 Mich 86 (2000).

13. Are injuries by co-employees compensable?

Yes. See also Answer 14.

14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g. 'irate paramour' claims)?

Yes, if an employee is attacked by a third party it is compensable, if the incident arose out of and in the course of employment. However, an injury resulting from a fight unconnected with the employment and motivated by personal reason is not compensable. *Morris v. Soloway* 170 Mich App 312 (1988). In fights involving an "irate paramour" courts have held such occurrence to be unconnected to the employment and have denied compensation. *DeVault v. General Motors Corp.,* 149 Mich App 765 (1986).

BENEFITS

15. What criterion is used for calculating the average weekly wage?

The average weekly wage (AWW) includes the earning of the employee in all employment, inclusive of overtime, premium pay, cost of living, and exclusive of fringe benefits which continue during the disability. The AWW is determined by computing the average of the total wages paid for the highest 39 weeks in the 52 weeks immediately preceding the date of injury. If less than 39 weeks were worked, the AWW is based on an average determined by the total weeks actually worked. If the employee is injured during the first week of employment or if the AWW cannot be easily ascertained, the wage may be calculated based on the number of hours contracted for times the rate, or in some cases the usual wage for similar services. Mich Comp Laws Ann §418.371.

16. How is the rate for temporary lost time benefits calculated, including minimum and maximum rates?

There is no minimum compensation rate and there is no distinction between part-time and full-time employment. The basic rate is 80% of the after-tax AWW of the employee as set forth in the annually published rate tables. The maximum rate is 90% of the State AWW. Mich Comp Laws Ann §§418.351 and 355. The maximum rate for 2017 is $870.00 based on a State AWW of $965.62.

17. How long does the employer/insurer have to begin temporary benefits from the date of disability begins?

Compensation benefits are due and payable on the 14th day after the employer has notice or knowledge of a disability and/or death, and are paid thereafter in weekly installments, unless disputed. Mich Comp Laws Ann §418.801. If benefits are not paid within 30 days after becoming due and payable where there is no ongoing dispute, a penalty of $50.00 per day, up to $1,500.00 may be added. Mich Comp Laws Ann §418.801(2).

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g. must be out ___ days before recovering benefits for the first ___days)?

An employee must be out two weeks before recovering benefits for the first week. Mich Comp Laws Ann §418.311. One week means seven consecutive days. *Peiffer v. General Motors Corp.,* 177 Mich App 674 (1989).

19. What is the standard/procedure for terminating temporary benefits?

The employer/insurer may terminate benefits unilaterally when the employee recovers based on a medical examination, returns to work, or refuses to respond to a *bona fide* offer of reasonable employment within his or her capabilities, without good and reasonable cause if there is no existing bureau order of benefits. Mich Comp Laws Ann §418.301. The employer/insurer notifies the Bureau/Agency of the termination by way of a Form 701, but must also advise the employee in writing that the benefits have been terminated and the reason for termination. A copy of the Form 701 must be furnished to the employee. Mich Admin Code R.408.31 An employer will normally file a Form 107 (Notice of Dispute) with the Bureau with copies to the employee.

20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?

Yes, if an employee is receiving weekly benefits and later is determined to have a scheduled loss or to be totally and permanently disabled, the prior benefits will be credited. Mich Comp Laws Ann §418.361.

21. What disfigurement benefits are available and how are they calculated?

Mutilations and/or disfigurements resulting from the injury are not specifically addressed in the Act. Reasonable and necessary medicals are covered and the need for cosmetic surgery for disfigurement may be compensable. Lost time associated with disfigurement and/or mutilation arising out of and in the course of employment, if medically substantiated, would be compensable. Mich Comp Laws Ann §418.315.

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

Scheduled losses are payable at 80% of the after-tax AWW subject to the usual maximum. Mich Comp Laws Ann §418.361(2). There is a minimum rate of 25% of the state average weekly wage. Mich Comp Laws Ann §418.356(3).

A. How many weeks are available for scheduled members/parts and the standard for recovery?

Specific loss/scheduled loss of body parts by amputation or loss of use are set forth by statute ranging from 11 weeks up to 269 weeks depending on the body part and/or member. Mich Comp Laws Ann §418.361.

B. Number of weeks for 'whole person' and standard for recovery.

Permanent partial disability benefits for non-scheduled injuries are paid at a rate equal to 80% of the difference between the pre-injury after-tax wage of the employee and the post-injury after-tax wage, not to exceed 90% of the State AWW. Such benefit payments continue for the duration of the disability. Mich Comp Laws Ann §418.361.

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

If the employee, who suffers an injury, is unable to perform work for which he or she had previous training, the employee is entitled to seek vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore the employee to useful employment. Benefits are payable for 52 weeks and, by special order of the Director, may be extended for an additional 52 weeks. Disputes are submitted to the Director for disposition. Mich Comp Laws Ann §418.319.

24. How are the permanent total disability benefits calculated, including the minimum and maximum rates?

The base rate for total and permanent disability is 80% of the after-tax AWW subject to the usual maximum. Mich Comp Laws Ann §§418.351 and 361(3). There is a minimum benefit of 25% of the State AWW. Mich Comp Laws Ann §418.356(3). A supplement may be available from the Second Injury Fund. Mich Comp Laws Ann §418.352 (1).

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

Reasonable funeral expenses may be recovered, up to $6,000.00, or the actual cost, whichever is less. Mich Comp Laws Ann §418.345. *Paige v. City of Sterling Heights*, 476 Mich 495 (2006).

B. Dependency claims.

The base death benefit rate is the same as the weekly rate for disability claims. It is, however, subject to minimums of 50% of the State AWW. The base duration is 500 weeks. Mich Comp Laws Ann §§418.321, 331, 335 and 356(2). If there are only partial dependents, then a proportional rate is calculated. *Lesner v. Liquid Disposal,* 466 Mich 95 (2002). If there are minor dependents remaining after the 500 weeks, additional benefits may be ordered to age 18 or 21. *Murphy v. Ameritech,* 221 Mich App 591 (1997). Mich Comp Laws Ann §§418.321, 331, 353 and 375. If there

are minor dependents remaining after the 500 weeks, additional benefits may be ordered to age 18 (age of majority) or upon a determination by a Magistrate to age 21. *Murpy v. America*, 22 Mich App 591.

26. **What are the criteria for establishing a 'second injury' fund recovery?**

The Second Injury Fund assumes responsibility for benefits after the employer has paid scheduled loss benefits to an employee who had an earlier loss of a hand, arm foot, leg or eye. The Fund is responsible for paying a portion of the benefits to those employees deemed to be totally and permanently disabled. Mich Comp Laws Ann §§418.352,361 and 521. The Fund reimburses increases in the weekly benefit for certain disabilities extending beyond two years for employees with low weekly rates, or other increases dictated by statute for persons with low weekly rates. Mich Comp Laws Ann §418.356. The Fund also reimburses employers/insureds for the following: (1) benefits paid in excess of the statutory maximum ($25,000.00 or 104 weeks of weekly benefits) in "silicosis and dust disease" cases, Mich Comp Laws Ann §418.531; (2) certain benefits paid in "dual employment" situations, Mich Comp Laws Ann §418.372; and (3) benefits paid beyond 52 weeks for certain employees who were determined to be "vocationally handicapped" prior to employment, Mich Comp Laws Ann §418.921. The Fund continues payments for certain "bankrupt" self-insured employers. Mich Comp Laws Ann §418.501, 418.537.

The Workers Compensation Act under § 418.405 establishes a presumption for members of full paid fire and police departments, county road commissions, county sheriffs, etc. for respiratory and heart disease resulting during the course of the employment, absent evidence to the contrary. § 418.405 (1)(2). A recent amendment has added cancer conditions including bladder, skin, brain, kidney, blood, thyroid, testicular, prostrate or lymphatic cancer is covered under the presumption. The provisions is referred to as "First Responder Presumed Coverage" § 418.405 (2-4)

27. **What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?**

A case may be re-opened, claiming a worsening or change of condition, if not barred by *res judicata. White v. Michigan Consolidated Gas Co.,* 352 Mich 201 (1958); *Flynn v. General Motors Corp.,* 162 Mich App 511 (1987). See also Answer 7.

28. **What situation would place responsibility on the employer to pay an employee's attorney fees?**

If the employer/insurer refuses to pay medical benefits, an attorney, who pursues payment of the medical benefits and/or reimbursement may be entitled to a fee from the employer/insurer. Mich Comp Laws Ann §418.315; *Watkins v. Chrysler Corp.,* 167 Mich App 122 (1988).

EXCLUSIVITY/TORT IMMUNITY:

29. Is the compensation remedy exclusive?

A. Scope of immunity.

The benefits provided in the Act constitute the "exclusive remedy" of the employee against the employer for personal injury or occupational disease. Mich Comp Laws Ann §418.131.

B. Exceptions (intentional acts, contractual waiver, 'dual capacity,' etc.).

The only statutory exception is for an intentional tort. A tort is "intentional" only when an employee is injured as the result of a deliberate act of the employer and the employer specifically intended the injury. An employer is deemed to have intended to injure if it had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. Mich Comp Laws Ann §418.131; *Travis v. Dreis & Krump Mfg. Co.,* 453 Mich 149 (1996)."Dual Capacity" may be an exception to the exclusive remedy doctrine depending on the factual situation. *Howard v. White,* 447 Mich 395 (1994); *Wells Fargo v. Firestone Tire & Rubber Co.,* 421 Mich 64 (1994).

30. Are there any penalties against the employer for unsafe working conditions?

An employee injured or killed as the result of an "intentional act" may proceed in tort, in addition to the workers' compensation action. Mich Comp Laws Ann §418.131. Placing an employee in unsafe working conditions or dangerous positions and/or violating governmental regulations does not necessarily constitute an intentional tort. Mich Comp Laws Ann §418.131. (See also Answer 29.)

31. What is the penalty, if any, for an injured minor?

Any minor under age 18, who is employed without a work permit, may receive double compensation. However, the fraudulent use of a work permit or a birth certificate would preclude the payment of double compensation. Mich Comp Laws Ann §418.161(1)(l).

32. What is the potential exposure for "bad faith" claims handling?

A workers' compensation carrier may be liable with respect to a claimant only in cases of *misfeasance,* and not *nonfeasance. Blackwell v. Citizens Insurance Co.,* 457 Mich 662 (1998).

33. What is the exposure for terminating an employee who has been injured?

The employer may not discharge or in any manner discriminate against an employee because the employee has exercised his or her rights under the Act. Mich Comp Laws Ann §418.301(13). In such instances, the employee may bring a civil action against the employer. *Phillips v. Butterball*

Farms Co. (After2nd Rem), 448 Mich 239 (1995); *Clifford v. Cactus Drilling Corp.,* 419 Mich 356 (1984). Under the recent amendments, effective December 19, 2011, see Mich Comp Laws Ann §418.301(13)

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes. Mich Comp Laws Ann §418.827.

35. Can co-employees be sued for work-related injuries?

As a general rule, no. Mich Comp Laws Ann §418.827. To have immunity the coworker must be acting within the scope of the employment; also, there is no immunity for an intentional tort. *Travis v.Dreis & Krump Mfg. Co.,* 453 Mich 149 (1996); *Rathbun v. Starr Commonwealth for Boys,* 145 Mich App 303 (1985); *Jones v. General Motors Corp.,* 136 Mich App 251 (1984).

36. Is subrogation available?

Where liability lies with a third party, the employee may bring a tort action against that third party. If the employee does not commence an action within one year of the occurrence, the employer/insurer may commence an action within the statute of limitations to enforce liability. If the employee sues and obtains an award, the employer/insurer has a statutory right to subrogation/reimbursement. Mich Comp Laws Ann §418.827. The employer/insurer must pay its proportionate share of the costs and attorney fees. *Franges v. General Motors Corp.,* 404 Mich 590 (1979). Under Michigan Automobile Insurance No Fault Law, there are limitations regarding employer/insurer's subrogation rights. *Bialochowski v. Cross Concrete Pumping Co.,* 428 Mich 219 (1987); *Great American Ins. Co. vs. Queen,* 410 Mich 73 (1980).

MEDICALS

37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

Medical bills for reasonable and necessary medical expenses must be paid promptly. Mich Comp Laws Ann §418.315. If payments are not made within 30 days after the employer/insurer has received notice of non-payment by certified mail, and there is no ongoing dispute, a $50.00 per day penalty shall be imposed up to $1,500.00. Mich Comp Laws Ann §418.801(3).

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or an authorization) at the administrative level?

At the time of filing the Application for Hearing, the employee must provide the employer/insurer with any relevant medical records that the employee possesses. Upon filing a response, the employer/insurer must provide the employee with any relevant medical records that are in existence at the time of the filing. Mich Comp Law Ann §418.222. *Snyder v. General Safety Corp (On Rem.),* 200 Mich App 332 (1993). Additionally, the parties are required to exchange medical examinations conducted in conjunction with the injury and/or claim. Medical information must be furnished to the opposing party within fifteen days of the request. Mich Comp Laws Ann §418.385.

If the employee provides an executed authorization to the employer/insurer, it may obtain any medical information upon which the parties agree. The opposing party must be provided with copies of medical records obtained through the authorization. In addition, either party may subpoena medical records to the Workers' Compensation Agency on a subpoena which the Agency approves and which counsel signs. Mich Comp Laws Ann §418.853.

39. What is the rule on (a) Claimant's choice of physician, and (b) Employer's right to second opinion and/or Independent Medical Examination?

A. Claimant's choice of physician.

The employer has the obligation to furnish the employee reasonable and necessary medical, surgical, hospital services, and medicines, as well as attendant care and/or nursing care as required. After twenty-eight (28) days, the employee may choose a physician by notifying the employer/insurer of the name of the physician and the intention to treat with that physician. An employer/insurer may file an objection to the named physician. Mich Comp Laws Ann §418.315.

B. Employer's right to second opinion and/or Independent Medical Examination.

The employer/insurer may have the employee examined periodically during the period of disability. If the employee refuses, benefits shall be suspended and may be forfeited. The examination report must be timely provided to the employee or the employer/insurer will be precluded from taking the testimony of the doctor. Mich Comp Laws Ann §418.385. The carrier shall pay travel expenses incidental to the examination. Administrative Code R. 408.45.

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

Medical benefits are payable if they are reasonable and necessary and are related to the personal injury. If a dispute develops, the matter may be submitted to the Bureau/Agency. All fees are subject to statutory rules regarding medical cost containment setting forth the maximum rates. Mich Comp Laws Ann §418.315. Attendant care provided by family members is limited to 56 hours per week and does not include non-medical care such as normal meal preparation. *Matney v. Southfield Bowl,* 218 Mich App 475 (1996).

41. Which prosthetic devices are covered, and for how long?

Medical expenses may include prosthetic devices, including limbs, eyes, teeth, eyeglasses, hearing apparatus or any other appliances necessary to cure, so far as reasonable, and to relieve the effects of the injury. Mich Comp Laws Ann §418.315.

42. Are vehicle and/or home modifications covered as medical expenses?

The magistrate may order modifications and/or additions to the home or vehicle for a medical necessity and/or to rehabilitate the employee. Mich Comp Laws Ann §§ 418.315 and 319. In an exceptional case, a new specially equipped vehicle may be ordered. In *Weakland v. Toledo Eng'g Co.,* 467 Mich 334 (2003), the Supreme Court held that "appliances" within the meaning of §418.315(1) includes necessary modification to a van, but not a new van itself.

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Yes. Effective June 28,1989, Michigan adopted the Workers' Compensation Health Care Service Rules, to regulate medical care and the fees charged by physicians, hospitals, etc. The rules comprehensively detail a fee schedule covering virtually all health care services provided to the employee, a requirement that every insurer set up a system for utilization review, a procedure for data collection, and a procedure for dispute resolution. Mich Admin Code R. 418.101-2324.

44. What, if any, provisions or requirements are there for 'managed care'?

The Act has no specific provision or requirements, except that expenses must be reasonable and necessary. Mich Comp Laws Ann §418.315. (See answer 40.)

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

When an Application for Hearing is filed by the employee, the Agency forwards a copy of the Application to the employer/insurer. Within 30 days of receiving the completed Application, the employer/insurer must file a written response on the appropriate form. If the claim is accepted, the employer/insurer files a Form 100/Basic Report of injury with the Agency and a Form 701 indicating the commencement of benefits. If the claim is disputed, the employer/insurer files a Form 107/Notice of Dispute with the Agency setting forth the basis for the dispute. The employer/insurer must file a Carrier Response with the Agency within thirty days of the receipt of the Application for Hearing. The employee and the employer/insurer must each provide the other with any medical records relevant to the claim. Mich Comp Laws Ann §418.222.

46. What is the method of claim adjudication?

A. Administrative level.

Once an Application for Hearing is filed, certain claims will be scheduled for informal mediation by the parties with an Agency appointed representative. The position of mediator has been eliminated. Mediations are limited to cases involving closed periods, medical only claims, no record of coverage, or employees without counsel represented by an attorney. There is a small claims provision for cases under $2000.00. All other cases involving a claim for compensation, petition to stop, or other litigation will be scheduled for a pre-trial conference and then assigned to a Magistrate for hearing. Mich Comp Laws Ann §418.841.

B. Trial court.

Any dispute or controversy concerning compensation or other benefits is submitted to the Agency and assigned to a Magistrate for hearing. The hearing is held in the venue where the injury occurred. The Magistrate makes such inquiries and investigations as deemed necessary, including subpoenaed records. The claimant must prove his entitlement to compensation and benefits under the Act by a “preponderance of the evidence”. Mich Comp Laws Ann §418.85l.

C. Appellate.

Once the Decision is received from the Magistrate, either party may file, within thirty days from the mailing date of the Magistrate's decision, a Claim for Review with the Michigan Compensation Appellate Commission. Once the transcript and briefs of the respective parties are filed, the three member Commission panel reviews the evidence and determines whether the fact finding of the Magistrate is supported by competent, material and substantial evidence on the whole record. Either party may file further appeals, by leave, with the Court of Appeals and the Michigan Supreme Court. Mich Comp Laws Ann §§418.859a and 418.861a.

47. What are the requirements for stipulations or settlements?

A claim may be settled by way of compromise and/or stipulation. The agreement must be submitted to the Magistrate for review and approval. A settlement redeeming all liability must be submitted to the Magistrate for approval. All parties must consent to the settlement. The Agency requires specific notification to the employer. Mich Comp Laws Ann §§418.836 and 418.837.

48. Are full and final settlements with closed medicals available?

Yes. See answer 47. A redemption settlement, approved by a Magistrate, with consent of all parties terminates all claims for compensation, including weekly benefits, medical, rehabilitation, etc. Mich Comp Laws Ann §§4l8.836 and 418.837.

49. Must stipulations and/or settlements be approved by the state administrative body?

Yes.

RISK FINANCE FOR WORKERS' COMPENSATION

50. **What insurance is required; and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?**

Every covered employer must be insured or qualify as a self-insurer. Insurance coverage is available through qualified private insurers. There is an assigned risk pool for certain employers as designated by the Agency. Mich Comp Laws Ann §418.61l.

51. **What are the provisions/requirements for self-insurance?**

A. **For individual entitles.**

Individual employers may qualify as self-insurers, subject to approval of the Workers' Compensation Agency. Authorization for self-insurance is dependent upon a showing of solvency, financial ability, and the ability to make payments. The Director may require the furnishing of a bond or other security. Mich Comp Laws Ann §418.611.

B. **For groups or 'pools' of private entities.**

Groups or "pools" of private entities in the same industry may qualify for group self- insurance status. Mich Comp Laws Ann §418.611(2).

52. **Are "illegal aliens" entitled to benefits of workers' compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contact in the United States, although most state acts include them within the definition of "employee"?**

"Aliens" are identified as employees, without exception for their illegal status. Mich Comp Laws Ann §418.16l(l)(l) In *Sanchez v. Eagle Alloy,* 254 Mich App 651 (2003), the Court of Appeals ruled that an undocumented worker was an employee under the Act. The Court noted that the plaintiff was unable to work due to the commission of a crime, illegal entry into the United States. Once the employer learns of the undocumented status of the employee, the employer can no longer employ him or her. Benefits must be suspended. Conviction is not required, but simply the commission of the crime. The employer must still pay medical and rehabilitation benefits under §418.319. Wage loss benefits may be denied on the basis that the employee is unable to obtain or perform work because of imprisonment or commission of a crime. Mich Comp Laws Ann §418.361(1). *Sweatt v. Department of Corrections*, 468 Mich 172 (2003).

53. **Are terrorist acts or injuries covered or excluded under workers' compensation law?**

A terrorist act would be subject to the same principles applicable to injuries by other third parties. See answer 14.

54. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare's interests pursuant to the Medicare Secondary Payer Act?

There are no specific state requirements by way of statute. A magistrate must be satisfied that the interests of Medicare have been properly addressed before agreeing to sign a redemption order or voluntary payment agreement.

Under Medicare regulations (42 CFR 411.46), Medicare is secondary payer to the payment of workers' compensation by a workers' compensation carrier or self-insured employer. The obligation to pay medical for a compensable condition cannot be shifted to Medicare. Therefore, Medicare has an interest in all lump sum settlements of a workers' compensation matter if at the time of the settlement the employee meets the following criteria:

- The employee is already a Medicare enrollee, in which case there is not a threshold settlement amount; or

- There is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement and the settlement amount is greater than $250,000.

If the employee meets the criteria for consideration by Medicare, Medicare must be notified in the event of a settlement. Upon review of the file, Medicare may conclude that the settlement does not meet its criteria, or it may require a Medicare set aside trust for large settlements, or it may require merely a custodial self-administered trust account. (Reference 42 CFR 411.404; 42 USC §1395).

Medicare has several options available. It has a direct right of action to recover from any entity responsible for making a payment, including the employer, insurance carrier, plan administrator and third party administrator. Medicare also has the right to suspend payment of Medicare payments on behalf of the employee.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The Federal Medicaid statute requires States to include in their plan for medical assistance provisions (1) that the individual will assign to the State any rights to payment for medical care from any third party and (2) that the individual will cooperate with the State in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. 42 U.S.C.A. §1396k(a). The State is authorized to retain such amount as is necessary to reimburse it (and the Federal Government as appropriate) for medical assistance payments and to pay the remainder to the individual. 42 U.S.C.A. §1396k(b).

The Michigan statute provides that the State is subrogated to any right of recovery for the cost of hospitalization and medical services not to exceed the amount of funds expended by the State for the care and treatment of the patient. To enforce its subrogation right, the State may either (a) intervene or join in an action or proceeding or (b) institute and prosecute a legal proceeding against a third person. Mich Comp Laws Ann §400.106(1)(b)(ii).

Recent State Guidelines require that the plaintiff, his or her attorney, or the counsel for the employer/insurer contact Medicaid to confirm that no lien exists or to resolve the lien before settlement of any case.

Group disability or hospital service insurers (along with HMOs and Blue Cross Blue Shield) are excepted from the general rule that a workers' compensation payment is not assignable. Mich Comp Laws Ann §418.821(2). This exception for "assignments" extends to reimbursement agreements. *Aetna Life Insurance Co. v. Roose*, 413 Mich. 85 (1982). The health insurer is encouraged to intervene in a proceeding, but notice to the employer or workers' compensation carrier of its right to reimbursement is sufficient to require the employer/carrier to make provision for reimbursement in any settlement reached with the employee. *Ptak v Pennwalt*, 112 Mich. App. 490 (1982).

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

HIPAA, 45 C.F.R. parts 160-164 and 65 F .R. 82462, went into effect on April 14. 2003. The law provides an exception for workers' compensation claims so as to allow the collection of medical records by employers and insurers. [45 C.F.R. 164.512(1)] Therefore, the current practice of obtaining medical records could proceed under state law.

At the time of filing their initial pleadings, both the claimant and the carrier shall provide each other with any medical records relevant to the claim that are in their possession. Mich Comp Laws Ann §418.222(2).

57. What are the provisions for "Independent Contractors"?

The determination of whether an individual is an Independent Contractor will be based on whether the facts of the case meet the statutory definition of an employee in the Act. Mich Comp. Laws Ann §418.161(1)(n). The Act sets forth that an employee is every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to the act. The "economic reality" test no longer is used to decide such questions. *McCaul v Modern Tile & Carpet, Inc,* 248 Mich App 610 (2001); *Hoste v Shanty Creek Management, Inc.* 459 Mich 561 (1999).

Based on the new amendments to the Act, on or after January 1, 2012, the IRS "20-factor test" will be applied to determine if the individual is an employee or independent contractor. A business entity may request the Administrative hearing system to determine whether 1 or more individuals performing service for the entity in this state are in covered employment. Mich Comp Laws Ann §418.161(1)(n). IRS Rev Rule 87-41. *Amerisure v. Time Auto Transportation ,* 497 Mich 19.

58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary companies/leasing companies?

No. However, the Supreme Court has recognized that in cases involving labor brokers, both the labor broker and the employer are given the protection of the exclusive remedy provision. Mich Comp Laws Ann §418.131; *Farrell v Dearborn Mfg Co.,* 416 Mich 267 (1982); *Kidder v Miller-Davis Co,* 455 Mich 25 (1997).

59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

No.

60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

The ALFA affiliated counsel who compiled this State compendium offers and expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below:

61. Are there any state specific requirements which must be satisfied in light of the obligation of the parties to protect Medicare's interest when settling the right to medical treatment benefits under a claim?

Under the Michigan Workers' Compensation Act, there is no specific requirement. However, as noted, in the event of a settlement under § 418.836, the Magistrate will insist that Medicare's interest and/or Medicaid's interest be considered as part of the settlement. The Magistrate will also require the parties to resolve any and all Medicaid liens prior to settlement.

The provisions of Medicare Act 42C FR 411-46 require the state to consider the interest of Medicare. The Federal Medicaid Statute 42 USCA § 1396(K)(b) protects the interest of Medicaid, both on a state and federal level.

62. Does your state permit medical marijuana and what are the restrictions for use and for work activity in your state' workers' compensation law?

Under the Michigan Workers' Compensation Act, § 418.315, requires the employer to furnish reasonable and necessary medical treatment to an injured worker, including medical, surgical and hospital services and medicines, or other attendants or treatment recognized by the laws of this state, as legal, when they are needed. Treatment could include dental services, prosthesis, eye glasses. § 418.315 expressly exempt employers and carriers from paying for "services performed by a profession that was not licensed or registered by the laws of this state on or before January 1, 1998". The Michigan Appellate Commission has held that this exemption includes the use of medical marijuana, which was not licensed or registered for medical use before January 1, 1998. Subsequently, the legislature passed § 418.315 (A), which indicates that "an employer is not required to reimburse or cause to be reimbursed charges for medical marijuana treatment".

63. Does your state permit recreational use of marijuana and what are the restrictions for use and for work activity in your state' workers' compensation law ?

Currently, the state legislature is discussing statutory changes for the recreational use of marijuana. The only reference in our state workers' compensation law is noted in question 62.