

MEMORANDUM

August 15, 1985

TO: FISCAL AWARENESS SERVICE Subscribers

FROM: Daniel P. Webber and Gerald A. Faverman

SUBJECT: WORKERS' COMPENSATION REFORM

Public Act 103 of 1985, which took effect on July 30, restructures the process of administering Michigan's workers' compensation system. The intent of the act is to eliminate the current backlog of cases, make the system more efficient, and reduce employers' costs.

The act extends the existing definition of a compensable injury to January 1, 1987. Under this definition, a worker is considered disabled and eligible for benefits if he or she cannot do the same job he or she was doing when injured. Other major changes include: requiring employers to pay for an employee's medical insurance during an appeal; removing the current 39 administrative law judges (ALJ) from the civil service system in 1987 and replacing them with 30 magistrates appointed by the Governor; replacing the 15-member appeals board in 1987 with a seven-member appellate commission; establishing a small claims process for handling claims of \$2,000 or less; capping attorneys' fees; lowering the interest rate on awards paid late; reducing employer-paid compensation for handicapped workers'; and providing for mediation and voluntary arbitration.

The Michigan Civil Service Commission filed suit August 8 challenging the provision which removes the ALJs from the civil service system. If the courts rule the provision unconstitutional, several other administrative changes also would be considered invalid because they are tied to the ALJ provision.

A summary of the act's provisions follows.

Personal Injury Claims

1. After March 31, 1986, requires the Bureau of Workers' Disability Compensation, after receiving a completed application for mediation or hearing from a claimant, to forward a copy of the application to the employer and claimant. The claimant and carrier must exchange any relevant medical information, and both must submit proof to the bureau that they have done so. The carrier must file a written response to the application with the bureau within 30 days of receiving the application.
2. Specifies the information to be included on an application for mediation or hearing and the written response of the carrier.
3. States that if a party fails to provide a medical report regarding an examination or medical treatment, that party will be precluded from taking the medical testimony of that physician only; however, the other party is allowed to take the disposition of that physician.
4. Requires a claim to be mediated by the parties under the following circumstances:

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- The claim concerns a definite period of time and the employee has returned to work
  - The claim is for medical benefits only
  - The claimant is not represented by an attorney
  - The bureau determines that the claim may be settled by mediation
5. Requires the bureau, after notifying all parties, to schedule a mediation conference for the claim and, before the conference is held, to review the carrier's response with the employee. The bureau shall also provide the employee with an explanation of his or her rights and a reasonable estimate of the maximum amount of benefits to which he or she would be entitled after attorney fees and costs are deducted, if the claim is approved.
  6. Requires the mediator, if a mediation conference has been held and the claim has not been resolved, to recommend one of the following:
    - If the amount of the claim is \$2,000 or less, that the claim be heard in the small claims division
    - If the amount of the claim is greater than \$2,000, that the claim be heard at a hearing
  7. Allows a party to file an application for a hearing unless the bureau certifies in writing that the party has not made a reasonable attempt to hold a mediation conference, if applicable.
  8. Requires a party filing an application for a hearing on a claim after a mediation conference has been held to request in writing a pretrial conference, if one is desired, within 60 days of the completion of the mediation conference.
  9. Requires cases involving a carrier which terminates the payment of benefits that had been paid voluntarily and cases involving a petition to stop or reduce compensation to take precedence over other cases and for a hearing to be held within 60 days.
  10. Requires any claim filed for a hearing after March 31, 1986 to be referred to the small claims division of the bureau if the amount of the claim is \$2,000 or less and the claimant requests the referral, and if the claim concerns either medical benefits or a definite period of time if the employee has returned to work. Parties involved may be represented by an agent but not by an attorney. The decision of the magistrate or hearing referee will be final.

#### Chief Administrative Officer

11. Requires the chairperson of the Appeal Board to employ a chief administrative officer for the board who will have the following duties:
  - General supervisory control of the work of the board
  - Scheduling the docket
  - Setting productivity standards
  - Preliminarily reviewing matters before the Appeal Board to determine if they may be disposed of by arbitration, settlement, or in some other manner
12. States that the purpose of the chief administrative officer is to dispose of cases to be heard by the Appeal Board no later than July 1, 1989. The

officer shall report annually to the Governor and Legislature regarding his or her progress.

#### Appeal Board

13. Allows the Governor to remove a member of the Appeal Board for good cause, which may include lack of productivity or other neglect of duties.
14. Allows the Governor, until July 1, 1989, with the advice and consent of the Senate, to appoint senior workers' compensation commissioners, senior or former hearing referees or commissioners, former members of the Appeal Board, and other qualified individuals to the Appeal Board to fill a vacancy or to temporarily increase the size of the board to expedite decisions. Persons appointed must be representatives of the general public.
15. Requires matters pending review before the Appeal Board to be assigned to a panel of two board members. The panel may consist of the following combinations:
  - One member each from employer and employee representatives
  - One member each from employee and general public representatives
  - One member each from employer and general public representatives
  - Two members from general public representatives
16. States that the decision reached by a panel shall be the final decision of the board. If the panel cannot reach a decision, the board's chairperson is required to assign a third panel member to review the matter. The third member must be from a group not already represented on the panel, except for a panel consisting of two general public representatives, in which case a third public representative shall be assigned. The decision of the third member shall be considered the final decision of the board.
17. Recommends that the Appeal Board, in an attempt to expedite the review of matters before the board, use personal case conferences to generate discussion of the facts and an exchange of views.

#### Repeal of Current System

18. Repeals sections 251, 255, 261, 265, 851A, and 859 of the act which regulate the Appeal Board, its decision-reaching process, and its chief administrative officer as of July 1, 1989, or when there are no more cases to be decided by the board, whichever occurs first.
  - Any cases remanded to the Appeal Board or remaining to be decided by the board after it no longer exists will be decided by the newly created Workers' Compensation Board of Magistrates, under the rules of the board.
  - Abolishes the position of hearing referee as of March 31, 1987.

#### Workers' Compensation Board of Magistrates

19. Establishes the Workers' Compensation Board of Magistrates as an autonomous entity in the Department of Labor, consisting of 30 members appointed by the Governor with the advice and consent of the Senate.
20. Requires the Governor to appoint the initial members of the board by January 1, 1986, and to designate one member as chairperson.

21. Requires all persons appointed to the board to be recommended by the Qualifications Advisory Committee and to be members in good standing of the State Bar of Michigan.
22. Requires members of the board to be appointed for four-year terms, except the initial members, 10 of which will serve for two years, 10 for three years, and 10 for four years. Members may be reappointed, unless they have served for twelve years. They will receive an annual salary.
23. Allows the Governor to remove a member of the board for good cause, which will include, but not be limited to, lack of productivity or other neglect of duties.
24. Requires that only "workers' compensation magistrates" hear cases filed after March 31, 1986.
25. Requires that any case filed before April 1, 1986, and not heard by a hearing referee by March 31, 1987, be heard by a workers' compensation magistrate according to the law and procedures followed by hearing referees.
26. Requires the chairperson of the board to consult with law schools, the State Bar of Michigan, and other legal associations to establish legal education courses in workers' compensation. Magistrates (and applicants for the position of magistrate) may be required to attend the courses as a condition of continued employment.
27. Requires the chairperson of the board to assign and reassign magistrates to hear cases at locations throughout the state, except for cases to be heard by an appeal panel.
28. Requires the board, in addition to a written order, to file a concise written opinion stating its reasoning for the order, including any findings of fact and conclusions of law.

#### Appellate Commission

29. Creates the Workers' Compensation Appellate Commission as an entity in the Department of Labor under the administrative authority of the Workers' Compensation Council. The commission shall consist of seven members appointed by the Governor with the advice and consent of the Senate.
30. Requires the Governor to appoint the original commission members by January 1, 1986, and to appoint one member as chairperson.
31. Requires commission members to be recommended by the Qualifications Advisory Committee and to be members in good standing of the State Bar of Michigan.
32. Provides that commission members will be appointed for terms of four years, except for members of the first commission, of which two members will serve for two years, two for three years, and three for four years, as designated by the Governor. Members may be reappointed unless they have served for twelve years.
33. Provides that commission members will receive an annual salary not less than that paid to a magistrate or hearing referee of the most senior classification.
34. Defines the commission as an independent body with the power and authority to review the orders of hearing referees and the orders and opinions of magistrates.
35. Requires the chairperson to randomly assign matters to be reviewed by the commission to a panel of three commission members for disposition. The decision reached by a majority of the panel's members will be the final decision of the commission.

36. Requires any matter before the commission that may establish a precedent with regard to workers' compensation in this state as determined by the chairperson, or any matter which two or more members request be reviewed by the entire commission, to be reviewed and decided by the entire commission.
37. Requires the opinions of the commission to be in writing and provides for the publication of those opinions.

#### Qualifications Advisory Committee

38. Requires the Governor, with the advice and consent of the Senate, to appoint by October 1, 1985, a six-member Qualifications Advisory Committee consisting of persons with experience in workers' compensation, with employer and employee interests equally represented. Members shall be appointed for four-year terms, except for the initial members, of which two will be appointed for two-year terms, two for three-year terms, and two for four-year terms.
39. States that committee members will serve without compensation but will be reimbursed for necessary expenses.
40. Requires the advisory committee to develop a written examination for applicants for the position of workers' compensation magistrate to test the applicants' knowledge of the Workers' Disability Compensation Act of 1969, fact-finding skills, Michigan rules of evidence, and basic human anatomy and physiology.
41. Requires the advisory committee to interview applicants for magistrate who pass the examination, including those who were hearing referees on or before March 31, 1987.
42. Requires the Governor to appoint the magistrates from the qualified applicants as determined by the committee.
43. Requires the committee to evaluate the performance of each magistrate at least once every two years, using criteria specified in the bill.
44. Requires the committee to submit a written report of the evaluation to the bureau.

#### Claims for Review

45. States that the order of a hearing referee or workers' compensation magistrate is final, unless review is ordered or requested within 30 days after the decision is mailed to the parties.
46. Specifies that claims for review for cases filed after March 31, 1986, will be filed with the Appellate Commission. Both the Appeal Board and Appellate Commission may grant additional time to file.
47. Specifies that a party filing a claim for review must file a copy of the hearing transcript with the commission within 60 days of filing the claim and must file its brief with the commission and provide any opposing party with a copy of the transcript and its brief within 30 days of filing the transcript.
48. Requires the employer or carrier, if either files a claim for review to the Appellate Commission or appeals to the Court of Appeals or the Supreme Court, to furnish a copy of the testimony, depositions, and other documents to the employer or his or her attorney.
49. Requires the receiving party, within 30 days of receipt of the transcript and brief by an appealing party, to provide a reply brief to the commission and the appealing party. In addition to a reply brief, the opposing party may file a cross appeal and brief, within the same 30 days. A party receiving a cross appeal has 30 days to file its reply brief with the commission.

50. Requires each party to specify to the commission those portions of the record that pertain to their respective positions.
51. States that, within 15 days after all briefs have been filed with the commission, the matter will be referred for review and decision to a panel of the commission or the entire commission, where applicable.
52. Provides that, for any case pending review by the Appeal Board in excess of three years, the parties may file a claim for review with the commissioner.
53. Establishes that until October 1, 1986, findings of fact made by a magistrate will be considered conclusive by the commission if supported by competent, material, and a preponderance of the evidence on the whole record. Beginning October 1, 1986, findings of fact made by a magistrate will be considered conclusive if supported by competent, material, and substantial evidence on the whole record. "Substantial evidence" means such evidence, considering the whole record, as a reasonable mind will accept to justify the conclusion. "Whole record" means the entire record of the hearing, including all of the evidence both in favor and against a certain determination. The commission may adopt in its entirety or in part the order and opinion of a magistrate.
54. States that the findings of fact made by the commission acting within its powers without fraud shall be conclusive. The Court of Appeals and the Supreme Court will have the power to review questions of law involved in any final order of the commission, provided application is made by the aggrieved party within 30 days after the order is handed down.
55. Permits the commission to dismiss a claim for review, assess costs, or take other disciplinary action when it has been determined that the claim was vexatious by reason of either of the following:
  - The claim was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal
  - A pleading, motion, argument, petition, brief, document, or appendix presented in the cause grossly disregarded the requirements of propriety or of a fair presentation of the issues.

#### Definition of Disability

56. Redefines "disability" for occupational diseases in section 401 of the act to make it identical to the definition for traumatic injuries in section 301:

A limitation of an employee's wage earning capacity in the employee's general field of employment resulting from a personal injury or work-related disease. The establishment of disability does not create a presumption of wage loss.

57. Retains sections 301 and 401 of the act containing the definition of disability in the event that any section of the act is found to be invalid by the State Supreme Court.
58. Repeals the definition of disability in sections 301 and 401 on January 1, 1987.

### Arbitration

59. Establishes that any case to be reviewed by the Appeal Board or commission may be voluntarily referred to an arbitrator mutually agreed upon in writing by both parties.
60. Requires the arbitrator to be a member in good standing of the State Bar of Michigan or of the American Arbitration Association.
61. Requires an arbitrator to adhere to the civil rules of evidence at a hearing if failure to do so will prejudice either party.
62. Allows an arbitrator to request written briefs from each party within 30 days after the close of the hearing, outlining those portions of the evidence supporting each party's claim.
63. Requires the arbitrator to render a signed, written order and opinion within 30 days after either the hearing or receipt of the briefs. The order will include any findings of fact and conclusions of law.
64. Establishes that, in the absence of fraud, the order and opinion of the arbitrator will be considered conclusive. The Court of Appeals and Supreme Court will maintain the power to review the order if an application is filed within 30 days.
65. Specifies that arbitration fees be paid from the General Fund.

### Liability and Benefits

66. Establishes that the liability of the carrier or fund regarding a claim will be determined at the time of the award of benefits.
67. States that if a carrier or fund originally determined to be liable for compensation and is later determined to not be liable, or not to the same extent as originally determined, the liable party will reimburse the carrier or fund with 12% annual interest.
68. Limits the amount of attendant or nursing care an employer must provide, if needed, to 56 hours per week if such care is to be provided by the employer's spouse, brother, sister, child, parent, or any combination of these persons.
69. Limits payment for nursing or attendant care to a period one year before the date for a hearing application is filed with the bureau.
70. Reduces the annual interest rate which must be paid on compensation resulting from an award of accrued benefits from 12% to 10%.
71. Allows employers who do not provide a pension plan but who do provide a profit-sharing plan pursuant to Section 401 (a) of the Internal Revenue Code to reduce their obligation to pay benefits based on the ratio of the employer's contributions to the total contributions made to the profit-sharing plan.
72. Lowers the age at which compensation to a minor dependent shall cease from 21 years to 18. This provision applies only to dependents who are under 18 as of July 30, 1985.
73. Shortens the period handicapped employees may receive employer-paid compensation from two years to one year, after which benefits will come from the Second Injury Fund.
74. States that a claim for review shall not operate as a stay of providing medical benefits required by the terms of the award of the hearing referee, workers' compensation magistrate, or arbitrator. Medical benefits must be awarded as of the date of the award and must continue until final determination of the appeal or for a shorter period if specified in the award. Benefits accrued prior to the award will be withheld until final determination of the appeal.
75. States that if the benefit amount is reduced or rescinded by a final determination, the carrier will be reimbursed for the amount of benefits

paid in excess of the amount finally determined. Reimbursement will come from the General Fund.

#### Exemptions from Liability

76. Exempts a person, firm, or corporation from regulation under the act if all of the employees of the person, firm, or corporation are excluded from regulation under the act.
77. States that an employer who willfully circumvents the act's provisions, or uses coercion, intimidation, deceit, or other means to encourage persons who would otherwise be subject to the act to pose as contractors in order to evade the act's requirements is guilty of a misdemeanor and subject to penalties.
78. Allows an employer to demand that a contractor not subject to the act insure the employer against any loss due to a claim filed under the act for compensation and other benefits.
79. Defines as an employee every person performing service in the course of trade, business, profession, or occupation of an employer at the time of injury, if the person 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.
80. States that a licensed real estate salesperson or associate real estate broker is not considered an employee if both of the following apply:
  - At least 75% of the compensation of the salesperson or broker is directly related to the volume of sales of real estate and not to the number of hours worked
  - The salesperson or broker has a written agreement with the broker who employs the salesperson which states that the salesperson is not considered an employee for tax purposes
81. States that an employer is not liable for compensation if the employee is unable to work because of imprisonment or commission of a crime.

#### Enforcement

82. Increases the penalties for employers who fail to obtain workers' compensation insurance to \$1,000 or imprisonment of 30 days to six months. Each day's failure is a separate offense.
83. Establishes that, in addition to the above penalties, all licenses granted by the State to the employer may be revoked upon a determination by the appropriate agency or licensing board subject to an administrative hearing.
84. Allows the employee of an employer subject to those penalties to seek damages through a civil action against the employer for an injury arising out of and in the course of employment, regardless of the act's exclusive remedy provision.
85. Requires carriers to pay to the bureau 10% of the amount due on benefits, medical bills, or travel allowances not paid within 30 days of the carrier receiving notice of nonpayment by registered mail.
86. Allows the Department of Management and Budget (DMB) to review the records and medical bills of any health facility or health care provider that a carrier determines is not in compliance with the schedule of charges or is requiring unjustified treatment, hospitalization, or office visits.



87. Requires DMB to certify a carrier that complies with the criteria or standards for utilization review as determined by DMB.

#### Administrative Revolving Fund

88. Establishes the Workers' Compensation Administrative Revolving Fund within the State Treasury to be used to supplement appropriations for financing the bureau, the commission, and the Appeal Board.
89. Requires that the \$100 fee collected by each party in a proposed redemption agreement be deposited in the fund.
90. Requires that all money in the fund at the end of each fiscal year remain in the fund and not be credited to the General Fund.

#### Attorney Fees

91. Establishes that for claims filed after March 31, 1986, the maximum attorney fee will be based upon the coordinated workers' compensation benefit amount according to a contingency fee schedule to be created under the act. Fees less than \$500 may be agreed upon in writing by the employee and attorney before an application for a claim has been filed.
92. Establishes that the computation of attorneys' fees for cases filed after March 31 and decided by the Appellate Commission will not be based on more than 104 weeks of the period the matter was pending before the commission. This limitation applies only to weekly compensation and not to the period of time the matter was pending review before the Court of Appeals or Supreme Court.