

## WORKERS' COMPENSATION CLIENT NEWSLETTER

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### Case Law Update

#### **Exclusive Remedy Provision Applies to Employees Injured During the Cancellation Period When Policy is Reinstated with No Lapse in Coverage**

In *Walrath v. Witzenmann USA LLC*, (2017), the plaintiff brought a negligence action claiming that the defendant violated MCL 418.611 by failing to carry workers' compensation insurance when the policy had been canceled at the time of his injury. The Michigan Court of Appeals stated that the legislature clearly intended to mutually benefit employees and employers by providing workers' compensation coverage to an injured employee while not allowing the employee to circumvent the exclusive remedy provision and pursue non-workers' compensation damages from the employer. However, the court held that an employer remains in compliance with MCL 418.611 if and when it reinstates the workers' compensation insurance policy and secures compensation for an injured employee with no lapse in coverage. The court further explained that this holding does not create a legal loophole allowing employers to avoid consistently maintaining a workers' compensation policy, because the employer must still promptly obtain coverage from an approved insurer backdated to cover the injury, in order to avoid civil liability under MCL 418.641(2).

#### **The Intentional Tort Exception to the Exclusive Remedy Provision Only Applies When the Employer Willfully Disregards its Actual Knowledge of the Injury Causing Condition**

The Michigan Workers' Compensation Act (WDCA) provides an exception to the exclusive remedy rule in the case of an intentional tort where the employer's "deliberate act" intentionally caused the employee's injury. A recent unpublished case in the Michigan Court of Appeals examines the intentional tort exception. In *Shumaker v. Meritt Tool & Die*, Michigan Court of Appeals, (2018), the plaintiff suffered an injury to his hand when he placed his hand on top of the defendant's machine. The press double cycled resulting in an injury to his hand. Subsequently, the plaintiff claimed that the press constituted a "continuously operative dangerous condition." The Court concluded that the employee must show: (1) that the employer had actual prior knowledge of the condition that caused his injury; and (2) that the employer willfully disregarded that knowledge. The court further held that an employee cannot recover under the intentional tort exception, if the employee knew of the condition that caused his injury, and subsequently failed to exercise the safety methods in place by the employer.

### **Employee's Mental Disability Did Not Constitute a Compensable Disability**

In *Perkowski v. Chrysler Group, LLC*, (July 27, 2018), the plaintiff appealed the opinion and order of the Michigan Workers' Compensation Appellate Commission (MWCAC), which reversed the magistrate's open award of disability benefits. The Michigan Court of Appeals reviewed the evidence in the record to determine if the plaintiff's employment was a significant cause to his mental disability under MCL 418.301(2). The court relied on the following *Martin* factors to make its determination: (1) the number of occupational and non-occupational contributions to the mental disability; (2) the relative amount of contribution of each contributor; (3) the duration of each contribution; and (4) the extent or permanent effect that resulted from each contributor. However, the court cautioned that the *Martin* factors are merely guides and the plaintiff must still show that his work-related injury arose in the course of employment. The court affirmed MWCAC's holding that an employee must support his claim for disability benefits with substantial evidence of mental disability arising out of actual employment events, not unfounded perceptions of employment.

## **LARA Workers' Compensation Agency Update**

### **New Workers' Compensation Calculation Program**

This year the Workers' Compensation Agency (WCA) released a new workers' compensation calculation program (WCCALC), which features the first release of the WORCS 2.0 program. WCCALC may be used to calculate the correct weekly benefit rate that is payable on general disability, specific loss, and death claims. However, WCCALC cannot equate for every nuance in a workers' compensation claim. Thus, WCA expects that users have the appropriate knowledge of the Workers' Disability Compensation Act (WDCA) to properly calculate claims in accordance with statutory requirements and mandates.

*For any questions regarding WCCALC, users may contact any of our Workers' Compensation attorneys at Giarmarco, Mullins & Horton, P.C.*

### **New Mileage Reimbursement Rate**

The Department of Technology, Management and Budget has increased the mileage reimbursement rate to \$0.545 per mile. This increased rate was effective as of January 1, 2018.

### **2018 Maximum Rate**

On January 3, 2018, the Bureau of Labor Market Information & Strategic Initiative reported that the statewide average weekly wage was \$999.31 as of June 30, 2017. Thus, pursuant to Section 418.355(2) of WDCA, the 2018 maximum weekly benefit based on 90% of the state average weekly wage, is \$900.00.

### **WORKERS' COMPENSATION We'll Walk You Through the Process**

*The workers' compensation process can be quite complex. Since each case is unique, it's often difficult to know which step to take next. At Giarmarco, Mullins & Horton, our approach is aggressive—we seek to resolve your workers' compensation issues in a way that makes sense for your organization. Our attorneys handle all levels of litigation, from trial through all appeals, including the Supreme Court of the State of Michigan.*

## Michigan Workers' Compensation Practitioner Update

In the past year there have been many changes and improvements in the practice of workers' compensation law in Michigan. Two major catalysts for this change have been the increase of millennials entering the workforce and evolving marijuana legislation.

### How the Growth of Millennials Impacts the Michigan Workforce

According to Pew Research, millennials became the single largest demographic group in the United States workforce in 2016. Today, there are an estimated 56 million millennials on the job in the U.S., compared to 53 million baby boomers. This shift will become even more dramatic over the next 19 years when most baby boomers will reach the age of 65. Similarly, a study conducted by Brookings Institute released in January 2018, shows that the millennial population (ages 18-34) in metro Detroit grew 4.6% from 2010-2015. This means that millennials now represent 21.6% of the metro Detroit demographic. This 4.6% growth falls right in line with the national average. Thus, metro Detroit is following the national shift of millennials eclipsing the number of baby boomers.

The growth of millennials in the workforce is changing the workplace in many ways. Specifically, in terms of workers' compensation, millennials have different expectations than older generations. First, millennials are less likely to have a strong understanding of insurance policies and more likely to expect help from their employers through training sessions and counseling. Second, millennials prefer to complete insurance transactions online or through mobile channels. Third, millennials value speed and efficiency. Thus, they prefer a convenient way to find medical care within their PPO network or to file a workers' compensation claim. The increase of millennials in the workforce is causing employers to revolutionize the way they deal with workers' compensation by providing more effective communication, timely and convenient service, and offering digital methods for filing claims.

### The Effects of the Marijuana Industry on Michigan's Workers' Compensation Law

In 2008, Michigan legalized medical marijuana by way of enacting the Michigan Medical Marijuana Act (MMMA), MCL 333.26221. The MMMA allows for registered patients and caregivers to legally engage in medicinal use of marijuana and possess no more than 2.5 ounces and/or twelve plants. While legalization of medical marijuana protects registered patients from criminal liability, the legal treatment of registered marijuana patients in other facets of civil law is nuanced and some-what blurred due to on-going debate.

### Medical Marijuana Patients and Workers' Compensation

Because of the opioid crisis, some doctors have begun prescribing marijuana as an alternative to addictive narcotics. Moreover, cannabis-related medical research suggests marijuana can be as effective as opioids in addressing issues such as epilepsy, glaucoma, and traumatic pain. For example, a July 2017 article published in the *Journal of the International Association for Study of Pain*, medical marijuana patients rated the effectiveness of marijuana treating chronic pain. The patients rated medical marijuana as 74.6% effective, on a scale of 0% ("no relief") to 100% ("complete relief"). Still, cannabis research is nuanced and more research is needed to learn more about its medical treating abilities. Moreover, even if medical marijuana becomes a more mainstream treatment option for workers' compensation injuries, marijuana remains illegal under federal law. **Marijuana's status as a schedule one substance means that a carrier can refuse to pay for the prescription if a doctor prescribes medical marijuana for an injured worker.**

In contrast, some states mandate medical marijuana reimbursement by state law. Connecticut, Maine, Minnesota, New Jersey, and New Mexico require insurers to pay valid workers' compensation claims involving

medical marihuana. However, in Michigan, “an employer is **NOT** required to reimburse or cause to be reimbursed charges for medical marihuana treatment.” MCLA 418.315(a). Yet, it is possible that the passage of Michigan Marihuana Legalization eventually could lead to Michigan repealing MCLA 418.315(a), and mandating reimbursement. Even if Michigan enacts such a mandate, Michigan will still have to deal with the legal conundrum stemming from marihuana’s federally illegal status.

### **Medical Marihuana and Use in the Workplace**

Another issue that states encounter with the interplay of workers’ compensation and medical marihuana, is whether employers may implement drug-free workplace policies. States that are fighting for the allowance of these policies, irrespective of legal status, argue that a drug-free workplace is an effective strategy to reduce worksite injuries. Michigan allows for such drug-free workplace policies. Moreover, an employer may terminate (under proper circumstances) an employee for drug use even if that employee is a registered medical marihuana patient.

One prevailing issue with drug-free policies in states where marihuana is medically or recreationally legal, is the burden of proof. Unlike alcohol, there is no reliable way for an employer to test if an employee is high at work. An employee could test positive for marihuana if he/she used the substance legally at home. Unlike other drugs, THC is absorbed into the bloodstream and then broken down into metabolites. THC metabolites are stored in body fat and gradually eliminated through excretion. Most employers use urine tests, which means that an employee’s test could come back positive for marihuana that the employee used weeks ago.

### **Concluding Thoughts . . .**

It appears that the Michigan Legislature is going to continue to move towards recreational legalization of marihuana. The more prevailing issue will become how the local, state, and federal governments will decide to regulate the still federally illegal activity. Because of the complexities associated with the marihuana legal landscape, other areas of law, such as workers’ compensation, will continue to be a prominent topic of discussion for Michigan policy-makers and lawyers.

*This newsletter is provided as an informational courtesy. The information is of a general nature and should not be acted upon without further details and legal guidance. The information contained in this newsletter does not provide legal advice. For legal advice, please contact one of the workers' compensation attorneys at Giarmarco, Mullins and Horton, P.C. © 2017*

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**GMH** **GIARMARCO, MULLINS & HORTON, P.C.**  
ATTORNEYS AND COUNSELORS AT LAW

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