

## WORKERS' COMPENSATION CLIENT NEWSLETTER

Fall 2020

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### New Workers' Compensation Rules Related to Covid-19 Positive First Responders

The Emergency Rules of the Michigan Department of Labor and Economic Opportunity, which were enacted on October 16, 2020, address first response employees (as defined in the rules) who are confirmed (via a positive test or physician diagnosis) as COVID-19 positive on or after March 18, 2020, and indicate that they are presumed to have suffered a "personal injury" under the workers' compensation act. Thus, such employees are eligible for workers' compensation benefits, subject to rebuttal by specific facts to the contrary. Essentially, the Emergency Rules restore the prior Executive Orders and once again give the "presumption" to the first response employee. The Rules, much like the prior Executive Orders, only allow the employer to avoid paying WC benefits if it can show specific facts that demonstrate that the cause or exposure to the COVID-19 did not occur at work.

We do note the requirement of being COVID-19 positive on or after March 18, 2020, as confirmed either by a test or by physician. We suggest that a positive COVID-19 test likely satisfies a first responder's requirements to get Workers' Compensation benefits under these Emergency Rules. However, we question (and suggest you do too) a COVID-19 positive diagnosis by a physician, absent a positive test. Would the diagnosis be based on factors such as a cough, fever, loss of smell, loss of appetite, or other symptoms that can be associated with many different diagnoses and illnesses other than COVID-19? If so, then, in the appropriate cases and based on a case by case analysis, we suggest considering disputing such cases. Again, this would be in a situation where an individual is diagnosed as Covid positive, only based on a physician diagnosis, and not a positive COVID test.

The scenario, wherein an employee could present at work, with symptoms similar to COVID-19 and would then possibly be sent home for a mandatory ten-day (or 14 day) quarantine period, does present an interesting analysis/decision for the employer. We don't believe the new Emergency Rules mandate those employees automatically be paid workers' compensation benefits, and certainly not in the absence of a positive COVID test. Some of those tests will come back positive but others may not (or may only have a COVID diagnosis based on a physician opinion and not a test), and it is the latter group that we believe would be justified in being disputed. Even the ones that come back positive would be subject to rebuttal by the employer with specific facts on the issue of exposure.

The new Emergency Rules are retroactive to March 18, 2020, which is the date of the Governor's initial Executive Order. They are in effect until March 20, 2021. Noticeably absent from these Rules are any reference to an employer being subject to the penalties provided by Section 631 of the Workers' Disability Compensation Act. That Section references the revocation of the privilege granted to an employer to carry its own risk.

### Michigan Court of Appeals rules that Massage Therapy is Not Compensable under Michigan Workers' Compensation Law

In Belcher v. Ford Motor Co., the Michigan Court of Appeals recently reversed the trial court and the Workers' Compensation Appellate Commission's findings that "massage therapy" is compensable and ruled that "an employer is not required to reimburse for *any* service performed by a massage therapist." The Court of Appeals based its determination on Section 315 of the Workers' Disability Compensation Act, which requires reasonable and necessary medical treatment to be provided. Section 315 identifies some specific limitations on the "reasonable and necessary" requirement. Specifically, an employer is not required to "reimburse or cause to be reimbursed, charges for services performed by a profession that was not licensed or registered by the laws of [Michigan] on or before January 1, 1998,

but that becomes licensed, registered, or otherwise recognized by the laws of [Michigan] after January 1, 1998.” The court indicated that massage therapists were first required to be licensed in Michigan effective January 9, 2009. Thus, the court ruled that “an employer is not required to reimburse for any service performed by a massage therapist.”

In addition to the above analysis used by the Court, section 315 states that an “employer is not required to reimburse ... for *physical therapy* service unless [1] that service was provided by a licensed physical therapist or physical therapist assistant under the supervision of a licensed physical therapist [2] pursuant to a prescription from [certain licensed] health care professional(s).” In Belcher, the plaintiff conceded that his massage therapy was not performed by a physical therapist or assistant, and thus, this was another basis the court relied on to rule that the defendant had no obligation to pay for the massage therapy.

The statute also states that for physical therapy services to be compensable, they must be performed pursuant to a prescription from certain licensed healthcare providers. Though the Court of Appeals did not specifically rely on it, the Plaintiff in Belcher, conceded that he had not obtained a prescription for massage therapy.

Though the above ruling is from the Court of Appeals, and it is possible that the Michigan Supreme Court could review this decision in the future, for now, we generally suggest not authorizing nor paying for massage therapy services for individuals seeking them as part of their workers’ compensation claims. However, if there is a situation where it is very obvious, or there is no disagreement between the claimant and defense medical professionals, that massage therapy is allowing an individual to keep working or to avoid significant other medical costs (i.e.- surgery, etc.), we do suggest that there be some “flexibility” to allow it or pay for it on a very limited case by case basis, should you choose to do so. However, based on Belcher, there certainly is no requirement to pay for or authorize massage therapy at this point.

We are happy to discuss these and other developments and how they may affect your claims handling during the COVID-19 pandemic or at any time in the future. We will also continue to provide you with up to date developments and information on Michigan Workers’ Compensation law as they occur. Feel free to contact any of the GMH lawyers that focus their practices on Michigan Workers’ Compensation law at any time.

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*For questions regarding the above information or any workers’ compensation issue in the State of Michigan, do not hesitate to call any of the attorneys at Giarmarco, Mullins and Horton, P.C., who regularly practice in the workers’ compensation area:*



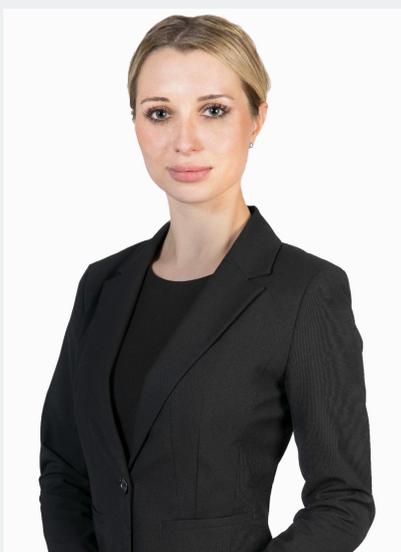
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