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Southfield MI 48034

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151 Central Avenue – Suite 260
Holland MI 49423

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July 7, 2021

David Campbell
Workers' Disability Compensation Agency
2501 Woodlake Circle
Okemos, MI 48864

Dear Mr. Campbell:

Re: Proposed Changes to Administrative Rules for Workers' Disability Compensation General Rules and Workers' Compensation Board of Magistrates General Rules

We reviewed the letters prepared by the Michigan Association of Justice and Michigan Self-Insurers' Association. We are satisfied that the negotiated language resolves all of the issues we addressed at the public hearing held on July 7, 2021 on the proposed changes to the Workers' Disability Compensation General Rules rule set and Workers' Compensation Board of Magistrates rule set with the exception of our issues noted with R 408.41b and c and R 418.91(1)(d)(ii) and (iii) .

R 408.41b and 408.41c

Proposed rules 408.41b and 408.41c are inconsistent with the Worker's Disability Compensation Act ("WDCA"). The proposed rules require a notice of election to be excluded under section **161(4)(5)** of the act shall be reported to the agency on form WC-337.

Requiring the filing of a form WC-337 for exclusions under section 161(4) is inconsistent with Section 161(4) in a number of respects including, the notice requirement, its application to different types of business entities, and the requirement that the employees being exempted represent all of the employees of the company.

Section 161(4) sets forth what is required for an employee of a corporation to be individually excluded from coverage under the WDCA. Section 161(4) states,

"An employee who is subject to this act, including an employee covered pursuant to section 121, who is an employee of a corporation that has not more than 10 stockholders and who is also an officer and stockholder who owns at least 10% of the stock of that corporation, with the consent of the corporation as approved by its board of directors, may elect to be individually excluded from this act by giving a notice of the election in writing to the carrier with the consent of the corporation endorsed on the notice. The exclusion remains in effect until revoked by the employee by giving a notice in writing to the carrier. While the exclusion is in effect, section 141 does not apply to any action brought by the employee against the corporation."

There is no requirement in Section 161(4) that notice of the election be provided to the agency. The only notice requirement is that notice of the election be provided to the carrier.

Further, R 408.41b states, "[t]he employer shall further certify that all employees are eligible to be excluded under section 161(2) or 161(3) of the act." This is impossible by the very wording of the WDCA. Section 161(4) applies solely to employees of corporations, Section 161(2) applies solely to employees of partnerships, and Section 161(3) applies solely to employees of limited liability companies. It is impossible for a corporation to certify that all of its employees are eligible to be excluded under Sections 161(2) or (3) as required by the rule because employees of a corporation are only eligible for exclusion under Section 161(4).

If it is determined that the notice of election referred to in Section 161(4) must comply with R 408.41b, it would render Section 161(4) entirely invalid since compliance is impossible based on the language.

R 408.41b also requires the employer certify "the employees signing the exclusion comprise all of the employees of the employer." There is no requirement in Section 161(4) that all employees signing the exclusion comprise all of the employees of the employer. Section 161(4) requires the consent of the corporation itself as approved by the board of directors. There is no requirement that each employee sign the exclusion and such a requirement would likely be an impractical burden and entirely unreasonable in many circumstances.

Additionally, the Form WC-337 specifically states, at the bottom, that the authority for the Form is "Workers' Disability Compensation Act 418.161(5)."

To cure this issue, we propose removing 161(4) from proposed rules 408.41b and c so that the rules only require a notice of election to be excluded under section 161(5) be reported to the agency on the form WC-337, or its electronic equivalent.

R 418.91(1)(d)(ii) and (iii)

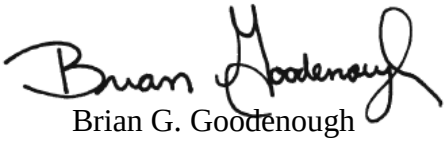
The proposed rule 418.91(1)(d)(ii), includes a requirement that a vocational consultant report include a job description outlining "all of" the functional requirements of the job. We recommend "all of" be stricken as the vocational expert may not know "all of" the functional requirements. We propose R 418.91(1)(d)(ii) read as follows, "[a] job description outlining the functional requirements of the job that are available."

With respect to proposed rule 418.91(1)(d)(iii), the current wording is overly broad. We suggest amending the language to read as follows, "[a]ny other pertinent information **reasonably** necessary to apply for the employment."

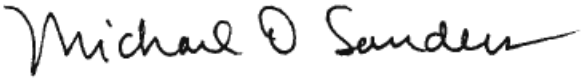
Sincerely,

FOSTER SWIFT COLLINS & SMITH PC

Alicia W. Birach



Brian G. Goodenough



Michael D. Sanders

We recommend the following changes to the proposed General Agency Rules. With these changes below, and with our recommended changes to the proposed Board of Magistrate Rules, we believe these rules will provide a practical framework for the administration of the Michigan Workers' Disability Compensation Act. We believe these rules, with our recommended revisions, will protect the interests of injured workers while minimizing the costs to Michigan businesses and insurance companies. These rules, as modified by our recommendations, will strike the right balance among all stakeholders in laying out rules to apply the current Michigan workers' compensation statute.

1. Rule 1(b) should be made more clear that the Director or a Magistrate retains the authority to require a party or witness to appear in person. There are circumstances where an appearance in person especially at trial enhances a magistrate's ability to assess credibility and allows an opposing party to more effectively cross-examine a witness. We recommend adding the sentence: **"This definition should not be interpreted to limit the authority of the director or a magistrate to require a party or a witness to appear in person."**

2. Rule 1(m)'s definition of 'vocational evaluation' needs to be more clear that it applies in the context of Section 319. We recommend changing the first sentence of the definition to provide "**(m) 'Vocational evaluation' means a vocational evaluation under Section 319."**

3. Rule 1a(4) requires an injured worker to make a claim on a specific form. This conflicts with the statute that provides that a claim can be made orally or in writing. MCL 418.381(1) The rule should make the use of the written form optional rather than mandatory by changing "shall" to "**may.**"

4. Rule 3(2)(a) proposes a new requirement that "To avoid payment of penalties, an employer or carrier must demonstrate a good faith legal basis or actual facts supporting the dispute." The business community objects to this proposal for various reasons including for its belief that it conflicts with the current statute. Rather than litigate for years the validity of any such rule, we recommend that this provision be deleted from the proposed rules.

5. Rule 10a(2) proposes requirements for what is required for an employer or carrier to file a petition to stop benefits after benefits were awarded by the magistrate. The noticed drafts of the rule published by the Agency were not as clear as they could be about what was necessary to file a petition to stop. We recommend the following language as more clear, detailed and consistent with the statute and caselaw:

   (2) At the time of filing an application requesting a stoppage of compensation, the moving party shall provide to the claimant and counsel, if represented the following:

   (a) Proof of payment of compensation to within 15 days of the date of the filing of a petition to stop compensation, and either

(b) an affidavit stating that the employee has returned to gainful employment paying wages at or greater than his or her average weekly wage at time of injury and that substantially describes the nature of the employment, or

(c)a signed statement from a physician:

1. stating that the employee is able to return to unrestricted employment, or

2. stating that the employee is able to return to restricted employment accompanied by an affidavit demonstrating that such reasonable employment has been offered, or is reasonably available, to the employee, or

3. stating that the conditions found to be work-related cease to exist and are no longer a cause of current wage loss, or

(d) proof of any other ground for stopping benefits permitted by law.

6. Rule 10a(6) would limit recoupment to overpayments to instances where an employee fraudulently concealed earnings or to where a coordination of benefit error occurred. There may be other circumstances where recoupment of overpayment is warranted. We recommend the following changes that permits recoupment overpayments in other contexts, but still gives a magistrate some flexibility and discretion to waive the obligation to reimburse the employer or carrier when doing so would cause the employee undue harm or defeat the purposes of the Act.

(6) Except as provided under section 354 of the act, where the carrier, PEGSISF, first responder presumed coverage fund, or self-insurers' security fund has voluntarily paid benefits or paid benefits pursuant to a voluntary pay agreement, no reimbursement of previously paid benefits may be ordered against the employee unless the employer or carrier establishes that the employee fraudulently concealed post-injury earnings that, if reported, would have reduced the amount of wage loss benefits paid, or establishes that benefits were overpaid as a result of a mathematical, technological or clerical error. Reimbursement of previously paid benefits shall not be ordered where an employer or carrier unreasonably changes its position regarding whether a condition is work-related or whether a claimant was disabled. If an overpayment occurs as result of a mathematical, technological or clerical error, the employer or carrier shall not recoup overpayments by reducing ongoing weekly benefits greater than fifty percent as provided in section 354(9). A magistrate may in his or her discretion waive reimbursement of an overpayment upon an employee's showing of undue harm. The magistrate may take into consideration whether recoupment of an overpayment would not serve the purposes of the act.

7. The proposed Rule 15a(3)-(4) appears to trigger a formal vocational evaluation and rehabilitation of a worker, even when neither the employer or employee find it helpful or necessary, or possibly where liability is disputed. We recommend the following language instead:

(3) Under section 319 of the act, the director may, on his or her own motion or upon receipt of an application from the employee or employer refer the employee to an agency-approved vocational rehabilitation provider for an evaluation of the need for a vocational rehabilitation program and the kind of vocational rehabilitation program necessary to return the employee to a remunerative occupation commensurate with their prior wage earning capacity, which is the primary objective of vocational rehabilitation services. Vocational rehabilitation may include, but is not limited to, evaluation and assessment, counseling, development of the IWRP, job search, job development and placement, education, and retraining. Any expenses incurred under this rule shall be the responsibility of the carrier, PEGSISF, first responder presumed coverage fund, or self-insurers' security fund.

If a party objects to the referral for a vocational evaluation within 28 days of mailing of the scheduling notice of the referral, the director or his or her deputy shall conduct a hearing on the matter.

(4) The director may extend this the time of the vocational evaluation when there is medical documentation contraindicating the timing of the evaluation, an impending offer of reasonable employment, or other good cause shown by any party on an agency-approved form. A vocational evaluation or other components of the vocational rehabilitation process may be delayed, or suspended upon the written stipulation of the employee and employer/ carrier for any reason. The employer or carrier may delay or suspend where the employer or carrier disputes where the employer or carrier disputes the issue of work-related disability that must first be determined by the board of magistrates, and there has been no finding by a magistrate or the commission that the employee has a work-related disability under Section 301(4)(a) or Section 401(1).

8. Consistent with the proposed revisions to Rule 15a, we recommend changes to Rule 15b that reflect a broader range of possible issues that may arise related to vocational rehabilitation n resulting in hearings before the Director.

Rule 15b. Any party may request a vocational rehabilitation hearing before the director or his or her representative, on form WC-104a or form WC-104c, application for mediation or hearing, or an electronic equivalent, and all the following provisions shall apply:

(a) A hearing shall be scheduled within a reasonable time, subject to the availability of the director or his or her representative and the parties involved. A request for a hearing shall, at a minimum, contain all of the following:

(i) A brief statement of the question concerning rehabilitation.

(ii) If requested by the employer, a citation of the specific instances of the employee's failure to cooperate in the rehabilitation program or other objections to related to a proposed or ordered IWRP.

(iii) If requested by the employee, the type of program requested and the reason for it, or other objections related to a proposed or ordered IWRP.

(c) The director or his or her representative, after providing an opportunity to be heard, may issue orders regarding vocational rehabilitation consistent with the act and these rules including R15a(4).

(d) Unless a request for review by the workers' disability compensation appeals commission is filed by a party within 15 days after the order of the director is mailed, the order shall stand as the order of the agency until further order of the Director.

July 7, 2021

/s/ *Dawn M. Drobnich*
Dawn M. Drobnich
Executive Secretary, Michigan Self-Insurers' Association

/s/ Donald Hannon
Donald H. Hannon
AV-rated Workers' Compensation Defense Attorney for 40 Years
Associate Member—Michigan Self-Insurers Association

/s/ Robert J. MacDonald
Robert J. MacDonald
Past President, Michigan Association for Justice
Co-Author, Worker's Compensation in Michigan: Law & Practice

/s/Richard L. Warsh
Richard L. Warsh
Past President, Michigan Association for Justice

Insurance Alliance of Michigan

July 7, 2021

Jack Nolish
Director
Workers Disability Compensation Agency
2501 Woodlake Circle
Okemos, Michigan 48864

Re: WCA Proposed Rule Set 2020-31 LE
General Rules

Dear Director Nolish:

The Insurance Alliance of Michigan (IAM) is the statewide trade association representing property and casualty insurers operating in Michigan. Approximately half of IAM members write workers' compensation insurance in the state.

Overall, we greatly appreciate the work of Agency staff in drafting Proposed Rule Set 2020-31 LE and the updates they provide. On behalf of the members of the IAM, I write to express our thoughts regarding of few of its provisions.

R408.31 Definitions:

Subrule (1)(l) provides for the definition of a "Return-to-work hierarchy," which includes "a sequence of steps designed to assist an employee with returning to: a) same job, same employer; b) modified job, same employer; c) different job, same employer; d) same job, different employer; e) different job, different employer; f) self-employment." We would suggest clarifying that these outcomes are listed in priority order, and not merely alternatives of equal measure.

R408.31a Report of Injury:

Subrules (3) and (5) require certain employer or employee actions to take place either "immediately," or "promptly." Is there an intended difference between the two timelines? Should one term or the other be used more uniformly?

Subrule (5) requires that the employer or carrier deliver to the employee documentation describing the employer or carrier's obligation to furnish reasonable and necessary medical care no later than "28 days following an injury." We would recommend the language be amended to state the deadline as "28 days

following *a report* of injury" as until the injury is reported, the employer or carrier will not have knowledge of the event and delayed reporting may place the employer or carrier in a difficult timeline.

Subrule (5)(a) states that insurers are not required to make payment to a physician "until the reports and itemized charges have been furnished to it." On the other hand, R408.33(2)(c) states that "[m]edical bills become due and payable on the day the carrier receives the bill." Is there potential conflict here that should be clarified?

R408.36 Service of Papers:

Subrule (1)(h)(iv) provides that electronic service between the parties sent "after 5:00 p.m. Lansing, Michigan time is deemed to be served on the *next day* that is not a Saturday, Sunday, or state holiday." Subrule (6) provides that documents received by the agency "on or before 11:59 p.m. Lansing, Michigan time are considered filed *on the same* business day." Is there a potential conflict here that should be clarified?

R408.39 Redemptions:

Subrule (9) provides that the "[f]ailure to comply with these rules *may* result in dismissal of the request for review." Section 418.837(3) of the code, however, provides that "[u]nless review is ordered or requested within 15 days after the date the order of the worker's compensation magistrate is mailed, or distributed electronically, to the parties, the order *shall be* final." We would request the language be clarified to eliminate possible conflict.

R408.40 Stoppage, Reduction, or Suspension of Compensation:

Subrule (6) allows that where certain compensation has been erroneously provided, reimbursement of previously paid benefits may be ordered against an employee only if the "employer or carrier establishes that the *employee concealed* post-injury earnings that, if reported, would have reduced the amount of wage loss benefits paid."

IAM would suggest that over-compensation may be the result of inaccurate information submitted intentionally or unintentionally by the employee or other parties and would therefore recommend broader language to also allow reimbursement where a mistake in calculation or other material information withheld by any party would have reduced the amount of wage loss benefits paid.

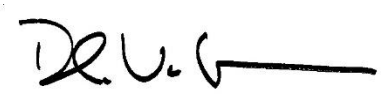
Alternatively, we would suggest amending the language to provide for reimbursement if "the employee concealed *any material information* that, if reported, would have reduced the amount of wage loss benefits paid."

R408.49 Determination of an Employee:

To the extent that a business entity may request a determination by the Director whether one or more individuals "are in covered employment," IAM would recommend clarifying that the insurer be given notice of such a request. Additionally, we would recommend the final sentence of the subrule be amended to provide that any decision rendered should not be binding "on an individual *or party* who did not receive notice" of the decision.

Thank you very much for your time and attention. Please let me know if you would like to discuss any of the comments provided in this letter.

Sincerely,



Dyck E. Van Koevering
General Counsel