The Building Tradesman Newspaper
November 4, 2011

GOP lawmakers vs. Michigan's workers
Workers comp benefits would shrivel under 'if'come-based reforms

LANSING – House Bill 5002 is the latest and one of the nastiest pieces of anti-worker legislation that state Republican lawmakers are considering.

The bill, if adopted, would curtail the already limited workers compensation benefits an injured worker could receive – based upon work which may or may not exist, requiring that an injured worker be treated exclusively by an employer's doctor, and potentially making it more difficult for workers to recover from work-related accidents. Detractors also say passage of the law would shift workers' injury costs back to the state in the form of increased applications for General Assistance, Medicaid and Unemployment Insurance.

"To think that Republicans wish to play politics with one of the pillars of middle-class economic security is truly appalling and just goes to show that the working-class person can't catch a break," said State Rep. Stacy Erwin Oakes (D-Saginaw) who has helped lead an uphill effort to derail HB 5002.

Currently, the state Workers' Compensation Act is the exclusive financial remedy for an injured worker, meaning that an injured worker is not able to sue in any other court to obtain damages other than a percentage of wages, medical and vocational rehabilitation. Detroit workers' comp attorney Tim Esper wrote in a column for our paper last month that workers comp reforms in HB 5002 represent "a wish list for its business backers."

"HB 5002 lets employers reduce comp benefits based on *phantom wages,"* he wrote. "All an employer has to do is to hire a vocational 'expert' to say that an injured worker is capable of earning a certain wage, even if no job paying that wage is available. Weekly benefit cuts of $300/week or more will become the norm. Many will lose their benefits altogether."

Esper pointed out to us an Oct. 14 letter written by Muskegon plaintiff attorney Roy Portenga about the real-world consequences of HB 5002. Following are excerpts of a letter Portenga sent to House Commerce Committee Chairman Wayne Schmidt (R-Traverse City):

"Please remember Workers' Compensation is a 'system' that applies to approximately four million workers in the State of Michigan. The purpose of the Act is to get benefits to injured employees quickly so that they don't miss house payments, etc. Moreover, the Act was set up to give incentive to employers and employees alike to get the employee back to work quickly. With this as background, I'll provide you with a brief, practical hypothetical and point out how the old law, the existing Sington/Stokes scenario, and HB 5002 handle the facts.

Hypothetical: A 37-year old employee who works for a small-town grocer as a warehouse worker/stocker where he's on his feet all day; has a high school education; is paid $12 per hour; has worked for the grocer many years; grocer genuinely likes the employee and the employee's family and is delighted to have him as an employee; 17 years before, the employee worked the best paying job he ever had – one year as a cab driver making $14 hour plus tips, a job he hated and quit.

The employee is capable of working a Walmart sit-stand option greeter job down the street which pays $9 per hour.

A pallet of product shifts while the employee is moving it with a hand-jack and heavy boxes fall onto and severely fracture his left leg. Employee's orthopedic surgeon says he has to do the sit/stand option work for the next six weeks, a restriction that does not permit him to return to work for the grocer for the six weeks.

Old law: The definition states a disability means 'a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease.'

Applying the disability definition to the above hypothetical, the employee had 'a limitation' in his wage earning capacity (he could no longer perform his warehouse/stocking job). After initial insurance company paperwork is done, the employee would receive his first check within three weeks (paid retroactive to his first day off) and he would receive benefits for the remainder of the six weeks; no house payments are missed.

Sington/Stokes, (the current interpretation of the law named after a state Supreme Court case): I won't go through all the steps that the Supreme Court requires injured employees and insurance adjusters to go through to establish disability for the six weeks at issue under the Sington/Stokes cases because it will take too long. It's that complicated (and that's why some changes to the Act are necessary).

Proposed HB 5002: According to HB 5002, the employee first has to establish that his injury 'results in the employee's being unable to perform **all** jobs paying the historical maximum wages in work suitable to that employee's qualifications and training including work that may be performed using the employee's transferrable work skills.'

In our hypothetical, the employee will receive **no** weekly work comp as he can still drive and thus can drive a taxi – a job which used to pay him $14 an hour. The employee cannot receive group disability benefits, even if the employer had such benefits, as those benefits only pay for non-work-related conditions. Employee misses one, maybe two house payments. Grocer is not happy as he paid premiums for work comp insurance and now his employee (and the employee's family), who he very much likes, suffers.

Assume for a moment the employee never worked as a taxi cab driver and that his best paying jobs to which his skills and qualifications transfer are all $12-an-hour jobs, including a $12-an-hour sit/stand cashier's job. Because he can do the sit/stand option cashier job, he gets no benefits. House payments, again, are missed.

Next, let's simply assume that the **only** job the employee's qualifications and training prepare him for are on-your-feet-all-day jobs which typically pay $12 per hour. So now, under Section 301(4)(A) he meets the first test of disability, i.e., the injury resulted in his "being unable to perform all jobs paying the historical maximum wages…."

Now, the 'virtual wage' issue comes into play. According to proposed Section 301(4)(A), "a disability is partial if the employee retains a wage earning capacity at a pay level less than his or her historical maximum wages in work suitable to his or her qualifications and training." Proposed Section 301(4)(B) then defines 'wage-earning capacity' as 'the wages the employee earns or is capable of earning, whether or not actually earned.'

In our hypothetical, the employee can still do a sit/stand option Walmart greeter job paying $9 per hour. So his disability is 'partial.'

Proposed Section 301(6) states that when a disability is partial, "the employer shall pay or cause to be paid to the injured employee…weekly compensation equal to 80 percent of the difference between the injured employee's after-tax average weekly wage before the personal injury and the employee's wage earning capacity after the personal injury.'

Remember, wage-earning capacity is defined as what the employee earns 'or is capable of earning, whether or not actually earned.' So in our hypothetical, the insurance company only has to pay 80 percent of the after-tax difference between a $12 an-hour job and a $9 an-hour job, roughly $80 per week. It's totally irrelevant whether the greeter job is available, whether the employee is in good faith applying for such jobs, etc. Bottom-line, house payments are missed.

Impact: The vast majority of workers comp claims are short, closed-period claims that are handled by adjusters without the involvement of attorneys. The system worked well until Sington/Stokes (a 2008 state Supreme Court decision that redefined state workers comp). Was there some litigation? Yes; there are always a few gray-area cases. But most cases were handled without litigation, workers were promptly paid and went back to work, and house payments were made.

What happens under HB 5002, as noted above, is a sham; employers pay good money for worker's compensation insurance which ultimately doesn't pay much if any weekly benefits. Since there's no such thing as a 'free injury,' desperate employees under the above circumstances are going to file lawsuits, or file for State Disability Assistance (through DHS), or file for unemployment (he couldn't do his old job but he can do some work), etc. Already threatened mortgage companies (and all creditors) aren't going to appreciate missed payments.

Summary: The heart of the proposed law is to change the definition of disability. There are Democrats and Republicans amongst the Commerce Committee and the citizens they represent. While our two-party system forces us to emphasize our differences, let's be frank, on most issues we agree (that's why we can 'live with' spouses, parents, and siblings of the other party!). Why? Because we all have a fundamental threshold of common sense and what we think is fair. HB 5002 goes below this threshold. I respectfully request the Commerce Committee to significantly alter HB 5002."

The bill is in the House Committee on Commerce.