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DOES THE WORKERS' COMPENSATION SYSTEM

William R. Levasseur

YES

The Maryland Workers' Compensation Act¹ is not unique in its design of a benefit delivery system favoring the injured worker. Those who are "covered employees"² benefit further from a statute which is to be "liberally construed."³

Over the years, legislation favorable to the injured employee has improved the benefit structure to allow, for example, unlimited benefits as to time or dollar value in permanent total, temporary total and death claims, and unrestricted selection of medical care providers. Furthermore, the Maryland appellate courts have repeatedly mandated that the Act is to be "liberally construed...in favor of the claimant,"⁴ invoking language such as "social legislation,"⁵ and "benevolence."⁶

Recently, it was reported that the National Council on Compensation Insurance (NCCI) conducted a study which revealed the heavy involvement of lawyers in our system.⁷ In addition, the study found that on the medical side, there was an increase in surgical procedures and questioned whether doctors may be performing too many surgeries. On the benefit side, the study found that permanent partial disability payments now account for most of the money flowing through the Maryland system.

Though the NCCI report appeared to be critical of the Maryland system, it noted a reduced backlog, use of a successful new computer imaging system, streamlined Commission operations, and the success of the three-tier permanent partial disability benefit system.

History

Practitioners working within the Maryland work-

ers' compensation system know that the law governing workers' compensation has been repeatedly changed by the Legislature, creating a hodge-podge of add-ons, deletions, amendments, and other alterations, making it extremely difficult to locate a particular passage or clause. In 1987, through the efforts of the Governor's office, the Workers' Compensation Act was substantially revised. Unfortunately, technical language was simply introduced into the existing law, giving rise to a continuation of confusion. Further changes were implemented in 1988, and in 1991, the Workers' Compensation Act was completely revised and recodified under the Labor and Employment Article.⁸

Throughout the 1991 annotations, a revisers' note states that the recodification is for clarification and procedure and does not affect the substance of law. In other words, the form and language of the law was changed to make sense out of chaos. For many of us, these changes created a logistics problem because long entrenched former references were no longer applicable, and the numerical and lettering designations of the long standing sections of the Act had been removed.⁹

Vocational Rehabilitation

For many years, the Workers' Compensation Act contained provisions for providing vocational rehabilitation to injured workers whose disabilities prevented them from returning to the work for which they were previously qualified.¹⁰ In 1987, 1988, and 1989, the vocational rehabilitation sections were reorganized and the Act was substantially amended, allowing the process to be better defined and administered. Previously,

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temporary total benefits for vocational rehabilitation were provided only if a claimant was undergoing authorized "training." Even though "training" was never defined, it was rarely or poorly utilized in view of its narrow scope. Under the new amendments, the law defined vocational rehabilitation and its services,¹¹ as well as "suitable, gainful employment,"¹² and provided that claimants could receive benefits as if on temporary total while receiving "services."¹³ This benefit change should be considered significant because it gives both parties incentive to use the system for the claimant's successful return to work.

The new law also required registration for vocational rehabilitation providers.¹⁴ If the provider did not register, it could not charge or be paid for its services.¹⁵ Clearly, this redefining and expansion of vocational rehabilitation has helped claimants in a previously underutilized process, and has helped to re-establish covered employees in the workplace while continuing benefits under certain circumstances.

The Three-Tier Plan

In 1987, when the Legislature substantially revised the benefit system, it created a fourth level of benefits which segregated minor disabilities from those considered more serious and disabling.¹⁶ One motivating factor behind this is important. The benefit structure was created to award higher benefits to the more seriously disabled. In order for that to be accomplished, an offset was needed and benefits were reduced for less serious disabilities.

In addition, the Legislature wanted to determine the long-term financial impact and put in place a fiscal tool to develop a statistical measurement. In creating these levels of benefits, the Legislature decided to allow a specified time to statistically analyze¹⁷ and determine whether these changes were of any significance so that needed changes could be made.

Medical Evidence

Another significant change to the Workers' Compensation Act occurred in 1987 when the Legislature attempted to gain some equality in the medical evaluation of disabilities. The Legislature attempted to create some uniformity in the determination of medical impairments, and mandated that physicians use the American Medical Association Guide for the Evaluation of Physical Impairments.¹⁸ Unfortunately, this permits physi-

cians to further enhance impairment ratings by allowing subjective commentary.¹⁹

The AMA Guide requires physicians to use an objective measuring method for impairments and then allows another level of subjective evaluation based upon factors that are not measured by instruments, and are therefore less reliable. This approach, though somewhat contradictory, obviously allows a positive effect on the evaluation process for claimants.

Enhanced Benefits

With all that said, it seems inescapable that the many changes noted have been enhancements, and in many cases improvements, to the Workers' Compensation Act -- changes which have enured to the benefit of claimants or, as they are now defined, "covered employees."²⁰ Covered employees who are injured and sustain serious disabilities are provided a substantial flow of benefits beginning with unlimited medical benefits,²¹ unlimited temporary total benefits,²² and lifetime benefits if permanently and totally disabled.²³ In addition, survivors and dependents may be awarded lifetime benefits in the event of a covered employee's employment related death.²⁴ It would appear, however, that the legislative intent behind many of the changes was the redefinition of where the emphasis should be placed for improving the benefit structure for those who are seriously disabled. Those who have less serious disabilities are still compensated, but the rates of benefits are lower, and some benefits are substantially reduced from what they would have been previously.²⁵ In a very limited number of disability claims, the Commission is allowed to award "other cases" or "industrial loss" benefits.²⁶

Employer Pays

How have these changes affected employers who are responsible by law for the payment of all workers' compensation benefits? Employers continue to be required to carry the brunt of the changes. The Legislature, ostensibly reacting to perceived employer abuse, created a number of negative aspects to the Workers' Compensation Act which were put into place to gain prompt compliance to awards. For example, the Legislature created penalties for late filings²⁷ and/or late payments for both compensation and medical benefits.²⁸ The Legislature has forced the employer to file certain specified forms, such as issues,²⁹ within a certain time

frame or else face the payment of a penalty.³⁰ Employers are required to provide for unlimited temporary total payments, unlimited permanent total payments, and unlimited medical expenses, in addition to allowing a covered employee to have an unlimited choice of health care providers without any real or significant check or balance in that regard.

The employer has also suffered from legislative indifference. The Legislature has consistently turned its back on any attempts by the employer to change the law with regard to injuries where there is significant involvement at the time of the injury with alcohol or drugs by a covered employee. Over the past few years, there have been serious attempts to give the Commission more discretion where injuries of death are occasioned by the use of alcohol or drugs. At this time, the law requires that an injury occurring to a covered employee will be covered unless the injury was occasioned "solely" by the use of alcohol or drugs.³¹ All attempts by employers to eliminate the word "solely," thereby giving the Workers' Compensation Commission discretion to assess the nature of substance use or abuse, seems not to be expected. In view of the restricted language, there has not been one reported case involving denial of benefits to a claimant, even where serious alcohol or drug abuse may have been involved.

Another costly and unique problem that continues to plague employers is the allowance of a compensable accidental injury where the injury is caused by a willful or negligent act of a third party directed against a covered employee. In such an injury situation, it is not necessary under those circumstances that the injury *arise out of* the covered employee's employment, as long as it *arises during the course of* employment.³² These covered events occur, often times where the injury results from personal and domestic disputes.

Recreational injuries are another source of concern for employers. At the present time, benefits are allowed in most instances for recreational injuries,³³ even though such injuries may not arise out of and in the course of employment. The Commission and the courts have consistently found that if there is some remote connection to the employment, a compensable injury exists.³⁴ There have been several attempts in recent years by the Legislature to define the parameters of such events, all of which have failed. Another area of concern involves average weekly wage calculations.³⁵ By rule, the Com-

mission has established an elaborate method for calculating average weekly wage. If a claimant works a full thirteen weeks prior to the accidental injury, then the calculation is usually simple and to the point -- the Commission averages those thirteen weeks. Complications arise where there are missing weeks, partial weeks, vacation days, sick days, job changes, and different employers. A good measure of one's ability to earn would clearly seem to allow the use of the actual total earnings for a thirteen week period divided by thirteen. Instead, by rule, the Commission has decided that in calculating the average weekly wage, they will consider only those weeks during the thirteen week period that the employee actually worked. In fact, this calculation does not truly represent the "average" weekly wage, but rather calculates the wage that is averaged during those weeks in which the claimant actually earned wages commensurate with full-time employment. Keep in mind that all benefits payable to a claimant are tied into the average weekly wage. No matter how itinerant a worker may be, that claimant will obtain the higher benefits even if the covered employee only worked one week during a thirteen week period.

Conclusion

There are many other aspects of the workers' compensation law that point to consistent and intentional legal interpretations which invariably favor a covered employee and dependents. Obviously, such an interpretation in certain claims is not entirely bad or incorrect. There are, however, important questions surrounding such interpretations. Does it make sense? Does it create a substantial financial burden on the average employer? Is it really what was intended?

Whether you are a claimant, an employer, an insurance company, self-insured, or if you have been involved with the workers' compensation system in most any capacity for any length of time, it is known that the workers' compensation system has always favored the injured employee. That is the way the system is designed. The employer simply pays the freight. Employers have no choice whether to provide coverage. It is a mandatory law.

The Maryland legislature passes the laws for generous benefits, the courts generally interpret the Workers' Compensation Act favorably to the claimant's position, and the Workers' Compensation Commission functions under a preamble and case law mandating a liberal construction of the statute. Employers and insurers

have all of that to contend with in addition to paying the bills.

Recent changes in the law put teeth in enforcing prompt payment of benefits, and the Commission has implemented rules and procedures, and a highly efficient computer system for a better delivery system. Attorneys representing claimants, who complain about the current system, may not want to admit that there is still not a level playing field. Claimants still emerge as the primary beneficiary of a law and a society that favors their entitlement. It is true that some benefit cost controls have been attempted, but that has not interfered or impaired the total flow of benefits.

ENDNOTES:

¹ Md. Code Ann., Labor & Employment §§ 9-101-1201 (1991); 1991 Md. Laws ch. 8, § 2.

² § 9-101(f).

³ Preamble to Act, Acts of 1914, ch. 800.

⁴ See generally *Bethlehem-Fairfield Shipyard, Inc. v. Rosenthal*, 185 Md. 416, 45 A.2d 79 (1945); *Kelly-Springfield Tire Co. v. Daniels*, 199 Md. 156, 85 A.2d 795 (1952).

⁵ *Lovellette v. Mayor of Baltimore*, 297 Md. 271, 465 A.2d 1141 (1983).

⁶ *Farrell Lines, Inc. v. Devlin*, 211 Md. 404, 127 A.2d 640 (1956).

⁷ Jane Bowling, *State Workers' Comp System Improving, But Delays Persist*, *The Daily Record*, Dec. 19, 1994, at 1.

⁸ Md. Code Ann., Labor & Employment §§ 9-101-1201 (1991); 1991 Md. Laws ch. 8, § 2.

⁹ The drafters, however, did provide a cross-reference to assist the user which has been particularly helpful. *Workers' Compensation Law of Maryland Annotated* (The Michie Co. 1994 edition). This is only found in the law book sold at the Workers' Compensation Commission.

¹⁰ Md. Ann. Code art. 101, § 8(c) (repealed 1991).

¹¹ Md. Code Ann., Labor & Employment § 9-670 (1991).

¹² § 9-670(b).

¹³ § 9-674(b)(1).

¹⁴ § 9-671.

¹⁵ § 9-671(c).

¹⁶ See Md. Code Ann., Labor & Employment § 9-628(b) (1994); Md. Ann. Code art. 101, § 36(3)(a)(i) (repealed 1991).

¹⁷ A sunset provision was inserted to allow termination of the new class if it was not cost effective. See Md. Code Ann., Labor & Employment § 9-628 (1994). This clause has been extended repeatedly until more statistical information is available.

¹⁸ See Md. Code Ann., Labor & Employment § 9-721 (1994); Md. Ann. Code art. 101, § 36C (transferred 1991).

¹⁹ Section 9-721 provides that the medical evaluation for a permanent impairment shall include an assessment of (1) atrophy, (2) pain, (3) weakness, and (4) loss of endurance, function, and range of motion.

²⁰ Md. Code Ann., Labor & Employment § 9-101(f) (1991).

²¹ § 9-660.

²² §§ 9-618-622.

²³ §§ 9-635-639.

²⁴ § 9-640.

²⁵ There are exceptions, even in the lower category of benefits. For example, fingers or toes are excluded and higher rates apply. § 9-627.

²⁶ § 9-627 (j).

²⁷ § 9-713.

²⁸ § 9-664.

²⁹ § 9-713(a)(2).

³⁰ § 9-713(d).

³¹ §§ 9-506(b)-(c).

³² But see § 9-101(b)(2) (emphasis added).

³³ *Turner v. State*, 61 Md. App. 393, 486 A.2d 804 (1985).

³⁴ See, e.g., *Sica v. Retail Credit Co.*, 245 Md. 606, 227 A.2d 33 (1967).

³⁵ See Md. Code Ann., Labor & Employment § 9-602 (1991); and COMAR 14.09.07.