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RE: HB 5002 Bill to Reform the Michigan Workers' Disability Compensation Act

Dear Members of the Michigan House of Representatives:

In recent years, the Michigan Supreme Court has made it extremely difficult for an injured worker to prevail in a workers' compensation case. In 2011, it has been widely reported that not a single injured worker has been awarded workers' compensation benefits by Detroit magistrates (who handle all cases arising out of Wayne, Macomb, Monroe, and Washtenaw counties) because of the extreme burden of proof placed on injured workers established by the Supreme Court in its 2008 *Stokes*[1] case.

It is particularly distressing to learn that, at such a time when virtually no benefits are being awarded anywhere in the State, that the insurance industry has been lobbying to pass legislation to dilute even further the rights of injured workers. HB 5002, introduced in the Michigan House through the Commerce Committee, unfortunately does just that. (An earlier draft of the bill pushed by lobbyists disingenuously described itself as a mere codification of existing Supreme Court precedent; nothing could be further from the truth.) There are problems with Michigan's workers' compensation–but much of HB 5002 would only compound them. HB 5002 would serve the purpose of allowing workers' compensation insurance carriers to pocket millions of dollars in workers' compensation premiums they have received, but the bill will radically shift the cost of caring for injured workers to taxpayers when most injured workers are forced to turn to Medicaid, state disability assistance, and general assistance when their workers' compensation claims are denied.

Workers' compensation carriers are not in need of a bailout. Former Workers' Compensation Bureau Director Professor Ed Welch of Michigan State University's School of Labor and Industrial Relations reports that workers' compensation insurance has become over the past decade a very lucrative line of insurance to write in Michigan. Current Michigan Workers' Compensation Agency Director Kevin Elsenheimer reports that due to declining liabilities, workers' compensation premium rates will drop in the state an average of 7.4% for the year. Rates also declined 1.9% and 3.1% in the preceding two years. Pete Kuhnmuench, the executive director of the Insurance Institute of Michigan, informed the House Insurance Committee recently that Michigan's per-claim cost is actually 35%

[1] *Stokes v Chrysler LLC*, 481 Mich 266, 750 NW2d 129.

lower than the median cost of workers' compensation claims in other states. While the Act as written is currently cost-friendly to Michigan's employers, HB 5002 would dramatically increase costs by institutionalizing a new practice that would require both an employer and employee to each hire vocational experts for several thousand dollars in every single workers' compensation case in order to determine the amount of weekly benefits payable. HB 5002 would drastically increase the burden on Michigan taxpayers and impose completely unnecessary and significant new costs on Michigan businesses and employers.

Michigan's Current Workers' Disability Compensation Act

Michigan passed a workers' compensation statute initially in 1912. Since the beginning, the Michigan workers' compensation statute has essentially provided weekly wage loss benefits to an injured worker if that worker has not been able to work within his or her qualification and training as a result of injury and no light duty work is available. Since 1982, an injured worker receives 80% of his after tax average weekly wage at the time of injury, but not more than 90% of the state average weekly wage. A worker's benefits do not increase to reflect cost-of-living adjustments. An injured worker is also entitled to potentially lifetime medical care for his injuries. A worker has a right to select a physician of his or choice for his care 10 days following the injury, and a procedure exists for an employer to challenge that selection. Michigan reformed the workers' compensation system several times in the 1980's and significantly reduced workers'compensation costs for employers by permitting an employer to reduce worker's compensation benefits by other benefits a worker receives like unemployment, sick leave, pension and Social Security benefits.

HB 5002: Is it even Constitutional?

It is important to understand the role of workers' compensation in our legal system. For hundreds of years in Anglo-American legal systems, an injured worker could bring a lawsuit against his employer if a worker sustained an injury through his employer's negligence and in that lawsuit, an injured employee could recover monies for lost wages, medical care, pain and suffering and other damages resulting from the injury. In the nation's first big wage of tort reform, workers were forced to give up their right to sue for damages including money for pain and suffering in exchange for small, certain, disability benefits, medical care and retraining benefits that were promised to be paid promptly without prolonged litigation. Every state in the Union ultimately adopted a workers' compensation statute, but it was hotly debated whether the workers' compensation statutes were a constitutional violation of due process because workers gave up such significant rights that ordinary Americans generally have when injured through another person's negligence. Ultimately, the courts ruled that many workers' compensation systems survived constitutional challenge because there was enough quid pro quo that workers generally gained in workers' compensation systems by receiving prompt disability payments without litigation that could provide a means of support to the injured worker and his family. HB 5002 would destroy that constitutional balance.

HB 5002 Overturns the 100 Year Old Pre-existing Condition Rule

In ordinary courts of law, if a person is injured as a result of someone else's negligence, the negligent party is responsible for all damages resulting from the negligence. The injury victim's preexisting conditions do not excuse the tortfeasor's negligence. That legal principle is a fundamental principle in workers' compensation law as well. HB 5002 would upset the constitutional balance by barring injured workers from any recovery whatsoever when an employer's negligence causes a worker's symptoms from a pre-existing condition to dramatically increase.

HB 5002 Makes it More Difficult for Workers Suffering From Post-Traumatic Arthritis

HB 5002 would make it harder for an injured worker to collect workers' compensation benefits when a worker has some evidence of degenerative arthritis in their medical record. When the Workers' Compensation Act was amended in the 1980's, language was added to increase an injured workers' burden of proof when the worker's disabling work injury was also considered to be a "condition of the aging process." There are a myriad forms of arthritis; arthritis can be post-traumatic, rheumatoid, genetic, etc, etc. HB 5002 would replace the individualized opinions of medical doctors regarding how a work injury resulted in disability with an across-the-board rule that degenerative arthritis regardless of its cause, is subject to a higher burden of proof.

HB 5002 Will Threaten Benefits for Disabled Workers Absent due to a Work Injury

HB 5002 would institutionalize harassment and discrimination against injured workers in the workplace. It would turn many worker's compensation cases into wrongful discharge cases. HB 5002 proposes language that if an injured employee is terminated "for fault" from a job following injury, that worker loses his or right to receive workers' compensation benefits. If HB 5002 passes, some employers will try to write up and discipline their injured workers for every minuscule offense imaginable in order to create a paper trail to justify the ultimate discharge from employment and termination of workers' compensation rights. Under HB 5002, if a worker is absent from work due to a work injury, employers will find their injured workers 'at fault' for violating attendance policies, fire their workers and argue that workers' compensation benefits cease because of the employee's faulty attendance. Michigan used to have a rule that terminated workers' compensation benefits when an injured worker performing light duty was fired due to gross misconduct. That would be a fairer standard that would limit employer abuse of the system.

HB 5002 will Punish Workers who Return to Light Duty Work Assignments

HB 5002 would also create a presumption that a worker is not entitled to any more wage loss assistance ever again if the worker returns to some kind of employment for more than 100 weeks. Under such a rule, if an employee herniates a disc in his back, returns to work on light duty, but ultimately his symptoms flare up again so he requires surgery, the employer or its insurance carrier will refuse to pay weekly benefits when the injured worker goes off for surgery based upon the statutory language that the claimant has a new wage earning capacity. Such a presumption is

particularly cruel for an injured worker who has done his best by attempting to work despite his ongoing pain and limitations. For a worker who came back to light duty for 250 weeks or more, HB 5002 would act as a complete and total bar to any future benefits.

HB 5002 Will Deprive Workers of Medical Care and Shift Costs to Medicaid

In 1963, Republican Governor George Romney asked my grandfather, former State Senator Robert J. MacDonald, to serve on his Workers' Compensation Study Commission. The major thing my grandfather pushed for while serving on that commission was the right of an employee to treat with a physician of his or her choice. The medical community fought for that right. Under the old system, injured workers did not have the benefit of a true patient-physician relationship where doctors candidly relayed information to their patients and patients could not trust their doctors. Under the old system, workers would often treat with their own doctor anyway, in addition to the company's doctor, and they would incur significant medical bills that would go unpaid or push the injured worker towards bankruptcy. HB 5002 would turn back the clock and take away a worker's right to treat with a physician of his or choice for the first 90 days following an accident. Such a rule will inevitably drive up the costs to taxpayers as Medicaid, Medicare, Blue Cross and county health plans get stuck paying the bills that workers' compensation carriers properly should.

For over thirty years, if a workers' compensation carrier refuses to pay reasonable and necessary medical expenses related to a work injury, the worker's compensation carrier runs the risk of having to pay an attorney fee to the injured worker's attorney for having to pursue payment in a trial. HB 5002 would eliminate the possibility that the insurance company may have to pay an attorney fee regarding unpaid medical bills. As a practical matter, attorney fees on medical bills have rarely been awarded, but the threat of having to pay attorney fees often gets the bills paid without a trial. HB 5002 would eliminate the economic incentive for an attorney to assist an injured worker in getting his or her medical bills paid. As a result, injured workers will turn to Medicaid and county health plans to get these bills paid and pass on these costs to taxpayers.

HB 5002 Discriminates Against Older Injured Workers by Depriving Them of Benefits

The current Michigan workers' compensation act already discriminates against older workers. HB 5002 would punish older workers even more. Under the current law, an older worker drawing Social Security Retirement Benefits who has taken a part time job to help make ends meet may very well receive no weekly wage loss benefits if he or she is injured on the job. Any workers' compensation benefits payable will be reduced by half of that worker receives in Social Security Retirement. I recently represented a sweet elderly woman who took a part-time minimum wage job working retail who hurt her back on the job. Had we taken her case to trial, she would have won **no** weekly benefits because half of her Social Security Retirement benefits exceeded 80% of the after-tax value of her average weekly wage.

HB 5002 is even more draconian. Under this amendment, if an injured worker is simply eligible for a pension, workers' compensation benefits will be reduced by that pension amount even

if the worker has not retired. Under such a scenario, a 48 year old employed with enough seniority at General Motors to retire, will see his or her workers' compensation benefits nearly wiped out because he could in theory sign up for his pension paying $3,000/month–even though that 48 year old employee plans to work another 17 years and only needs to be off work for 6 months for a minor surgery.

HB5002 Eliminates All Benefits for Many Widows and Widowers who Lose a Spouse in a Workplace Fatality.

Workers' compensation statutes were originally conceived to assist widows and orphans who lost a husband or father in a workplace fatality. HB 5002 would eliminate any form of assistance to widows or widowers who relied upon their deceased spouse for 49.999% of their livelihood. If the surviving spouse had a job that paid a tad more than the worker that was killed, the widow will get nothing.

HB 5002 will Cost Employers Thousands of Dollars in Unnecessary Litigation Costs *Every Time* an Injured Worker is Injured on the Job.

While the changes described already would be unnecessarily cruel to workers, and increase the burden on the state's budget, the most radical change recommended in HB 5002 would be elimination of the constitutional wage loss replacement system created by the Michigan legislature in 1912.

Since its inception, Michigan's workers' compensation system has required an employer or its insurance carrier to pay an injured worker, unable to do work within his qualifications and training, a percentage of his lost wages unless the worker has been offered a job he or she can perform.

The insurance industry has been lobbying in the legislature and in the courts to change this system for a number of years. Until the last decade, a workers' compensation magistrate would decide disputed cases generally by reading the medical opinions of the treating and examining doctors, hearing about the claimant's past work from the claimant and company personnel, as well as hearing about any light duty job offers that had been made to the employee. The insurance industry has been arguing that it ought to instead be able to call as witnesses "vocational experts" who can testify about the functional requirements of various jobs that exist in the universe and argue that because such jobs exist somewhere, claimants should not be entitled to any benefits even though there is no proof that such jobs are actually available to the claimant.

The Michigan Supreme Court partially endorsed this new expensive use of vocational experts in its 2009 *Stokes v DaimlerChrysler* decision. Since that decision, each employee and each employer increasingly feel pressured to typically spend thousands of dollars to hire a vocational expert to identify all of the jobs in the universe the claimant was qualified and trained to do before his or injury

and to offer a so-called expert opinion as to whether there are any such jobs the claimant has the capacity to perform despite his work injury at his previous earnings level. Without such expert testimony, magistrates increasingly indicate they do not feel like a claimant can prove his entitlement to benefits under the *Stokes* standard--or that an employer can defeat such a claim.

To make matters worse, the insurance industry has also been arguing that it should be able to reduce a claimant's weekly workers' compensation benefits if a vocational expert provides an opinion that there are lesser paying jobs somewhere in the universe that an injured worker can perform, even if no such job has been offered or made available. The Supreme Court has recently been toying with the idea of permitting such a radical change to the law in several of its recent cryptic *Lofton*[2] orders–even though the Michigan Supreme Court clearly rejected these arguments in a number of cases decided in the 1930's.[3]

If every injured workers' benefits in the state can be slashed by $300/week because a vocational expert is willing to prepare a report stating that there are relatively non-physical jobs existing somewhere in the country that pay $300/week (but that aren't actually available or offered to the claimant), every injured worker in the state will face unprecedented financial disaster. Such workers will be applying for general assistance, state disability assistance, and will literally be seen laying on the side of the road begging for pocket change. It will also blow a hole in the State's budget.

HB 5002 would embrace this radical change to the Michigan workers' compensation act by redefining how benefits are calculated for the 'partially disabled' worker. Michigan has always had a wage loss replacement workers' compensation statute. By requiring employers to pay wage loss benefits or offer an injured worker a job, Michigan's system has worked effectively in bringing workers back to meaningful productive work quickly following an injury. Allowing benefits to be reduced because of the existence somewhere of 'theoretical jobs' would eliminate this incentive and dramatically increase Michigan's unemployment rate. (Half of the states in this country instead pay workers' compensation benefits based upon the claimant's medical impairment. In those 'medical impairment' states, workers get certain benefits regardless of their return to work. Michigan workers don't get such benefits (except for amputations or the functional equivalent thereof); the constitutional tradeoff has been that they get wage loss benefits instead if there is no work available.)

Under the system advocated by the insurance industry in HB 5002, every work injury in Michigan would have to be litigated in order to determine the claimant's benefit amount. Every injured worker, and every employer, would have to retain lawyers and vocational experts who would testify regarding the claimant's hypothetical wage earning capacity. No worker will get the speedy wage loss replacement benefits workers were promised when they gave up their right to sue their

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[2] *Lofton v Autozone*, 482 Mich 1005, 756 NW2d 85, 483 Mich 1133, 766 NW2d 290.

[3] For more detail, see my chapter "Workers' Compensation Cases" in the Michigan Basic Practice Handbook, 6th edition, published by the Institute of Continuing Legal Education.

employer in circuit court for damages at the time the workers' compensation statute was enacted. This expensive procedural nightmare is already being created because of Michigan Supreme Court's decision in *Stokes*. These increased litigation costs will eventually start driving up the costs of workers' compensation premiums. HB 5002 would embrace this change by ensuring that these litigation costs for employers and employees skyrocket.

The State Bar of Michigan's Workers' Compensation Section, composed of worker, employer and insurer representatives, has already been talking about the unnecessary costs associated with the *Stokes* decision and plans to recommend alternative proposals to reduce costs to address these issues. HB 5002 would instead institutionalize and embrace the expensive use of vocational experts and the slashing of benefits to the unemployed injured worker.

HB 5002 as written will be a financial windfall for vocational experts and workers' compensation carriers, but it would be devastating to injured workers, costly to Michigan employers and extremely burdensome on Michigan taxpayers. Please take the time to reconsider this bill. There *are* significant problems with unnecessary costs and delays in today's Michigan workers' compensation system. While I do not doubt that the sponsors of this bill are well-intentioned in their efforts to bring down the costs of operating a business to make Michigan more attractive to new business and industry, this bill will unnecessarily drive up costs. It is imperative that you take the time to carefully consider alternative proposals that can better serve the employers and employees of this state. I remain

Very Truly Yours,

Robert J. MacDonald