Compensation for Work-Related Vehicular Accidents

By Barry D. Adler

When the doorbell rings these days, there's a good chance it's a package from one of the countless online retailers whose business has boomed in recent years. More online shopping, of course, means more deliveries and more deliveries mean more work-related motor vehicle accidents, which means more Michigan workers killed or injured.

Michigan employers pay, and Michigan workers receive, benefits for work-related motor vehicle injuries under both the Workers' Disability Compensation Act (WDCA)[1] and the state's no-fault act. The interplay of these two statutory schemes is the subject of this review.

Compensable injuries

Benefits under the WDCA are primary, i.e., if an employee is injured in a motor vehicle accident while on the job, the employer's workers' compensation insurer (or the employer, if self-insured) is the first source of recovery.[2]

In 2011, section 301 of the WDCA was amended to make it more difficult to prove that a personal injury occurred at work.[3] The higher burden of proof led to denial of more workers' compensation claims. Many orthopedic conditions such as degenerative disc disease, degenerative joint disease, and osteoarthritis have been classified as non-compensable, unless "contributed to or aggravated or accelerated by the employment in a significant manner."[4] No amount of good lawyering and creative medical opinions will change the fact that such claims are usually denied and disputing them through the workers' compensation system is slow, tedious, and costly.[5]

Under the no-fault act, it is much simpler to establish the existence of a compensable injury; that is, one entitling the injured party to personal insurance protection (PIP) benefits.[6] The claimant must show only that he or she suffered "accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle."[7]

At a Glance

Michigan employers pay—and Michigan workers receive—benefits for work-related motor vehicle injuries under both the Workers' Disability Compensation Act and the Michigan no-fault act. Practitioners should be alert to the interaction of these statutory schemes.

If an injured party can establish that a specific traumatic event caused or aggravated an underlying preexisting condition, coverage will be afforded.[8]

In other words, it is much easier to establish that a cognizable injury occurred under the no-fault act than under the revised WDCA. An unintended consequence of the change to the WDCA, then, has been a shift in the cost of work-related motor vehicle injuries away from workers' compensation insurers to no-fault carriers.

Disability

The 2011 amendments also made establishing a disability under the WDCA more difficult by adding the concepts of "wage-earning capacity" and "good-faith effort to procure work" to the statute.[9] A finding of disability in itself is not sufficient for wage-loss benefits and establishing a long-term disability in particular requires overcoming many hurdles.[10]

By comparison, the no-fault act does not include any comparable obstacles to compensation. A first-party insurer is required to pay work-loss benefits if the injuries cause disability from employment.[11] Common-law concepts of disability from work are applied, such as the duty to mitigate damages.[12]

Remedies

An employee injured in a work-related motor vehicle accident can potentially obtain benefits under both the WDCA and the no-fault act. If a workers' compensation claim is denied, the applicable no-fault insurer should pay the claim.[13] An injured person is only obligated to use "reasonable efforts" to obtain payments available from a workers' compensation insurer. The insured is not required to go through protracted litigation before turning to the no-fault insurance carrier for coverage.[14]

Although common, a no-fault insurer's blanket reliance on the denial of a workers' compensation claim as a basis for denying a no-fault claim may be found unreasonable and can result in liability for the claimant's attorney fees.[15] A no-fault carrier has a duty to investigate the insured's claim.[16] Relying on an independent medical examination by a workers' compensation carrier may be unreasonable, especially if the examining physician does not meet the criteria for performing an examination under the no-fault law[17] and is therefore precluded from testifying.

No-fault carriers, however, have the right to intervene and participate in their insureds' proceedings. This policy protects their economic interest and creates a strong incentive to pay the claim.[18] The no-fault carrier has a direct interest in the outcome of the workers' compensation proceeding, as it would be entitled to reimbursement per MCL 500.3109(1). As a party in interest, a no-fault carrier may also initiate the proceeding by filing a request for hearing with the agency.[19]

An injured worker involved in a work-related accident while operating or occupying an employer's vehicle will still look first to workers' compensation for medical coverage.

Wage loss benefits

Workers' compensation wage-loss benefits are calculated "backwards" based on the employee's "average weekly wage."[20] The maximum weekly benefit in 2020 was $934.[21] There is no limit on the number of weeks benefits are payable, but the benefit rate is fixed as of the date of injury and does not increase except in very limited circumstances.[22]

No-fault benefits look forward, and work loss is defined as "loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured."[23] The most recent maximum benefit is $5,755 for 30 days.[24]

Although an injured employee may recover both workers' compensation and no-fault benefits, the no-fault carrier is allowed to set off the workers' compensation payments from the no-fault wage loss.[25] The remaining "differential benefit" most likely consists of the difference between the approximately 60 percent of average wage paid by the workers' compensation carrier and the 85 percent of lost income due from the no-fault insurer. A claimant, then, would receive 25 percent of wage loss from the no-fault carrier, but only for the three years after the accident.[26]

If the claimant qualifies for Social Security disability benefits, this typically ends the differential, as the amount will also be subtracted from the PIP differential.[27] Workers' compensation benefits cannot be coordinated with Social Security disability.[28]

Medical expenses

Workers' compensation insurance is also primary for payment of accident-related medical expenses.[29] Workers' compensation, however, pays medical expenses per a detailed fee schedule.[30]

By contrast, until the July 1, 2020, effective date of the 2019 changes, the no-fault act provided all Michigan insureds with unlimited coverage of medical expenses for motor-vehicle accidents. Recent amendments added a no-fault medical benefit fee schedule.[31] Reimbursement ranges from 190 percent to 250 percent of amounts payable under Medicare.[32] This schedule will apply to treatment or rehabilitative occupational training after July 1, 2021.[33]

Michigan insureds can select among different coverage levels of per-individual and per-loss occurrence, and commercial policies will also offer three levels of coverage.[34] Workers' compensation, however, provides unlimited medical coverage.

An injured worker involved in a work-related accident while operating or occupying an employer's vehicle will still look first to workers' compensation for medical coverage.[35] However, if the employer did not maintain workers' compensation coverage, no-fault benefits will be payable by the insurer for the furnished vehicle.[36] This may subject the claimant to the allowable expense coverage level purchased by the employer. The claimant may still pursue a workers' compensation claim against the uninsured employer for any excess expenses.[37] The no-fault carrier may also pursue a claim for reimbursement as explained above. If an injured worker is operating his or her personal vehicle, workers' compensation remains primary. Excess claims would be presented to the insured's auto carrier or a spouse's or resident relative's insurer.[38]

This area of law will transform as the 2019 legislation is implemented and interpreted by the courts. Be assured that insurance carriers will amend their policies to anticipate some of these scenarios.

Attendant care

The WDCA requires employers to pay for "attendant or nursing care," but limits attendant care provided by the employee's "spouse, brother, sister, child, parent, or any combination of these persons" to 56 hours per week.[39] The rate payable is whatever is "reasonable" and related to the level of care being provided; there is no fee schedule for attendant care rates.[40]

Attendant care was not previously a separately defined benefit under the no-fault act; it was an "allowable expense" under the umbrella of "all reasonable charges incurred for reasonably necessary…services…for an injured person's care…"[41] Under the 2019 amendments, however, after July 1, 2021, auto insurers will be required to pay for only 56 hours per week for in-home, family-provided attendant care services.[42] This limitation does not apply to services provided in a facility or by a nurse or home-health aide from a commercial agency. Specifically, the 56-hour limitation on in-home, family-provided services only applies if the assistance is "provided directly, or indirectly through another person, by any of the following":

- "An individual who is related to" the injured person.[43]
- "An individual who is domiciled in the household of" the injured person.[44]
- "An individual with whom the [injured person] had a business or social relationship before the injury."[45]

An insured retains the right, with his or her care provider, to contract with the auto insurance company "to pay benefits for attendant care for more than" the 56-hours-per-week limitation on in-home, family-provided assistance.[46] Under the revised no-fault act, therefore, it will no longer be possible to turn to the no-fault carrier for excess attendant care benefits if the insured is receiving care as a benefit under workers' compensation.

Third-party claims

When an employee is injured during a work-related motor vehicle accident and third-party liability is available, several situations can affect a claim.

If the tortfeasor is a coworker—that is, "a natural person in the same employ or the employer" as the injured employees—the "exclusive remedy" of the WDCA typically would bar any cause of action.[47] If the injury was caused by a coworker's negligence and he or she was operating a vehicle not owned by the employer, there is owner's liability for the accident if the vehicle was being operated with the owner's knowledge and/or consent.[48] These cases typically arise in car washes, automobile dealerships, and auto-repair facilities. The coworker's negligence is imputed to the owner.

The injured worker does not necessarily have to reimburse the workers' compensation carrier out of any third-party recovery. In *Great American Insurance Company v. Queen*, the Michigan Supreme Court carefully analyzed the overlap between workers' compensation benefits paid and limitation of benefits available under the no-fault act. The court held that where the workers' compensation carrier sought reimbursement for payments that substituted for no-fault benefits that would have been otherwise payable, had it not been for the governmental setoff provision of MCL 500.3019, the workers' compensation carrier had no right to reimbursement out of the third-party tort recovery. Simply put, the workers' compensation carrier cannot be in a position superior to a no-fault carrier; a no-fault carrier has no right to reimbursement out of a motor vehicle-related third-party settlement.[49]

If the workers' compensation carrier pays beyond three years of wage loss, a lien attaches[50] and a future credit may be in play under the *Franges* formula.[51] No lien attaches for that portion of the recovery attributable to damages suffered by a spouse such as loss of consortium.[52] It should be noted that any attempt to avoid the lien by allocating settlement proceeds to non-economic damages will fail.[53]

Uninsured and underinsured motorist claims pose unique questions in the context of work-related motor vehicle accidents. Whether (and to what extent) a lien may be valid is beyond the scope of this article. Each contract must be examined to determine lien rights. Many policies attempt to set off other benefits such as workers' compensation. Many policies also exclude benefiting a workers' compensation carrier. It is also possible to argue that these cases are contractual and not third-party liability claims. Michigan's courts have not decided these issues.

Conclusion

Practitioners should be cognizant of the interaction of the WDCA and the no-fault act. For personal-injury attorneys, examining both potential sources of recovery and considering the effects of either type of claim on the other is critical. The carrier's representative should take care to comply with the applicable requirements of both statutory schemes when addressing the claim of an employee injured in an on-the-job motor vehicle accident. ■

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ENDNOTES

1. MCL 418.101 et seq.
2. MCL 500.3101 et seq. MCL 500.3109 and *Gregory v Transamerica Ins Co*, 425 Mich 625, 631; 391 NW2d 312 (1986).
3. MCL 418.301(1)–(2).
4. MCL 418.301(2).
5. MCL 418.853 mandates that "process and procedure under this act shall be as summary as reasonably may be," but in practice, that is rarely the case. Medical witness depositions, vocational expert testimony, medical record admission rules, subpoenas and limited discovery result in a hearing process that closely resembles other courts. Work injury claims are now very complex and not easily resolved "summarily."
6. MCL 500.3105(1).
7. *Id.*
8. E.g., *McKim v Home Ins Co*, 133 Mich App 694, 698–699; 349 NW2d 533 (1984) and *Mollitor v Associated Truck Lines*, 140 Mich App 431, 437; 364 NW2d 344 (1985).
9. MCL 418.301(4)(b)–(c).
10. MCL 418.301(4)(a) and MCL 418.301(5) (this statutory provision outlines the essential requirements).
11. MCL 500.3107(1)(b).
12. E.g., *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 652; 513 NW2d 799 (1994) and *Bak v Citizens Ins Co*, 199 Mich App 730, 733; 503 NW2d 94 (1993).
13. See discussion in *Perez v State Farm Mutual Automobile Ins Co*, 418 Mich 634; 344 NW2d 773 (1984) and *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173; 870 NW2d 731 (2015).
14. E.g., *Perez*, 418 Mich at 650 and *Adanalic*, 309 Mich App at 197.
15. MCL 500.3148.
16. MCL 500.3142(2) requires the insurer to pay benefits "within 30 days after [it] receives reasonable proof of the fact and of the amount of loss sustained." The insurer has a duty to "fairly review" a claim, e.g., *Morales v State Farm Mutual Auto Ins Co*, 279 Mich App 720, 730–732; 761 NW2d 454 (2008).
17. MCL 500.3151(2).
18. *Russell v Welcor, Inc*, 157 Mich App 351, 355–356; 403 NW2d 133 (1987).
19. MCL 418.847 and *Application for Mediation or Hearing: Form C*, Mich Dept of Labor and Economic Opportunity (Rev 8/19), available at <https://www.michigan.gov/documents/wca/wca_WC-104C_fillin_287934_7.pdf> [https://perma.cc/QWS9-V9UA]. All websites cited in this article were accessed December 8, 2020.
20. MCL 418.371(2).
21. *State Average Weekly Wage Chart* (2019), Mich Dept of Labor and Economic Opportunity <https://www.michigan.gov/documents/wca/wca_averge-weekly-wage_chart_477569_7.pdf> [https://perma.cc/ST49-4MCX].
22. MCL 418.371(2) and MCL 418.356.
23. MCL 500.3107(1)(b). Because the benefits are not taxable, they are reduced by 15% unless it is shown that taxes are lower. Fringe benefits are not included.
24. Dept of Ins and Financial Svcs Bull 2020-35-INS, available at <https://www.michigan.gov/documents/difs/Bulletin_2020-35-INS_700135_7.pdf> [https://perma.cc/J4Q3-2EZP].
25. MCL 500.3109(1).
26. MCL 500.3107(1)(b).
27. MCL 500.3109(1) allows a set off of benefits "provided under the laws of… the federal government."
28. MCL 418.354(11).
29. MCL 418.315(1) and MCL 500.3109.
30. MCL 418.315(2)–(9).
31. MCL 500.3157.
32. MCL 500.3157(2).
33. *Id.*
34. MCL 500.3107c is the "PIP choice" statute.
35. MCL 418.301.
36. MCL 500.3114(3).
37. MCL 418.641(2).
38. MCL 500.3114(1).
39. MCL 418.315(1). Of course, an injured worker may contract with any other individual or agency to provide unlimited attendant care.
40. E.g., *Sokolek v General Motors Corp*, 450 Mich 133, 145; 538 NW2d 369 (1995).
41. MCL 500.3107(1)(a).
42. MCL 500.3157(10).
43. MCL 500.3157(10)(a).
44. MCL 500.3157(10)(b).
45. MCL 500.3157(10)(c).
46. MCL 500.3157(10), (11), (14).
47. MCL 418.131.
48. MCL 257.401.
49. *Great American Ins Comp v Queen*, 410 Mich 73; 300 NW2d 895 (1980). An exception applies for out of state accidents under MCL 500.3116(2).
50. *Commercial Union Assurance Co v Dockins*, 141 Mich App 570, 572–573; 367 NW2d 360 (1985).
51. *Franges v General Motors Corp*, 404 Mich 590, 618; 274 NW2d 392 (1979).
52. *Jones v McCullough*, 227 Mich App 543, 547; 576 NW2d 698 (1998).
53. *Pelkey v Elsea Realty & Investment Co*, 394 Mich 485; 232 NW2d 154 (1975).