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313 S. Washington Square
Lansing MI 48933

Southfield
28411 Northwestern Highway – Suite 500
Southfield MI 48034

Grand Rapids
1700 E. Beltline NE – Suite 200
Grand Rapids MI 49525

Detroit
333 W. Fort Street – Suite 1400
Detroit MI 48226

Holland
151 Central Avenue – Suite 260
Holland MI 49423

St. Joseph
800 Ship Street – Suite 105
St. Joseph MI 49085

Writer's Direct Phone: 248.785.4721 **Fax**: 248.538.2082 **Reply To**: Southfield **E-Mail**: ABirach@fosterswift.com

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)

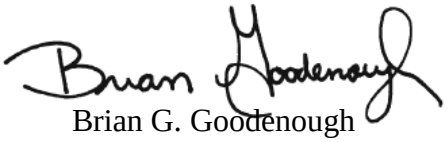
The proposed rule 418.91(1)(d)(ii), includes a requirement that a vocational consultant report include a job description outlining "all of" the functional requirements of the job. We recommend "all of" be stricken as the vocational expert may not know "all of" the functional requirements. We propose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

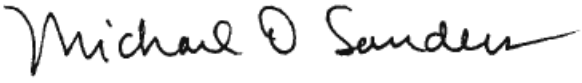
Sincerely,

FOSTER SWIFT COLLINS & SMITH PC

Alicia W. Birach



Brian G. Goodenough



Michael D. Sanders

We recommend the following changes to the proposed Board of Magistrate Rules. With these changes below, and with our recommended changes to the proposed Agency 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 a reasonable balance among all stakeholders in laying out rules to apply the current Michigan workers' compensation statute.

1. Rule 9(4) needs two technical fixes related to the duties to respond to subpoenas. As drafted, only a "party" needs to respond to a subpoena, when clearly that was not intended. Documents often need to be obtained by parties from non-parties, including but not limited to medical providers. Also, the proposed rule requires the recipient of a subpoena to send a copy of all documents requested to all parties in the litigation. A recipient of a subpoena should not be burdened with that requirement, and we not believe the drafters of the rule intended this. It appears the drafters inadvertently conflated the duties of the recipient of the subpoena, and the duties of the party subpoenaing the records once that party has obtained a copy. We recommend instead the following language:

   (4) The recipient of a subpoena shall immediately do either of the following:

   (a) Provide a complete copy of the records to the requesting party.

   (b) Make the records reasonably available to the requesting party for copying.

   After a requesting party has obtained a copy of subpoenaed records, that party shall promptly provide a copy to all other parties.

2. With respect to the proposed Discovery Rule 11(1)(a) and (b) and Rule 17(2)(b), as employers and carriers are required to produce copies of medical reports prepared by defense medical examiners and all treating medical records must be exchanged, it only seems fair that injured workers and their attorneys be required to produce copies of reports prepared by medical examiners retained by an employee. If an employee has a right to have a defense medical examination report admitted into evidence, an employer and carrier should have a similar right to place an employee medical examination report into evidence. The recommended language below fixes that, and makes it clear that the failure to complete Form 105A and Form 105B should not be subject to Section 222 and its sanctions. If the employer is no longer in existence, it also cannot be reasonably expected to complete a Form 105B.

Rule 11. (1) Discovery provided in sections 222, 301, 401, and 853 of the act, MCL 418.222, 418.301, 418.401, and 418.853, and applicable caselaw, must be available under the supervision of the magistrate as set forth in this rule.

(a) The claimant shall provide the information and records required pursuant to section 222(3) of the act, MCL 418.222, a completed WC-105A, and copies of reports from medical examiners requested by the employee or his or her attorney within 30 days of receipt.

(b) The employer or carrier shall provide information and records required pursuant to sections 385 and 222(2) of the act, MCL 418.385 and 418.222, and a completed WC-105B, except where the employer is no longer active and there is no representative available to complete the form.

Rule 17(2)(b) A report of an independent medical examiner under Section 385 of the act, MCL 418.385, shall be admitted into evidence if offered by the injured employee. A report by an independent medical examiner requested by the injured employee or his or her attorney must be admitted into evidence if offered by the defendant.

3. Also in the Discovery Rule at Rule 11(1)(f), we recommend another change. The rule requires a party, upon request, to produce various records but the general terms in the proposed rules refer to just employer and personnel records, while the list that follows in the rule includes non-privileged claims records. The recommended change makes the text of the rule consistent internally. The recommendation below also makes it clear that a party must, upon request, produce various records, and that it is not really appropriate for the responding party to pick and choose what records to send based upon their perception of what is relevant and what is not. It is the magistrate's role to determine what evidence is relevant and admissible, not opposing counsel's.

(f) If not already provided by the employer pursuant to subdivision (1)(b) of this rule, employers, carriers, and claims administrators shall, upon written request, provide a complete copy of all employment, personnel and claims records of the employee in their possession, including, but not limited to, electronically stored or communicated information. Records must include, but are not limited to, all of the following:

4. We recommend two minor changes at Rule 11(1)(g) related to defense medical examinations. We believe doctorate level psychologists ought be included in the definition of physician for purposes of conducting defense examinations in mental disability cases. We also recommend replacing the word 'limit' with 'determine' in describing a magistrate's power to determine how a defense medical examination is conducted. Our recommended language is as follows:

Upon request, an employee shall submit to an examination by a physician or surgeon authorized to practice medicine in this state. <u>The term 'physician' as used in this rule shall be interpreted to include psychologists who satisfy the requirements of MCL 333.18223 and MCL 333.1100(c) (11).</u> The magistrate may <u>determine</u> the time, place, manner, conditions, and scope of the examination.

5. We recommend a change to Rule 11(1)(h) regarding how a vocational interview pursuant to *Stokes* is conducted. The intent of the Director's Rules Committee was to permit the current practice of employees attending these vocational interviews with their attorneys consistent with the Michigan Constitution. A comma in the noticed rules is missing from the proposed and noticed rules, which with the missing comma, would require an attorney to secure permission of a magistrate and show good cause in order to be allowed to represent his or her client at a *Stokes* interview. This was not the intent of the Rules Committee. We recommend this language instead:

The employee may appear with a person of the employee's choosing. The employee may record the interview at the employee's expense with the consent of the opposing party or by order of the magistrate for good cause shown.

6. We recommend several changes to Rule 13 dealing with the joint final pretrial conference. Our recommended changes make it clearer that material protected by attorney-client privilege need not be exchanged or disclosed at the joint final pretrial, but may be offered into evidence thereafter. Our recommended revisions reinforce the intent that any joint final pretrial order should not act as a straightjacket or trap for the unwary, and that the parties should have the ability to address new issues or offer newly obtained or discovered evidence either not anticipated in the pretrial order, or for strategical trial or appellate reasons not raised until after proofs are completed, or the Magistrate's Order/Opinion has been written. The workers' compensation statute provides that process shall be as summary as reasonably may be. Not every case may be efficiently adjudicated with the use of a joint final pretrial order. We also recommend that the use of such an order not be mandatory. Our proposed changes are underlined below:

Rule 13. (1) Records or other exhibits of any kind that any party intends to offer as evidence in the proceeding shall be exchanged between the parties no later than 14 days before the JFPTC. After the parties have gathered and exchanged the existing medical and other evidence, upon stipulation of the parties or at the discretion of the magistrate, there must be a JFPTC with the magistrate regarding admissibility of evidence or any other preliminary matters.

(2) The parties <u>may</u> prepare and file a joint final pre-trial statement that lists issues for adjudication, stipulations, and any potential witnesses and exhibits, <u>other than materials subject to attorney-client privilege</u>, that the parties intend to submit into evidence at the

time of trial. <u>This will not constitute a waiver of any issue, witness testimony, or exhibit not specifically raised or listed should a statement be submitted.</u>

(3) Any objections to the proposed witnesses and exhibits shall be made by the parties and ruled upon by the magistrate. Upon finding that a proposed exhibit under this rule is not authentic or was created specifically for purposes of the litigation, the magistrate may exclude the proposed exhibit. Any decision on any objections is subject to R 418.90(5) and (6).

(4) All admissible exhibits must be listed in a JFPTO, <u>except as provided in subsection (2) or (7) or R14(6)</u>, and admitted at the time of trial.

(5) After the completion of the JFPTC, the magistrate shall place the case on the trial docket and assign a trial date. The magistrate may schedule a subsequent JFPTC if necessary.

(6) The parties are bound by the stipulations listed on the JFPTO unless modified or withdrawn for good cause shown. If a stipulation is modified or withdrawn, the party proposing the stipulation may offer additional evidence, including testimony necessitated by the withdrawal or modification.

(7) The parties must be entitled to necessary rebuttal evidence and witnesses, <u>including materials subject to attorney-client privilege</u>, not listed on the JFPTO at the time of trial.

(8) While a case is pending on the trial docket, the parties may attempt to cure or remedy any objections raised by the opposing party at the JFPTC. The magistrate may make subsequent rulings as to admissibility once the parties have had the opportunity to cure or remedy any objections raised.

(9) At the discretion of the magistrate, a case may be returned to the case development docket after being placed on the trial docket if the circumstances require, to allow further development.

7. We recommend modifying Rule 14(6) to make it more clear that parties can offer additional evidence beyond that listed on a joint final pretrial statement or order, as some evidence may be privileged, not yet obtained or newly discovered, or strategically are not offered until appropriate during trial. Our recommendation we think allows more practical flexibility.

(**(6) Unless provided in accord with R 418.92 and R 418.93, all records or other exhibits of any kind that any party intends to offer as evidence in the proceeding must be exchanged between the parties no later than 14 days before the JFPTC. <u>This will not preclude admission at trial of any additional records or exhibits, and does not constitute preclusion of records or exhibits not in the possession of either party, or newly discovered relevant evidence from being admitted</u>**.

July 7, 2021 */s/ Dawn M. Drobnich*
Dawn M. Drobnich
Executive Secretary, Michigan Self-Insurers' Association

/s/ *Donald H. 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

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Administrative Rules Division
611 West Ottawa Street; 2nd Floor, Ottawa Building
Lansing, MI 48933
Phone: (517) 335-2484; Email: MOAHR-Rules@michigan.gov

JCAR AGENCY REPORT/PACKAGE 2019-130 LE

1. List names of newspapers in which the notice of public hearing was published and publication dates:

Ann Arbor News Daily Edition June 13, 2021
Detroit Legal News June 17, 2021
The Mining Journal June 18, 2021

2. List of the name and agency representative(s) attending public hearing:

Jack Nolish, WDCA Director
Deb Outwater, WDCA Executive Secretary
David Campbell, WDCA Agency Division Director
Kris Kloc, WDCA Medical Claims Analyst

3. Persons submitting comments of support:

Jayson Chizick for Worker's Compensation Section of the Michigan State Bar Association.
Michigan Self-Insurers Ass'n and Michigan Ass'n for Justice Ad Hoc Stakeholder advisory group.
Don Hannon, Associate Member Michigan Self-Insurer's Association
Dawn Drobnich, Executive Secretary, Michigan Self-Insurers' Association
Richard Warsh, Past President, Michigan Association for Justice
Robert MacDonald, Past President, Michigan Association for Justice
Alicia W. Birach: Foster, Swift, Collins & Smith.
Dyke VanKoevering: General Counsel, Insurance Alliance of Michigan.

4. Persons submitting comments of opposition:

No comments of opposition

Name & Organization	Comments Made At: (Public Hearing or Written)	Comments	Rule Number & Citation Changed	Agency Rationale for Rule Change

1) Dawn Drobnich	**Written**	**Rule 9(4) needs two technical fixes related to the duties to respond to subpoenas. As drafted, only a "party" needs to respond to a subpoena, when clearly that was not intended.**	**§418.89(4)** **Rule 9(4)**	**Clarified who responds to a subpoena and what must be provided.**
2) Dawn Drobnich	**Written**	**Discovery Rule 11(1)(a) and (b) and Rule 17(2)(b), as employers and carriers are required to produce copies of medical reports prepared by defense medical examiners and all treating medical records must be exchanged, it only seems fair that injured workers and their attorneys be required to produce copies of reports prepared by medical examiners retained by an employee.**	**§418.91(1)(a)** **Rule 11(1)(a) & (b)**	**Clarification of wording to facilitate exchange of medical reports in cases.**
3) Dawn Drobnich	**Written**	**The proposed changes R18.91(1)(d)(ii) to require a vocational report to include "a job description outlining the functional requirements of the job that are available" and the proposed change to R418.91(1)(d)(iii) that would require defendants to produce "any other pertinent information reasonably necessary to apply for the employment." We think Defendants should be producing the information that can be obtained from prospective employers so that employees have a meaningful opportunity to understand the job requirements, and a meaningful way to apply for the jobs. The recommended changes to the rule should suffice---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. With respect to proposed rule 418.91(1)(d)(iii), the current wording is overly broad.**	**§418.91(1)(d)(ii)& (iii)** **Rule 11(1)(d)(ii,iii)**	**Clarification of wording to make sure appropriate information about job requirements is provided.**
4) Dawn Drobnich	**Written**	**The rule requires a party, upon request, to produce various records but the general terms in the proposed rules refer to just employer and personnel records, while the list that follows in the rule includes non-privileged claims records.**	**§418.91(f)** **Rule 11(1)(f),**	**Wording change to clarify which records must be provided to the employee.**

5) Dawn Drobnich	**Written**	**We believe doctorate level psychologists ought be included in the definition of physician for purposes of conducting defense examinations in mental disability cases. We also recommend replacing the word 'limit' with 'determine' in describing a magistrate's power to determine how a defense medical examination is conducted.**	**§418.91(1)(g)** **Rule11(1)(g)**	**Added description of qualifications for a psychologist to be included in the list of available specialists for employee evaluation. Clarification of who may accompany employee during evaluation.**
6) Dawn Drobnich	**Written**	**A comma in the noticed rules is missing from the proposed and noticed rules, which with the missing comma, would require an attorney to secure permission of a magistrate and show good cause in order to be allowed to represent his or her client at a Stokes interview.**	**§418.91(1)(h)** **Rule 11(1)(h)**	**Corrected punctuation error.**
7) Dawn Drobnich	**Written**	**Our recommended changes make it clearer that material protected by attorney-client privilege need not be exchanged or disclosed at the joint final pretrial, but may be offered into evidence thereafter. Our recommended revisions reinforce the intent that any joint final pretrial order should not act as a straight jacket or trap for the unwary, and that the parties should have the ability to address new issues or offer newly obtained or discovered evidence either not anticipated in the pretrial order, or for strategical trial or appellate reasons not raised until after proofs are completed, or the Magistrate's Order/Opinion has been written.**	**§418.93** **Rule 13**	**Clarification of process for exchange of evidence prior to trial; admissibility of later acquired evidence; admissibility of evidence initially classified as privileged; admissibility of undisclosed rebuttal evidence.**
8) Dawn Drobnich	**Written**	**It is not clear that parties can offer additional evidence beyond that listed on a joint final pretrial statement or order, as some evidence may be privileged, not yet obtained or newly discovered, or strategically are not offered until appropriate during trial.**	**§418.94(6)** **Rule 14(6)**	**Clarification of admissibility of evidence not available at the time of the joint pre-trial conference order.**
9) Dawn Drobnich	**Written**	**Discovery Rule 11(1)(a) and (b) and Rule 17(2)(b), as employers and carriers are required to produce copies of medical reports prepared by defense medical examiners and all treating medical records must be exchanged, it only seems fair that injured workers and their attorneys be required to produce**	**§418.97(2)(b)** **Rule 17(2)(b)**	**Language changed to provide of admission medical reports by both parties.**

		copies of reports prepared by medical examiners retained by an employee.		
10) Jayson Chizick	**Hearing**	**Commenting in support of the proposed rule set.**	**2019-130-LE**	**N/A**

Upload JCAR PACKAGE Attachments

The ARS requires users to upload the below documents in either the Final Rule Tab or the JCAR Package Tab. ***Do NOT forget to include these documents.***

Final Rule Tab (Word doc):

- *Final Strike/Bold of the Rules*
- *Final Draft of the Rules*
- *Affidavit*
- *Transcript*
- *Written Comments*

JCAR Package Tab (PDF):