

## **Labor helps soften some of the sharpest workers' comp changes**

**By J. Timothy Esper**

LANSING – Michigan Republicans granted the Christmas wishes of HB 5002's business backers by enacting their *phantom wages* workers' comp bill, signed by Gov. Snyder on Dec. 19. Although the new law tips the balance heavily against injured workers, efforts by organized labor, notably the building trades, plaintiff workers' comp attorneys, and the Michigan Association for Justice softened some of the worst elements of the bill.

The leadership and membership of the building trades' unions who stepped up, contacted their legislators and otherwise made their voices heard in this process made a big difference in taking some of the hurt out of the final bill.

The centerpiece of the legislation remains *phantom wages*. As before, proving disability requires showing a loss in wage-earning capacity. The Republican bill defines that as the wages an employee earns *or is capable of earning* at a job reasonably available to that employee, *whether or not wages are actually earned*. The impact of the bill was softened by requiring that a job must be *reasonably available* to the injured worker and that full weekly benefits must continue for workers who make a *good-faith effort* to find work but can't obtain work within their wage-earning capacity.

The law now imposes an affirmative duty to seek work reasonably available. Construction workers who refuse to seek lesser-paying work within their restrictions following work injuries, risk the loss of workers' comp benefits. The new law left the door open for comp carriers to deny benefits, even to those whose disability will only be short-term, unless they seek other work.

The business backers of HB 5002 testified that their *phantom wages* provision would not deny benefits to legitimately disabled workers. Meanwhile, the state Supreme Court endorsed the *phantom wages* concept, and comp carriers promptly used it to cut off benefits. In a Senate committee hearing two days before Thanksgiving, a parade of injured workers testified, and documentary evidence was submitted, proving that benefits were already being cut off based on non-existent earnings. Embarrassed Republicans were forced to remove the sharpest teeth from this damnable provision.

A few of the bill's highlights:

- Company directed treatment for work injuries moves up from 10 to 28 days, but down from the 90 days originally proposed.
- Police and firefighters were excluded from the phantom wages provision.
- Workers on light duty following work injuries who are fired "for fault" lose all weekly benefits.
- Regular pensions will be subject to coordination once a worker who will not be able to return to work reaches full retirement age.

The new law has many other changes and is full of inconsistencies. There will be an inevitable increase in disputed claims, more litigation, and lengthy appeals. The consequence will be that many injured workers' comp benefits will be delayed or denied. In enacting HB 5002, Republicans have upended a law that was intended to provide swift and certain payment of benefits to injured workers. Their bill gives business and insurance interests powerful new weapons, leaving injured workers at the mercy of employers and their comp carriers. Remember this Republican Christmas gift when these same legislators seek re-election in the fall.

*(Tim Esper is a Detroit attorney specializing in workers compensation law).*