

bill is presented to the governor and is subject to his veto power.² Thus it must be concluded that the enactment of a statute is a process involving both the legislature and the governor. *Lawson v. Kanawha County Court*, 80 W. Va. 612, 92 S.E. 786 (1917).

Accordingly, it is my opinion that while the legislature has the power to specify the frequency which the auditor general is to audit state agencies, "as required by the legislature" means something other than "by law" such as by joint or concurrent resolution. It follows in answer to your last two questions that the auditor general is not required to follow the audit frequency in statutes passed either before or after the adoption of the Michigan Constitution of 1963.

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WORKMEN'S COMPENSATION ACT:

Week of Incapacity — meaning of

Weekly Benefits — computation and amount of

Under the Workmen's Compensation Act, a week of incapacity is a period of 7 consecutive days, not including the day of injury, in which an injured worker is incapacitated from earning a full week's wages. If an injured worker is incapacitated part of a day from earning full wages, during any week, he is incapacitated from earning full wages for that week.

While an injured worker's incapacity for work resulting from the injury is partial, he is entitled to workmen's compensation benefits based on a percentage of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, subject to the maximum weekly rates provided in section 10(a) of part II of the Workmen's Compensation Act.

No. 4612

May 27, 1968.

Senator Sander M. Levin
State Capitol
Box 240
Lansing, Michigan 48902

Your inquiry of May 25, 1967, with respect to the interpretation and administration of the Workmen's Compensation Act,¹ hereinafter referred to as the Act, poses two basic questions:

First, is an employee who is partially disabled as the result of an injury that arose out of and in the course of his employment entitled to compensation only after having accumulated "(a)n aggregate of 7 or more days of

² Article IV, Section 33, Michigan Constitution of 1963.

¹ P.A. 1912 (1st Ex. Sess.), No. 10, as amended (C.L. 1948, § 411.1 *et seq.* [M.S.A. 1960 Rev. Vol. and 1968 Cum. Supp. § 17.141 *et seq.*]).

disability not including Sundays or the day of injury?" (1964-65 A.A.C.S., R. 408.31, p. 3282).

Second, in the event a worker is partially disabled and loses one or several days of work in a week should he be paid on the basis of a fractional part of the week or paid "a weekly compensation equal to 66 $\frac{2}{3}$ % of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than" the maximum set forth in the Act? (M.S.A. 1968 Cum. Supp. Sec. 17.160).

It is my understanding that the questions you present relate only to those cases where the injured individual is incapacitated from earning full wages for one, part of one, or several days in either consecutive or intermittent weeks. Accordingly, my answers apply only to such situations. The obligation to pay medical expenses is not involved.

With respect to the first question, section 3 of part II of the Act provides:

"No compensation shall be paid under this act for any injury which does not incapacitate the employe for a period of at least 1 week from earning full wages, but if incapacity extends beyond the period of 1 week, compensation shall begin on the eighth day after the injury. If such incapacity continues for 2 weeks or longer or if death results from the injury, compensation shall be computed from the date of the injury." (M.S.A. 1968 Cum. Supp. § 17.153).

Since, under the above section, the compensable period begins on the *eighth day after the injury*, the beginning week of incapacity would precede the eighth day after injury and would, therefore, exclude the day of injury. It is not necessarily a calendar or payroll week, although, by coincidence, it may be such. Instead, it is a period of seven days duration with reference to the day on which the period begins. Since that period precedes the eighth day after injury, it is obvious that the seven days comprising that period must be consecutive.

The first seven days, i.e., week, of incapacity from earning full wages are not, initially, compensable. However, they may be recaptured for compensation purposes under the second sentence in the above quoted section 3 of part II, *supra*:

"If such incapacity continues for 2 weeks or longer or if death results from the injury, compensation shall be computed from the date of the injury."

A problem is presented with respect to that part of Rule 1, which reads as follows:

"Employers must report immediately to the department on form 100 all injuries, including diseases, which arise out of and in the course of the employment and result in:

"a. An aggregate of 7 or more days of disability not including Sundays or the day of injury.

"b. Death.

"c. Specific losses."

(1964-1965 A.A.C.S., R. 408.31, p. 3282).

This rule, which paraphrases section 3 of part II of the Act, supra, deals only with the reporting of injuries and not with the obligation to pay compensation. Under the rule, the "seventh" day in the aggregate of seven days excluding Sunday and the day of injury is, where consecutive, the same as the "eighth" day after the injury as stated in section 3 of part II of the Act, supra, and is the beginning of the compensable period.

However, a week is, as I have stated above, a period of seven consecutive days, and in order that it entitle an injured worker to compensation, he must have been incapacitated from earning full wages during that period. If, during such period, he is incapacitated for even one day or part of a day from earning wages, it follows that, during that week, he is incapacitated from earning full wages. The right to benefits for partial disability depends, not only upon wage loss, but also upon a decreased capacity to work. Accordingly, in order to meet these requirements, it is not necessary that the week be seven consecutive days of disability or seven such days accumulated over a period of time. Although it is possible that Rule 1 may be interpreted to the contrary, it must be borne in mind that the portion of the rule presently under consideration is intended as a reporting device, and that statutes cannot be amended by rules or regulations.

It is possible that Rule 1, supra, as it now reads, does not necessarily appear to require the reporting of all compensable injuries; in such respect, it should be clarified.

With respect to the second question, it is to be observed that a right to compensation requires that the injury "incapacitate the employee * * * from earning full wages * * *." (Section 3, part II of the Act, supra.) Under section 10(a) of part II of the Act, as last amended by Act 44, P.A. 1965 (M.S.A. 1968 Cum. Supp. § 17.160), it is the obligation of the employer "(w)hile the incapacity for work resulting from the injury is partial" to pay, as compensation, a percentage "of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter," subject to certain maximum weekly rates provided for in that section.

The weekly loss in wages, upon which compensation is computed, is based upon the extent of impairment of earning capacity. (Section 11, part II of the Act as last amended by Act 44, P.A. 1965 and Act 140, P.A. 1967 [M.S.A. 1968 Cum. Supp. § 17.161]). In other words, the test is whether the injury has decreased his capacity to work and earn wages in the same or other employment. The weekly compensation is, under said section 10(a), part II of the Act, supra, a percentage of the difference of what the worker was earning before and what he is able, in view of the impairment, to earn after the injury.

There is no language in the Act which permits payment on the basis of a fraction or percentage of total weekly compensation, which fraction or percentage corresponds to the fraction or percentage of the work days lost in a week. In this connection, it should be noted that the Director of the Workmen's Compensation Department has advised that the tables entitled "Daily Compensation Rates" are to be deleted from the Department's next published compilation of the Act and rules of practice.

You have also inquired as to what administrative steps are necessary to require payment of compensation improperly withheld from employees, otherwise entitled to benefits, from the time that employers have failed to make proper payments.

The Act requires that insurance carriers and uninsured employers keep a record of workmen's compensation benefits paid and that such payments be reported to the Workmen's Compensation Department (C.L. 1948, § 413.5; M.S.A. 1960 Rev. Vol. § 17.178). The Department's Rule No. 2 (R. 408.32, 1954 A.C.S. 48) covers the details of such reporting. It is further to be observed that the Department's Rule No. 5 (R. 408.35, 1954 A.C.S. 21) provides:

"If the department shall have reason to believe that there has not been compliance with the provisions of the compensation act, it may on its own motion give notice to the parties and hold a hearing for the purpose of determining the facts and the rights of the parties. Such notice shall contain a statement of the matter to be considered."

It is to be noted that Rule 5 does not compel the Department to take any action on its own motion, but it may, in its discretion, do so.

Aside from the above observations as to administrative procedures, it must be borne in mind that it is the obligation of the employer or its insurer to pay the compensation in situations such as are under consideration in this opinion. The only fund from which the Workmen's Compensation Department makes payments is the Second Injury Fund (M.S.A. 1968 Cum. Supp. § 17.158[1]), no portion of which is available for the payment of benefits for other than total and permanent disabilities. Accordingly, if there are individuals who have not received compensation in accordance with the principles herein discussed and their employers dispute their right to additional compensation, such persons should file with the Workmen's Compensation Department petitions for hearings for the adjustment of their claims.

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