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No-Fault Wage Loss Seminar

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The following packet consists of materials prepared by Anselmi & Mierzejewski, P.C. at the request of Farmers Insurance with regard to ongoing litigation and in anticipation of future litigation, and is protected from discovery and admission at trial by the work product doctrine, MCL 2.302(B)(3)(a), and Attorney Client Privilege.

No-Fault Wage Loss Seminar

August 30, 2011

Outline

I. Introduction

II. MCL 500.3107(1)(b)

A. Breakdown of Statute

1. Loss of Income for Work an Injured Person *would have* performed *but for* the Motor Vehicle Accident
 - a. Loss of Income, not Loss of Earning Capacity (would have earned, not could have earned) *Nawrocki v. Hawkeye*, 83 Mich. App. 135 (1978)
 - (1) Stay At Home Dad - Earning Potential
2. First 3 Years Post Accident
3. Cut off at Death
4. 15% Reduction to Account for Income Taxes
5. \$4,929 Monthly Maximum for 2010-11
 - a. Maximum is fixed as of the Date of Loss
6. Individuals 60+ can opt out with a signed waiver

B. Reasonable Proof

1. Application for Benefits
2. Wage Salary and Benefit Verification Form
3. Attending Physicians Report
 - a. MCL 500.3158
 - (1) Refusal of Employer to furnish form not a basis for denial *Ward v. Titan*, 287 Mich.App. 552 (2010)
 - (2) We can assume the same for an Attending Physicians Report
 - b. Important in creating a paper trail even if unanswered
4. Pay Stubs
5. Tax Returns
6. W2 Forms
7. 1099 Forms
8. Overtime Records

C. Specific Examples

1. Self Employed Individuals
 - a. $(\text{Gross Receipts} - \text{Expenses}) \times .85 = \text{Wage Loss Benefit}$ *Adams v. ACIA* 154 Mich .App. 186 (1986)
 - b. Benefit can be recovered when business is losing money if claimant is paid a salary *Ross v. ACIA* 481 Mich. 1 (2008)
 - (1) W2 as proof
2. Independent Contractors *Ward v. Titan*, 287 Mich. App. 552 (2010); *Adams v. ACIA* 154 Mich .App. 186 (1986)
3. “Under the Table” Employment
 - a. Is compensable with reasonable proof *Ward v. Titan*, 287 Mich. App. 552 (2010)
 - b. “Wrongful Conduct Rule” for occupations which require a license?
4. Underemployed Claimant pre DOL
 - a. If Claimant can show through convincing evidence that he would have changed jobs and earned a higher income, increased work loss benefits can be paid *Kirksey v. Manitoba Public Insurance* 191 Mich. App. 12(1991)
5. Pre DOL position eliminated after accident
 - a. Due to economic circumstances
 - (1) Claimant does not get wage loss benefits
 - b. Due to claimants absence
 - (1) Claimant gets wage loss benefits, not necessarily tied to the period of disability *Nawrocki v. Hawkeye*, 83 Mich. App. 135 (1978)
 - (2) Claimant voluntarily quits subsequent job, still gets pay differential *Marquis v. Hartford*, 444 Mich. 638 (1994)
 - (3) Claimant must always mitigate
6. Duty to Mitigate - Claimant must **always** mitigate *Bak v. Citizens*, 199 Mich. App. 730 (1993)
 - a. Vocational Rehabilitation as a 3107(1)(a) Allowable Expense
7. Subsequent Intervening Events
 - a. Incarceration
 - b. Other Accidents
 - c. Sickness
 - d. Death

D. Offsets and Deductions

1. Deducted from the monthly benefit or the monthly maximum, whichever is lowest
2. Post Accident Employment
 - a. If Claimant works post DOL, deduct additional income
3. State Or Federal Benefits - MCL 500.3109(1)
 - a. Social Security
 - (1) Total Benefit Set Off, including money which goes to Plaintiff's Attorney *Popma v. ACIA* 199 Mich. App. 653 (1993)
 - b. Workers Compensation
4. Other Health or Accident Coverage - MCL 500.3109a
 - a. Look to the Terms of the Policy
5. Unemployment Benefits
 - a. Require a showing that the recipient can work
 - b. Need a court order to obtain records
6. Assigned Claims Super Offset
 - (1) MCL 500.3172(2) - Any benefit covering the same loss

III. MCL 500.3107a - Temporarily Unemployed

A. Statutory Breakdown

1. Last month of full employment x .85 = wage loss benefit
2. Claimants employed in any capacity do not qualify as Temporarily Unemployed *Popma v. ACIA* 199 Mich. App. 653 (1993)
3. Unavailability of work, not inability to work *McDonald v. State Farm*, 419 Mich.146 (1984)

B. Reasonable Proof

1. Written Job Offer
2. Affidavit of Prospective Employer
3. Filing of an Application for Employment is not enough
4. Must still be income the claimant *would have* earned

C. Specific Examples

1. College Student who voluntarily leaves work for school is temporarily unemployed *Kennedy v. ACIA*, 87 Mich App 93 (1979)
 - a. Benefits should still be calculated on the basis of income which would have been earned
2. Underemployed does not mean temporarily unemployed *Popma v. ACIA* 199 Mich. App. 653 (1993)
 - a. Does not mean last full time job used to calculate benefit
3. Applies to temporary lay off or seasonal unemployment
 - a. Seasonal employees should be paid only in the months they would have earned income

IV. MCL 500.3108 - Survivors Loss

A. Statutory Breakdown

1. Post Date of Death loss of contributions of tangible things of economic value that the dependants would have received from the deceased.
 - a. Not just lost wages
 - b. All demonstrable contribution the deceased *would have* made to his dependants but for his death *Miller v. State Farm*, 410 Mich. 538 (1981)
 - c. **Does Not** include Loss of Earning Capacity
2. Post Date of Death replacement services are also compensable
3. Monthly Maximum is the same as wage loss benefits
 - a. Wages, other tangible things of economic value and replacement services combined cannot exceed monthly maximum
4. 3 year maximum from Date of Loss, not Date of Death

B. Specific Examples

1. Net Income after taxes is the proper measure for claims based on income alone *Miller v. State Farm*, 410 Mich. 538 (1981)
2. The deceased personal consumption should not be taken into account *Miller v. State Farm*, 410 Mich. 538 (1981)
3. Child Support Payments Count *Fredrickson v. State Farm*, 141 Mich. App. 235 (1985)

C. Offsets and Deductions

1. Social Security Death Benefits *Moshier v. Financial*, 120 Mich. App. 522 (1982)
2. In General, the same offsets and deductions to a wage loss claim apply

V. Conclusion

THE INSURANCE CODE OF 1956 (EXCERPT)
Act 218 of 1956

500.3107 Expenses and work loss for which personal protection benefits payable.

Sec. 3107. (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than \$1,750.00 or more than \$5,000.00.

(b) Work loss consisting of 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. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply. Beginning March 30, 1973, the benefits payable for work loss sustained in a single 30-day period and the income earned by an injured person for work during the same period together shall not exceed \$1,000.00, which maximum shall apply pro rata to any lesser period of work loss. Beginning October 1, 1974, the maximum shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner but any change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum.

(c) Expenses not exceeding \$20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first 3 years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

(2) A person who is 60 years of age or older and in the event of an accidental bodily injury would not be eligible to receive work loss benefits under subsection (1)(b) may waive coverage for work loss benefits by signing a waiver on a form provided by the insurer. An insurer shall offer a reduced premium rate to a person who waives coverage under this subsection for work loss benefits. Waiver of coverage for work loss benefits applies only to work loss benefits payable to the person or persons who have signed the waiver form.

History: Add. 1972, Act 294, Eff. Mar. 30, 1973;—Am. 1988, Act 312, Eff. Mar. 30, 1989;—Am. 1991, Act 191, Eff. Jan. 1, 1992.

Constitutionality: The legislature did not violate constitutional due process or equal protection in providing for cost-of-living increases for no-fault insurance work loss benefits under subdivision (b) of this section, but not for no-fault insurance survivors' loss benefits under MCL 500.3108. *Davey v Detroit Automobile Inter-Insurance Exchange*, 414 Mich 1; 322 NW2d 541 (1982).

Compiler's note: Act 143 of 1993, which amended this section, was submitted to the people by referendum petition (as Proposal C) and rejected by a majority of the votes cast at the November 8, 1994, general election.

Popular name: Act 218

Popular name: Essential Insurance

Popular name: No-Fault Insurance

Administrative rules: R 500.811 of the Michigan Administrative Code.

THE INSURANCE CODE OF 1956 (EXCERPT)
Act 218 of 1956

500.3107a Basis of work loss for certain injured persons.

Sec. 3107a. Subject to the provisions of section 3107(1)(b), work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident.

History: Add. 1975, Act 311, Imd. Eff. Dec. 22, 1975;—Am. 1991, Act 191, Eff. Jan. 1, 1992.

Popular name: Act 218

Popular name: Essential Insurance

Popular name: No-Fault Insurance

THE INSURANCE CODE OF 1956 (EXCERPT)
Act 218 of 1956

500.3108 Survivor's loss; benefits.

Sec. 3108. (1) Except as provided in subsection (2), personal protection insurance benefits are payable for a survivor's loss which consists of a loss, after the date on which the deceased died, of contributions of tangible things of economic value, not including services, that dependents of the deceased at the time of the deceased's death would have received for support during their dependency from the deceased if the deceased had not suffered the accidental bodily injury causing death and expenses, not exceeding \$20.00 per day, reasonably incurred by these dependents during their dependency and after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit if the deceased had not suffered the injury causing death. Except as provided in section (2) the benefits payable for a survivors' loss in connection with the death of a person in a single 30-day period shall not exceed \$1,000.00 for accidents occurring before October 1, 1978, and shall not exceed \$1,475.00 for accidents occurring on or after October 1, 1978, and is not payable beyond the first three years after the date of the accident.

(2) The maximum payable shall be adjusted annually to reflect changes in the cost of living under rules prescribed by the commissioner. A change in the maximum shall apply only to benefits arising out of accidents occurring subsequent to the date of change in the maximum. The maximum shall apply to the aggregate benefits for all survivors payable under this section on account of the death of any one person.

History: Add. 1972, Act 294, Eff. Mar. 30, 1973;—Am. 1978, Act 459, Imd. Eff. Oct. 16, 1978.

Constitutionality: The legislature did not violate constitutional due process or equal protection in providing for cost-of-living increases for no-fault insurance work loss benefits under MCL 500.3107(b), but not for no-fault insurance survivors' loss benefits under this section. Davey v Detroit Automobile Inter-Insurance Exchange, 414 Mich 1; 322 NW2d 541 (1982).

Popular name: Act 218

Popular name: Essential Insurance

Popular name: No-Fault Insurance

**MICHIGAN MOTOR VEHICLE NO-FAULT INSURANCE LAW
ATTENDING PHYSICIAN'S REPORT**

DATE	POLICYHOLDER «Contact_FirstName» «Contact_LastName»	ACCIDENT DATE «Claim_LossDate»	CLAIM NUMBER «Unit_Number»
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To assist us in determining benefits due under the Michigan motor vehicle no-fault law, the attending physician must complete this report. You are required to provide this information in accordance with the Michigan motor vehicle no-fault insurance law, P.A. 294 of the Public Acts of 1972.

Patient's name: «Unit_ClaimantFirstName» «Unit_ClaimantLastName»

Age: ____ Occupation/Job Description:

History of Occurrence and Injury as described by Patient:

Diagnosis and Concurrent Conditions:

Is condition a result of this accident? Yes No

Date When did symptoms first appear?	Date When did patient first consult you for this condition?	Have you treated patient before this date? If yes, when?
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Has patient ever had same or similar condition? YES NO If yes, state when and describe.

Is patient able to perform routine household chores? YES NO If no, please explain (see next page)

Will patient require attendant care? YES NO Undetermined If yes, please see next page

Patient was unable to work: From _____ through _____	If still disabled, patient should be able to return to work on: Date: _____ approximate _____
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Is patient still under your care for this condition? Yes No If Yes, indicated projected duration and frequency of treatment?

Has this person been referred to another medical specialist or to therapy? If so, please give name and address.

Auto-related prescriptions (Please list)

REPORT OF SERVICES

Attach itemized bill(s) for this accident only, and include amounts paid or payable by other sources. Attach verification of payment or rejection.

DATE	PHYSICIANS NAME (Please Print)	PHYSICIAN'S SIGNATURE
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MICHIGAN MOTOR VEHICLE NO-FAULT INSURANCE LAW
WAGE, SALARY AND BENEFITS VERIFICATION

DATE	POLICYHOLDER «Contact_FirstName» «Contact_LastName»	ACCIDENT DATE «Claim_LossDate»	CLAIM NUMBER «Unit_Number»
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EMPLOYEE'S NAME: «Unit_ClaimantFirstName» «Unit_ClaimantLastName»

The above named person has applied for benefits under the MICHIGAN MOTOR VEHICLE NO-FAULT INSURANCE LAW as a result of injuries sustained in an automobile accident on the date indicated. We understand this person is your employee or former employee. To assist us in determining benefits that may be due this person, please provide us with the answers to the following questions. You are required to provide this information in accordance with the MICHIGAN MOTOR VEHICLE NO-FAULT INSURANCE LAW, P.A. 294, of the Public Acts of 1972.

Thank you for your cooperation.

Social Security Number: _____

1. Job Title and Description of Duties:

2. Dates of Employment: From: _____ through _____

3. Employment Status: FULL -TIME PART-TIME
SEASONAL LEAVE OF ABSENCE LAY-OFF TERMINATION

4. Circle days worked in average week: S M T W T F S
Hours worked per day _____ Hours worked per week _____

5. Income earned last calendar year: \$ _____

6. Wages: Hourly \$ _____ (Include COLA and Shift Premium)
Salary \$ _____ Other (Specify) \$ _____

7. Last day employee worked prior to this accident: _____

8. Returned to Work? Yes No if yes, date returned:

9. Employee Paid for Date of Injury? Yes No
10. Was employee working overtime at the time of disability? Yes No
11. If yes, average hours of overtime per week: _____ Rate of pay for overtime:
\$ _____

12. Did Employee's injury arise out of and in the course of employment? Yes No

13. If yes, give the name of the Worker's Compensation Insurance Carrier?

14. Is employee covered by a wage or salary continuation plan? Yes No If yes,
give name and address of provider of benefits and describe the nature of the plan:

Policy Number: _____

When do benefits begin? _____

Amount payable per week: \$ _____

How long are benefits payable? _____

15. Is employee covered by a medical benefits plan? Yes No

If yes, give name and address of provider and policy number:

Policy Number: _____

Date

Print Name and Title

Signature

Phone Number