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FISCAL IMPACT REPORT

ORIGINAL DATE 2/28/15
 LAST UPDATED 3/2/15 HB 250/HJCS

SPONSOR HJC

SHORT TITLE Workers' Comp Return to Work Benefits SB _____

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workers' Compensation Administration (WCA)

SUMMARY

HJC Substitute for HB 250 reorganized Section 52-1-25.1 and clarified exceptions to Temporary Total Disability (TTD) and Permanent Partial Disability (PPD) entitlement by placing the exceptions in separate subparagraphs. The Substitute also addresses issues and questions raised during hearing. First, the Substitute provides that where an employer makes a bona fide, reasonable return to work offer, the worker is not entitled to TTD benefits or PPD modifier benefits if the worker rejects the offer. Second, the Substitute continues to provide that a worker who returns to work and is later terminated for misconduct loses TTD and PPD modifier benefits, provided that an employer shall be subject to bad faith penalties when an employer terminates a worker for the pre-textual reasons of attempting to avoid payment of benefits of as retaliation against the worker. Finally, the Substitute revises Section 52-1-25.1 to clarify that an employer is still obligated to provide worker with reasonable and necessary medical care, regardless of the worker's return to work status.

FISCAL IMPLICATIONS

No fiscal impact has been identified.

SIGNIFICANT ISSUES

This committee substitute amends the Workers' Compensation Act to state that an employee is entitled to two-thirds of their pre-injury wage if the employer does not offer work at the employee's pre-injury wage. Additionally, the statute is amended to state that an employee is not

entitled to benefits if an employee rejects an offer of employment at or above pre-injury wages and within medical restrictions, accepts other employment at or above pre-injury wages, or is terminated for misconduct for both temporary total disabilities and permanent partial disability.

The Workers' Compensation Administration (WCA) commented the bill would clarify the applicability of the return to work provisions of the Act and restore the formulaic design of when an injured worker is entitled to benefits under the Act. However, the provision for entitlement in two-thirds pre-injury wage was added to the substitute bill.

LFC staff analysis has not identified any significant issue with the committee substitute which is contradictory to the purpose of the original bill.

WCA reports that HJC Substitute addresses the issues raised in *Cordova v. KSL Union*, 2012-NMCA-083 by shifting the emphasis from the subjective reasonableness of the worker's rejection of a work offer to the reasonableness of the employer's offer. Under the Substitute, where the employer's return to work offer is bona fide and reasonable to the employer and to the worker, the worker should return to work or will lose TTD or PPD modifier benefits.

HJC Substitute addresses the gap in the law identified by the Court of Appeals in *Hawkins v. McDonalds*, 2014-NMSC-048. The Substitute provides that a when a worker returns to work and is terminated for misconduct, the worker is no longer entitled to TTD and PPD modifier benefits. The Substitute also protects workers from unscrupulous employers by mandating bad faith penalties when the employer terminates the worker for pretextual reasons of attempting to avoid payment of benefits or retaliation against the worker.

HJC Substitute also clarifies that the employer's obligation to provide reasonable and necessary medical care is not affected by the bill.

Original Bill

The 1990 Workers' Compensation Act balanced the interests of injured workers and the interests of employers. The workers' compensation system is designed to be formulaic (i.e., if this, then that) so that claims can be paid predictably and consistently and so that parties know what is expected of them. As part of those balanced interests, the 1990 reforms sought to encourage return to work and discourage reliance on compensation benefits. See Section 52-1-26 NMSA 1978, "To assure that every person who suffers a compensable injury with resulting disability should be provided with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards." Additionally, in 2001 a RAND Study found that workers' outcomes are much better when workers can return to work with the at-injury employer, 34 days off work for those that return versus 478 days off work for those that do not return.

A recent court decisions, *Cordova v. KSL Union*, 2012-NMCA-083, and *Hawkins v. McDonalds*, 2014-NMSC-048, decrease the likelihood an injured worker will return to work quickly and stay at work. The agency analysis states the court decisions erode the return to work provisions of the Act and set precedent that fosters litigation in a system where litigation should be a last resort.

Section 52-1-26 NMSA 1978 sets the principle that, after a worker reaches a state of maximum medical improvement, the worker will receive disability modifier benefits when the worker does not return to work earning at least the injury wage. A 2012 Court of Appeals ruling in *Cordova v. KSL Union*, 2012-NMCA-083, held that a worker could chose not to return to work and still collect modifier benefits if the worker’s decision was a reasonable one. In *Cordova*, the injured worker began the retirement process prior to the work place injury. After the work place injury, the worker returned to work with the at-injury employer but then decided to proceed with voluntary retirement. Despite the worker’s decision to voluntarily retire, the court ruled the employer was still obligated to pay modifier benefits to the worker.

Section 52-1-26 Section 52-1-25.1 NMSA 1978 sets a principle that, before a worker reaches a state of maximum medical improvement, the worker will receive temporary disability benefits as long as the worker has not returned to work earning at least the injury wage. The amendments contained in this bill also address the recent Supreme Court decision in *Hawkins v. McDonalds*, 2014-NMSC-048, which held termination of post-injury employment, whether for misconduct or not, does not affect a workers’ entitlement to temporary disability benefits or permanent partial disability benefits. In this case, the worker was terminated for violating the employer’s zero-tolerance sexual harassment policy after the employer learned worker failed to report an incident of sexual harassment. The court ruled that, despite the worker’s misconduct which led to termination, the employer was still obligated to pay worker temporary disability and modifier benefits. The Court stated:

“While we recognize that [an] injured employee could intentionally violate company policy in order to get fired and yet be entitled to full [temporary total disability] benefits, we are bound to construe Section 52-1-25.1(B) in favor of providing compensation to an injured worker absent clear statutory language to the contrary. It is not our place to insert language into the WCA that does not exist. That task falls to the Legislature alone.”

RELATIONSHIP

Senate Bill 553 and House Bill 238 deals with workers’ compensation benefits and intoxication.

Senate Bill 51 deals with workers’ compensation air ambulance fee schedules.

KK/bb/aml/bb