



## 2015 CHANGES TO WISCONSIN WORKERS COMPENSATION ACT

In December 2015 the Wisconsin Worker's Compensation Advisory Council (WCAC) released its "agreed bill" to amend the Wisconsin Worker's Compensation Act. It was introduced into the Legislature as 2015 Assembly Bill 724 (AB 724). It passed the Legislature in mid-February 2016, and was signed by Governor Scott Walker on February 29, 2016. It was published on March 1, 2016. **The provisions below are effective for injury dates occurring on or after March 2, 2016.**

This document discusses the significant changes to the Act.

### SUMMARY OF CHANGES

#### Major Changes

- Persons Selling or Distributing Newspapers are now subject to a "nine point test" to determine whether they are employees or independent contractors for purposes of workers compensation
- Maximum weekly Permanent Partial Disability (PPD) rate increases starting March 2, 2016
- Position will be funded at the Department of Justice to investigate WC fraud committed by employees, employers, insurance carriers and providers
- Electronic Medical Record Fee is fixed at \$26.00 per request
- Treating Practitioner's Final Report must be provided timely and maximum fee is \$100.00; report is not required in cases where claim is completely denied
- Statute of Limitations for traumatic injuries is reduced from 12 years to 6 years
- PPD Apportionment requires an injured worker who claims PPD for an injury to disclose all previous findings of PPD or "other impairments that are relevant to that injury" upon request; the employer is liable only for PPD caused by work injury and/or occupational disease
- Prospective Orders for Retraining can be issued by Administrative Law Judge (ALJ) for future courses of instruction or retraining
- Physician Dispensing - reimbursement for medications dispensed outside of a licensed pharmacy are limited to the pharmacy fee schedule and the existing dispensing fee
- Red Book Successor - the Department has authority to locate and use a successor to the Drug Topics Red Book, which sets the prescription drug prices, if necessary
- No Offset for Part-Time Wages During Retraining - an employee must work more than 24 hours in a week for a Respondent to credit wages earned against vocational retraining TTD compensation
- Discharge or Suspension for Misconduct or Substantial Fault - Temporary Total Disability (TTD) will be denied when an employee is released to light duty work and is suspended or terminated due to misconduct as defined in sec. 108.04(5) or substantial fault as defined in Wis. Stat. sec. 108.04(5g) (a).
- Violation of Employer's Alcohol / Drug Policy where there is a direct causation between the violation of the alcohol or drug policy and the workplace injury bars indemnity

#### Miscellaneous Changes

- Individuals providing long term and family care services for a person participating in the self-directed service option under the Social Services statute (Wis. Stat. sec. 46.001 *et seq.*), and who do not otherwise have worker's compensation coverage for their services are considered to be employees of the entity that is providing financial management services for that person
- The 21-day deadline to file a timely appeal to Labor and Industry Review Commission (LIRC) is clarified
- The 28-day deadline for LIRC to set aside an order for further consideration runs from the date of its decision, not the date the decision is mailed
- The party who files an appeal of a commission decision shall be named the plaintiff and shall name as defendants the commission and all those persons and entities identified by LIRC in its decision as necessary to be named as a party for the appeal to circuit court

## 2015 Changes to Wisconsin Worker's Compensation Act

- All private employers who are self-insured for purposes of worker's compensation will be ordered to pay into the Self-Insured Employers Liability Fund (SIELF); all assessments against private sector self-insured employers will be made on a pro rata basis according to payroll
- Political subdivisions will not receive invoices for payments into the fund and injured workers of political subdivisions are not entitled to claim payments from the SIELF; the Self-Insurers Council is no longer involved with the self-insured status of political subdivisions
- The statute has replaced references to "municipality" with the broader term "local government unit," which may encompass more governmental agencies
- Eligibility for supplemental permanent total disability benefits is extended for two (2) years for injuries prior to January 1, 2003; the maximum supplemental benefit rate is increased to \$669.00 per week
- The Department is required to write rules on minimum PPD ratings for amputations, motion loss, reduced sensation and surgery; the department to convene a "medical advisory committee" to "review and recommend revision of those ratings to the department and the council on worker's compensation." This relates to Wis. Adm. Code Sec. DWD 80.32 and codifies the method by which the rule has previously been amended
- Funding from the Worker's Compensation annual assessment will be provided to update the Uninsured Employers Fund (UEF) mainframe computer system to a current platform during this biennium

### PERSONS SELLING or DISTRIBUTING NEWSPAPERS

**Sec. 102.07(6)**, which previously defined persons selling or distributing newspapers or magazines on the street or house to house as employees, *is repealed*. Now, the nine point test in sec. 102.07(8) (b) will be used to determine if they are employees or independent contractors for worker's compensation purposes.

- **Impact and Analysis:** For any claims for injury involving newspaper distributors or newspaper and/or magazine sales persons or distributors the nine point test must be completed to determine if they are classified as "employees" or "independent contractors" for purposes of coverage under the worker's compensation policy.

### PPD RATE

**Sec. 102.11(1)** provides for an increase in the maximum weekly PPD rate

- For injuries on or after January 1, 2013 to March 1, 2016 - \$322.00
- For injuries on or after March 2, 2016 to December 31, 2016 - \$342.00
- For injuries on or after January 1, 2017 - \$362.00

- **Impact and Analysis:** Date of injury will determine the correct PPD rate.

### WC FRAUD

**Sec. 102.125** requires the Worker's Compensation Division to notify the state Department of Justice when its investigation shows a possible criminal violation. The current statute is limited to fraudulent insurance claims. It expands the types of "crimes" that can cause prosecution and specifically added theft, forgery, fraudulent writings, fraudulent data writing, fraudulent insurance claims and fraudulent destruction of certain writings. Also, this section added an "any other criminal law" violation to the list.

- **Impact and Analysis:** The broader language means that employees, employers, insurers and their agents could be prosecuted.
- This provision also creates and funds a position in the Department of Justice for prosecuting worker's compensation fraud by any party.

**ELECTRONIC MEDICAL RECORD FEE**

**Sec. 102.13(2) (b)** indicates the cost for medical records in an electronic format shall be set at a fixed rate of \$26.00 per request.

- **Impact and Analysis:** Could decrease the cost of obtaining large batch requests for medical records from one provider.
- Will not impact the minimum charge of \$7.50 for obtaining single date office visit notes or treatment notes for individual appointments / return to work slips in paper format.
- Does not change the cost ceilings for paper requests.

**TREATING PRACTITIONER'S FINAL REPORT**

**Sec. 102.13(2)(c)** indicates the treating practitioner's final medical report must be provided on a timely basis at a maximum charge of \$100.00. A treating practitioner's final report will not be required in cases where the claim is completely denied.

- **Impact and Analysis:** Places a ceiling on the amount a treating practitioner can charge for a "final medical report" at \$100.00 per injury date.
- Also requires the practitioner to complete the final report on a timely basis; however "timely basis" is not defined and there is no penalty for a late report.

**STATUTE OF LIMITATIONS**

**Sec. 102.17(4)** shortens the statute of limitations for *traumatic* injuries occurring on or after March 2, 2016 from 12 to 6 years. The clock for tolling the statute of limitations starts running as of the date of injury or date of last indemnity payment, whichever is later. Exceptions to the statute of limitations remain for certain types of traumatic injuries, i.e. amputations, loss of vision, permanent brain injuries, hip and knee replacements and the need for an artificial spinal disc.

- **Impact and Analysis:** It is the current practice of the Worker's Compensation Division to hold applications that are filed to toll the running of the statute of limitations indefinitely regardless of whether there is an actual dispute between the parties. Unless the Division changes its practice or other statutory language is enacted mandating the rejection of an application filed solely to toll the running of the statute of limitations, this provision will not have its intended effect.
  - Only pertains to traumatic claims with a date of injury after March 2, 2016;
  - May see more applications filed alleging dual medical causation, *i.e.*, traumatic and occupational exposure;
  - Will not see the impact before March 1, 2022; and
  - The practice of applicant's attorneys filing applications to toll the running of the statute will continue absent a change in Division's practice.

**PPD APPORTIONMENT**

**Sec. 102.175(3)** requires an injured worker who claims permanent disability for an injury to disclose "all previous findings of permanent disability or other impairments that are relevant to that injury" upon request. This section further provides for apportionment of PPD between disability caused by a traumatic work injury and that caused by "other factors, including occupational exposure with the same employer, whether occurring before or after the time of injury." The employer is liable only for PPD caused by work injury and/or occupational disease. The evidence of the other disability can come from medical reports, medical records or other competent evidence. Medical practitioners who rate PPD "shall address in the report the issue of causation of the disability and shall include in the report an opinion as to the percentage of permanent disability that was caused by the injury and the

percentage of permanent disability that was caused by other factors, whether occurring before or after the injury.”

- **Impact and Analysis:** Provides for apportionment of PPD between disability caused by a traumatic work injury and that caused by other factors, including occupational exposure with the same employer, whether occurring before or after the time of injury. The employer is liable only for PPD caused by the work injury and also any PPD caused by occupational disease.
- Requires an injured worker who claims PPD compensation for an injury to disclose prior PPD or other impairments that are relevant to that injury, if requested.
  - Any physician who prepares a report on permanent disability shall address the issue of causation of the permanent disability that includes a determination of the approximate percentage of permanent disability caused as a direct result of the work-related injury with the percentage attributable to other factors before and after the injury.

**PROSPECTIVE ORDERS FOR RETRAINING**

**Sec. 102.18(1) (b) (2)** allows ALJ to order the payment of vocational retraining compensation before the employee actually commences a course of instruction. Currently, this issue is litigated after the worker actually starts school, which provides evidence of intent to be retrained.

- **Impact and Analysis:**
- This provision could allow workers to start school and then quit, thereby requiring the respondent to pay start-up costs like tuition, books, fees, purchasing equipment (laptops) and some temporary disability compensation.
- There is no provision for the worker to repay respondent if the worker quits school and does not obtain successful retraining, nor does it give the respondent any credit against a subsequent loss of earning capacity claim that can be made for those workers who fail to complete school.
- Unknown if employee can bypass DVR approval/IPE process with a private vocational report to obtain a Decision and Order for retraining.

**PHYSICIAN DISPENSING**

**Sec. 102.425(1) (cm) and (3) (a) (intro)** indicates reimbursement for medications dispensed outside of a licensed pharmacy shall be limited to the pharmacy fee schedule and the existing dispensing fee.

**RED BOOK SUCCESSOR**

**Sec. 102.425 (3) (a) 1** if the Red Book is discontinued and becomes unavailable the Department will have authority to locate and utilize a successor to the Drug Topics Red Book if necessary.

- **Impact and Analysis:** The Red Book is a drug pricing resource utilized by healthcare professionals for drug utilization review. It contains information on prescription and over-the-counter products and simplifies identification, analysis, and comparison of drug and non-drug products. If the Department decides to utilize a successor book it may impact allowable reimbursement rates for prescription and other non-drug products.

**NO OFFSET FOR PART-TIME WAGES DURING RETRAINING**

**Sec. 102.43(5) (c)** makes permanent the provision that requires an employee work more than 24 hours in a week in order for a respondent to credit wages earned against vocational retraining's temporary total disability compensation.

- **Impact and Analysis:** This provision reinstates the law that was in effect until 2014. There is no sunset on this provision.

## 2015 Changes to Wisconsin Worker's Compensation Act

- The injured worker will be required to provide verification of the number of hours worked each week for a determination to be made as to whether they are entitled to the full TTD benefit for a week.
- Only hours worked over 24 hours within the week will impact the TTD benefit for that week.

### DISCHARGE OR SUSPENSION FOR MISCONDUCT OR SUBSTANTIAL FAULT

**Sec. 102.43(9) (e)** indicates temporary disability will be denied when an employee is released to light duty work and is suspended or terminated due to misconduct as defined in sec. 108.04(5) or substantial fault as defined in sec. 108.04(5g) (a), Wis. Stats., connected with the employee's work.

**Misconduct** per the Unemployment Insurance Act (Wis. Stat. sec. 108.04(5) and (5g)) includes: violation of an employer's reasonable written policy concerning the use of alcohol and/or controlled substances, theft, conviction of a crime, harassment/assault at the workplace, absenteeism, falsifying business records of the employer, willful and deliberate violation of a written and uniformly applied standard or regulation, substantial fault involving rule infractions, inadvertent errors, and failure to perform work.

- **Impact and Analysis:** Adds a TTD defense to claims involving employee's "misconduct."
- Claims for medical expense and PPD are not affected.
- Yet to be determined is the effect a finding at an unemployment compensation hearing would have on the corresponding worker's compensation case, *i.e.*, whether a termination for misconduct can be litigated twice, once at an unemployment compensation hearing and again at the workers compensation hearing.

### VIOLATION OF EMPLOYER'S ALCOHOL / DRUG POLICY

**Sec. 102.58** expands the statute to create a *complete bar* to any primary compensation or death benefits where the injury is caused by the employee's violation of "the employer's policy concerning drug or alcohol use." Primary compensation and death benefit" means compensation or indemnity for disability or death benefits – other than increased compensation for death benefits (penalty). This section preserves the current rule for injuries caused by the employee's failure to use safety devices or follow the employer's safety rules. In those cases, with certain qualifiers, primary compensation and death benefits (not medical expense) can be reduced by 15% to a maximum of \$15,000.00 per injury date.

- **Impact and Analysis:** This provides a total bar to payment of primary compensation or death benefits where the injury is **caused** by the employee's violation of "the employer's policy concerning drug or alcohol use."
- Will require expert toxicologist and other medical opinions to address issues of causal relationship; may require accident reconstructionist, depending on the issues involved in the case.
- This does not bar the payment of medical treatment and prescription expense.
- Maintains the current rule regarding a 15% reduction (maximum of \$15,000.00) in primary compensation or death benefits due to injuries caused by the employee's failure to use safety devices or follow employer's safety rules.

### MISCELLANEOUS

**Sec. 102.01(2) (d)** - Provisions previously referring to a "municipality," which was defined to include a county, city, town, and village, now refers to a "local governmental unit" which is more broadly defined to include a political subdivision of the state or any other public or quasi-public corporation.

**Sec. 102.07(20)** – Individuals providing services for injured persons participating in the self-directed service option under the Social Services statute (Wis. Stat. sec. 46.001 *et seq.*), are deemed employees of the Social Service entity that is providing financial management services for the injured person, provided the individuals do not have their own worker's compensation coverage.

**Sec. 102.18(3)** - The 21-day deadline to file a timely appeal to LIRC is clarified.

## 2015 Changes to Wisconsin Worker's Compensation Act

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**Sec. 102.18 (4) (a)** - The 28-day deadline for LIRC to set aside an order for further consideration runs from the date of its decision, not the date the decision is mailed.

**Sec. 102.23 (1) (a) (c) and (cm)** - The party who files an appeal of a commission decision shall be named the plaintiff and shall name as defendants the commission and all those persons and entities identified by LIRC in its decision as necessary to be named as a party for the appeal to circuit court.

**Sec. 102.28 (2) (a), (b), (bm), (c), (d) and (e)** - The process for political subdivisions to become self-insureds for worker's compensation purposes is now included in the statute. This change clarifies that the Self-Insurers Council is no longer involved with the self-insured status of political subdivisions.

**Sec. 102.28(7) (b) (bm) and (d)** - The Division has long promulgated rules by which an employer can become self-insured for purposes of the Worker's Compensation Act. For employers who are insured under a policy of insurance the statute has a mechanism wherein certain payments are not made to the injured worker or a medical provider but to the work injury supplemental benefit fund. Benefits may be paid from the fund for meritorious claims for occupational disease barred solely by the statute of limitations. Benefits for occupational disease may be awarded when the status or existence of the employer or its insurance carrier cannot be determined. Self-insured employers must also fund the Self-Insured Employers Liability Fund (SIELF) for the same purpose. The statute changes the method of assessment from one previously based on percentage of a pending claim exposure and it is now made against the self-insured employer on a pro rate basis according to payroll. Political subdivisions cannot be included in the SIELF and their employees are not entitled to bring claims against the SIELF for benefits.

**Sec. 102.29(12)** - Employees of entities described in Wis. Stat. sec. 102.07(20) who make a claim for worker's compensation benefits are barred from making a claim or bringing an action in tort against the person to whom services were rendered.

**Sec. 102.44(1) (ag), (am) and (b)** - The update extends the eligibility and increases the maximum for supplemental benefits. The worker's compensation code provides supplemental benefits for certain permanently totally disabled (PTD) individuals. For employees injured many years ago, the fixed PTD rate may become inadequate over time and supplemental benefits are available. Any person who is receiving PTD, or continuous temporary total disability (TTD) more than 24 months after the date of injury, resulting from an injury that occurred prior to January 1, 2003 (previously January 1, 2001) shall receive supplemental benefits. This shall be payable by the employer, the employer's insurance carrier or from the supplemental benefit fund. The supplemental benefits shall be paid only for weeks of disability occurring after January 1, 2005 and shall continue during the period of such total disability subsequent to that date. If the person is receiving the maximum weekly benefit in effect at the time of injury, the supplemental benefit for a week of disability occurring after March 2, 2016 shall be an amount that, when added to the regular benefit for the case shall equal \$669.00 (increase from \$582.00). If the employee is receiving a weekly benefit less than the maximum benefit in effect on the date of injury, the supplemental benefit for a week of disability occurring after March 2, 2016 shall be an amount sufficient to bring the total weekly benefits to the same proportion of \$669.00 (previously \$582.00) as the employee's weekly benefit bears to the maximum in effect on the date of injury.

**Sec. 102.44 (4m)** - The Department of Workforce Development is required to write rules on minimum permanent partial disability ratings for amputations, motion loss, reduced sensation and surgery. It directs the department to convene a "medical advisory committee" to "review and recommend revision of those ratings to the department and the council on worker's compensation." This relates to Wis. Adm. Code Sec. DWD 80.32 and codifies the method by which the rule has previously been amended.

**Non-statutory** - Funding from the Worker's Compensation annual assessment will be provided to update the Uninsured Employers Fund (UEF) mainframe computer system to a current platform during this biennium.