

Council on Worker's Compensation
Meeting Minutes – Virtual Meeting (WebEx)
201 E. Washington Avenue, Madison, WI
GEF-1 Building
Madison, Wisconsin
August 24, 2021

The Department of Workforce Development (DWD) provided public notice of the meeting under Wis. Stat. § 19.84.

Members present in-person, by telephone or by video: Ms. Bloomingdale, Mr. Buchen, Ms. Frank, Mr. Fugina, Ms. Johnson, Mr. Kent, Mr. Large, Mr. Nettum, Mr. Peters (Chairperson), Mr. Schwanda, Mr. Streff and Mr. Tindall

Excused: Ms. Thomas

Staff Present: Mr. Aiello, Mr. Brockman, Ms. Brown, Mr. Dipko, Ms. Lake, Ms. McCormick, Mr. Moreth, Mr. O'Malley, Ms. Przybylo, and Ms. Weinberger

- 1. Call to Order/Introductions:** Mr. Peters convened the Worker's Compensation Advisory Council (WCAC) meeting at approximately 10:00 a.m. in accordance with Wisconsin's open meetings law and called roll of the WCAC members.
- 2. Approval of the Minutes:** A motion was made by Mr. Large to approve the minutes of the July 13, 2021 meeting. Mr. Buchen seconded the motion. The minutes were unanimously approved without correction.
- 3. Correspondence:** Mr. O'Malley reviewed the correspondence received since the last meeting.

A letter dated August 13, 2021 was received from Mr. Nate Myszka, Senior Manager, State Government Affairs at Medtronic. In his letter Mr. Myszka urged the WCAC to reject replacing Wisconsin's existing worker's compensation treatment guidelines, developed by expert physicians from across the state, and the adoption of a national worker's compensation treatment guideline.

A letter dated August 19, 2021 was received from Ms. Julie Gilbert, Founder and CEO of Fairwater Revenue Recovery, LLC. In her letter Ms. Gilbert further discussed the concerns she expressed in her earlier letter to the WCAC of May 2021 about using the Worker's Compensation Research Institute's (WCRI) data as a basis for suggesting a fee schedule.

- 4. AB-487 and SB-485 Network Transportation Companies & Drivers:** These are companion bills that propose legislative changes to Chapters 102, 103, 104, 108, 224 and 632, Wis. Stats., relating to delivery network couriers and drivers for delivery companies. The bills provide that under specific circumstances, delivery network couriers and drivers for transportation network companies (application-based drivers) are not employees of the delivery network companies and transportation network companies (network companies) for the purposes of worker's compensation insurance, minimum wage laws, and unemployment insurance. In the bill, "application-based driver" is defined as a delivery network courier or participating driver who provides services through the online-enabled application, software, or system of a network company.

The bills provide that application-based drivers are not employees for purposes of worker's compensation if a network company does not engage in all of the following:

- Prescribe specific dates, times of the day, or a minimum number of hours during which the driver must be logged into the network company's on-line application, software or system.
- Terminate the contract of a driver for not accepting a specific request for transportation or delivery services.
- Prohibit the driver from performing services through other network companies except while performing services through that network company.
- Restrict a driver from working in any other lawful occupation or business.

AB-487 and SB-485 authorize the Department of Financial Institutions (DFI) to approve financial institutions to offer portable benefit accounts from which drivers may receive distributions of compensation for lost income due to illness, accident or loss of work; transfer money to an IRA; and pay premiums for health insurance. Network companies may also provide accident and sickness insurance for the drivers covering medical expenses and lost income due to work-related injuries. Network companies may voluntarily, but are not required, to offer drivers portable benefit accounts and sickness and accident insurance. Eligibility requirements for the portable benefit accounts and sickness and accident insurance are included in the bills. Amounts paid under the sickness and accident insurance policies are to be treated as if paid under ch. 102, Wis. Stats.

Mr. Buchen asked about how these bills may apply to Uber drivers. Mr. O'Malley responded that the drivers would likely be considered employees, but that he was not aware of there being any worker's compensation claims by drivers to date.

- 5. AB-499 Abusive Work Environments:** This bill contains proposed legislative changes to Chapters 102 and 814, Wis. Stats., to prohibit abusive work environments. AB-499 is similar to bills that were introduced in previous legislative sessions related to abusive work environments. This bill prohibits abusive work environments and creates a civil cause of action for individuals who are subjected to abusive work environments. The bill provides a specific exception to the exclusive remedy provision in s. 102.03 (2), Wis. Stats. The bill allows for affirmative defenses and a one (1) year statute of limitations after the last prohibited act.

The remedies available to employees in SB-499 include enjoining an employer or an employee from engaging in certain activities, removal of a person who engaged in abusive conduct from the work area, reinstatement, medical expenses, back pay front pay, damages for pain and suffering, punitive damages, compensation for emotional distress and reasonable costs and attorney fees. If an employer is found to have engaged in an unlawful employment practice that did not result in an adverse employment action against the aggrieved employee, the employer is not liable for compensation for emotional distress or punitive damages unless the abusive conduct was extreme and outrageous. A self-insured employer, worker's compensation insurer and the Uninsured Employer Fund (UEF) will be reimbursed for compensation and medical expense payments made for the same incident.

6. **Department Proposals:** Mr. O'Malley presented the Department's proposals for this legislative session.

Department Proposal 1

This proposal was previously approved by the WCAC and included in 2019 SB-673. Authorize budget authority for the creation of an additional .2 FTE position in the WCD. The WCD has a .8 FTE position that has been difficult to fill and has been vacant for about three (3) years. The WCD recommends making this a 1.0 FTE position which will help with recruitment and filling this position.

Department Proposal 2

This proposal was previously approved by the WCAC and included in 2017 SB-665 and 2019 SB-673. Amend ss. 46.275 (4m), 46.227 (3r), 46.281 (1k), 46.2897 (3) and 46.995 (3), Wis. Stats., to include language that clearly states the individuals performing services for the long-term care programs will be considered employees of the entity that is providing financial management services for purposes of worker's compensation coverage.

Department Proposal 3

This proposal was previously approved by the WCAC and included in 2017 SB-665 and 2019 SB-673. Amend s. 102.04 (1) (b) 1 and 2, Wis. Stats., to provide that every person who at any time employs three (3) or more employees for services performed in Wisconsin is subject to CH. 102, Wis. Stats., and the person becomes subject to ch. 102, Wis. Stats., on the day on which the person employs three (3) or more employees for services performed in this state.

Department Proposal 4

Amend s. 102.05 (3) to provide authority for farmers who have not had an employee at any time within a continuous period of two (2) years to automatically withdraw from subjectivity to ch. 102, Wis. Stats., in the same manner as other employers.

Department Proposal 5

Amend s. 102.13 (1) (b) and create 6, Wis. Stats., to allow an employee to have an observer present at examinations provided by himself or herself present at examinations conducted at the request of employers and worker's compensation insurance carriers.

Department Proposal 6

This proposal was previously approved by the WCAC and included in SB-665. Amend s. 102.15 (1), Wis. Stats., to authorize the WCD to promulgate administrative rules necessary to carry out its duties and functions under ch. 102, Wis. Stats.

Department Proposal 7

This proposal was previously approved by the WCAC and included in 2017 SB-665. Renumber s. 102.16 (1) (b), Wis. Stats., to (1) (b) 1 and to create s. 102.16 (1) (b) 2., Wis. Stats., to provide statutory authority for the WCD to conduct alternative dispute resolution activities in cases where no hearing application has been filed and in cases where an application has been filed but the case is not ready to be scheduled for a hearing.

Department Proposal 8

This proposal was previously approved by the WCAC and included in 2017-SB-665. Amend s. 10217 (1) (c), (cg), (cm), (cr) and (ct), Wis. Stats., to provide the DHA with statutory authority over approving licenses to appear at worker's compensation hearings.

Department Proposal 9

This proposal was previously approved by the WCAC and included in 2019 SB-673. Create s. 102.33 (2) (b) 7, Wis. Stats., to allow the WCD to provide limited worker's compensation record information to the Department of Health Service and county departments of social services for purposes of child support of an employee's name and address, the name and address of the employee's employer and any financial information about the employee.

Department Proposal 10

This proposal was previously approved by the WCAC and included in 2019 SB-673. Amend ss. 102.80 (1) (d), 102.81 (4) (b) and (5), Wis. Stats., to authorize the Uninsured Employer Fund (UEF) to receive the distribution of third-party proceeds under s. 102.29, Wis. Stats., in the same manner as worker's compensation insurance carriers and self-insured employers

The Department reserves the option to amend or to submit additional proposals as may be necessary in the future.

- 7. Motion to Caucus:** A motion was made by Ms. Bloomingdale to go into a closed session under s. 19.85 (1) (e.g.), Wis. Stats., to deliberate items on the agenda and to adjourn the meeting from closed session. The motion was seconded by Mr. Tindall. The motion passed unanimously. Mr. Peters announced the closed session, statutory authority and the nature of business to be considered. The open session of the meeting was adjourned at approximately 11:00 a.m.

The Worker's Compensation Advisory Council's next meeting is scheduled for Tuesday, September 28, 2021.