

DRAFT
Council on Worker's Compensation
Meeting Minutes
201 E. Washington Avenue
GEF-1 Building, Room F305
Madison, Wisconsin 53703
May 23, 2019

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

Members present: Ms. Bloomingdale, Ms. Frank, Mr. Kent, Mr. Nettum, Mr. Peters (Chair), Mr. Reader, Mr. Redman, Mr. Schwanda, Ms. Thomas and Mr. Tindall

Excused: Mr. Buchen, Mr. Fugina and Ms. Johnson

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

1. **Call to Order/Introductions:** Mr. Peters convened the Worker's Compensation Advisory Council (WCAC) meeting at approximately 10:10 a.m. in accordance with Wisconsin's open meetings law. Members of the WCAC, the audience, and Worker's Compensation Division (WCD) staff introduced themselves.
2. **Approval of the Minutes:** A motion was made by Ms. Bloomingdale to approve the minutes of the May 14, 2019 meeting. Mr. Reader seconded the motion. The minutes were unanimously approved without correction.
3. **Correspondence:** Mr. O'Malley stated that no correspondence had been received since the meeting on April 14, 2019.
4. **Motion to Caucus:** Mr. Reader moved the members to go into closed caucus. Mr. Redman seconded the motion. By unanimous vote, the members went into closed caucus at about 10:30 a.m. The members returned from caucus at about 2:00 p.m.
5. **Department Proposal 1:** The Department proposes the transfer of the worker's compensation adjudicatory functions and staff currently at the Department of Administration-Division of Hearings and Appeals (DHA) back to the Department of Workforce Development-Worker's Compensation Division (WCD). Ms. Bloomingdale made a motion to accept Department Proposal 1 as part of the next Agreed Upon Bill for this biennium; Mr. Reader seconded the motion. The motion passed unanimously.
6. **Labor and Management Proposals:** Mr. Reader presented the proposals of Management to be considered in the next Agreed Upon Bill for 2019-2020.

Mr. Reader noted that Management's proposals are a mixture of items that have been brought forward in the past and newly proposed items. Worker's compensation works well in Wisconsin because all of the Council members work hard every two years to arrive at an Agreed Upon Bill. Typically, the Bill is accepted by lawmakers and it is hoped that the process will move forward in the same manner this year. The system works well because

the players involved in the system are very concerned about safety in the workplace. Some of the reforms proposed will bring Wisconsin in line with other states. Some of the proposals address the incredibly high cost of healthcare in worker's compensation. Management wants to ensure that all parties involved in the system are playing by the same set of rules. According to the Workers' Compensation Research Institute (WCRI), Wisconsin continues to lead the nation in the cost of medical care for injured workers with medical costs accounting for 74% of growth in claim costs. The medical payments for a claim in Wisconsin are about 51% above the median state. While some of the costs of claims are below average, we should not ignore the costs that are increasing in the other parts of the program as those areas need improvement.

Management proposed the following:

1. Employer directed care. Allow employer directed care for the first 90 days of treatment, outside of emergency room care. Allow employers to specify a diverse list of health care providers who are authorized to provide care for injured workers. The list shall include at least six health care providers, at least three of whom must be physicians who are geographically accessible and have specialties that are appropriate based on anticipated work-related medical problems of the employees. The list must include contact information and must be posted in a prominent location. The reason for this proposal is for employers to have the ability to negotiate better discounts with providers.
2. Electronic billing/payments. Require that all providers caring for worker's compensation patients utilize electronic billing and be able to receive payments electronically.
3. Electronic medical records. Require all medical providers caring for worker's compensation patients to transmit medical records electronically.
4. Treatment guidelines. Establish treatment guidelines in Wisconsin based on ODG or another appropriate national model. Guidelines must be followed unless pre-authorization is received from the WC insurer.
5. Fee dispute resolution process. The Department currently certifies databases for use in the fee dispute resolution process of the amounts health service providers charge for services. We propose that the Department certify databases of the average health service fees paid to health service providers. Update Wis. Stat. 102.16 and DWD Administrative Code s. 80.72 to reflect this database change. This proposal is to adjust the current system to bring WC medical costs in line with the amount that is paid in the rest of the healthcare system.
6. Statute of limitations. Reduce statute of limitations to two years, except that in the case of occupational disease caused by exposure to toxic substances there shall be no statute of limitations, and where an employee's injury that is otherwise undisputed requires a prosthesis or artificial joint, there shall be no statute of limitations as to medically necessary treatment expenses directed to the prosthesis or artificial joint. A

two-year statute of limitations will bring Wisconsin in line with just about every other state.

7. Tolling the statutes. Past Department practice allowed tolling the statutes. This practice was ended by DOA Division of Hearings and Appeals effective March 1, 2017. Amend Wis. Stats. 102 to state that applications will only be accepted by the Department when there is a justiciable controversy. Management wants this practice by DHA to continue when the adjudicatory functions and staff return to DWD.
8. Department policies and procedures. Require the Department to update the July 19, 2013 memo entitled "Department Policies and Procedures." Include in the updated memo the Department's statutory authority for each item.
9. Wage expansion. Benefits shall be based on actual earnings from the employer where the injury occurred at the time of the injury. This proposal is to end the practice of wage expansion for employees who work part-time.
10. Employee misrepresentation of physical condition. Prohibit benefits under Wis. Stat. 102 to an injured worker if the worker intentionally made a false statement as to their physical condition after a job offer was made, the employer relied on the misrepresentation and this reliance was a substantial factor in the hiring, and there was a causal connection between the false misrepresentation and the injury.
11. Worker's compensation denied by another state. The state of Wisconsin should not accept cases that have been denied by other states for cause. Cases that are contesting jurisdiction should be handled by the state, but cases that have been denied in another state for compensability should not be considered in Wisconsin.
12. No permanent total disability (PTD) benefits once Social Security old-age assistance benefits begin. Current law provides PTD benefits for life. PTD benefits should be terminated once the injured worker receives Social Security old-age/retirement assistance benefits.
13. PPD minimum ratings. Eliminate minimum permanent partial disability ratings from DWD Administrative Code Chapter 80 where surgical treatments have made it such that outcomes result in no permanent disability.
14. Notice of injury. All initial reports of injuries must be made by the injured worker to the employer according to the employer's procedures as posted or as outlined in an employee handbook within the current statutorily required timeline of 30 days.
15. PTD re-evaluation. An employer or insurer may request an injured worker receiving PTD benefits to have their PTD ratings re-evaluated every three years.

16. Disability determinations. Permanent disability determinations must be made by occupational health physicians or other qualified healthcare providers according to statutory guidelines.
17. Death benefits. There shall be no death benefit in PTD claims when the death is unrelated to the occupational injury or illness.
18. Physician dispensing. Limit physician dispensing of opioids for a workplace injury to one 7-day supply.
19. Hearing test. Require the hearing test completed most proximate to the date of employee removal from a noisy work area as defined by OSHA standards, whether before or after such date and whether the employee is removed by reassignment, quit, termination, or retirement, to be used to establish any loss of hearing claim.
20. Attorney fees for hearing aids. Specify that the cost of hearing aids shall be removed from lump sum settlement amounts prior to determining attorney fees.
21. PEO reform. Allow employers to keep their incumbent worker's compensation insurance carrier regardless of their relationship with a PEO for other human resource services.

Ms. Bloomingdale presented the Labor Proposals. She expressed Labor's belief that the Agreed Upon Bill process should be kept intact. Labor made the following proposals:

1. Permanent Partial Disability Benefit Maximum Rate: Increase of approximately 5% per year from the rate established in negotiations for the 2017 agreed bill, which had provided for a maximum rate in 2019 of \$407 per week. That would result in a maximum PPD rate of \$427 for injuries on or after 1/1/2020, and \$448 for injuries on or after 1/1/2021.
2. Temporary Disability Benefit: Increase the rate for temporary disability benefits from 66.67% of average weekly wage to 80% of average weekly wage beginning with dates of injury on or after 01/01/2020. The intent of this proposal is to better make the worker whole after a workplace injury.
3. Permanent Total Disability Supplemental Benefit: Four-year bump in eligible dates/rates. Current law provides for those injured prior to 1/1/2003 a supplement to max rate of \$669. A four-year bump would take it to injuries prior to 1/1/2007, and increase the maximum benefit to \$777 per week.
4. Scholarships: Provide for a statutory scholarship benefit for injured worker's children, when a parent's injury causes death or permanent total disability. Scholarship amount for each child would be for the tuition, room and board, and book expense for up to four years at a Wisconsin State University System school, Wisconsin State Technical College System, or certified apprenticeship program of the child's choice.
5. Statute of Limitations extended by payment of medical expense. Current law, s. 102.17(4), Wis. Stats., provides for a statute of limitations of 6 years for traumatic

injuries, measured from the date of injury or the last payment of primary compensation (indemnity benefits to worker), whichever is later. Payment of medical expense currently does not extend the statute of limitations. This proposal would add the date of the last payment of medical expense as an additional measurement point for the start of the statute of limitations.

6. Shoulder Replacement, Spinal Fusions: Amend s. 102.17(4) to include shoulder replacement (reverse shoulder replacement) as well as spinal fusions as an additional serious traumatic injury with no statute of limitations.
7. Physical Therapy Access: In order to allow injured workers to go directly to a physical therapist following a work injury and have such treatment paid for under WC, amend s. 102.17 (1)(d) to allow physical therapists to opine on the necessity for PT treatment and causal relationship to injury but not opine on the extent of disability.
8. Increase Release of Unaccrued Benefits in Compromise Agreements: Increase the amount of the unaccrued compensation that may be released to the injured worker without restriction in a compromise settlement in pursuant to s. DWD 80.03(1)(d) from \$10,000 to \$50,000.
9. Eliminate Interest Credit on Advancements: Amend s. 102.32(6m) to change the interest credit to insurers for advancements of compensation from the current 5% to zero%.
10. Injured Worker Choice of Third-Party Settlements: Amend s. 102.29 (third party negligence cases) to change the law from the employer having an equal voice in whether a settlement offer should be accepted to the employee having the right to control the settlement or no settlement decision.
11. Indexing of Permanent Total Disability Rate: Indexing with six-year lag. For injuries beginning 1/1/2020, index weekly benefits for permanent total disability or continuous temporary total disability for more than 24 months after the date of injury to the rate in effect at the time the benefit accrues for periods more than six years after the date of injury.
12. Posting of Injured Worker WC Rights: Require all employers to display a DWD approved poster of WC employee rights at the workplace, including information on opioids and alternative treatments.
13. Continuation of Health Care Coverage: If during the period of temporary disability an employer fails to continue to provide ongoing group health care coverage for an injured worker, or the injured worker and his/her dependents, if such coverage was provided as of the time of injury, the employee is due an additional benefit equal to 100% of the employer contribution for such group health care that the worker (and his/her dependents, if applicable) had as of the date of injury. This additional benefit is in addition to any temporary disability benefits due, and is not subject to the maximum TTD rate.
14. Loss of Earning Capacity for Scheduled Injuries: If a worker suffers a scheduled injury, and if retraining has been attempted but fails to fully restore the injured worker's pre-injury earning capacity, or retraining is not feasible for the injured worker, allow a claim

for loss of earning capacity in the same manner as currently allowed for unscheduled injuries.

15. Opioids: Ms. Bloomingdale explained opioid issues are very difficult for injured workers to address. Workers have to consider their health and their ability to return to work. Labor has tried to incorporate some changes to the law that will help the injured worker deal with the injury and minimize the use of opioids as much as possible. Labor would like to see more direct access to alternative treatments. Labor concurs with Management's past proposal about limiting the dispensing of opioids to a 7-day supply. It is Labor's desire for medical providers to exercise good judgement in the use of opioids, but not to establish "hard and fast" rules for providers. It is important to educate injured workers about the use of alternative treatments for chronic pain. Such alternative treatments are numerous and may also include medical marijuana. If an injured worker becomes addicted to opioids, the worker should be afforded the opportunity to seek treatment and have such treatment covered. If an IME opines that opioid treatment must be discontinued, the injured worker must be notified that the payment for the opioids will be continued for a period of 30 days from the date the IME opinion is received or 30 days from the completion of an expedited mediation.

The following is a recitation of Labor's Opioid Proposal:

Preamble: Labor's Proposals with respect to Opioids is a two-fold approach: 1) Attempt to manage pain with the best available treatment while trying to minimize the use of opioids when possible; and 2) Deal with the aftermath of the use of opioids in for an injured worker who becomes addicted. Attempting to minimize opioid use without providing for those who have become dependent already on the use of opioids can have disastrous consequences. Labor's proposal discourages the use of hard and fast "rules" and "numbers" with respect to the use and amount of opioids, trusting that a well-informed medical community, guided by caring guidelines for the use of opioids, is the best rule to follow.

- 1) Clarify that no physician/chiropractor referral is needed in WI for treatment with a physical therapist, with current law expanded to allow for a physical therapist able to opine on necessity for treatment and relationship to injury to ensure that the employer/carrier must pay for PT even in the absence of a physician referral.
- 2) Limit physician *dispensing* of opioids for a workplace injury to a 7-day supply per claim. Opioids *dispensed* by a physician beyond a 7-day supply shall be deemed to be unnecessary treatment per 102.16(2m). Note that this limitation is for *dispensing*, but does not limit a physician's ability to *prescribe* opioids for any reasonable and necessary time frame.
- 3) All medical providers should use "good judgment" in the use of opioids. As highlighted by recent medical news, hard and fast "rules" have been used too often to discontinue opioids inappropriately. As the medical community continues to grapple with the opioid issue, physicians are encouraged to carefully review the latest literature and recommendations on the use and discontinuance of opioids, as reflected by the latest "Wisconsin Medical Examining Board Opioid Guideline – January 16, 2019."

- 4) Educate injured workers that “alternative treatment” for chronic pain, in lieu of or in combination with medication, is a medical expense that may be reasonably required to cure and relieve from the effects of the injury and a covered medical expense under the WC Act.
- a. “Alternative treatments” for chronic pain other than medication may include, but are not limited to, manipulation therapy, electrical stimulation, chiropractic care, massage, trigger point injections, dry needling, acupuncture, acupressure, suction (cupping), virtual reality therapy, and psychological treatment.
 - b. “Alternative treatment” for chronic pain may include, but is not limited to, medication alternatives to opioids, such as Acetaminophen, anticonvulsants, topicals, interventional (epidurals, nerve blocks), lidocaine or ketamine infusions, and medical marijuana.
- 5) If an injured worker is prescribed opioids by a treating physician, and the employer/insurer obtains an IME opinion that opioids are not needed, the following shall apply:
- a. Any IME opinion regarding the cessation of opioid medications **MUST** contain:
 - i. A discussion of “alternative treatments” other than opioid medication for the treatment of the injured worker’s pain, and if opining that “alternative treatments” are also unnecessary, an explanation as to why alternatives are unnecessary;
 - ii. A proposed plan of discontinuation of opioid therapy consistent established medical guidelines. No “cold turkey” discontinuation of opioids is ever a reasonable treatment plan.
 - iii. That if the IME opines that the injured worker has developed behaviors indicative of opioid use disorder, affirmatively offer to pay for, and assist the worker in locating and obtaining, addiction treatment therapy at a facility of the patient’s choice.
 - b. The employer/insurer shall advise the employee that currently prescribed opioids will be continued to be paid by the employer/insurer for no less than 30 days from the date the IME opinion is received by the injured worker, or 30 days from the completion of an expedited mediation conference as set forth below, whichever is later;
 - c. The employer/insurer shall advise the employee of the right to have an expedited mediation conference with an ALJ to discuss the employee’s options regarding opioid use, including the right to continue to rely upon his treating physician’s recommendations for continued opioid use and to have a hearing on the issue of continued opioid therapy, “alternatives treatments” to opioid use, and the injured worker’s right, if they elect to discontinue opioid

use, to all necessary medical treatment, including medical and psychological treatment for addiction.

- i. The Department shall expedite all requests by an injured worker for an opioid mediation conference, with a goal of a conference within the 30-day continued prescription payment period. Should a mediation be requested by the employee but is not held within the 30-day period, the employer/insurer shall continue to pay for prescribed opioids until a mediation is held.
- 6) Educate injured workers regarding opioid therapies, opioid addiction, and alternatives treatments by providing a mailing to injured workers. The mailing should include language that if one becomes addicted to opioid medications due to a work injury, all reasonable and necessary medical care for the injury includes addiction treatment. Provide information regarding opioid treatment and addiction on the posting of WC rights.
7. **Other Business:** A discussion was held regarding upcoming meeting dates for the Council.
8. **Adjournment:** A motion was made by Mr. Reader to adjourn to closed caucus and to adjourn directly after caucus. The motion was seconded by Ms. Bloomingdale. The motion passed unanimously. The meeting was adjourned at approximately 2:55 p.m.

The Worker's Compensation Advisory Council's next meeting is scheduled for Thursday, May 30, 2019.