

DRAFT
Council on Worker's Compensation
Meeting Minutes – Hybrid Meeting (In-person and Teleconference)
201 E. Washington Avenue, Madison, WI
GEF-1 Building
Madison, Wisconsin
July 13, 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. Reader, Mr. Schwanda, Mr. Streff, Ms. Thomas, and Mr. Tindall

Excused: None

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 Ms. Bloomingdale to approve the minutes of the June 15, 2021 Labor caucus meeting. Mr. Reader seconded the motion. The minutes were unanimously approved without correction.

A motion was made by Mr. Reader to approve the minutes of the June 8, 2021 meeting. Ms. Bloomindale seconded the motion. The minutes were unanimously without correction.

3. **Correspondence:** Mr. O'Malley reviewed the correspondence received since the last meeting.

A letter dated June 28, 2021 was received from Attorney Paul R. Riegel, Legal Counsel for the Milwaukee Brewers. In the letter, Attorney Riegel discussed the issue of wage expansion as it pertains to part-time employees who work odd schedules.

Attorney Riegel was present at the meeting and spoke to the Council about the concerns raised in his letter. The Milwaukee Brewers have about 750 employees who are seasonal part-time stadium workers. They work odd schedules that do not allow them to be treated as part-time workers under section 102.11, Wis. Stats. If an injury occurs, the wage of these employees is expanded and results in a significant step up in temporary total and permanent partial disability benefits. The Milwaukee Brewers are asking for an amendment to Chapter 102 that does not require the use of a 13-week standard for the calculation of wages for employees of seasonal employers like the Brewers. The Brewers do not control when games are scheduled; Major League Baseball (MLB) sets the dates and locations of games for the Brewers and all other teams in the MLB. Other professional sports teams, including the Bucks and the Packers, and any team that hires stadium workers for their games, would support the statutory change. The vast majority of the part-time stadium workers are retired,

and the acceleration of benefits may be problematic if the employees are receiving other benefits, such as Social Security or pension/retirement. No one is working at the stadium for a significant income.

4. **Motion to Caucus:** A motion was made by Ms. Bloomingdale to adjourn to closed caucus under s. 19.85 (1) (e.g.), Wis. Stats., to deliberate items on the agenda, before exchanging proposals. The motion was seconded by Mr. Reader. The motion passed unanimously. Mr. Peters announced the closed session, statutory authority and the nature of business to be considered. The members went into closed caucus at about 10:30 a.m. The members returned from caucus at about 12:30 p.m.
5. **Labor and Management Proposals:** Ms. Bloomingdale presented the Labor Proposals, which were as follows:
 1. **Permanent Partial Disability Benefit Maximum Rate:** Increase of \$20 per year from the rate established in negotiations for the 2017 agreed bill, which would result in a maximum rate in 2021 of \$442 per week. For injuries after 1/1/22 the maximum rate would be \$462, and for injuries after 1/1/23 the maximum rate would be \$482. Provide for automatic \$20 increases in the maximum PPD rate per year without the need for inclusion in every agreed bill.
 2. **Employer Safety Violation:** Amend s. 102.57, Wis. Stats., to state as follows: “If injury is caused by the failure of the employer to comply with any statute, rule, safety standard, or order of the department of safety and professional services, or of the federal Departments of Labor, Health or Transportation or its agencies, where the employer is subject to safety regulation from those federal Departments or agencies, compensation and death benefits provided in this chapter shall be increased by 15 percent of total compensation, medical expense and death benefits paid, but the total increase may not exceed \$15,000. Failure of an employer to reasonably enforce compliance by employees with any statute, rule, safety standard, or order of the department of safety and professional services, or the federal Departments of Labor, Health or Transportation or its agencies, where the employer is subject to safety regulation from those federal Departments or agencies, constitutes failure by the employer to comply with that statute, rule, safety standard or order.”
 3. **COVID Causation Presumption for Certain Occupations:** Extend s.102.03 (6), Wis. Stats., in four ways: A) To apply to public-facing essential workers [see attached list] in addition to “first responder” as that term is already defined in the statute (a list of covered workers to be included was on a handout); B) To apply to any employee whose employer has had 5 or more employees contract an epidemic virus or bacterium; C) To apply indefinitely with regard to COVID-19; and D) To apply in the future to epidemic novel viruses or novel bacterium. For purposes of this section, “epidemic” shall be defined as a virus or bacterium that spreads easily and quickly and affects or tends to affect a disproportionately large number of individuals within a population, community or region at the same time.
 4. **Death Benefits:** Revise the death benefit statutes to eliminate the concept of dependency. Death benefits shall be payable to surviving spouses, children, siblings, parents, and other next-of-kin in a manner similar to probate/estate law.

5. **Permanent Total Disability Supplemental Benefit:** Establish a six (6) 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 six-year bump would take it to injuries prior to 1/1/2009, and increase the maximum benefit rate to \$831.
6. **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.
7. **Statute of Limitations extended by payment of medical expense.** Current law, s. 102.17(4), Wis. Stats., provides for a statute of limitations of six (6) years for traumatic injuries, measured from the date of injury or the last payment of primary compensation, 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.
8. **Shoulder Replacement, Spinal Fusions:** Amend s. 102.17(4), Wis. Stats., to include shoulder replacement, reverse shoulder replacement, as well as spinal fusions as an additional serious traumatic injury with no statute of limitations.
9. **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 pursuant to s. DWD 80.03 (1) (d) of the Wisconsin Administrative Code from \$10,000 to \$50,000.
10. **Eliminate Interest Credit on Advancements:** Amend s. 102.32 (6m), Wis. Stats., to change the interest credit to insurers for advancements of unaccrued compensation from the current 5% to zero (0) %.
11. **Injured Worker Choice of Third-Party Settlements:** Amend s. 102.29, Wis Stats., 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.
12. **Indexing of Permanent Total Disability Rate:** Indexing with six (6) year lag. For injuries beginning 1/1/22, index weekly benefits for permanent total disability to the rate in effect at the time the benefit accrues for periods more than six years after the date of injury.
13. **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, or on the company's employee-accessible website.
14. **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 dependents if such coverage was provided as of

the time of injury, the temporary total disability rate shall be expanded in an amount equal to 100% of the employer contribution for such group health care that the worker (and his dependents, if applicable) had as of the date of injury. In such a circumstance, the maximum TTD rate does not apply to cap TTD benefits.

15. **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.
16. **Amend s.102.17(9)(b), Wis. Stats., to include Emergency Medical Technicians.**
Allow EMTs to claim a mental injury that is not accompanied by a physical injury that results in a diagnosis of post-traumatic stress disorder.
17. **Limit Number of Medical Record Review Reports.** Under current law, an employer or worker's compensation carrier may commission an unlimited number of medical record reviews by medical providers, and those reports are not required to be disclosed to claimants. Amend s. 102.13 (1), Wis. Stats., to provide that an employer or carrier may only obtain a medical record review with either the provider who has or will later conduct an IME pursuant to s. 102.13(1) (a), Wis. Stats., or with one provider other than a provider who performs an IME pursuant to s.102.13(1) (a), Wis. Stats.; that such reports must be disclosed to claimants within a reasonable time of receipt by the employer or carrier; and that record reviews are limited in any event to one every six (6) months, as are IMEs.
18. **Opioids:** 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 for an injured worker who becomes addicted. Attempting to minimize opioid use without providing for those who become dependent 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 Wisconsin for treatment with a physical therapist, with current law expended to allow for a physical therapist able to opine on necessary treatment and relationship to injury to ensure that the self-insured employer/ WC insurance carrier must pay for physical therapy even in the absence of a referral by a physician.
 2. Limit physician dispensing of opioids for a workplace injury to a seven (7) day supply per claim. Opioids dispensed by a physician beyond a seven (7) day supply shall be deemed treatment under s. 102.16 (2m), Wis. Stats. This limitation is for dispensing only, 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 judgement" in the use of opioids. Hard and fast "rules" have been used too often to discontinue opioids inappropriately. Physicians should be encouraged to carefully review the latest literature and recommendations on then use and discontinuance of opioids, as reflected by the "Wisconsin Medical Examining Board Opioid Guideline-January 16, 2019, found at:
<https://dsps.wi.gov/Documents/BoardCouncils/MED/MEBGuidelinesv9.pdf>
4. Educate injured workers that "alternate 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 Wisconsin 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, interventionals (epidurals, nerve blocks), lidocaine or ketamine infusions, and medical marijuana.
5. If an injured worker is prescribed opioids by a treating physician, and the self-insured employer/WC insurance carrier obtains an independent medical examination (IME) that opioids are not needed, the following shall apply:
 - a. Any IME opinion regarding the cessation of opioid medications shall contain:
 - i. A discussion of "alternative treatment" 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 with established medical guidelines. No "cold turkey" discontinuation of opioids will ever be a reasonable treatment plan.
 - iii. 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 self-insured employer/WC insurance carrier shall advise the worker that currently prescribed opioids will be continued to be paid by the self-insured employer/WC insurance carrier 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 self-insured employer/WC insurance carrier shall advise the worker of the right to have an expedited mediation conference with an administrative law judge (ALJ) to discuss the worker's options regarding opioid use, including the right to continue to rely upon the treating physician's recommendations for continued opioid use and to have a hearing on the issue of continued opioid therapy, "alternative treatments" to opioid use, and the worker's right, if they elect to discontinue opioid use, to all necessary medical treatment, including medical and psychological treatment for addiction.
 - i. All requests for an opioid mediation conference by workers shall be expedited with a goal of a conference within the 30-day continued prescription payment period. Should a mediation conference be requested by a worker, but is not held within the 30-day period, the self-insured employer/WC insurance carrier shall continue to pay for prescribed opioids until the mediation conference is held.
- 6. Educate injured workers regarding opioid therapies, opioid addiction and alternative treatments by providing a mailing to the injured workers. The mailing is to include language that if someone becomes addicted to opioid medications due to a work-related injury, all reasonable and necessary medical care for the injury includes addiction treatment. Provide information regarding opioid treatment and addiction on the posting about worker's compensation rights.

Labor reserves the right to amend or add to these proposals as may be necessary during the Agreed Bill process.

Mr. Reader stated that Labor's proposals were well thought out. He also noted in Wisconsin medical marijuana is illegal. He questioned whether restrictions would need to be lifted for the costs of this treatment to be covered by worker's compensation.

Mr. Reader presented the Management Proposals, which were as follows:

1. **Medical Fee Schedule.** Wisconsin is an extreme outlier because there is no medical fee schedule in place. The proposal is the Department shall develop a medical fee schedule for hospital charges to be in place by January 1, 2023. The fee schedule shall strive to keep costs below the national average according to national data from WCRI. The fee schedule may be regional to account for different costs in different regions of the state.
2. **Fee dispute resolution process.** The Department currently certifies databases for use in the fee dispute resolution process with the amounts health service providers charge for services. The proposal is for the Department to certify databases with the average health service fees paid to health service providers, and update s. 102.16 (2), Wis. Stats., and s. DWD 80.72 of the Wisconsin Administrative Code to reflect this database change.
3. **Employer directed care.** Without the ability to direct care, employers are unable to bargain with medical providers for meaningful discounts. The proposal is to allow

employer directed care for the first 90 days of treatment, outside of emergency room care. To utilize this, employers must specify a diverse list of health care providers who are authorized to provide care for injured workers. The list shall include at least six (6) 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.

4. **Electronic billing/payments/medical records.** Require that providers caring for worker's compensation patients utilize electronic billing and be able to receive payments electronically, as well as be able to transmit medical records electronically.
5. **Treatment guidelines.** Establish treatment guidelines in Wisconsin based on ODG or another appropriate national model. Under this proposal, guidelines would be required to be followed by providers unless pre-authorization is received from insurer.
6. **Earnings determination.** Benefits shall be based on actual earnings from the employer where the injury occurred at the time of the injury. Wage expansion shall not be allowed.
7. **Disability ratings determinations.** Permanent disability determinations must be made by occupational health physicians or other qualified healthcare providers according to statutory guidelines. Eliminate the minimum permanent partial disability ratings from s. DWD 80.32 of the Wisconsin Administrative Code where surgical treatments have made it such that outcomes result in no permanent disability.
8. **Prohibit PPD-Stacking.** LIRC and courts have held that the minimum awards set forth in s. DWD 80.32 of the Wisconsin Administrative Code can be stacked for each surgical procedure due to the same injury. This leads to awards that are higher than the amount set by code. Permanent disability ratings should be based on actual ratings as assessed by medical experts.
9. **PTD re-evaluation.** An employer or insurer may request an injured worker receiving PTD benefits to have their PTD ratings re-evaluated every three (3) years.
10. **Require work exposure be the predominate cause to allow compensability.**
Require that for a non-traumatic injury to be compensable under worker's compensation, workplace exposure should be the predominant cause of the condition.
11. **Death benefits.** There shall be no death benefit in PTD claims when the death is unrelated to the occupational injury or illness.
12. **Statute of limitations.** Reduce statute of limitations to two (2) 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 said prosthesis or artificial joint.

13. **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.
14. **Employee misrepresentation of physical condition.** Prohibit benefits under ch.102, Wis. Stats., 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.
15. **Disallow benefit venue shopping.** Prohibit the state of Wisconsin from accepting cases for review 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.
16. **No PTD benefits once Social Security old-age assistance benefits begin.** Current law provides for Permanent Total Disability benefits for life. PTD Benefits should be terminated once the injured worker receives Social Security old-age/retirement assistance benefits.
17. **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 ch.102, Wis. Stats., to state that applications will only be accepted by the Department when there is a justiciable controversy.
18. **Group Self-Insurance.** Require the Department of Workforce Development (DWD) to study, along with Office of the Commissioner of Insurance (OCI), what would be required to allow group self-insurance whereby businesses of related industries would be able to join together to self-insure their worker's compensation liability as a group. Report back to WCAC and the legislature by 1/1/2023.

Mr. Reader indicated that management's proposals were offered only to improve on the current system, as Wisconsin already has a good system.

Mr. Kent commented about Management Proposal No.14 that the Department of Justice (DOJ) has an assistant attorney general assigned to deal with reports of worker's compensation fraud. Mr. O'Malley explained the Worker's Compensation Division (WCD) and the Unemployment Insurance Division (UID) each pay one-half of the cost for a full-time assistant attorney general and the WCD pays for a one-half time investigator at the DOJ to investigate and prosecute worker's compensation fraud. Ms. Bloomingdale indicated an interest in hearing from the DOJ about the status of fraudulent claims.

Mr. Buchen clarified that Labor Proposal No. 14 for continuation of health care coverage with employers meant that employers would continue to pay their share of the premium. The members of the Council discussed the numbers associated with the proposal for continuation of health care coverage.

6. Other Business: None

- 7. Adjournment:** A motion was made by Ms. Bloomingdale to go into a closed session under s. 19.85 (1) (eg), Wis. Stats., to deliberate items on the agenda and to adjourn the meeting from closed session. Mr. Reader seconded the motion. The motion passed unanimously. Mr. Peters announced the closed session, statutory authority and the nature of the business to be considered. The open session of the meeting was adjourned at approximately 2:00 p.m.

The Worker's Compensation Advisory Council's next meeting is scheduled for Tuesday, August 24, 2021.

[WCAC 7.13.21 MEETING MINUTES DRAFT 8.17.21]