

# **2013 WISCONSIN WORKER'S COMPENSATION UPDATE**

**BY**  
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## **1. GOV. WALKER MAKES KEY ADMINISTRATIVE APPOINTMENT**

In Feb. 2013, Gov. Scott Walker appointed Clarence William Jordahl to a six-year term as commissioner of the Labor and Industry Review Commission. At the time of his appointment, Jordahl was manager of government affairs for Alliant Energy, a Madison-based utility. According to his LinkedIn profile, Jordahl previously served in several jobs for Republican governors Tommy Thompson and Scott McCallum. Between 1986 and 1991, he served as a legislative liaison in the governor's office. Then from 1991 to 1994, he served as a legislative and business liaison in the state Dept. of Transportation. Jordahl graduated from Marquette Law School of Milwaukee in 1995 and in 1979 he graduated from Pomona College of Claremont, Calif., with a Bachelor of Arts degree. As of March 18, 2013, Jordahl's appointment was pending in the state Senate. It must be approved by the Senate before Jordahl can join the LIRC. He would fill Ann Crump's position and that would mean Gov. Walker made two appointments to the LIRC. Gov. Walker also appointed Laurie McCallum, Scott's wife, two years ago. Gov. James Doyle appointed the other commissioner, Robert Glaser. His six-year term expires in Feb. 2015. Adding Jordahl to the LIRC could make its decisions friendlier to employers.

## **2. ADVISORY COUNCIL NEGOTIATIONS START**

The Worker's Compensation Advisory Council (WCAC), a committee of five business and five labor representatives, is currently negotiating over changes to the Worker's Compensation Act. The WCAC is expected to send the Legislature an "agreed bill" by late Summer 2013. Attached are proposals from various interests, including business ("management"), labor, the Walker administration ("the department") and the public. What follows are some highlights.

### **A. Permanent disability compensation**

The agreed bill traditionally includes annual increases in the permanent partial disability maximum weekly rate, usually of \$10 per year. The rate for 2013 injuries is \$322 per week. The 2012 rate was \$312 per week. In 2002, the maximum weekly PPD rate was \$202, an increase of \$110 in ten years, or 55%. According to the U.S. Dept. of Labor, the consumer price index from March 2002 to March 2012 increased 28%. The maximum average weekly wage for temporary disability, permanent total disability and death benefits increased 32% over the same period. Labor proposed raising the 2014

maximum PPD rate to \$337 per week and the 2015 rate to \$352 per week. Business has not proposed any increase.

Business proposed limiting permanent total disability awards (see management proposal no. 6). The proposal's exact intent is unclear, but it appears to require reducing permanent total disability compensation after the disabled worker is 67 years old or otherwise receives old-age social security compensation. Currently, PTD compensation is paid to the applicant for life. A group of employers calling itself Wisconsin Employers for Equitable Worker's Compensation proposed halting PTD payments at the point the worker reached the eligibility age for old-age social security payments.

Labor also proposed automatically increasing the PTD rate for all PTD recipients six years after their injury dates to account for price inflation. Currently, PTD rates are increased for those whose injury date precedes May 1, 2010.

Business proposed a requirement that the Worker's Compensation Division notify self-insured employers and insurers if any persons receiving PTD compensation also received wage income. The proposal requires the Division to review the employment and social security status of all PTD recipients every three years after they begin to receive PTD and to report those results to the entity making payment.

Business also proposed apportioning permanent disability between injury dates, if there is medical evidence of a pre-existing disability. It is difficult to tell if this proposal is any different than what is now required by Wis. Adm. Code Sec. DWD 80.50(1)(b). What would be a significant change is if the definition of pre-existing disability in the preceding rule changed from disability conceded by a worker's compensation insurer or awarded by an administrative law judge to disabilities rated by a doctor or contemplated by Wis. Adm. Code Sec. DWD 80.32.

## **B. Medical expenses**

Business proposed "a medical fee schedule that uses Medicare rates as the basis for the schedule. Providers [are] to be paid at 175 percent of the then-current Medicare rates." Business also proposed allowing employers to "direct" medical care for injured workers in the first 90 days following an injury. If the employer has a collective bargaining agreement in place, then its management and union are to negotiate and "agree upon a panel of [medical] providers, and to create incentives for the use of the agreed-upon panel of providers.

Business also proposed closer adherence to the medical treatment guidelines set forth in Chapter DWD 81 of the Wisconsin Administrative Code, a chapter that is currently ignored. Business proposed revising the guidelines, then adhering to them. For treatment not allowed by the guidelines, business proposed a requirement that the medical provider discuss the treatment with the employer or its insurer. If liability for the

proposed treatment is denied, it must be in writing and the Division can hold a hearing to require the treatment.

Business also proposed barring medical providers from repackaging drugs and charging more than the wholesale price set by the original drug manufacturer. These drugs could be dispensed only within 15 days of the injury. After that, they must be dispensed by a “licensed pharmacy.” Labor more or less agreed with that proposal, but specified that the “repackaged” price should be subject to the pharmacy fee schedule set forth in Wis. Stat. Sec. 102.425. Labor also proposed that the “reasonable” charge for surgical implants be limited to a “10% markup over the net cost.” It defined “net cost” as “provider’s invoice cost for the device (after all discounts or rebates [are] applied).”

### **C. Statute of limitations**

Business proposed shortening the statute of limitations from 12 years to three. It also proposed to require that “all initial reports of injuries must be made by employees within one (1) year of the date of a traumatic injury.” The current notice period for traumatic injuries is 30 days, per Wis. Stat. Sec. 102.12. It is unclear why business wanted to extend that time period.

### **D. The Work Injury Supplemental Benefit Fund**

The state runs a fund called the Work Injury Supplemental Benefit Fund (WISBF) that pays limited classes of claims. Its largest expense is that it pays the difference between the PTD rate set at the time of injury and the escalated rate per Wis. Stat. Secs. 102.44(1)(am) and 102.44(1)(b). Other major expenses include payments under the second-injury statute, Wis. Stat. Sec. 102.59, and to the minor children of deceased employees. The WISBF is headed for insolvency because of generous increases in the PTD rates over the past several bargaining sessions. The WCAC increased those payments without increasing revenue to the WISBF. Now each side has proposed changes to preserve the solvency of the WISBF.

Labor’s proposals are to increase the fund’s income by requiring self-insured employers and insurers to pay any savings they achieve through rate reductions allowed by the reverse social security disability offset (Wis. Stat. Sec. 102.44(5)) into the WISBF. Labor also proposed to require self-insured employers and insurers pay all increases in the PTD rates with no reimbursement from the WISBF. Business proposed repealing Wis. Stat. Sec. 102.59, the second-injury statute.

The only way the fund can remain solvent is by dealing with the problem that caused it in the first place – increases in the PTD reimbursement payments with no matching increases in the fund’s income. Either those increases have to be suspended or reduced, or employers will have to pay more into the fund. Expect the insurers to agree to pay the PTD increases without getting reimbursement from the WISBF. Then look for worker’s compensation premiums on employers to increase so those payments can be made.

## **E. Health insurance**

Labor proposes a requirement that employers continue the payment of health insurance premiums during periods when a worker is on temporary disability, or to pay the worker the full value of those premiums as compensation above the temporary total disability rate. The payment includes family plan premiums, if those were paid at the time of injury. This is a repeal of *Theuer v. LIRC*, 2001 WI 26, 242 Wis. 2d 29, 624 N.W.2d 110. The business representatives on the WCAC are not likely to accept this without a substantial *quid pro quo* from labor.

## **G. Drug testing**

Management proposes that injured employees be denied indemnity compensation if they fail a post-injury drug test that is administered as part of an employer's "substance abuse testing policy that is reasonable, uniformly enforced, and in place at the time of an accident." Currently, temporary disability can be reduced or denied if an employee violates an employer's drug policy while in the healing period and eligible for light work. Wis. Stat. Sec. 102.43(9)(c).

# **3. LABOR AND INDUSTRY REVIEW COMMISSION DECISIONS**

## **A. MOMENTARY DEVIATIONS ARE COMPENSABLE**

The applicant, a bus driver, left his driver's seat and chased a passenger out of the bus after the passenger spit on him. Almost immediately after exiting the bus, he slipped on ice and ruptured his left Achilles tendon. He crawled back into the bus within 25 seconds and resumed driving within two minutes. The driver's employer denied his worker's compensation claim, asserting that he was not performing services growing out of and incidental to his employment at the time of injury because he substantially deviated from his employment activities. The bus company employer's policy forbade drivers from leaving their busses without a driver for any reason, even to chase a criminal. After hearing, an administrative law judge agreed with the employer and dismissed the application. The driver appealed and the Labor and Industry Review Commission reversed, holding that his deviation was momentary and impulsive. The decision is consistent with *Maahs v. Industrial Comm.* 25 Wis. 2d 240, 130 N.W.2d 845 (1964). In that case, a car wash attendant, while vacuuming the back seat of a sheriff's squad car, opened a box and removed an object he thought was a flashlight. He pushed a button while peering into one end of the object; it exploded and poked out one of the worker's eyes. The court held that momentary deviations that are motivated by curiosity do not constitute intent to stop performing services growing out of an incidental to employment. Commissioner Laurie McCallum dissented from the majority in the bus driver case, writing that the applicant's actions indicated the driver intended to deviate substantially from his employment for his own purposes, i.e. to pursue the passenger until he was caught. The majority responded that the driver's actions were impulsive (reaction

to being spat upon), momentary (30 seconds) and insubstantial (he went no further than three or four yards from the bus before returning to his seat). *Bracey v. Milwaukee Transport Services, Inc.* (WC Claim No. 2010-018481, LIRC February 28, 2012)

## **B. EVEN WALKING CAN CAUSE INJURY**

The applicant, a bus driver, punched a time clock to start work at the bus station, then left the bus station to walk to the designated “relief point” where he would relieve another bus driver. However, he mistakenly went to the wrong relief point. He was jogging down a sidewalk along a street to the correct relief point when he fell and injured himself. The bus company offered two defenses: that the driver was not performing services growing out of and incidental to his employment because, prior to entering a bus, he was not on “pay status.” The LIRC rejected that argument, holding that when an employee engages in employment-related activity, his pay status does not matter for determining whether he was performing services growing out of and incidental to his employment. The bus company also argued that the driver’s fall did not arise out of employment because some medical records indicated the applicant was walking when he fell. The employer argued that walking is a task of everyday living, not a hazard of employment. The LIRC first held that the applicant was jogging, not walking, which is a work activity when done for an employment purpose. The LIRC further held that, even if the applicant had been walking, the activity of ambulating while working can be considered a work activity and a hazard of employment. The question is not what the worker was doing, but its purpose. *Coates v. Milwaukee Transport Services, Inc.* (WC Claim No. 2010-011431, LIRC July 20, 2012)

## **C. APPLICANT CANNOT BE TOTALLY DISABLED DUE TO TWO SURGERIES AT THE SAME TIME**

The applicant had two compensable knee replacement surgeries: the left knee on March 2, 2009, and the right knee on July 27, 2009. For both injuries she reached an end of healing on November 29, 2009. In separate decisions, the ALJ awarded temporary disability for the left knee from March 2, 2009, to November 29, 2009, and for the right knee from July 27, 2009, to November 29, 2009. On appeal, the respondent argued that the order for the left knee should be modified so that the applicant was not receiving double TTD for the July 27, 2009, to November 29, 2009, time period. The LIRC agreed, holding that a worker cannot be more than totally disabled under *Podolak v. United Enterprises* (WC Claim No. 1997-031074, LIRC December 18, 2004). Although the *Podolak* case applied to permanent total disability, the LIRC extended the rule to TTD with this case. *Anderson v. Nestle USA, Inc.* (WC Claim No. 2005-023718, LIRC October 31, 2011)

#### **D. A ONE-WEEK OCCUPATIONAL DISEASE**

In *Toufar v. Harley Davidson Motor Co.* (WC Claim No. 2009-011335, LIRC October 31, 2011), the employee claimed an occupational neck disease arising from one day's worth of employment activity on March 30, 2009. Since being hired in 2000, the employee worked in a position where 75% of his work was automated. He had a pre-hire injury to his neck for which he underwent a one-level fusion in 1995. He had a three-level fusion in 2005 due to complications arising from his pre-existing condition. He did not make a worker's compensation claim for the 2005 surgery. On March 30, 2009, he was transferred to a position where 100% of his work was manual, and where he was required to repetitively bend and twist his neck to inspect parts coming off a conveyor. After four hours in that position, he complained to his supervisor and union steward that he was experiencing pain shooting from his neck into his arms. He continued working in the manual labor position for another three days before being taken off work by his doctor, and he later had a third neck surgery. The employee claimed the work he performed for the one week accelerated the degenerative condition in his neck, making the third surgery the result of a work-related injury.

The employer argued that this was a textbook case of a "manifestation of a pre-existing condition," which is non-compensable under case law. The administrative law judge agreed and dismissed the application, and the employee appealed to the LIRC. The LIRC reversed the ALJ, holding that the repetitive bending and twisting in the employee's new position was a material contributory causative factor in the progression of the worker's degenerative neck disease. It noted that the worker was largely symptom-free before he started the manual work. Under *Gumienny v. County Concrete* (WC Claim No. 2004-017501, LIRC July 11, 2006), there is no minimum period of employment exposure as a matter of law before the exposure can become compensable. Note that this case is on appeal to the circuit court.