

DRAFT
Council on Worker's Compensation
Meeting Minutes
GEF-1 Building
Madison, Wisconsin
October 21, 2015

Members present: Mr. Beiriger, Ms. Bloomingdale, Mr. Buchen, Mr. Ginsburg, Mr. Herzog, Ms. Johnson, Mr. Kent, Ms. Nugent, Mr. O'Malley (Acting Chair), Mr. Redman, Mr. Schwanda, Ms. Seiler, and Ms. Thomas

Excused: Mr. Brand

Staff present: Mr. Krueger, Mr. Moreth and Ms. Smiley

1. Call to Order/Introductions: Mr. O'Malley convened the Worker's Compensation Advisory Council (WCAC) meeting at approximately 10:10 a.m. in accordance with Wisconsin's open meetings law. Mr. O'Malley announced that Ms. Delora Newton was no longer Administrator of the Worker's Compensation Division (WCD). As of October 19, 2015, Ms. Newton was appointed Administrator of the Department of Workforce Development's Division of Vocational Rehabilitation. Mr. Brian Krueger will serve as the acting administrator of the WCD until the appointment of a new administrator. Council members, WCD staff and members of the audience introduced themselves.

2. Approval of Minutes: Mr. Beiriger moved to approve the minutes of the August 25, 2015, meeting. Ms. Bloomingdale seconded the motion. The minutes were unanimously approved without correction.

3. Correspondence: There were no new items of correspondence to the Council received since the last meeting held on August 25, 2015.

4. Letter to Mr. John Metcalf: There was a motion by Mr. Kent for the Council to send a letter to Mr. John Metcalf to congratulate him on his retirement and thank him for his service to the State of Wisconsin and the Council. Mr. Buchen seconded the motion. The motion passed unanimously. WCD staff will prepare the letter for review by members of the Council. The letter will be signed by all Council members.

Mr. Beiriger moved for the members to go into closed caucus. Ms. Bloomingdale seconded the motion. The motion was approved unanimously and the members of the Council went into their separate caucuses at about 10:30 a.m.

The Council reconvened in open session at approximately 1:00 p.m.

5. Labor Proposals: Ms. Bloomingdale discussed the following Labor proposals. Labor proposes to adopt the Department's proposed technical changes including those changes proposed for the Self-Insurers Council and the Labor and Industry Review

Commission (LIRC). In addition, Labor proposes to adopt the fiscal agent proposal. Labor's proposals are as follows:

Labor Proposal No. 1 is to increase the weekly rate for permanent partial disability (PPD) by \$30 in 2016 and an additional \$15 in 2017 since there was no increase in 2014 or 2015.

Labor Proposal No. 2 is to extend supplemental benefits two (2) years to include people injured before January 1, 2003, and set the maximum benefit rate of \$669.00 per week.

Labor Proposal No. 3 is to switch responsibility for future supplemental benefits payments from the Work Injury Supplemental Benefit Fund (WISBF) to the WCD's Operating Fund, with carriers to reimburse the WCD by proportion. Labor is dropping this proposal in light of the Budget Bill.

Labor Proposal No. 4 is to index the rate for permanent total disability (PTD) or continuous temporary total disability (TTD) more than 24 months after the injury date to the rate in effect at the time the benefit accrues for periods more than six years after the injury date.

Labor Proposal No. 5 is to index the rate for PPD after 200 weeks to the same proportion of the maximum PPD rate in effect at the time beginning with the 201st week of PPD benefit. Labor is willing to drop this proposal at this time.

Labor Proposal No. 6 is to reinstate s. 102.43(5) (c), Stats., which sunsetted on April 30, 2014. Under this provision, there will be no reduction in retraining benefits for part-time wages up to 24 hours per week during periods of instruction.

Labor Proposal No. 7 is to allow administrative law judges to issue prospective orders directing insurance carriers or self-insured employers to pay for a future course of vocational retraining.

Labor Proposal No. 8 is to provide additional benefits to the injured worker if the employer fails to maintain group health care coverage for the injured employee during the period of temporary disability. In the spirit of reaching an agreement, Labor is willing to drop this proposal this year but it remains a very important issue.

Labor Proposal No. 9 is to limit the price of a prescription drug to the pharmacy fee schedule if the drug is dispensed by the provider without any time limit for dispensing.

Labor Proposal No. 10 is to set a flat rate of \$26 per request for records provided in electronic format, regardless of the number of pages.

Labor Proposal No. 11 is to provide funding for one (1) position at the Department of Justice for the investigation and prosecution of fraud committed by employees, employers, insurance carriers, or providers.

Regarding the issue of medical cost containment, Labor also proposed a pilot study for an alternate resolution process. This would be similar to a program in Minnesota. The injured workers would use a group of doctors and health care professionals selected jointly by labor and management. The pilot program would be limited to an association of employers that are awarded highway contracts by the Department of Transportation. The proposal is for a pilot study for a period of five (5) years; there would be a sunset provision. The data would be reviewed by the Council on a yearly basis. The WCD would conduct a patient/worker satisfaction survey on a regular basis. Participation in the program would be voluntary on behalf of the employer and the bargaining unit representative. This would not be a self-funded program; the employers would utilize standard insurance.

6. Management Proposals: Mr. Beiriger stated the Management proposal for medical cost containment was withdrawn at this time. Management has a continued interest in the control of medical costs. However, since it is late October, such a proposal is not ready for this session and will require more time to be developed. Management agrees to adopt the Department's proposed technical changes including changes proposed by the Self-Insurers Council and LIRC. Management also agrees to adopt the fiscal agent proposal. Management's proposals are as follows:

Management Proposal No. 1 is to reduce the statute of limitations for traumatic injuries from 12 years to three (3) years excepting those injuries caused by exposure to a toxic or hazardous substance.

Management Proposal No. 2 is to apportion permanent disability based on causation. This would be based on a doctor's determination of the percentage of permanent disability caused by the direct result of a work injury and the percentage attributable to other factors both before and after the injury, including prior injuries.

Management Proposal No. 3 is to eliminate the minimum permanent partial disability ratings in the Wisconsin Administrative Code. Mr. O'Malley noted the WCD is in the process of updating Chapter DWD 80.32 of the Administrative Code and is drafting a questionnaire for physicians. Management proposed that all minimums be eliminated.

Management Proposal No. 4 is to limit the time that medications may be dispensed outside of a licensed pharmacy to a period no greater than 15 days from the injury date. Refills of medications dispensed more than 15 days after the injury date would not be reimbursed. The rate of reimbursement and dispensing fee would be subject to the pharmacy fee schedule.

Management Proposal No. 5 is to ensure the average wholesale price of a prescription drug on the date the drug is dispensed under s. 102.425(3)(a)1, Stats., is that amount quoted in the Drug Topics Red Book or its successor in a nationally recognized pricing resource.

Management Proposal No. 6 is to set a fixed rate of \$10 per request for medical records in an electronic format. In addition, final medical reports should be provided on a timely basis at a maximum charge of \$100.00.

Management Proposal No. 7 is to eliminate wage escalation. Average weekly wage should be based on actual earnings at the time of injury.

Management Proposal No. 8 is to establish a rebuttable presumption that, when an individual receives social security retirement benefits, he or she is no longer available for work and no longer entitled to disability benefits. Management is willing to defer action on this proposal for this session.

Management Proposal No. 9 is to eliminate a death benefit in PTD claims when the death is unrelated to the occupational illness or injury. Management is willing to defer this proposal for this session.

Management Proposal No. 10 is to prohibit the recovery of benefits when the employee violates the employer's drug and/or alcohol policy. This provision should be accompanied by the repeal of the 15 percent reduction for employee misconduct.

Management Proposal No. 11 is to deny benefits for temporary disability if the employee is released for light duty work and is subsequently terminated for good cause as defined under Unemployment Insurance standards. Section 102.35(3) would remain in effect (the penalty provision against an employer who refuses to rehire or terminates an injured employee without good cause).

Management Proposal No. 12 is that for establishing a hearing loss claim, the extent of loss must be measured by a hearing test most proximate to the date of the employee's removal from a "noisy work area" as defined by OSHA standards, whether the test is before or after such date and whether the employee is removed by reassignment, quit, termination, or retirement.

There was a motion by Mr. Beiriger for the Council to go into closed caucus, seconded by Ms. Bloomingdale. The motion was unanimously approved. The Council went into closed caucus at approximately 1:35 p.m.

The Council reconvened in open session at approximately 3:30 p.m.

7. Discussion on Labor & Management Proposals.

Ms. Bloomingdale responded with Labor's position on the Management proposals.

The reduction of the statute of limitations from 12 to three (3) years for traumatic injuries will have a very negative effect on injured employees, especially for injured workers who have an injury that does not require immediate surgery. Employees' group health insurance would reject the claim if it was past the statute of limitations. If this happens the cost for the claim would be shifted to the public and taxpayers or the person would not get the care they need. A person who has a one (1) back fusion will most likely need another back surgery and this will be thrown out. Changing the statute of limitations could encourage protective behavior like doctors performing premature surgeries. Ms. Bloomingdale requested Management to take another look at this proposal and come back with something else.

Management proposal No. 2 for apportionment abandons the "as is rule". This will increase the rate of litigation and it is impossible for doctors to divide up human beings by their body parts and this could end up having more independent medical examinations that will increase costs to the system.

For Management proposal No. 3, Labor will be proposing to reconvene the medical advisory committee to review current PPD minimums and where appropriate to revise or update the minimums to meet changes in technology.

Labor will wait on Management proposal No. 4.

Labor is in agreement with Management proposals No. 5 and 6.

Labor is struggling with Management proposal No. 7 concerning wage escalation because there is a problem with more people working at part-time jobs. There is a process now for escalating wages for part-time employees who have multiple jobs. Ms. Bloomingdale gave an example of a highly paid building trades worker with a part-time job at Home Depot for five (5) hours per week at wages of \$8 per hour. If injured on the part-time job and not able to work at the full time job the employee would only receive compensation of \$26 per week without expansion of the wage. Mr. Beiriger explained the counter side to this situation is the part-time employer would be responsible to replace \$1,000 per week based on five (5) hours of employment.

Management proposals No. 8 and 9 have been dropped.

Management proposal No. 10 about the drug and alcohol policy is a big issue for Labor. This proposal takes away the no fault aspect of the worker's compensation law in Wisconsin. We want to get away from the idea of penalizing someone who violated a drug or alcohol standard set by an employer who was injured through no fault of their

own. Labor would like to propose increasing the maximum amount from 15 percent to 25 percent and increase the maximum dollar amount to \$25,000 for violations of ss. 102.57 and 102.58, Stats.

To address Management's concerns about an employee on light duty being immune from termination, Labor will agree if a worker on light duty is terminated, it would be the employer's burden of proof. The UI standard is arbitrary and it was recently changed and could be changed at any point. Labor proposes that the language from the Boynton Cab case should be inserted in s. 102.43 (9), Stats. The following language to be inserted, "so the intended meaning of the term misconduct is limited to conduct evincing such willful and wonton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior of which the employer has the right to expect his employee or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design or show an intentional and substantial disregard of the employer's interest or the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not to be deemed misconduct." Labor also suggest that the penalties under s. 102.35 (2) and (3), Stats., be made more meaningful by increasing the fine up to \$10,000 and up to ten years of lost wages.

Mr. Beiriger commented on Labor's proposals.

Management is still looking at the numbers for Labor proposals No. 1 and 2. Management may end up with different numbers and is open minded to addressing this as part of a larger agreement.

Labor proposal No. 3 was covered in the Budget Bill.

Labor proposal No. 4 on indexing PTD will be difficult to address because it will result in increased costs to the system and there is no cost offset involved like realizing cost savings through a medical fee schedule.

Labor proposal No. 5 was dropped.

Labor proposal No. 6 was looked at before.

Labor proposal No. 7 is more of a concern. Ms. Peterson stated from the employer's standpoint that it is hard to return employees to work after they have been injured and that clarification is needed that retraining would be entertained in the future absent an offer of suitable employment.

For medical provider dispensing, Management is close to having an agreement.

Management basically agrees with the proposal on limiting fees for electronic medical records.

Management is basically fine with funding the fraud position with the Department of Justice.

The Labor proposal for the limited study has potential to be a cost containment measure. Management would like to have an expanded scope for this. Management also acknowledges the considerable work by the Labor members in developing this proposal.

There was a motion by Mr. Redman for the Council to go into closed caucus, seconded by Mr. Beiriger. The motion was unanimously approved. The Council went into closed caucus at approximately 4:05 p.m.

The Council reconvened in open session at approximately 6:45 p m.

Mr. Beiriger provided a status update on the progress of deliberations by Management and comments concerning Labor's proposals.

Management offered as part of a total package to raise the PPD rates \$10 for 2016 and \$10 for 2017.

Management would agree to Labor's proposal for a two (2) year extension in the eligible date for supplemental benefits up to January 1, 2003, with the maximum benefit rate increased to \$669 per week as part of the overall package.

For the proposal of indexing PTD, Management is not interested and rejects this because this session there is no funding mechanism due to medical costs.

Labor proposal No. 5 was dropped.

Management is agreeable to Labor proposal No. 6 and making this a permanent feature of the law as part of an overall deal.

Management is agreeable to Labor proposal No. 7 but the language needs to be clarified for this. Ms. Johnson stated there is current language in the statute regarding interlocutory orders and orders for prospective medical care and the language for this proposal could be added to that section.

Labor proposal No. 8 regarding continuation of health care was dropped.

Management has withdrawn the 15 day dispensing limitation period from its proposal and that prescription drugs can be dispensed by the provider subject to the pharmacy fee schedule and dispensing fee.

Labor agreed to Management proposal on the \$10 fee for electronic records and limiting the fee for a final medical report to \$100.

Management agreed to the funding of the position for investigation and prosecution of fraud at the Department of Justice.

For Labor's proposal about the pilot study, Management is still trying to figure out how to do it.

Item number one (1) on the proposal list for Management is to reduce the statute of limitations from 12 to 3 years. A handout with a bar graph covering the statute of limitations in all of the states was distributed. Wisconsin is the only state with a 12 year statute of limitations. Maine, Minnesota and Utah are at six (6) years, Delaware and Hawaii are at five (5) years and Massachusetts is at four (4) years. About two-thirds of the states are at two (2) years. Management's proposal is to get more in line with other states.

Management proposal No. 2 is for the apportionment issue. Medical science is at a point where it can recognize the difference between an injury that was sustained with scar tissue and an injury that is recent subject to a worker's compensation claim. Language used in an apportionment statute in California was distributed. Ms. Johnson commented that doctors would get an employee's past medical records, diagnostics, and discussions with patients and be able to compare their condition before and after the injury. If this proposal is enacted the same thing will occur if there are disagreements based on medical opinions. Employers will still be accepting employees "as is", but will only have to pay for permanent disability based on the extent the employees were further damaged by the work-place injury. Ms. Johnson raised an example of an employee who had automobile and motorcycle accidents resulting in knee injuries with plates, screws and pins, and following a work-related injury with a torn meniscus, the employer was required to pay 20 per cent PPD when no more than 5-7 per cent PPD was due to the work-related injury.

For Management proposal No. 3 there is a need to revisit the minimum PPD ratings. These need to be restudied.

Management proposal No. 4 concerning physician dispensing, the 15 day limit was dropped but we agree the current pharmacy fee schedule and dispensing fee should apply.

For Management proposal No. 5, the intent is that at such time as there is no resource for determining the average wholesale price, we need to be able to find another resource. It is meant to give some leeway to the Department to look at options for pharmacy pricing because there may be cost limitations. The idea is that we need to have a back-up plan for the Red Book if it is no longer available.

Management proposal No. 7 is based on it being problematic for one employer to be responsible for lost earnings someplace else. In the short term we may need to find a way to fund a benefit that we do not want employers to pay for but we also do not want to leave an employee without indemnity for the other 20 hours of work per week. The Work Injury Supplemental Benefit Fund (WISBF) is a resource that is available that we may look at to cover all or a portion of benefits until such time as it can be addressed as a larger issue. We do not know the status of the WISBF at this time and there are other payments made from it other than supplemental benefits. Payments from the WISBF could be a creative way to address this proposal. Ms. Bloomingdale expressed Labor's willingness to work with Management on exploring this option.

Management proposals No. 8 and 9 were dropped.

For Management proposal No. 11 some ideas were discussed regarding adopting language in the Boynton Cab case and increasing penalties. This is moving in the wrong direction for Management. The concern is that two (2) employees, one with a work-related injury and the other with no work-related injury, are treated differently. Ms. Bloomingdale stated that Labor did not want to open the floodgates to have unscrupulous employers place employees on light duty and then terminate them and be given a financial incentive to do this.

Management proposal No. 12 pertaining to hearing tests for hearing loss cases has been withdrawn.

There was a motion by Mr. Beiriger for the Council to go into closed caucus, seconded by Mr. Redman. The motion was unanimously approved. The Council went into closed caucus at approximately 7:30 p.m.

The Council reconvened in open session at approximately 10:30 p.m.

8. Agreed Upon Bill: In addition to the proposals from the Department, Self-Insurers Council, LIRC, and the fiscal agent proposal, the Council reached agreement on the following provisions to be included in this session's bill. Mr. Beiriger presented the additional provisions that were approved.

The statute of limitations for traumatic injuries will be reduced from 12 years to six (6) years.

Apportionment of permanent disability will be based on causation. Any physician who prepares a report on the issue of permanent disability shall address the issue of causation of the permanent disability that includes a determination of the approximate percentage of permanent disability caused by the direct result of the work-related injury with the percentage attributable to other factors before and after the injury, including prior injuries. An employee who claims a work-related injury shall, upon request, disclose all previous permanent disabilities, physical impairments, and the records needed to make an apportionment determination. The intention is for the employer to be responsible for the extent of the injuries that were caused from that work. There will be traumatic and occupational injuries, long term exposures, repetitive motion et.al. Statutory language will need to be developed to cover this.

The Department will create a medical advisory committee to review the minimum PPD ratings in DWD Chapter 80.32 of the Administrative Code. This committee will regularly review and update the minimum ratings as warranted. This committee will report to the Council.

Reimbursement for medications dispensed outside of a licensed pharmacy shall be limited to the pharmacy fee schedule and the existing dispensing fee.

Under s. 102.425(3) (a) 1., the Department has authority to locate and utilize a successor to the Drug Topics Red Book if necessary.

The cost for medical records in an electronic format shall be set at a fixed rate of \$10.00 per request. A final medical report must be provided on a timely basis at a maximum charge of \$100.00.

On the issue of wage escalation, the Department shall investigate the availability of funds in the Work Injury Supplemental Benefit Fund (WISBF) and the possibility of shifting payment for some of these benefits to the WISBF in claims where wage has been escalated. The Department shall investigate the potential costs of such a measure. The Department will report its findings to the Council.

There shall be no recovery of indemnity benefits when the employee violates the employer's drug and/or alcohol policy and where there is direct causation between violating the drug and/or alcohol policy and the workplace injury. The language, "and causal to the injury" is added at the end of the first sentence to Management proposal No.10.

Temporary Total Disability (TTD) will be denied when an employee is released to light duty work and is subsequently terminated for good cause based on UI standards.

The Permanent Partial Disability (PPD) rate will increase \$20.00 in 2016 and \$20.00 in 2017.

The supplemental benefits will be extended for two (2) years for injuries prior to January 1, 2003, and the maximum supplemental benefit rate will be set at \$669.00 per week.

There will be no reduction in retraining benefits for employees earning part-time wages up to 24 hours per week during periods of instruction. There will be no sunset on this provision.

Administrative law judges will have the authority to issue prospective orders for vocational rehabilitation retraining benefits for future courses of instruction or training.

The Department shall fund one (1) Department of Justice (DOJ) position to investigate and prosecute fraud committed by employees, employers, insurance carriers and providers.

The Department's proposals, including technical changes to the Act, the Self-Insurers Council, and LIRC, shall be adopted. The proposed extra funding for a mainframe update of the DWD computer system is adopted. In addition, the fiscal agent proposal is adopted.

While not part of the agreed-upon bill, Labor members will draft proposed language regarding the pilot study for alternate dispute resolution previously discussed and will provide additional information about the program and how it works in Minnesota.

Ms. Bloomingdale expressed appreciation for everyone's dedication and commitment to each other, to the Council process and to the worker's compensation system. Ms. Bloomingdale also expressed thanks to the Management members of the Council, DWD staff and everyone who has been helping along in the process. She stated that the members representing Labor will be looking forward to joint support by Management of the Agreed Upon Bill in the legislature. We have a mutual understanding that we should not go outside this process and we will make our best efforts to educate the legislature about this process and the value of this Agreed Upon Bill.

Mr. Beiriger commented that everyone on the Council has been focusing on how to make good public policy and our charge is to provide good counsel to the legislature regarding policy changes for worker's compensation. Mr. Beiriger stated that this Agreed Upon Bill is a reflection of the Council's best efforts and that it is a good bill. He expressed thanks for sticking through the lengthy process and there is an end product everyone can support.

There was a motion by Mr. Beiriger to accept the proposals as presented by Management and as agreed to by Labor as the agreed upon bill for this session. Seconded by Ms. Bloomingdale. The motion was unanimously approved.

9. Adjournment: Motion by Mr. Beiriger, seconded by Ms. Bloomingdale to adjourn. The motion carried unanimously and the meeting was adjourned at approximately 10:50 p.m.