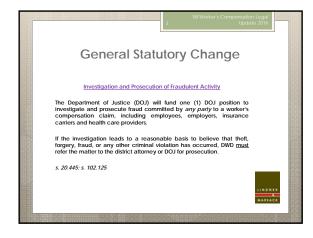


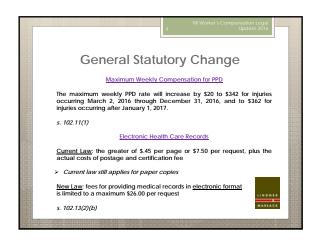
2015 Wisconsin Act 180

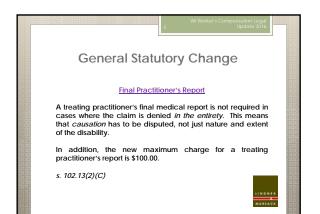
Governor Walker signed 2015 Assembly Bill 724 on February 29, 2016

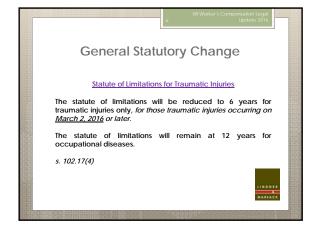
The Bill was published on March 1, 2016

2015 Wisconsin Act 180 became *effective* March 2, 2016









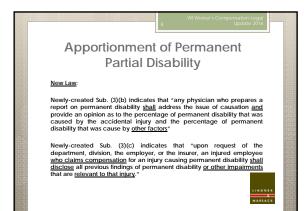


 Former Law:
 \$102.175 Apportionment of Liability

 Sub. (1) indicates that apportionment of benefits can occur between two accidental injuries
 There is no current law that addresses apportionment of permanent disability between one accidental injury and "other factors"

New Law:

Newly-created Sub. (3)(a) reads that "If a report from a physician establishes that an injured Employee has incurred permanent disability, but that a percentage of disability was due to the accidental injury sustained in the course of employment and a percentage of that disability was caused <u>by other factors</u>, <u>whether occurring before or after the time of injury</u>, the Employer is only liable for the percentage of permanent disability cause by the accidental injury."

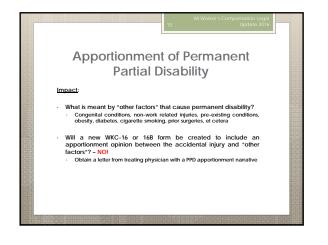


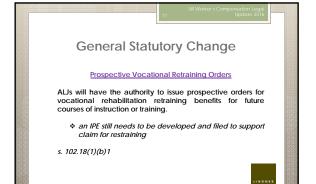
Apportionment of Permanent Partial Disability

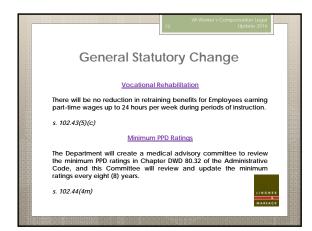
Impact:

Only applies to traumatic injury claims, not occupational; may see more occupational claims

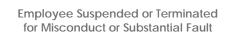
- Does not overrule the "as is" rules on legal causation Under the "as is" rule, a pre-existing condition can be a compensable work injury if precipitated, aggravated and accelerated beyond normal progression (*Uewellyh*). The new apportionment statute merely addresses functional PPD, not apportionment of causation.
- Effective Date: DWD could not agree upon whether this statutory change applies to dates of injury of March 2, 2016 or later, or if it applies to all dates of injury prior to March 2, 2016. If this statutory change is procedural, it can be applied retroactively to all dates of injury.
 - injury. If this statutory change is <u>substantive</u>, it can only apply to dates of injury of March 2, 2016 and later.
 - Arguably, the statutory change is <u>procedural</u> as it only affects the enforcement of a right (right to PPD). Arguably, it does not take away a substantive right to claim PPD.











Existing Law: §102.43(9)(a) through (d) - Brakebush Bros. case

 (c) TID may be terminated if the EE is suspended or terminated because they violate an Employer's written and regularly enforced drug or alcohol policy (EE must fail the 2nd drug test after coming back to work)

 (d) TID may be terminated if the EE has been convicted of a crime, is incarcerated, and is not available to return to restricted work placement





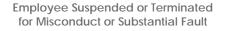
Employee Suspended or Terminated for Misconduct or Substantial Fault

(c) Conviction of a crime or other offense subject to civil forfeiture if the conviction makes it impossible for the Employee to perform their job duties

(d) One or more threats or acts of harassment, assault, or other physical violence instigated by an Employee at the workplace

(e) Absenteeism by an Employee on more than 2 occasions within the 120-day period before the date of the Employee's termination, unless otherwise specified by the Employer in a Manual that Employee received and signed tof, but only if the Employee does not provide their Employer both "notice" and "one or more valid reasons" for absenteeism

Excessive tardiness by an Employee in violation of a policy that Employer communicated to Employee, but only if the Employee does not provide their Employer both "notice" and "one or more valid reasons" for tardiness



(f) Employee falsifies business records of Employer

(g) A willful and deliberate violation of a written and uniformly applied standard or regulation of the federal government or a state or tribal government by an Employee of an Employer that is licensed or certified by a governmental agency, for which violation would cause the Employer to be sanctioned or have its license or certification suspended



Employee Suspended or Terminated for Misconduct or Substantial Fault

<u>IWO</u>: If the Commission finds that none of the specific incidents of misconduct apply from s.108.04(5)(a) through (g), then the Commission next determines whether the Employee's actions constitute "misconduct" as originally defined in the *Boynton Cab* case, which is the now the general definition found is s.108.04(5), as follows:

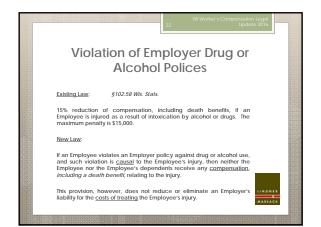
"<u>Misconduct</u>" means one or more actions or conduct evincing such <u>willful or wanton disregard</u> of an Employer's interests as found in (1) deliberate violations or disregard of standards of behavior which an Employer has a right to expect of his or her Employees, gr (2) in carelessness or negligence of such degree or recurrence as to manifest culpability, wronglul intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an Employer's interests, or of an Employee's duties and obligations to his or her employer.

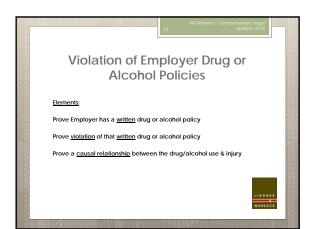


Employee Suspended or Terminated for Misconduct or Substantial Fault

Impact on Claims Handling:

- <u>Effective Date</u>? DWD argues that this statutory change applies only to dates of injury of March 2, 2016 or later.
 Defense coursel argues that as long as the misconduct resulting in termination occurs after March 2, 2016, then TID can be discontinued, regardless of the date of injury
- "Juby
 "Jub only is deniable, but not liability for PPD or medical expenses for treatment
- treatment
- UC ALJ's decision is not admissible in workers' compensation matter, but the Employee's testimony under oath at UC Hearing can be used at the work comp hearing, possibly to impeach Employee's conflicting testimony
- UC ALJ finds "no misconduct" do you pay back TTD benefits and continue to pay ongoing TTD benefits? – NO! We get another shot to prove "misconduct" at the workers' compensation Hearing





Violation of Employer Drug or Alcohol Polices Impact on Claims Handling: • <u>Compensation is deniable, but not medical expenses for treatment</u> • <u>Compensation includes TD, MPD and death benefit</u> • <u>Effective Dates</u>? DWD indicates that this statutory change applies only to dates of injury of March 2, 2016 or later, given that the injury has to be cusal • Retain experts to prove causal relationship?

- · What does "causal" mean?
- Does every Employer now require a written policy?
- Must every Employer perform drug testing after every injury?



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Employee Suspended or Terminated for Misconduct or Substantial Fault

pact on Claims Handling

Im

- · What should be included in an Employer's drug and alcohol policy?
- Policy should be in writing
- · What is the prohibited conduct?
- · Which testing methods will be utilized?
- How will the sample be collected?
 What is the disciplinary process for violation?

CASE LAW UPDATE

Tolling Statute of Limitations Schmidt v. Superior Die Set Corp. (WC Claim No.: 1979-037984, LIRC June 25, 2015)

The Commission affirmed the Department's policy that allows an Applicant to file Hearing Applications to toll the statute of limitations and place the matter in "not ready for Hearing" status until the Applicant is ready for Hearing.

The Circuit Court affirmed the Commission on March 8, 2016.

 With the reduction of SoL for traumatic injuries to six (6) years, may see increase in filed Hearing Applications

CASE LAW UPDATE

Termination for Substantial Fault (UC Decision)

Operton worked as a cashier at Walgreens for 20 months. During this time, see testified that she processed 80,000 transactions, but was terminated for only 8 "cash handhing errors" (0001% of all transactions). Walgreens argued against an award of UC benefits based on "substantial lault"; *i.e.*, that her cash handling errors "violated a reasonable company policy against excessive cash discrepancies." The ALJ agreed with Walgreens and denied UC benefits. The Commission affirmed.

On appeal, the decision was reversed. The Court held that "one or more inadvertent errors" are specifically excluded from the definition of "substantial fault" under \$108.04(5g)(3). Operton's actions were not intentional, or careless or negligent enough to establish wrongful intent. Operfor was awarded UC benefits.

CASE LAW UPDATE

Reasonableness of Fee Dispute Brantley v. Kenosha County (WC Claim No.: 2014-008087, LIRC April 11, 2016)

On appeal to LIRC, Respondents argued that Dr. Ahuja's charges for cervical spine surgery were not reasonable. In their brief, Respondents coursel argued that Dr. Ahuja's \$167.333 (bill was unceasonably high, clinig an audit by Rising Medical Solutions (a DVID-approved database) that found his bills were 203% more than the reasonable amount.

DWD 80.72 establishes the procedures and requirements for resolving a dispute under Wis. Stat. s. 102.16(2).

CASE LAW UPDATE

Liability for Payment of "Written-Off" Medical Expenses Larry v. Harley Davidson Motor Co Group LLC (WC Claim No.: 2014-031361, LIRC May 23, 2016)

In <u>Hoefs v. Midwest Hotel</u>, WC Claim No. 1999-029146 (LIRC October 21, 2003) the Commission held that if a medical provider accepts payment from a Health Insurer other than the workers' compensation insurer, the Commission <u>WILL NOT</u> require the workers' compensation insurer to pay to the provider those contractually written-off amounts.

In Morson v. Hevde Health System, Inc., WC Claim No. 2005-009475 (LIRC June 18, 2008), the Commission held that if the charges were written-off for other reasons (most commonly because they are uncollectible because Employee cannot pay), the Commission WILL require the workers' compensation insurer to pay to the provider those written-off amounts.

CASE LAW UPDATE

Liability for Payment of "Written-Off" Medical Expenses - continued Larry v. Harley Davidson Motor Co Group ILC (WC Claim No.: 2014-031361, URC May 23, 2016)

In <u>Kuehne v. Air Products Chemicals</u>, WC Claim No. 2011-010074 (LIRC April 30, 2012), the Commission held that if the medical provider opted to pursue an injured worker for written-off portions (i.e., balance-bill the patient), the Commission will <u>HOLD 07E1</u> the issue of medical expenses for future attempts by the provider of pursue those written-off expenses.

In this decision, the Commission modified the ALJ's Order to reflect that *IF* the provider pursued the Applicant for the written-off charges, there would be an resolve whether the Respondent would be liable for the charges. Furthermore, the Respondent would be liable for the charges. Furthermore, the Respondent would not be precluded from challenging those written-off express as being unreasonable, or for any other treason.

 Likely an ALJ will order resolution through the Health Cost Dispute Resolution Process. DWD 80.72; Wis. Stat. s. 102.16(2)(b)

CASE LAW UPDATE

The language of Wis. Stat. ss. 102.16 and 102.18, along with DWD 80.72, are attached for reference

