


2016 Wisconsin Worker's Compensation Legal Update

Wisconsin Worker's Compensation Forum, Inc.
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WI Worker's Compensation Legal Update 2016

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



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General Statutory Change

[Investigation and Prosecution of Fraudulent Activity](#)

The Department of Justice (DOJ) will fund one (1) DOJ position to investigate and prosecute fraud committed by *any party* to a worker's compensation claim, including employees, employers, insurance carriers and health care providers.

If the investigation leads to a reasonable basis to believe that theft, forgery, fraud, or any other criminal violation has occurred, DWD must refer the matter to the district attorney or DOJ for prosecution.

s. 20.445; s. 102.125



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General Statutory Change

[Maximum Weekly Compensation for PPD](#)

The maximum weekly PPD rate will increase by \$20 to \$342 for injuries occurring March 2, 2016 through December 31, 2016, and to \$362 for injuries occurring after January 1, 2017.

s. 102.11(1)


[Electronic Health Care Records](#)

Current Law: the greater of \$.45 per page or \$7.50 per request, plus the actual costs of postage and certification fee

➤ *Current law still applies for paper copies*

New Law: fees for providing medical records in electronic format is limited to a maximum \$26.00 per request

s. 102.13(2)(b)



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General Statutory Change

[Final Practitioner's Report](#)

A treating practitioner's final medical report is not required in cases where the claim is denied *in the entirety*. This means that *causation* has to be disputed, not just nature and extent of the disability.

In addition, the new maximum charge for a treating practitioner's report is \$100.00.

s. 102.13(2)(C)



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General Statutory Change

[Statute of Limitations for Traumatic Injuries](#)

The statute of limitations will be reduced to 6 years for traumatic injuries only, *for those traumatic injuries occurring on March 2, 2016 or later.*

The statute of limitations will remain at 12 years for occupational diseases.

s. 102.17(4)



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Apportionment of Permanent Partial Disability

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 by other factors, whether occurring before or after the time of injury, the Employer is only liable for the percentage of permanent disability cause by the accidental injury."




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Apportionment of Permanent Partial Disability

New Law:

Newly-created Sub. (3)(b) indicates that "any physician who prepares a report on permanent disability shall address the issue of causation and provide an opinion as to the percentage of permanent disability that was caused by the accidental injury and the percentage of permanent disability that was cause by other factors"

Newly-created Sub. (3)(c) indicates that "upon request of the department, division, the employer, or the insurer, an injured employee who claims compensation for an injury causing permanent disability shall disclose all previous findings of permanent disability or other impairments that are relevant to that injury."




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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 (*Leswellly*). 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.
 - If this statutory change is substantive, it can only apply to dates of injury of March 2, 2016 and later.
- Arguably, the statutory change is procedural as it only affects the enforcement of a right (right to PPD). Arguably, it does not take away a substantive right to claim PPD.



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Apportionment of Permanent Partial Disability

Impact

- What is meant by "other factors" that cause permanent disability?
 - Congenital conditions, non-work related injuries, pre-existing conditions, obesity, diabetes, cigarette smoking, prior surgeries, et cetera
- Will a new WKC-16 or 16B form be created to include an apportionment opinion between the accidental injury and "other factors"? - **NO!**
 - Obtain a letter from treating physician with a PPD apportionment narrative

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General Statutory Change

Prospective Vocational Retraining Orders

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

❖ *an IPE still needs to be developed and filed to support claim for retraining*

s. 102.18(1)(b)1



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General Statutory Change

Vocational Rehabilitation


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

s. 102.43(5)(c)

Minimum PPD Ratings

The Department will create a medical advisory committee to review the minimum PPD ratings in Chapter DWD 80.32 of the Administrative Code, and this Committee will review and update the minimum ratings every eight (8) years.

s. 102.44(4m)



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Employee Suspended or Terminated for Misconduct or Substantial Fault

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

The *Brakebush Bros.* case stands for the proposition that if the *injury* is the cause of the wage loss, not the termination from employment, then the Insurer still owes TTD benefits while the Employee is in a healing period

Wis. Act 172 in 2005 created four (4) statutory exceptions to the *Brakebush* rule, which are codified in s. 102.43(9)(a) through (d), as follows:

- (a) TTD may be terminated if the EE, without reasonable cause, refuses a good-faith offer of employment w/n their limitations
- (b) TTD may be terminated if the EE is suspended or terminated for the alleged commission of a crime "substantially related to that employment" and the EE is charged with that crime




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Employee Suspended or Terminated for Misconduct or Substantial Fault

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

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



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Employee Suspended or Terminated for Misconduct or Substantial Fault

Addition to Existing Law: §102.43(9)(e) Wis. Stats. is a newly-created 5th exception to the *Brakebush Bros.* rule

§102.43(9) indicates that "Temporary disability shall be payable and include the period during which an Employee could return to a restricted type of work during the healing period, unless any of the following apply:

- sub. (e): The Employee's employment with the Employer has been suspended or terminated due to misconduct, as defined in s. 108.04(5), or substantial fault, as defined in s. 108.04(5g)(a), by the Employee connected with the Employee's work."
- Definitions for "misconduct" and "substantial fault" are adopted from the Unemployment Compensation Act



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Employee Suspended or Terminated for Misconduct or Substantial Fault

In Unemployment Compensation Hearings, the Commission follows a three-step approach in analyzing the Employee's discharge:

ONE: The Commission first determines whether the Employee was discharged for "misconduct" by engaging in any actions enumerated in s. 108.04(5)(a) through (g), as follows:

(a) Violation of an Employer's reasonable written policy concerning alcohol or drug use

(b) Theft of an Employer's property or services with intent to deprive the Employer of property or services permanently, or theft of currency of any value, or felonious conduct connect with employment, or intentional or negligent conduct that causes substantial damage to Employer's property



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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 for*, 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




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Employee Suspended or Terminated for Misconduct or Substantial Fault

(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




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Employee Suspended or Terminated for Misconduct or Substantial Fault

TWO: 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 in s.108.04(5), as follows:

"Misconduct" means one or more actions or conduct evincing such willful or wanton disregard 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, or (2) in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful 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.




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Employee Suspended or Terminated for Misconduct or Substantial Fault

THREE: If the Commission finds that none of the specific incidents of misconduct apply from s.108.04(5)(a) through (g), and the incident does not meet the general definition of "misconduct" under *Boynton Cab*, then the Commission finally determines whether the discharge was for "substantial fault" as defined in s.108.04(5g), as follows:

"Substantial Fault" includes those acts or omissions of an Employee over which the Employee exercised reasonable control and which violate reasonable requirements of the Employee's Employer, *but does not include any of the following:*

- 1) One or more minor infractions of rules unless an infraction is repeated after the Employer warns the Employee about the infraction
- 2) One or more inadvertent errors made by the Employee
- 3) Any failure of the Employee to perform work because of insufficient skill, ability or equipment




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Employee Suspended or Terminated for Misconduct or Substantial Fault

Impact on Claims Handling:

- **Effective Date?** – DWD argues that this statutory change applies only to dates of injury of March 2, 2016 or later.
 - *Defense counsel* argues that as long as the misconduct resulting in termination occurs *after* March 2, 2016, then ITD can be discontinued, regardless of the date of injury
- **ITD** only is deniable, but not liability for PPD or medical expenses for 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 ITD benefits and continue to pay ongoing ITD benefits? – **NO! We get another shot to prove "misconduct" at the workers' compensation Hearing**



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Violation of Employer Drug or Alcohol Policies


Existing Law: §102.58 Wis. Stats.

15% reduction of compensation, including death benefits, if an Employee is injured as a result of intoxication by alcohol or drugs. The maximum penalty is \$15,000.

New Law:

If an Employee violates an Employer policy against drug or alcohol use, and such violation is causal to the Employee's injury, then neither the Employee nor the Employee's dependents receive any compensation, including a death benefit, relating to the injury.

This provision, however, does not reduce or eliminate an Employer's liability for the costs of treating the Employee's injury.



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Violation of Employer Drug or Alcohol Policies

Elements:

Prove Employer has a written drug or alcohol policy

Prove violation of that written drug or alcohol policy

Prove a causal relationship between the drug/alcohol use & injury




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Violation of Employer Drug or Alcohol Policies

Impact on Claims Handling:

- Compensation is deniable, but not medical expenses for treatment
 - Compensation includes TD, PPD and death benefits
- **Effective Date?** 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 causal
- 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

Impact on Claims Handling:

- 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?

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CASE LAW UPDATE

Tolling Statute of Limitations
Schmidt v. Superior Die Set Corp. (WC Claim No.: 1979-037984, URC 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

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CASE LAW UPDATE

Termination for Substantial Fault (UC Decision)
Operton v. LIRC, 2016 WI APP 27, April 14, 2016

Operton worked as a cashier at Walgreens for 20 months. During this time, she testified that she processed 80,000 transactions, but was terminated for only 8 "cash handling errors" (.0001% of all transactions). Walgreens argued against an award of UC benefits based on "substantial fault"; 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 s.108.04(5g)(a). Operton's actions were not intentional, or careless or negligent enough to establish wrongful intent. Operton was awarded UC benefits.

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CASE LAW UPDATE

Reasonableness of Fee Dispute
Bardley 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 counsel argued that Dr. Ahuja's \$167,363.10 bill was unreasonably high, citing an audit by Rising Medical Solutions (a DWD-approved database) that found his bills were 203% more than the reasonable amount.

Based upon the audit information, the Commission found that there was a reasonable dispute about the reasonableness of Dr. Ahuja's bills. The Commission concluded that the best practice was to resolve the dispute through the Health Cost Dispute Resolution Process, and directed the self-insured employer to notify Dr. Ahuja under *Wis. Stat. s. 102.16(2)(b)* that the reasonableness of the fee was in dispute. *Wis. Stat. s. 102.18(1)(bg)(1)*.

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

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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 *Hoefs v. Midwest Hotel*, WC Claim No. 1999-029146 (LIRC October 31, 2003), the Commission held that if a medical provider accepts payment from a Health Insurer other than the workers' compensation insurer, the Commission **WILL NOT** require the workers' compensation insurer to pay to the provider those contractually written-off amounts.

In *Monson v. Heyde 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.

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CASE LAW UPDATE

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

In *Kuehne v. Air Products Chemicals*, 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 **HOLD OPEN** the issue of medical expenses for future attempts by the provider to 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 **interlocutory Order**, preserving the Applicant's right to take further action to resolve whether the Respondent would be liable for the charges. Furthermore, the Respondent *will not* be precluded from challenging those written-off expenses as being unreasonable, or for any other reason.

- o *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

QUESTIONS

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