

**UPDATE ON CHANGES TO WISCONSIN'S WORKER'S COMPENSATION ACT
IN THE RECENTLY-PASSED BUDGET BILL**

How it happened, what it means, and what is coming next

LUKE KINGREE
Siedow & Jackson, S.C.
Eau Claire, WI

Overview

Currently, all administration of Wisconsin's worker's compensation system is conducted by the Worker's Compensation Division (WCD), which is a sub-agency of the Department of Workforce Development (DWD). The 2015 – 2016 State Budget Bill proposed by Gov. Walker this year contained a provision to effectively eliminate the WCD. Administration and insurance staff of the WCD would be transferred to the Office of Commissioner of Insurance (OCI). Administrative law judges (ALJs) of the WCD would be transferred to the Office of Hearings and Appeals (OHA), which is a sub-agency of the Department of Administration (DOA). Few, if any, functions of the worker's compensation system would be performed by DWD in the future.

A number of interests and entities weighed in for and against the proposed changes. Ultimately, the Legislature's Joint Finance Committee rejected the proposed transfer of administrative and insurance staff and functions from WCD to OCI. However, they approved the proposed transfer of all but 6 administrative law judges from WCD to DHA, with the stipulation that 80% of hearings conducted by the worker's compensation ALJs must be worker's compensation cases as opposed to other types of cases heard by DHA ALJs, such as probation or parole cases. On July 13, 2015, Gov. Walker signed the Budget Bill and used his line-item veto to strike the mandate that 80% of cases heard by worker's compensation ALJs must be worker's compensation cases. The Governor believed that DHA administrators should be allowed to set ALJ workloads instead of the Legislature.

As a result, on January 1, 2016, all but 6 worker's compensation ALJs will be transferred from WCD to DHA. The 6 ALJs remaining at WCD will perform administrative functions such as claim oversight, duty judge service, review/approval of compromise agreements, informal advice to call-ins, management of WCD staff, and settlement conferences. The ALJs at DHA will conduct hearings in worker's compensation cases. No one will physically move offices at this stage; rather, they will occupy the same physical locations on January 1 as they do now.

How It Happened

I. Initial Proposal

- "Stakeholder memo" dated January 15, 2015: First notice of changes in the upcoming budget bill. A group of defense and applicant attorneys who were opposed to the changes began to coalesce and email ideas/strategies back and forth.
- The WC Advisory Council was not consulted regarding these changes. This was the first time changes were proposed to the WC law outside of the Advisory Council in 104 years.

- The first draft of the budget bill released on February 3, 2015, contained numerous errors and omissions in statutory language changes. For example, it was not clear that court reporters would be transferred with the ALJs to DHA. It was not clear whether the duty judge position would be retained. It was not clear whether compromise agreements in cases where no hearing application had been filed would be reviewed/approved by an ALJ. It was not clear whether there would be remote hearing locations.
- No information on costs was included in the proposal. It was possible that more than \$1 million would be needed to create a new IT system. This could have resulted in an increased assessment on insurers who pay claims in Wisconsin, or a special assessment.

II. Reactions to the Proposal

- 10-12 lawyers start writing memos, meeting or speaking with insurance executives, legislative aides, newspaper reporters, and performing an investigation via open records laws.
- Legislative draft file revealed that the request for the changes originated in DOA, specifically the office of the agency director Michael Huebsch. The Secretary of DWD, Reggie Newson, was involved in asking for the changes as well. No WCD administrators were consulted. No insurers or employers were consulted. The Advisory Council was not consulted. No attorneys who practice worker's compensation law were consulted. No industry groups were advocating for the changes. Legislators did not know who was in favor of the changes. Unclear who was truly behind the changes, or why.
- Lobbying: Preserving Worker's Compensation Coalition (PWCC) was formed in late March 2015. It is/was a bipartisan group of attorneys committed to preserving the Advisory Council process and defeating the proposed changes in the budget bill. Hired a Republican lobbyist.
- Legislators: Sen. Sheila Harsdorf, Sen. Luther Olson, Rep. Schraa were convinced by PWCC lobbying efforts backed by data and reasoned argument. Sen. Van Wangaard was a former client of a worker's compensation attorney and was persuaded to oppose the changes, as well.

- Wisconsin Medical Society: Eventually persuaded to oppose the changes in their entirety. At first, the Society was inclined to seek assurances that the changes would not result in a fee schedule. However, once it became clear that there were many ways to harm Society interests through administrative changes, the Society opposed the deal in its entirety.
- Others: Some executives with domestic Wisconsin insurance companies lobbied against the changes. Their primary concern was uncertainty regarding improvement to the system versus degradation to the system, and urged removal of the proposal for further study and review.

III. Basis for the Proposal

- None officially identified. DWD Secretary Newson, OCI Commissioner Nickel, and DOA Secretary Huebsch testified in front of the Joint Finance Committee that the changes were intended to create “efficiencies” and “streamlined procedures,” and would “leverage existing ALJ expertise” or “leverage insurance expertise.” How the changes would create these things was never discussed in any substantive detail.
- Possible “unofficial” reasons: Two separate sources independently reported to PWCC that Commissioner Nickel verbally stated to a group of OCI administrators at a meeting that he was prepared to administratively implement a medical fee schedule tied to Medicare rates. He reportedly said this on two different occasions. In addition, there are numerous ways OCI could alter the administration of the worker’s compensation system via rewriting the Administrative Code, changing procedures for claim filing/reporting requirements, and possible elimination of the WC Ratings Bureau.
- Possible “cabal” of disgruntled employers: During conversations with legislators, PWCC members were made aware that a few executives at some large self-insured employers wanted to completely remake Wisconsin’s worker’s compensation law to their liking. What appears to be harmless administrative changes in the agencies managing the worker’s compensation law could have been seen as a way to “crack the eggshell” of the Advisory Council and eventually do away with the Advisory Council.

IV. Arguments Against the Proposal

- Data: Wisconsin has the lowest length of TTD in the nation by far. Total costs per claim are among the lowest, if not *the* lowest, in the nation. Medical costs per claim are in the bottom quartile in the nation. Worker's compensation rates have remained steady or decreased if the past 5 years of premium costs are averaged. Premium costs are the lowest in the Midwest and among the lowest in the country by far. Low litigation rate in Wisconsin compared to other states, e.g. Illinois. Low litigation times compared to Illinois, i.e. 14 month average vs 4 year average.
- No problem was identified that was in need of fixing. No rationale for changing a model system, or how the proposed changes would accomplish any improvement in the system.
- Advisory Council: Changes have always gone through the Advisory Council or its predecessors. This has created a stable system compared to other states. For example, claims adjusters doing Tennessee worker's compensation claims need a 47-page flowchart of the law and benefits and how they changed over the years. Ignoring the Advisory Council could lead to a "yo-yo" system.
- The Wisconsin Idea: It's more than a mission statement for the UW System. The Wisconsin Idea is a series of employment and taxation policies centered around the concept that opposing interests can sit down together and reach a consensus that will be beneficial for both, workable, respectful to all involved, and fair. Wisconsin's worker's compensation law was the first worker's compensation law in the country to be found constitutional under the US Constitution as providing an adequate remedy for injured workers and adequate protections from civil liability to employers. It was part of the Wisconsin Idea.
- Many insurers take part in the system: If the WC Ratings Bureau was eliminated, or claims oversight at the WCD or OCI were degraded, there may be a "race to the bottom" among insurers. Some insurers could not continue to do business in Wisconsin. In addition, domestic Wisconsin insurance companies could be out-competed by large multi-state insurers.
- No one could say, with any degree of confidence whatsoever, what exactly would happen with these changes. No studies were conducted, no analysis of operations was performed, no advice was sought from those most knowledgeable about the system. In contrast, a study of ALJs from the year 2000

showed that there would be no discernable improvement in the timeliness or quality of ALJ decisions by consolidating ALJs into one or two state agencies. No one knew exactly how OCI Commissioner Nickel would administer the WC system.

V. The End Game

- Agency Secretaries get nervous: DWD Secretary Reggie Newson issued a memorandum entitled “Frequently Asked Questions” in late April, in which he attempted to address some of the concerns about the proposed changes. This was distributed publicly and to the legislators themselves. OCI Commissioner Nickel reportedly prepared a similar internal memo. The memos did not provide any real new information or justification for the changes. They simply repeated talking points without evidence or facts to back them up.
- PWCC responds: Prepared a one-page fact sheet taking apart the “Frequently Asked Questions” memo. This was distributed to every legislator.
- Independent Insurance Agents of Wisconsin and Wisconsin Manufacturers and Commerce weigh in: IIAW wrote a newspaper article strongly backing the changes in early May. They likely did it as a favor to Commissioner Nickel, as he regulates their industry. WMC was on the sidelines before declaring in early May that they were entirely in favor of the proposed changes. No reason was identified; rather, their lobbyists simply informed the legislators that they were in favor and the changes should be passed in their entirety.
- May 27, 2015: The Joint Finance Committee delayed their vote twice during the day. The lobbyists were near the caucus rooms lobbying legislators up to the minute they entered the legislative chamber to vote. In the end, a compromise was hatched (likely that day) whereby the administrative staff would be kept at WCD, and most of the ALJs would be transferred to DHA with the stipulation that 80% of their cases must be worker’s compensation cases. OCI would not have any role in the day-to-day functioning of the WC system. No one is aware who concocted this compromise idea, or why.
- July 13, 2015: Gov. Walker line-item vetoes the 80% requirement. In theory, ALJs who normally perform hearings in other areas of law, like tax permitting and environmental regulation, could do WC cases. Likewise, ALJs who normally perform WC cases could be forced to do hearings in other areas of law.

What It Means

I. How It Affects Claims Management

- Largely unknown. All compliance measures, filing forms with the WCD, etc. will be entirely unchanged. There will still be a duty judge to answer questions and informally resolve disputes. For hearings, we will still have the same judges as we do right now, and we still have court reporters. None of the judges are retiring. The most likely effects, if any, will be in the time it takes to schedule a hearing, or confusion in transferring the file between WCD and DHA once a hearing has been set.

II. How It Affects Decisions In Litigated Cases

- Largely unknown. The head of DHA has reportedly informed the WC ALJs that the other ALJs at DHA who normally perform probation, parole, environmental permitting, tax issues, etc., will not be doing any WC cases. However, he may need to “borrow” some WC ALJs to do probation and parole hearings due to a severe backlog of those hearings. The most likely effects, if any, will be on the time it takes to schedule a hearing or get a decision.
- Studies by the national non-partisan Worker’s Compensation Research Institute have concluded that part of the reason Wisconsin’s WC system is so effective and efficient is the specialization of WC ALJs and the dispute resolution, claims oversight, and other functions of a centralized, single WC agency. Now that the functions are split across two agencies, we could see a degradation in the quality of decisions. No ALJs are retiring now, but new hires will not be “raised” in the WCD or specialize in worker’s compensation cases. Fortunately, the claims oversight, dispute resolution, etc., of the WCD will continue.

III. What About the Advisory Council?

- MIA: The Advisory Council did not take a position on the budget bill. This is despite the fact that the budget bill made significant changes to the administration of the WC law and the Advisory Council was not consulted.
- A serious blow: Significant changes to the WC law have been made outside of the Advisory Council for the first time ever. PWCC argues that these are cosmetic administrative changes as opposed to substantive changes to the law, but others may argue that the precedent has been set.

IV. Why Should Employers and Insurers Care?

- Stability: Premiums are easily calculated by the WC Ratings Bureau, in part, because of the stability of the law. Claims management is made easier and predictable by a stable law.
- Everyone should have input on the WC law. Not just a few powerful interests.
- Retribution: If the Advisory Council is rendered irrelevant, we could become a “yo-yo” state. The current dominant political party will not be in power forever, and a time will come where changes to the WC law that are detrimental to employer and insurer interests will be passed outside of the Advisory Council.

What Is Coming Next

I. Standalone Legislation

- Employee negligence: A draft bill has been circulated which would reduce worker’s compensation benefits in proportion to the comparative negligence of the injured worker. Our litigation rate would go from 20% to 95%. See attached materials.
- Employer quizzing of employee medical conditions at hire: The draft bill also includes a provision that worker’s compensation benefits would not be payable if the injured worker represented his/her medical condition to the employer at the time of injury.
- Fee schedule: The draft bill also includes a fee schedule tied to Medicare rates.
- Other proposed legislation: Several other ideas floating around include opt-in opt-out similar to Texas and Oklahoma, introduction of employer “co-pays” and “deductibles” to WC insurance policies, capped length of TTD periods, no escalation of benefit rates, reduction of the statute of limitations to 2 or 3 years, no TTD if employment ends for termination for cause, and reduction of WC benefits if the injured worker broke *any* state or federal law at the time of injury.

II. Radical Changes Proposed by WMC and Management in the Advisory Council

- WMC and management proposals: Unprecedented in the sweeping scope and nature of the proposed reforms. They seek to fundamentally re-configure the entire structure of the law and its operation. See attached materials.
- Directed care: WMC wants a fee schedule at almost any cost, even if it means directed care in Wisconsin WC claims. See attached materials.

III. Coming Legislative Battle

- Clash of the Titans: The Wisconsin Medical Society is likely going to be opposed to many of the WMC and management proposals. Who will win, and what will the resulting legislation look like? The way legislative “sausage making” works, one scenario is that the Medical Society bargains a way to preserve their best interests while leaving the rest of WC stakeholders to the mercy of WMC and the legislature.