2019 Forum

Wisconsin Worker's Compensation Forum, Inc.

A HOUSE DIVIDED:

Apportionment of PPD and Other Hot Legal Topics

Introduction

- I. An overview of apportionment in Wisconsin
- II. Sec. 102.175(1): How apportionment of liability works
- III. Sec. 102.175(3): How apportionment of permanent disability might be applied
- IV. Other hot legal topics

I. An overview of apportionment in Wisconsin

- A. Apportionment of liability has long been allowed in Wisconsin Worker's Compensation cases. However, it required a precise opinion from a treating doctor; apportionment was denied unless such medical evidence was in the record. *See South Side Roofing v. Industrial Commission*, 252 Wis. 403 (1948); *Merton Lumber Co. v. Industrial Commission*, 260 Wis. 109 (1951)

I. An overview of apportionment in Wisconsin

- B. Wis. Stat. § 102.175(1) became effective in 1980 and allowed latitude to apportion liability as long as there is medical support for apportionment, even without an exact mathematical breakdown of liability. 1979 Senate Bill 472
- C. Wis. Stat. § 102.175(2), providing a mechanism to ensure that an injured worker is paid benefits if the only dispute is which party or parties are responsible, was enacted in 1993. 1993 Assembly Bill 844 (1993 Wisconsin Act 81)

I. An overview of apportionment in Wisconsin

- D. Wis. Stat. § 102.175(3), providing for apportionment of permanent partial disability, became effective for dates of injury after March 1, 2016. 2015 Assembly Bill 724 (2015 Wisconsin Act 180)
- How will this new statute be applied and what impact will it have on existing case law and other statutes?

Quiz!

- True or False: A work injury is not compensable if it is mostly due to pre-existing issues

I. An overview of apportionment in Wisconsin

- E. The "as is" doctrine
  - 1. Same theory as the "eggshell plaintiff" doctrine in common law; also known known as the "thin skull" doctrine; or in criminal law "you take your victims as you find them"
  - 2. This longstanding legal doctrine was quickly adopted into WI WC law

I. An overview of apportionment in Wisconsin

- F. Application of the "as is" doctrine
  - 1. An employee's predisposition to injury does not relieve the employer from liability for worker's compensation
  - 2. An employer is liable for all disability caused by an injury regardless of the employee's pre-existing conditions or predisposition to injury
  - 3. An employer is liable for medical treatment and disability caused by or contributed to by a work injury if the work injury hastened the need for the treatment, even if the medical treatment and disability was inevitable
  - 4. The same rule applies in occupational disease claims

Quiz!

- True or False: Prior to the effective date of Wis. Stats. sec. 102.175(3), a carrier was liable for all permanent partial disability resulting from a work injury, even if the injured worker had previously been assessed permanent partial disability

I. An overview of apportionment in Wisconsin

- H. Caveats
  - 1. "**Wis. Admin. Code § DWD 80.32 Permanent disabilities**. (1)
  - …The minimum also assumes that the member, the back, etc., was previously without disability. Appropriate reduction shall be made for any preexisting disability." (emphasis added)
  - 2. A pre-existing disability is not one that arose from the same work injury or occupational exposure
  - 3. Reductions have been allowed *at times* for pre-existing disability even when an administrative code minimum is involved.
  - 4. The criteria established in *Lewellyn* incorporate the "as is" doctrine in its three-part causation test, but also recognize that a mere manifestation of a clearly defined pre-existing condition does not result in a compensable work injury

II. Wis. Stat. § 102.175(1): How apportionment of liability works

- A. 102.175(1) Apportionment of liability.
- B. When does this statute apply?
- 1. Accidental injuries only, not occupational disease claims
- 2. Each party must have liability and must be made a party to the proceedings
- 3. Must have medical support as to the relative contribution to the disability although the support does not *necessarily* have to be an exact mathematical breakdown

Quiz!

- True or False: A worker's compensation carrier can implead an automobile insurance carrier into a worker's compensation claim

II. Wis. Stat. § 102.175(1): How apportionment of liability works

- C. What benefits can be apportioned?
  - 1. The statute simply states that liability for benefits is subject to apportionment; therefore, both indemnity benefits and medical expenses are subject to apportionment
  - 2. There is authority indicating that benefits for permanent and total disability can be apportioned
  - 3. Benefits for permanent and total disability cannot be apportioned to the Second Injury Fund
- D. One case apportioned liability as between occupational disease claims but it is an outlier

II. Wis. Stat. § 102.175(2)

- E. **102.175 Apportionment of liability.** "**(2)** If after a hearing or a prehearing conference the division determines that an injured employee is entitled to compensation but that there remains in dispute only the issue of which of 2 or more parties is liable for that compensation, the division may order one or more parties to pay compensation in an amount, time, and manner as determined by the division. If the division later determines that another party is liable for compensation, the division shall order that other party to reimburse any party that was ordered to pay compensation under this subsection."

- Note: This section authorizes the Division to order interim payments in order to relieve the hardship for an injured employee where the only issue is which party is responsible for payment

Quiz!

- True or False: The Division can order a party to pay permanent partial disability (PPD), so long as it is undisputed that PPD occurred, even if the extent of PPD is in dispute

III. Sec. 102.175(3): Apportionment of permanent disability.

- A. **102.175 Apportionment of liability.**
- B. What we know about Wis. Stat. § 102.175(3):
  - 1. Applies to traumatic injuries only
  - 2. Applies to permanent disability only
  - 3. Provides an employer is only liable for the permanent disability caused by the work injury if a percentage of permanent disability is attributable to other factors, whether occurring before or after the accident
  - 4. Does <u>not</u> allow for apportionment caused by prior permanent partial disability arising out of an occupational disease injury with the same employer

III. Sec. 102.175(3): Apportionment of permanent disability

- B. What we know about Wis. Stat. § 102.175(3) (cont.):
  - 5. All practitioners who prepare reports addressing permanent disability shall address the issue of apportionment of permanent disability, setting forth the percentage due to the effects of the work injury and the percentage attributable to other factors before and after the injury (emphasis added). See Overman v. Marinette Marine Corp, WC Claim No. 2016-008107 (case remanded for opinion of apportionment of PPD) but see Disanto v. JBS Distribution LLC, WC Claim No. 2011-027099 (no medical evidence for apportionment and the issue was not raised at hearing but the LIRC decision did not mention that the date of injury was September 11, 2011)

III. Sec. 102.175(3): Apportionment of permanent disability

- B. What we know about Wis. Stat. § 102.175(3) (cont.):
  - 6. If asked, an applicant for benefits must disclose all prior findings of permanent disability or other impairments that are relevant to the injury, including disclosing the actual medical records necessary to make an apportionment of permanent disability (emphasis added)
  - 7. The statute does not alter the "as is" doctrine as it relates to causation but may impact the amount of permanent disability than an injured worker will receive—*Lewellyn* is still good law

III. Sec. 102.175(3): Apportionment of permanent disability

- B. What we know about Wis. Stat. § 102.175(3) (cont.):
  - 8. Likewise, the statute does not overrule *Lange v. LIRC*, 215 Wis. 2d 561 (Ct. App. 1997) (holding that a work-related injury that plays any part in a second, non-work-related injury is properly considered a substantial factor in the re-injury, and the employer is liable for the second injury. For a work-related injury to not be a substantial factor in the second injury, LIRC must find that the claimant would have suffered the same injury, to the same extent, despite the existence of the work-related injury)
  - 9. The change will almost certainly lead to an effort to characterize more injuries as occupational disease injuries

III. Sec. 102.175(3): Apportionment of permanent disability

- C. What we do not know about Wis. Stat. § 102.175(3):
  - 1. Whether this section will be interpreted to be a substantive or procedural change. See Disanto v. JBS Distribution LLC, WC Claim No. 2011-027099 (LIRC refused to apportion PPD but not explicitly because the date of injury was September 11, 2011)
  - 2. Whether an injured worker will be entitled to the minimum permanent partial disability set forth in Wis. Admin. Code § DWD 80.32, for permanent partial disability arising out of a work injury, or whether the minimum PPD may be apportioned
  - 3. Whether this section will be applied only to functional permanent partial disability versus loss of earning capacity

III. Sec. 102.175(3): Apportionment of permanent disability

- C. What we do not know about Wis. Stat. § 102.175(3):
  - 4. How "percentage of that disability" will be interpreted and applied
  - 5. What "other factors" before the date of accidental injury will be considered and how that provision will be applied. Will it include only pre-existing disabilities versus pre-existing conditions?
  - 6. What "other factors" after the date of accidental injury will be considered and how that provision will be applied
  - 7. The manner and extent to which 102.175(3) will impact the decision in *Lange*

Quiz!

- True or False: The Division can order apportionment of temporary disability benefits under sec. 102.175(3)

Quiz!

- The Division can only apportion PPD under 102.175(3) if there is a medical opinion which provides the basis for apportionment

Quiz!

- To be or not to be?
- Animal, vegetable or mineral?
- Pro or con?
- Shaken or stirred?

- Bears or Packers?

Other Hot Topics

- A. Legislative Update
  - 1. At the time the seminar materials were due, the next meeting of the Advisory Counsel was scheduled for September 10th
  - 2. The issues that were presumably discussed are set forth in the minutes of the May 23, 2019 Advisory Council meeting, a copy of which is at the end of the outline. Some of the more important proposals:

- Departmental:
  - reunite the Division

- Management:
  - employer directed care
  - electronic records and electronic billing for records
  - treatment guidelines
  - statute of limitations
  - limit expansion of wage for part time employees
  - prohibit benefits for employees who misrepresent their physical condition in a material manner
  - stop permanent and total disability benefits once SSA retirement benefits begin

- Management (cont.):
  - eliminate PPD minimums for surgeries in which no PPD resulted
  - enforce 30-day reporting requirement
  - provide right to revisit PTD status every three years
  - eliminate death benefits in PTD cases if the death is unrelated to injury
  - allow reliance of pre-retirement audiograms in hearing loss cases under certain circumstances
  - for hearing loss cases, mandate that amounts paid for past or future medical care (hearing aids) be specified and that no attorney fees be awarded on such amounts

- Labor
  - increase TTD, PPD and PTD benefits
  - provide scholarships for children of employees who die or are rendered PTD as a result of a work injury
  - extend statute of limitations by including last payment of medical expenses as an additional measurement point for the start of the statute of limitations
  - add shoulder replacements and lumbar fusions to the list of procedures with no statute of limitations
  - increase amount of unaccrued compensation that can be advanced in a compromise from $10,000 to $50,000

- Labor (cont.):
  - eliminate interest credit on advancements from current 5% rate
  - allow injured worker an equal say in whether a third-party settlement offer should be accepted
  - employer penalties for stopping health insurance benefits during the period of temporary disability
  - allow LOEC claims for scheduled injuries if retraining does not restore loss or if retraining is not feasible
  - various proposals to address opioid crisis, such as requiring a 30-day notice before discontinuing opioids based on an IME opinion and providing education and treatment for addicted workers

Other Hot Topics (cont.)

- B. Caselaw Update
  - 1. Two LIRC cases referenced before in the apportionment section, *Overman* and *Disanto*, are included in the outline materials
  - 2. Court cases: there was one Wisconsin Supreme Court case dealing with rule-making authority but nothing specific to worker's compensation law. Below is a summary of the Court of Appeals' cases over the past year

- ***Mueller v. LIRC*, No. 2018AP707, 2019 WL 4018350 (Wis. Ct. App. Aug. 27, 2019).**

- --compensable right shoulder injury claim following which Ms. Mueller voluntarily retired from the employer

- --claim for temporary disability benefits following retirement denied under the theory that the wage loss was attributable to the retirement and not the effects of the work injury

- --argument that subsequent re-entry into the workforce on a part-time basis was rejected because the applicant did not prove that her work-related injury adversely impacted her wage upon re-entering the labor market

- ***Bukovic v. Labor & Indus. Review Comm'n*, 2019 WI App 5, ¶ 1, 385 Wis. 2d 513, 925 N.W.2d 778**

- --Applicant was injured stealing argon gas from his employer. Mr. Bukovic wanted the argon gas for a welding setup at home. He brought a hose to work to transfer the gas from the employer's commercial argon gas tank to an acetylene tank that he also "borrowed" from the employer. Mr. Bukovic lied when asked by a manger why he brought the hose to work

- -- ALJ denied the claim, finding the Mr. Bukovic was engaged in a material deviation from the employment. Therefore, he was not performing service growing out of and incidental to the employment when injured; LIRC affirmed as did the circuit court

- --the Court of Appeals also affirmed, rejecting among other arguments that the employer failed in its duty to properly train its employee because transferring gas in that manner was not part of the employee's job duties

- ***White v. LIRC*, 2018 WI App 71, 384 Wis. 2d 632, 922 N.W.2d 314**

- --this case entailed a claim for compensation for Unreasonable Refusal to Rehire under Wis. Stat. 102.35(3) following a compensable low back injury

- --essentially a standard of review case, with the Court of Appeals determining that there was credible and substantial evidence to support LIRC's finding that the refusal to rehire was not unreasonable

- ***Compare to Wise v. Labor & Indus. Review Comm'n*, 2019 WI App 5, ¶ 2, 385 Wis. 2d 514, 925 N.W.2d 780**

- ***Vallier v. Labor & Indus. Review Comm'n*, 2019 WI App 15, 386 Wis. 2d 352, 927 N.W.2d 166**

- --conceded right elbow and right shoulder injury

- --the applicant had treated for right shoulder pain prior to the work injury but there was no evidence that the treating doctors supporting the claim were aware of that fact. The applicant later complained of neck pain and ended up undergoing a cervical fusion

- --the ALJ awarded benefits and LIRC reversed, finding the opinion of the IME doctor to be more credible. In doing so, LIRC made a finding of fact that turned out to be unsupported by the record

- --the circuit court and the Court Of Appeals affirmed. This is also essentially a standard of review case, noteworthy only because the court held that the unsupported finding of fact was not material to LIRC's credibility determination

Quiz!

- We’ve had enough of this stuff

QUESTIONS?

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