2001 DRAFTING REQUEST

Bill

Received: **07/10/2001**

Received By: **malaigm**

Wanted: **As time permits**

Identical to LRB:

For: **Workforce Development 7-6704**

By/Representing: **Richard Smith**

This file may be shown to any legislator: **NO**

Drafter: **malaigm**

May Contact:

Addl. Drafters:

Subject: **Employ Priv - worker's comp**

Extra Copies:

Submit via email: **YES**

Requester's email: **smithri@dwd.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Worker's Compensation changes

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	malaigm 08/30/2001	csicilia 09/04/2001		_____ _____			S&L
/P1			jfrantze 09/04/2001	_____ _____	lrb_docadmin 09/04/2001		S&L

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/1	malaigm 09/17/2001	csicilia 09/17/2001	jfrantze 09/17/2001	_____ _____	lrb_docadmin 09/17/2001	lrb_docadmin 09/18/2001	

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LRB-3500

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Worker's Compensation
Department's Legislative Proposals
June 27, 2001

Subject	Statute	Proposal
Definition of employer subject to the Act	102.04(2)	Amend 102.04(2) as follows: Except with respect to a partner or member electing under s. 102.075 members of partnerships or limited liability companies shall not be counted as employees. Except as provided in s. 102.07(5)(a) a person under contract of hire for the performance of any service for any employer subject to this section ~~(1961)~~ shall not constitute an employer of any other person with respect to such service and such other person shall, with respect to such service, be deemed to be an employee only of such employer for whom the service is being performed. *Comment. This deletes an obsolete reference.*
Definition of employer subject to the Act	102.07(4m) (No) Covered under 102.07(5)(d) - More	Amend 102.07(4m) as follows: For the purpose of determining the number of employees to be counted under s. 102.04(1)(b) or (c), but for no other purpose, a member of a religious sect is not considered to be an employee if the conditions specified in s, 102.28(3)(b) have been satisfied with respect to that member. *Comment: 102.04(1)(b) excludes certain religious sect members when counting* **non-farm** *employees to determine if an employer is subject to the Act. 102.04(1)(c) relates to* **farm** *employees, to whom the same counting provision should also apply. This corrects an inadvertent oversight.*

Employee defined	102.07	Create a cross-reference in Chapter 102 to s. 166.03(8)(d). 102.07 Employe defined. "Employe" as used in this chapter means: (19) An emergency management employee or volunteer as defined in s. 166.03(8)(d). *Comment. An attorney representing an injured volunteer suggested the cross-reference.* Section 166.03(8)(d) reads as follows: Employees of municipal and county emergency management units are employees of the municipality or county to which the unit is attached for purposes of worker's compensation benefits. Employees of the area and state emergency management units are employees of the state for purposes of worker's compensation benefits. Volunteer emergency management workers are employees of the emergency management unit with whom duly registered in writing for purposes of worker's compensation benefits. An emergency management employee or volunteer who engages in emergency management activities upon order of any echelon in the emergency management organization other than that which carries his or her worker's compensation coverage shall be eligible for the same benefits as though employed by the governmental unit employing him or her. Any employment which is part of an emergency management program including but not restricted because of enumeration, test runs and other activities which have a training objective as well as emergency management activities during an emergency proclaimed in accordance with this chapter and which grows out of, and is incidental to, such emergency management activity is covered employment. Members of an emergency management unit who are not acting as employees of a private employer during emergency management activities are employees of the emergency management unit for which acting. If no pay agreement exists or if the contract pay is less, pay for worker's compensation purposes shall be computed in accordance with s. 102.11
Work-experience students	102.077(3) 102.07(12m) 102.29(8)	Delete the sunset provisions related to work-experience students. *Comment: Current law authorizes schools to voluntarily insure work-experience students, but only if they get* **no wages** *from the work-site employer. The option is rarely used. The exclusive remedy provision immunizes the work-site employer from tort suits. The sunset provisions were enacted in 1996 and extended in 1998 and 2000. No problems have been reported to the Department.*

working day

Weekly wage • Overtime • Employer's normal full-time work week	102.11(1)(a)	Amend 102.11(1)(a) as follows: Daily earnings shall mean the daily earnings of the employee at the time of the injury in the employment in which the employee was then engaged. In determining daily earnings under this paragraph, overtime shall not be considered. Overtime means hours worked beyond the employer's normal full-time ~~workweek~~. Premium pay such as time-and-a-half or double time may be earned during the normal workweek or during overtime. If at the time of the injury the employee is working on part time for the day, the employee's daily earnings shall be arrived at by dividing the amount received, or to be received by the employee for such part-time service for the day, by the number of hours and fractional hours of such part-time service, and multiplying the result by the number of hours of the employer's normal full-time working day for the employment involved. The words "part time for the day" shall apply to Saturday half days and all other days upon which the employee works less than normal full-time working hours. The average weekly earnings shall be arrived at by multiplying the employe's hourly earnings by the hours in the employer's normal full-time workweek or by multiplying the employe's daily earnings by the number of days and fractional days in the employer's normal full-time workweek ~~normally worked per week~~ at the time of the injury in the business operation of the employer for the particular employment in which the employee was engaged at the time of the employee's injury, whichever is greater. ~~Except as provided in par. (b),~~ it is presumed that the employer's normal full-time workweek is 24 hours for flight attendants, 56 hours for firefighters, and at least 40 hours for other employes unless there is reasonably clear and complete documentation ~~to rebut it~~. If the employer has a multi-week schedule with regular alternating hours, the employer's normal full-time workweek is the average number of weekly hours in the multi-week schedule. A workweek is from Sunday to Saturday. *Comment.* *1. Overtime and premium pay are not synonymous. Overtime is not used to calculate earnings under par (a), but is used under par. (d). For most employes, earnings are the larger of paragraphs (a) or (d).* *2. Whether one uses the employe's daily earnings (or hourly earnings) those earnings have always been multiplied by the days (or hours) in the* **employer's** *normal full-time workweek, not the days (or hours) worked by the claimant. True, the department uses the claimant's actual work days (or hours) as a starting point to audit the employer's workweek. But, that does not conclusively determine the workweek.* *3. The confusion is getting worse. In 2000, LIRC and the circuit court refused to consider arguments from the employer regarding its regular schedule. Instead, LIRC and the court determined the workweek under 102.11(1)(a) is based on the "local labor market" not the injury employer's schedule. The department has never used the local labor market under par. (a). The labor market concept used in UI is not used in WC. In WC, the closest one comes to the local labor market is looking at "same or similar" employment under par. (c)--a rarely used section. See* Diane Aronson v. Caregivers Home Health, *No. 00-CV000615, Waukesha County, November 1, 2000.* *4. Adding the hourly formula to the daily formula in the current statute will not change the average weekly earnings. However, for most insurers and employers the hourly formula will make more sense.* *(continued)*

established by the employer

that presumption

108.02(17)

	(continued)	*5. The hourly formula also makes it easier to phrase the 24-, 56- and 40-hour presumptions and the multi-week schedule in modern language. The department's 24-, 56- and 40-hour presumptions need to be codified. They are widely accepted and ease the administration of a complex wage law. Still, sometimes insurers do not accept the 40-hour presumption and refuse to provide reasonably clear and complete documentation to support a different figure alleged by the employer.* *6. With multi-week alternating schedules the question is whether one should one use the hours in the week of injury or average the hours? There are reasonable arguments for each position.* *7. The Sunday-to-Saturday workweek is not a problem but should be codified.*
Weekly wage • Part-time part-of-class	102.11(1)(f)	Amend 102.11(1)(f) as follows: 1. Except as provided in sub. 2, average weekly earnings may not be less than 24 times the normal hourly earnings at the time of injury. 2. The weekly temporary disability benefits for a part-time employee who restricts his or her availability in the labor market to part-time work and is not employed elsewhere may not exceed the average weekly wages of the part-time employment. 3. The members of a regularly scheduled class of part-time employes must do the same type of work and maintain the same regular work schedule. The members of a class do not need to work the same days or shifts, but a schedule is not regular if the minimum and maximum weekly hours scheduled by the employer or actually worked by any member of the class vary by more than 5 hours during the 13 weeks prior to the injury. Employes are not part of a class unless at least 10 percent of the employer's workforce doing the same type of work are members of the class. A class must have more than one employe. An employer may not use multiple locations to establish a class. For State of Wisconsin employees it is presumed that membership in a class is determined separately for each agency or department, although a smaller subunit may used if appropriate. *Comment. These changes codify the department's current procedures.* *1. In a NRA case, the court distinguished a "class" of four part-time watchmen working staggered-days and staggered-shifts from a full-time watchman. See* Allis Chalmers v Industrial Comm., 215 Wis. 616 (1934). *See also,* Carr's Inc. v. Industrial Comm., 234 Wis. 466 (1940). *2. The 5-hour variance is less than the 8-hour variance approved by the Wisconsin Supreme Court in* Carr's Inc., *the leading part-time, part-of-class wage case.* *3. 13 Weeks is borrowed from the 90-day period specified for full-time employment in DWD 80.51(1).* *4. The department wage analysts have used the 10-percent concept and required more than one employe in a class at least since the 1980's when Harry Benkert wrote: "The class must be regularly scheduled. We have also administratively determined 'class' to mean more than one employe. There must be a significant number of employes relative to the employment to constitute a class."* *5. Until very recently, the department did not consider multiple locations in determining a class. Recently it has been allowed in some cases. Wage analysts are unanimous that the law would be simpler to administer if the long-standing policy excluding mutiple locations were codified.*

Fraud report	102.125(2) RM (1) RP(2)	Delete the requirement for an annual fraud report to the Governor and Legislature (or, alternatively, have the Department report to the Council). *Comment. The Department refers only about 15 cases of alleged fraud annually to district attorneys. They prosecute about 3. This low level of fraud reported and prosecuted does not justify such high-level annual reporting. The Department has issued reports covering the first 5 years of the program. There is nothing new to report.*
Medical fee disputes	102.16(2)(d)	Delete the sunset provision on the fee dispute program. *Comment. The provision was enacted in 1992. The sunset has been extended every two years since then. The program is well established.*
Medical necessity of treatment disputes	102.16(2m)(c)	Amend 102.16(2m) (c) as follows: ~~Before~~ Except as provided in ss. 102.16(1) or 102.18(1), before determining the necessity of treatment provided for an injured employee who claims benefits under this chapter, the department shall obtain a written opinion on the necessity of the treatment in dispute from an expert selected by the department. To qualify as an expert, a person must be licensed to practice the same health care profession as the individual health service provider whose treatment is under review and must either be performing services for an impartial health care services review organization or be a member of an independent panel of experts established by the department under par. (f). The department shall adopt the written opinion of the expert as the department's determination on the issues covered in the written opinion, unless the health service provider or the insurer or self-insured employer present clear and convincing written evidence that the expert's opinion is in error. *Comment. Peer review in 102.16(2m)(c) is an option for compromise orders under 102.16(1) or for an ALJ issuing orders after hearing under 102.18(1), but it was never intended to be a requirement.*
Multiple parties	102.17(1)(c) and (e) 102.20 102.23(1)(d)	Substitute "any" for "either" in four statutes: 102.17(1) (c) ~~Either~~ Any party shall have the right to be present at any hearing, in person or by attorney, or any other agent, and to present such testimony as may be pertinent to the controversy before the department.... 102.17(1) (e) The department may, with or without notice to ~~either~~ any party, cause testimony to be taken.... 102.20 Judgment on award. If ~~either~~ any party presents a certified copy of the award to the circuit court for any county, the court shall, without notice, render judgment in accordance therewith... 102.23(1)(d) ...The action may thereupon be brought on for hearing before the court upon the record by either any party on 10 days' notice to the other.... *Comment. "Any" is more appropriate if there are more than 2 parties.*

Safety inspections	102.17(1)(h) 102.57 102.58	The safety reports referenced in these statutory sections have been performed by the Division of Safety and Buildings for the Worker's Compensation Division for many years. Until recently, both Divisions were in DILHR (now DWD). Several years ago S&B moved to the Department of Commerce and continued the investigations under a memorandum of understanding with the Worker's Compensation Division. There were no statutory changes to Chapter 102 after S&B Division moved to Commerce. Effective January 1, 2002, S&B (Department of Commerce) may not renew it's MOU with the Worker's Compensation Division. ***Problems.*** 1. The Worker's Compensation Division in the Department of Workforce Development wants clear authority to conduct or contract for services to accomplish the safety investigations. It is not clear whether the phrase "employed by the department" in s. 102.17(1)(h) includes persons employed under contract or a memorandum of understanding—or is limited to persons on the Department's payroll. 2. Does the recent move of the S&B safety specialists to another Department (Commerce) create any ambiguity about the use of the word, "department" in ss. 102.17(1)(h), 102.57 and 102.58? Can we assume s. 102.01(2)(ap) is controlling with respect to the term "department" even though the S&B safety specialists used for this function moved to a new department a few years ago? 3. The Department of Workforce Development does not know how it will accomplish the mission of conducting safety investigations. It may continue some arrangement with S&B. It may contract with the private sector or federal government. It may seek position authorization and funding to hire staff in the Division. The statutory language regarding the Department's responsibility to act and its authority to act needs to be broad enough to accomplish any of these. ***Proposal***. The Worker's Compensation Division in the Department of Workforce Development wants to amend s. 102.17(1)(h), 102.57 and 102.58, as necessary, to clarify that it has the responsibility and authority to conduct, contract for or otherwise secure the services of safety inspectors in the public or private sector.

Statute of Limitations	102.17(4)	1. Eliminate the 12-year statute of limitations for claims involving the loss or total impairment of: • the hand or rest of the arm, • the foot or rest of the leg, • any loss of vision • any brain injury and total or partial knee or hip replacements. 2. Use the Work Injury Supplemental Benefit Fund (WISBF) to pay for these claims after 1/1/2002 regardless of the date of injury. *Comment.* *1. Insurers used to pay these claims voluntarily if the claim was meritorious, except for the statute of limitations. Now, insurers routinely defend against these claims citing the statute of limitations. Since these are pre-existing conditions group health carriers refuse coverage. There has been a significant increase in problems with serious eye injuries and the need for prosthetic devices, both of which essentially require life-long treatment. The need for future knee or hip replacements is a trap for the unwary. Doctors advise holding off surgery as long as possible. Unwary claimants may not know to preserve their right to surgery by filing an application for hearing.* *2. Occupational injuries beyond the 12-year period are currently funded from WISBF. This would be similar.*
Voluntary direct deposit of benefits	102.26(3)(b)	Create a new subparagraph in 102.26(3)(b). 102.26(3)(a) Except as provided in par. (b), compensation exceeding $100 in favor of any claimant shall be made payable to and delivered directly to the claimant in person. (b) 1. The department may upon application of any interested party and subject to sub. (2) fix the fee of the claimant's attorney or representative and provide in the award for that fee to be paid directly to the attorney or representative. 2. At the request of the claimant medical expense, witness fees and other charges associated with the claim may be ordered paid out of the amount awarded. 3. If the claimant and the insurer mutually agree, the claimant may request an insurance carrier or employer to deposit payments or awards under this chapter directly in a financial institution by electronic transfer or as otherwise approved by the department. The claimant may revoke consent by providing appropriate written notice. *Comment. 102.26(3)(a) requires compensation over $100 to be "delivered directly to the claimant." This prevents payment to a third party, e.g., the claimant's attorney. Arguably, it prevents direct deposit in a claimant's bank account. Some states specifically authorize direct deposit because it's faster and safer than mail delivered to the home. At least one state, Texas, mandates that insurers give employees a direct deposit option. The financial services consultant for one TPA that is setting up a system to offer the option in other states has requested permission to offer this option in Wisconsin. Their process to approve and generate payments is not changed. The employe must fill out a direct deposit authorization form and may revoke authorization at any time. The insurer may not be compelled to provide this service.*

Open records	102.31(8) 102.33 (2)(a) 626.32(1)(a) CR (c)	SECTION 1. 102.31 (8) of the statutes is amended to read: The Wisconsin compensation rating bureau shall provide the department with any information it requests relating to worker's compensation insurance coverage, including but not limited to the names of employers insured and any insured employer's business, business status, type and date of coverage, manual premium code, and policy information endorsements and reinstatement dates. The department may enter into contracts with the Wisconsin compensation rating bureau to share the costs of data processing and other services. The Wisconsin compensation rating bureau may authorize the department to publish or release information obtained by the bureau under s. 626.32(1) (a). The department shall not make that information public except as authorized by the rating bureau. SECTION 2. 626.32 (1) (a) of the statutes is amended to read: 626.32 (1). ACQUISITION OF INFORMATION. (a) *General.* Every insurer writing any insurance specified under s. 626.03 shall report its insurance in this state to the bureau at least annually, on forms and under rules prescribed by the bureau. The bureau must file, pursuant to rules adopted by the department of workforce development, a record of such reports with the department. No such information may be made public by the bureau or any of its employes except as authorized or required by law and in accordance with its rules. *Comment. The Council agreed to this change in principle in the last session. In 1982, the AG determined that records of organizations like WCRB are not subject to Wisconsin's Open Records law. See May 7, 1982 letter to Insurance Commissioner Susan Mitchell. In April 1999, the AG supported the Department's refusal to release that WCRB insurer information from a database shared by WCRB and the WC Division. The Division assumes that Datalister, Inc., a Florida firm, intended to use the insurance policy information to solicit employers. The AG encouraged the Department to clarify the statutory intent. This proposal codifies the long-standing working relationship between the Department and the Rating Bureau and is supported by both agencies. In August 1999, Datalister successfully sued to obtain similar data under Arizona and Minnesota laws.*
Typographical error	102.32(5)	Amend 102.32(5) as follows: Any insured employer may, within the discretion of the department, compel the insurer to discharge, or to guarantee payment of its liabilities in any such case under this section and thereby release himself or herself from compensation liability therein, but if for any reason a bond furnished or deposit made under sub. (4) does not fully protect, the compensation insurer or ~~uninsured~~ insured employer, as the case may be, shall still be liable to the beneficiary thereof. *Comment. In the context of a subsection dealing with the relationship of an insured employer to its insurer, the reference to an "**un**insured" employer is absurd.*

Prompt PPD payments	102.32(6)	Amend 102.32(6) as follows: If compensation is due for permanent disability following an injury or if death benefits are payable, payments shall be made to the employee or dependent on a monthly basis. Compensation for permanent disability shall begin within 30 days after the end of the employee's healing period or after the insurer receives a medical report with a permanent disability rating, whichever is later. If the insurer notifies the claimant within 30 days after the end of ~~temporary disability~~ or after receiving the rating, whichever is later, that the insurer is scheduling an examination under s. 102.13(1), compensation shall begin within 30 days after the insurer receives the examining report, or within 90 days after the notice to the claimant of the intent to schedule the exam, whichever is earlier. Payments for permanent disability shall continue on a monthly basis, and shall accrue and be payable between intermittent periods of temporary disability, including payments based on the minimum permanent disability ratings set by rule if the insurer has clear information regarding the nature of the ~~injury or the surgery~~. The department may direct an advance on a payment of unaccrued compensation or death benefits if it determines that the advance payment is in the best interest of the injured employee or his or her dependents. In directing the advance, the department shall give the employer or the employer's insurer an interest credit against its liability. The credit shall be computed at 7%. *Comment.* *1. In October 2000, the Department proposed codifying the 30-day payment standard and clarifying how to handle intermittent periods of PPD and temporary disability to a group of about 40 experienced insurance claims handlers and supervisors. In November 2000, an insurance attorney requested the extension for IMEs, with 30 days to give notice of intent to schedule the IME and a 90-day limit on starting payments (even if the IME is not done by then).* *2. This also clarifies that if PPD is due because of the minimum ratings in DWD 80.32, it is due during weeks in which no temporary disability is paid—regardless of whether there is an end of healing, permanency rating, or return to work.* *3. The Council amended the Department's proposal to commccommence payments with 30 days rather than 14 days.*

Admin rules; Electronic media	102.37	Amend 102.37 as follows: Employers' records. Every employer of 3 or more persons and every employer who is subject to this chapter shall keep a record of all accidents causing death or disability of any employee while performing services growing out of and incidental to the employment. This record shall give the name, address, age and wages of the deceased or injured employee, the time and causes of the accident, the nature and extent of the injury, and any other information the department may require by rule or general order. Reports based upon this record shall be furnished to the department at such times and in such manner as it may require by rule or general order, ~~upon forms~~ in a format approved by the department. *Comment.* *1. The term "rule" has replaced the phrase "general order" in almost all other statutory usage. However, since both terms are occasionally used elsewhere (e.g., s. 103.005, which is cross-referenced in s. 102.39) the reference to general orders is retained rather than deleted). The same change is proposed in 102.37, 102.38, 102.39, 102.57 and 102.58* *2. The requirement to use a "form" is unnecessarily restrictive. The statute is more restrictive than the electronic reporting rule, DWD 80.02(3). The Department allows and encourages insurers to provide required information in other formats--fax, EDI and over the internet.*
Admin rules; Electronic media; Insurer reports	102.38	Amend 102.38 as follows: Records of payments; reports thereon. Every insurance company which transacts the business of compensation insurance, and every employer who is subject to this chapter but whose liability is not insured, shall keep a record of all payments made under this chapter and of the time and manner of making the payments, and shall furnish reports based upon these records or any other information to the department as it may require by rule or general order, ~~upon forms~~ in a format approved by the department. *Comment.* *1. Just as employers must provide any information required by rule in 102.37. insurers should provide any information required by rule, not just payment information. For example, insurers (not employers) now provide the first report of injury (WKC-12). See DWD 80.02(2).* *2. General order is an obsolete term. The same change is proposed in ss. 102.37, 102.38, 102.39, 102.57 and 102.58.*
Admin. rules	102.39	Amend 102.39 as follows: General orders; application of statutes. The provisions of s. 103.005 relating to the adoption, publication, modification and court review of rules or general orders of the department shall apply to all rules or general orders adopted pursuant to this chapter. *Comment. The same change is proposed in ss. 102.37, 102.38, 102.39, 102.57 and 102.58*

Format ?
102.076(2)

Wage offset	102.43(6)(b) (c)	Amend 102.43(6)(b) as follows: Wages received from other employment held by the employee when the injury occurred shall be considered in computing actual wage loss from the employer in whose employ the employee sustained the injury, if the employee's weekly temporary disability benefits are calculated under s. 102.11(1)(a). If the employe's wage is expanded under s. 102.11(1)(a) the employe's earnings from other employment held at the time of injury shall be offset against that expanded wage not the actual wage at the time of injury. *Comment. This would clarify that the offset against the* **expanded** *wage is only for workers who had more than one job at the time of injury. [For people who get a second job* **after** *the injury the offset has always been taken against the* **actual** *pre-injury wage, not the wage expanded under s. 102.11(1)(a).] 2-Job wage earners were clearly relying on the 2-job wages prior to the injury. For this reason, in 1985, the offset was eliminated. In 1988, the offset was restored to prevent what some saw as unjust enrichment. However, the offset was intended to be against the expanded wage to prevent undue hardship. Unfortunately, the statutory language has never been clear. In recent years, there have been more and more arguments on this point. And, recent LIRC decisions have added to the confusion, by adding wages from both jobs to determine both the TTD rate and the offset--something the department has never done. Typically, the problem addressed by this change occurs when the worker who is hurt on a part-time job is able to* **partially** *return to work at the full-time job. (Once they have returned full-time to the full-time job, the offset will almost always reduce TTD to zero regardless of whether it is taken against the actual or expanded wage from the part-time job.) The problem is that the higher wage from a partial return to the full-time job almost immediately offsets the actual wage from a (typically) lower paying part-time job. Even when the offset is made against the expanded wage, the worker is still making far less than prior to the injury from both jobs (that is, there is no unjust enrichment.) In short, the department believes the 1988 offset against the* **expanded** *wage was a compromise between* **no** *offset and offsets against* **actual** *wage.*
Admin. rules	102.57	Amend 102.57 as follows: Violations of safety provisions, penalty. If injury is caused by the failure of the employer to comply with any statute, rule or any lawful order of the department.... *Comment. The same change is proposed in ss. 102.37, 102.38, 102.39, 102.57 and 102.58*
Admin. rules	102.58	Amend 102.58 as follows: Decreased compensation. If injury is caused by the failure of the employee to use safety devices which are provided in accordance with any statute, rule or lawful order of the department.... *Comment. The same change is proposed in ss. 102.37, 102.38, 102.39, 102.57 and 102.58*
Vocational rehabilitation	102.61(1m) (c) (d) (e) (f)	Delete obsolete reference to Department of Health and Family Services *Comment. DVR is now a Division of DWD, not DHFS.*

(2)

Prepared by
Richard D. Smith, Director
Bureau of Legal Services
Worker's Compensation Division

Malaise, Gordon

From: Smith, Richard
Sent: Wednesday, August 01, 2001 3:45 PM
To: Malaise, Gordon
Cc: Norman-Nunnery, Judy; Conway, John; O'Malley, Jim
Subject: Council on Worker's Compensation

2001-7-24.DOC

Gordon,
I am enclosing a ***draft*** of the meeting minutes from the Council's July 24th meeting. Items ***5A to 5I*** describe changes that should be added to the "agreed bill" items that I sent you earlier. I annotated some of those sections with additional information which I hope you find useful in drafting. Those annotations will not appear in the public minutes.

I understand you will return from vacation August 6th. I will be on vacation that week, but Jim O'Malley (266-0331) is quite familiar with these issues. I am confident he can help you with any questions you may have the week of August 6-10. I will return to work August 11th. I'd welcome an opportunity to walk you through some or all of these items if you think it will help.

I am working with Jason in Rep. Hundtermark's Office to develop a schedule for bill hearings. They always want the bill sooner than we are ready to "let go." This year will probably be no different. The bill is unusually ambitious in terms of what it accomplishes, but I'm not sure the extent to which it adds complexity to your drafting. There will be an unusually large number of people who want to "flyspeck" what I'm sure will be 2 or 3 LRB drafts. Anything you can do to help us get the first draft out quickly will be greatly appreciated. Thanks.

Dick Smith, Director
Bureau of Legal Services
Worker's Compensation Division

--- D R A F T ---

Council on Worker's Compensation
Meeting Minutes
Madison, Wisconsin
July 24, 2001

Members present: Mr. Bagin, Mr. Beiriger, Mr. Buchen, Ms. Coakley, Ms. Connor, Mr. Glaser, Mr. Gordon, Mr. Newby, Ms. Norman-Nunnery, Mr. Olson, Ms. Vetter, Mr. Welnak.

Staff present: Mr. O'Malley, Mr. Shorey and Mr. Smith.

1. ***Minutes.*** Ms. Norman-Nunnery convened the meeting in accordance with Wisconsin's open meetings law. As amended, Mr. Welnak moved adoption; Mr. Bagin seconded the motion. The motion to adopt the minutes of the June 25, 2001 meeting was unanimously approved.

2. ***Meeting September 13, 2001.*** Ms. Norman-Nunnery said that Richard Victor, Executive Director, Worker's Compensation Research Institute, would be in Madison to lead a briefing on two WCRI papers. The first is a multi-state examination of health care costs; the second is a study of medical costs in Wisconsin. She asked the members to try to hold September 13, 2001 open on their calendars for a Council meeting.

3. ***Correspondence.*** Ms. Norman-Nunnery asked the Council members to review correspondence, including a letter from Attorney John Edmonson relating to several legislative proposals.

4. ***Caucus.*** The Council members temporarily adjourned to separate caucuses to discuss their respective legislative proposals.

5. ***"Agreed Bill".*** Mr. Bagin explained the following proposals. He proposed that they be adopted as a package and included in the bill.

   A. ***Management Proposal 1—Honthaner's Restaurants***. Mr. Bagin said that, subject to changes that may come from LRB drafting, they had reached agreement on a proposal to limit the application of the *Spencer* doctrine relating to the payment of temporary and permanent disability in certain cases. He said the intent was ***not*** to disturb the *Spencer* doctrine as it relates to disability benefits for cases that look like *Spencer*--where the employer initially concedes a work injury; at some point, the employee undergoes invasive surgical treatment in good faith that later, on the basis of an adverse

medical examination, is determined to be unnecessary treatment; and as a consequence of this invasive and unnecessary surgical procedure, the employee has additional temporary or permanent disability for which the employer is liable. He said the intent was to respond to the *Honthaner's Restaurants* case so that, even in cases where employers and insurers concede a work injury, they may use an examining doctors opinion to defeat liability for disability benefits that are a consequence of ***non***-invasive and unnecessary medical treatment--even if the employee underwent the unnecessary treatment in good faith. (See attachment 1)

Gordon, the draft language in attachment 1 was worked out by 5 attorneys representing the Department, Labor and Management. While each word was carefully chosen, they recognize you may recommend some drafting changes. The parties agree in principle, but they need to make sure that the words accurately memorialize the principles. Please call if you have any questions. The footnotes are as they will appear in our annotated publication, WKC-1, Worker's Compensation Act of Wisconsin.

✓B. ***Management Proposal 3—Delete sunset in s. 102.16(2(d).*** Mr. Bagin said the sunset has been extended every session since 1994. While the system is not perfect it has proven more workable than the system it replaced.

✓C. ***Management Proposal 4—Eliminate the 10-day payment period in DWD 80.15.*** Mr. Bagin said that one of the ironies of automation is that it sometimes takes longer to issue a check than it did before automation. He said this would repeal the 10-day payment standard in DWD 80.15 for stipulations and compromise orders and set a uniform 21-day payment standard on all orders. Mr. Smith asked if the proposal was intended to merely revise the rule or to amend the statute and revise the rule. Mr. Bagin said that to assure a January 1, 2002 effective date the proposal was to create a statute and amend the rule.

Gordon, I'm not sure where the best place to put this is. 102.18?

✓D. ***Management Proposal 7—No vocational rehabilitation if employer offers suitable employment at no less than 90% of the employe's pre-injury wage.*** Mr. Bagin said the intent was to apply the job offer/suitable employment concept in s. 102.61(1m) and DWD 80.49 to the DVR process in s. 102.61(1). He said the private-sector system includes the job-offer concept and, until very recently, so did the state DVR process. Mr. Smith asked if the intention was that the offer at 90% of the pre-injury wage had to come from the injury employer or did the concept include a job search. Mr. Bagin confirmed that the job offer had to come from the injury employer and that there was no intention to require the employee to undertake a job search.

Gordon, in voc rehab there are two systems. First, the system assumes that DVR will provides all services (I'll call that the public system). This is under 102.61(1). Second, is where DVR determines a WC client is eligible, but DVR has no money to provide services to develop a plan. In that case, the WC client may use a system of private rehab counselors. This is s. 102.61(1m).

When the private system was set up it was designed to mirror the public system as close as possible. At that time, under the public DVR system, DVR would not certify a WC client as eligible for retraining if the injury-employer would take the person back to work at a suitable employment. DVR determined "suitable employment" on a case by case basis without any written standards. Therefore, the private system in Wis. Admin. Code DWD 80.49 mirrored this—and went a step further by defining an offer of "suitable employment" in DWD 80.49(4)(d) and (5), and establishing a process for notifying the worker of this offer in DWD 80.49(8).

The bill should be drafted so that the elements of those DWD rule sections are enacted into the 102.61(1) publi- sector DVR process. There is only one minor change. The definition of suitable employment in DWD 80.49(5)(a) is 85% of the average weekly wage. That should be 90% in the bill. Thus, an employer who makes an offer of suitable employment at 90% of the average weekly wage will not be liable to pay any WC vocational rehab TTD payments as provided in s. 102.43(5) or actual and necessary travel or maintenance costs under 102.61(1). The concept is that if the employer makes an offer of "suitable employment" that employer has no voc rehab liability regardless of what DVR determines with respect to the person's eligibility for retraining under federal law in s. 102.61(1).

This change is necessary because a few years after this private system was established, the federal government said DVR could not deny eligibility on the basis that the injury employer made a good job offer to the WC client. The feds said DVR did not do that in determining eligibility for their non-WC clients (most of whom had little or no employment history) and that DVR could not discriminate against WC clients in this way. Eventually, to keep its federal funding, DVR agreed to comply with the federal mandate. They said they would certify WC clients who were otherwise eligible for voc rehab even if the injury employer had offered the person his or her job back. DVR said the only real issue for DVR certification would be the extent of the person's permanent physical or mental disability—not whether the injury employer had offered the person back his or her job. DVR will continue to certify WC clients as eligible for retraining under the federal law.. But, if the employer(makes or has made) a suitable job offer, the employer has no liability under Chapter 102 to pay for the vocational rehabilitation.

E. ***Labor Proposal A.*** Increase the current $184 maximum rate for PPD as follows:

Effective January 1,	2002	$212	~ 318
	2003	$222	~ 333
	2004	$232	~ 348
	2005	$242	~ 363

Gordon, this is the standard 102.11 increases for PPD.

F. ***Labor Proposal B.*** Currently, the maximum rate for temporary disability, death benefits and permanent total disability is set by a formula in s. 102.11(1) that uses the state's average weekly earnings as determined under s. 108.05.

Mr. Bagin said that effective January 1, 2002, 2003, 2004 and 2005, the maximum rate would be the formula amount plus 10%.

Gordon, the change should be written in a way that in 2006, reverts to the formula used today—the 108.05 formula. Only the 10% addition to the formula should sunset in 2006.

G. ***Labor Proposal 17c—Prospective treatment.*** After the second sentence in s. 102.18(1) add: "The department may order an employer or insurer to pay for reasonable and necessary future treatment that arises from the injury."

H. ***Labor Proposal D—Increase supplemental benefit in 102.44(1)(a) from $150 to $202.*** Mr. Bagin said the proposal increases the minimum supplemental benefit to $202 in s. 102.44(1)(a) and changes the year in s. 102.44(1) from 1976 to 1978—the year that corresponds with a maximum weekly rate of $202.

I. ***Labor 18—Recorded statements DWD 80.24.*** When an employe gives the employer or insurer a signed statement relating to a claim, the employe must be given a copy. When the statement is recorded and not immediately reduced to writing, the current rule says the employe or his or her attorney is entitled to a copy of the entire statement within a reasonable time after application for hearing is filed. If the employer or insurer do not comply, they may not use the statement in any manner in connection with the claim. He said the employer or insurer may comply by providing a copy of the recording or a transcribed copy. Mr. Bagin said the proposal deletes the phrase "after application for hearing" in DWD 80.24. He said the drafter may "clean up" other language in the rule before codifying it in Chapter 102 as long as it does not change the meaning.

J. ***Future action.*** Mr. Bagin said there may still be a need for the Council to take some further action regarding the investigation of safety violations. He also said that the Council would study medical costs, probably by creating a formal subcommittee.

Mr. Bagin said the management members of the Council unanimously supported these proposals. He recommended that the Council adopt the package of proposals and add it to those proposals approved earlier this year. He recommended they take no further action on items that were previously tabled.

Mr. Glaser said that the labor members of the Council supported the proposals. He offered several additional comments.

He said that an article in the *Business Journal* reported the 4% rate increase in premiums was only the second increase in the last 8 years. He said that contrasted sharply with rate increases in various non-worker's compensation costs over the same period. Therefore, he said, it's possible that the study on medical costs may show that the worker's compensation system is working fine. Worker's compensation may have found some answers that would benefit the rest of the health-care system.

He said both sides deserved praise for working out a reasonable agreement on the *Honthaner's* proposal. It eliminates a longstanding concern for management that *Spencer* should be limited to cases that resemble *Spencer*. And, it minimizes labor's concern that there might be a significant increase in contested cases, requiring many more employees to pursue litigation to obtain benefits.

He said the DVR proposal is a fair one. It takes something that works reasonably well in the private-sector system and applies the same concept to the state DVR system. He emphasized his belief that, in most cases, after a work injury an employe is better off returning to work at the pre-injury employer than attempting vocational retraining.

Finally, he said there were some significant issues on which they were unable to achieve as much as labor might have wanted. For example, he said, while they agreed to raise the minimum benefits for long-term disabled from $150 to $208, they had been unable to agree on a broader cost-of-living increase. He said he hoped that by taking a four-year approach to the major benefit rates in this bill that, over the next two years, they could focus more attention on other issues that merit review—and do it in an atmosphere with a little less emotion and pressure.

Mr. Buchen said he agreed with Mr. Bagin and Mr. Glaser that reaching an agreement on the *Spencer/Honthaner's* issue was a significant achievement. He said it was important to establish an employer's right to use an IME to dispute certain disability claims involving unnecessary medical treatment. He said it was particularly important for treatment that can extend over a long period of time—usually to treat injuries that are more subjective—and that do not involve treatment as serious as the surgery in *Spencer*. At the same time, he said he understood that labor members felt it was important to preserve an employe's right to disability compensation after undergoing significant surgical procedures in good faith, even if the surgery or other invasive treatment is later determined to be unnecessary.

Ms. Norman-Nunnery expressed her thanks to the labor and management leaders, and to the other labor, management and insurance members and advisors, for resolving some thorny issues. She also thanked the legislative liaison for his active participation in the process, as well as those serving as liaison from the Medical Society, Chiropractic Association and Hospital Association.

Mr. Bagin moved that the proposals he outlined today be added to the proposals previously approved by the Council as part of the agreed bill, and that the entire package be drafted as a bill for consideration by the Legislature during their fall floorperiods. Mr. Glaser seconded the motion. The motion passed unanimously.

The Council adjourned.

Attachment 1 -- Management Proposal 1

Section 1. Section 102.42(1) is amended to read:

102.42(1) TREATMENT OF EMPLOYE. The employer shall supply such medical, surgical, chiropractic, psychological, podiatric, dental and hospital treatment, medicines, medical and surgical supplies, crutches, artificial members, appliances, and training in the use of artificial members and appliances, or, oat the option of the employe, if the employer has not filed notice as provided in sub. (4), Christian Science treatment in lieu of medical treatment, medicines and medical supplies, as may be ~~reasonably required~~ necessary[1] to cure and relieve from the effects of the injury, and to attain efficient use of artificial members and appliances....(ETC.)

Section 2. Section 102.42(1m) is created to read:

102.42(1m) If the employer concedes a compensable injury, or in a contested case under s. 102.17(1), if there is a finding that an injury is compensable, and the employe in good faith undertakes treatment that is unnecessary, then the employer shall pay disability indemnity[2] provided there is a disability as a consequence of invasive treatment. For purposes of this subsection, invasive treatment shall be limited to treatment that is generally medically acceptable.[3]

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[1] This change is not intended to change the meaning, but to update to the modern terms that distinguish disputes about "reasonable fees" from disputes about "necessary treatment" as, for example, in s. 102.16(2) and (2m), Stats.

[2] Disability indemnity is intended to include all forms of temporary or permanent disability.

[3] Sections 102.16(2) and (2m) repealed *Spencer v. ILHR Department,* 55 Wis. 2d 525, 200 N.W. 2d 611(1972) as it applied to the treatment expenses as a consequence of unnecessary medical treatment. Those sections did not repeal *Spencer* as it applies to disability indemnity payments as a consequence of unnecessary treatment. Section 102.42(1m) authorizes the Department to deny payment for some types of unnecessary treatment and is intended to overrule *Honthaner's Restaurants, Inc. v. LIRC,* 2000 WI App 273, 240 Wis. 2d 234, 631 N.W.2d 660.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3500/P1dn
GMM

Dick:

In reviewing this draft, please note all of the following:

1. In addition to the changes requested by labor, management, and the department, this draft also corrects s. 15.227 (4) to delete a reference to "members" of the department. That reference should have been deleted in last session's bill when members of LIRC were removed from the council.

2. The draft does not include the department's recommended change to s. 102.07 (4m) because members of a religious sect that does not believe in worker's compensation who are engaged in farming are already covered in s. 102.07 (5) (d).

3. Section 102.07 (7m), relating to emergency response team members, cross-references regional emergency response team members under s. 166.215 as well as municipal, county, and state emergency response team members under s. 166.03 (8) (d).

4. Labor's instructions that the maximum compensation rate under s. 102.11 (1) (intro.) shall equal the state's average weekly earnings "plus 10%" do not specify 10% of what. Alternatives include 10% of the *state's* average weekly earnings or 10% of the *employee's* average weekly earnings. This preliminary draft specifies that the 10% refers to the *employee's* average weekly earnings. If that is incorrect, please advise.

5. The definition of "workweek" for purposes of s. 102.11 (1) (a) was inserted in s. 102.01 (2), the general definitions section for the chapter, because there was no place in s. 102.11 (1) (a) to squeeze in a definition. Accordingly, the draft also changes a reference to "working week" in s. 102.11 (1) (b) to "workweek" to conform that paragraph to the new definition.

References to "week" and "weekly" abound throughout the chapter. If any of those references actually refer to a calendar week beginning on Sunday and ending on Saturday, that is, a "workweek" as defined in the bill, rather than to a period of seven days that may begin on any day of the week, then those references might also need to be changed to "workweek."

6, In s. 102.11 (1) (f) 1., relating to the 24–hour floor for members of a class of part–time employees, the draft lays a foundation for the definition of "class of part–time

employees" by first clarifying that the provision only applies to an employee who is a member of such a class of employees. The draft also clarifies that the average weekly earnings of such an employee may be expanded to 24 times the employee's hourly wage *or the employee's actual weekly wage*, whichever is greater.

7. In s. 102.123, relating to statements provided by an employee, DWD 80.24 does not specify *when* a written statement must be given to the employee. Accordingly, this draft specifies that a written statement must given to the employee within a reasonable time after the statement is made. The draft treats a recorded statement similarly.

8. In ss. 102.17 (4) and 102.66 (1) and (2), relating to the statute of limitations for an employee who loses a hand or the rest of the arm or a foot or the rest of the leg, this draft refers to *any part* of the rest of the arm or leg because "the rest of the arm or leg" standing alone implies that the employee must lose his entire arm from the shoulder on down or his entire leg from the hip on down when, in fact, the employee might only lose his arm from the elbow on down or his leg from his knee on down.

Indeed, if we say "any part of the arm" does a reference to "hand" become redundant since the hand is part of the arm? Also, what about losing a part of the hand, *e.g.*, a thumb or finger, is that situation intended to be covered by this draft? If so, we should probably specify "any part of the hand."

9. In s. 102.18 (1) (e), relating to the 21–day payment period, note that s. 102.21 provides for a different procedure for municipal employers. Accordingly, the draft provides an exception for municipal employers covered under s. 102.21.

10. With respect to information received from the Wisconsin compensation rating bureau, note that the draft amends not only s. 102.31 (8), but also ss. 102.33 and 626.32 (1) (a) to provide for confidentiality of that information under those provisions as well.

11. In s. 102.32 (6), the department's proposed language refers to the insurer having "clear information regarding the nature of the injury or surgery." That subsection, however, contains no antecedent for the reference to "injury or surgery." Accordingly, this draft refers to the employer's knowledge of the *permanent disability*, which is what the subsection is talking about.

For alternative methods of expressing the employer's knowledge of the employee's injury, see, for example, ss. 102.17 (4) and 102.42 (1).

12. In s. 102.42 (1m), relating to liability for unnecessary treatment that causes further disability, the draft, for the sake of clarity, states not only when the employer is liable, but also when the employer is not liable, that is, the employer is liable when the treatment is invasive and medically acceptable, but is not liable when the treatment is either noninvasive or not medically acceptable.

13. In s. 102.43 (6) (b), relating to offsetting wages from another job when calculating the employee's wage loss, the concept of "wage expansion" is not expressed in the statutes in so many words. Accordingly, this draft describes that concept by reference to "average weekly earnings calculated under s. 102.11 (1) (a)."

If you have any questions about the draft or this drafter's note, please do not hesitate to contact me directly at the phone number or e–mail address listed below.

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