

Department Proposals for WCAC Consideration - June 2017

Department Proposal 1

s. 102.81 (4) (a).

- The language in this paragraph provides the Uninsured Employers Fund (UEF) is to receive all of the proceeds from third party settlements less attorney fees and costs. This creates a disincentive for attorneys to represent employees in third party actions. The paragraph should be amended to provide the distribution of third party proceeds as stated in s. 102.29 (1), Wis. Stats. With this amendment the UEF would receive distribution of proceeds in a similar manner as a WC insurance carrier or self-insured employer.

Proposed language under s.102.81 (4) (a).

(4) An injured employee, or the dependent of an injured employee, who received one or more payments under sub. (1) shall do all of the following:

(a) If the employee or dependent begins an action to recover compensation from the employee's employer or a 3rd party liable under s. 102.29, provide to the department a copy of all papers filed by any party in the action.

(b) If the employee or dependent receives compensation from the employee's employer ~~or a 3rd party liable under s. 102.29~~, pay to the department the lesser of the following:

1. The amount after attorney fees and costs that the employee or dependent received under sub. (1).
2. The amount after attorney fees and costs that the employee or dependent received from the employer, ~~or 3rd party.~~

(c) If the employee or dependent receives compensation from a 3rd party liable under s. 102.29, pay to the department the proceeds as specified in s. 102.29 (1) (b).

Department Proposal 2

s. 102.33 (2) (b) 7.

- Under current law the Division may provide limited worker's compensation record information to the department of children and families or a county child support agency. The information is limited to the name and address of the employee who is the subject of the record, the name and address of the employee's employer, and any financial information about that employee contained in the record.

The proposed amendment allows the Division to provide limited worker's compensation record information to the department of health services or a county department of social services. The information is limited to the name and address of the employee who is the subject of the record, the name and address of the employee's employer, and any financial information about that employee contained in the record.

Proposed language under s. 102.33 (2) (b) 7.

The requester is the department of health services or a county department of social services under s. 46.215, 46.22, or 46.23, the request is made under s. 49.22 (2m), and the request is limited to the name and address of the employee who is the subject of the record, the name and address of the employee's employer, and any financial information about that employee contained in the record.

Department Proposal 3

s. 102.04 (1) (b) 1.

Under current law, every person who usually employs three or more employees for services performed in this state is subject to the worker's compensation law. The term "usually" is not defined in the statutes and is thereby open to interpretation, ambiguity and lack of clarity. This proposal provides that every person who at any time employs three or more employees for services performed in this state is subject to the worker's compensation law and specifies that a person becomes subject to that law on the day on which the person employs three or more employees for services performed in this state.

Proposed language under s. 102.04 (1) (b) 1.

Every person who usually at any time employs 3 or more employees for services performed in this state, whether in one or more trades, businesses, professions, or occupations, and whether in one or more locations. A person who employs 3 or more employees for services performed in this state becomes subject to this chapter on the day on which the person employs 3 or more such employees.

Department Proposal 4

Fund 227 WC Operations

WC Draft Notes for a New Alpha Appropriation

The Department recommends the creation of a new Workers Compensation Chapter S. 20.445 Alpha appropriation. It is recommended that the alpha appropriation be a Segregated Annual Funds appropriation (SEG), with \$5.0 million of annual budget authority, and within Fund 227.

Background

- Under 2015 Act 55, DWD was to collect up to \$5 million per year and would be used to provide reimbursement to insurers paying supplemental benefits, and to pay claims put on hold due to solvency issues with the fund. Under the Act the Department would pay claims for reimbursement in the chronological order in which they were received. No reimbursement would be paid to insurers for employees injured beginning on January 1, 2016.
- A similar provision was recommended by the Advisory Council's agreed upon bill, 2013 AB 711/SB 550.
- The Act however bill did not establish a new alpha appropriation (Separate account within DWD-WC's accounting metrics) and did provide for spending authority in Fund 227. Meaning the Department under the Act could collect the monies, but not pay them out.
- A onetime workaround was provided for this year, however, the budget authority in (1) (ra) is not high enough in this appropriation. Also, the (1) (ra) alpha appropriation is designated for administrative purposes, while the newly created "WISBF" assessments" are an aids payment in nature.
- Creation of a new Fund 227 alpha appropriation with \$5.0 million of annual budget authority will permit effective administration of the program in accordance with the intent of Act 55 and the previous WCAC provision.
- This provision would not increase revenue for DWD-WC or increase assessments on stakeholders, just provide DWD-WC with the authority to reimburse carriers for monies it is required to collect.

Department Proposal 5

Fund 229 WC Uninsured Employers Fund

WC Draft Notes for Statutory Language Change to 20.445 (1) (sm)

The Department recommends modifying the designation of appropriation 20.445 (1) (sm) *Uninsured employers fund; payments* from a Segregated Revenue Sum Sufficient appropriation to a Segregated Revenue Continuing appropriation. This change more accurately reflects the actual fiscal process for the appropriation. Moreover, the modification will create efficiencies for accounting and budget transactions and cash balance reporting.

The proposed change will not affect assessments or payments from this fund.

Background

WC's Fund 229 *Uninsured employers fund* was created via 1989 WI Act 64. Excerpted below is the Chapter 102 citation that authorizes the nonlapsible trust fund designated as the uninsured employers fund and designates appropriation 20.445 (1) (sm) for making payments.

S. 102.80 (1) There is established a separate, nonlapsible trust fund designated as the uninsured employers fund consisting of all the following:

102.80(1) (a) **(a)** Amounts collected from uninsured employers under s. 102.82.

102.80(1) (b) **(b)** Uninsured employer surcharges collected under s. 102.85 (4).

102.80(1) (d) **(d)** Amounts collected from employees or dependents of employees under s. 102.81 (4) (b).

102.80(1) (e) **(e)** All moneys received by the department for the uninsured employers fund from any other source.

102.80(1) (f) **(f)** Amounts transferred to the uninsured employers fund from the appropriation account under s. 20.445 (1) (ra) as provided in s. 102.81 (1) (c).

102.80(1m) **(1m)** The moneys collected or received under sub. (1), together with all accrued interest, shall constitute a separate nonlapsible fund designated as the uninsured employers fund. Moneys in the fund may be expended only as provided in s. 20.445 (1) (sm) and may not be used for any other purpose of the state.

The current law definition for appropriation 20.445 (1) (sm) *Uninsured employers fund; payments* says:

20.445 (1) (sm) *Uninsured employers fund; payments.* From the uninsured employers fund, a sum sufficient to make the payments under s. 102.81 (1) and to obtain reinsurance under s. 102.81 (2). No moneys may be expended or encumbered under this paragraph until the first day of the first July beginning after the day that the secretary of workforce development files the certificate under s. 102.80 (3) (a).

This definition equates to SEG Sum Sufficient and requires revenues to be recorded in a "revenue only" account while payments are made from a different account. To report cash balances the two accounts must be manually merged.

Department Proposal 6

s. 102.17 (1) (a) 5.

- Administrative rules primarily related to worker's compensation adjudicative functions contained in ch. DWD 80 will be transferred to the DHA. However, there are a number of other administrative rules that are not primarily related to adjudicative functions that also apply to adjudicated cases. The administrative rules that apply to both adjudicative and non-adjudicative functions must be consistently applied for the effective administration of the worker's compensation system. The proposal is for an amendment to create a new subdivision in s. 102.17 (1) (a), Wis. Stats., to require DHA to follow administrative rules promulgated by the Worker's Compensation Division (WCD), and that limits DHA to promulgating its own rules of procedure.

Proposed language for the creation of s. 102.17 (1) (a) 5., Wis. Stats.

s. 102.17 (1) (a) 5.a. The division shall follow rules promulgated by the department for the administration of this chapter.

s. 102.17 (1) (a) 5.b. Notwithstanding s. 227.11, the division may only promulgate rules of procedure for the administration of this chapter.

Department Proposal 7

s. 102.16 (b) 1. & s. 102.16 (1) (b) 2

- There is currently no statutory authority in ch. 102, Wis. Stats., that specifically authorizes the Worker's Compensation Division (WCD) to conduct alternative dispute resolution (ADR) activities to resolve disputed worker's compensation cases. Currently, the WCD utilizes Dispute Resolution Specialists on its staff to work with pro se claimants (employees not represented by attorneys), employers and worker's compensation insurance carriers to resolve cases without the need for formal hearings. The proposal is to renumber s. 102.16 (1) (b), Wis. Stats., to s. 102.16 (1) (b) 1., and create s. 102.16 (b) 2., Wis. Stats., to authorize the WCD staff to also conduct ADR activities in cases involving employees appearing pro se where hearings applications were filed, with cases both ready and not ready to be scheduled for hearings, for the purpose of conducting ADR activities to resolve cases without the need for formal hearings.

Proposed language, the amendment will renumber s. 102.16 (1) (b) to s. 102.16 (b) 1. The proposed language for the creation of s. 102.16 (1) (b) 2., is as follows:

s. 102.16 (1) (b) 2. The department may conduct alternate dispute resolution activities for a case involving an employee who is not represented by an attorney where no application has been filed under s. 102.17 (1) (a) 1., or with respect to which an application has been filed under s. 102.17 (1) (a) 1., and the case is ready or not ready to be scheduled for a hearing.

Department Proposal 8

s. 102.17 (1) (c),

- Section 102.17 (1) (c), Wis. Stats., provides statutory authority for the process to allow persons who are not attorneys licensed to practice law in Wisconsin to represent parties at worker's compensation hearings. Under current law the Worker's Compensation Division (WCD) is authorized to grant to persons who are not attorneys licensed to practice law in Wisconsin permission to appear at hearings. The Division of Hearings and Appeals (DHA) now conducts worker's compensation hearings and should have statutory authority to regulate the process for authorizing persons not licensed to practice law in Wisconsin to appear before the DHA in representation of parties at hearings and to grant licenses to appear. Section DWD 80.20 of the Wisconsin Administrative Code is the administrative rule covering licenses to appear. Section DWD 80.20 of the Wisconsin Administrative Code cannot be transferred to DHA at this time with the other administrative rules primarily related to adjudicative functions because there is no current provision in s. 102.17 (1) (c), Wis. Stats., for DHA to have authority over this rule.

The proposed amendment to s. 102.17 (1) (c), Wis. Stats., will provide DHA with statutory authority over the license to appear process and s. DWD 80.20 of the Wisconsin Administrative Code. When the amendment becomes effective s. DWD 80.20 of the Wisconsin Administrative Code may be transferred to DHA by a nonstatutory provision in the WCAC "Agreed Upon Bill".

Proposed language for the amendment to s. 102.17 (1) (c) is as follows:

s. 102. 17 (1) (c) 1. 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 division. No person, firm, or corporation, other than an attorney at law who is licensed to practice law in the state, may appear on behalf of any party in interest before the division or any member or employee of the division assigned to conduct any hearing, investigation, or inquiry relative to a claim for compensation or benefits under this chapter, unless the person is 18 years of age or older, does not have an arrest or conviction record, subject to ss. 111.321, 111.322 and 111.335, is otherwise qualified, and has obtained from the ~~department~~ division a license with authorization to appear in matters or proceedings before the division. Except as provided under pars. (cm), (cr), and (ct), the license shall be issued by the ~~department~~ division under rules promulgated by the ~~department~~ division. The ~~department~~ division shall maintain in its office a current list of persons to whom licenses have been issued.

2. Any license issued under subd. 1. may be suspended or revoked by the ~~department~~ division for fraud or serious misconduct on the part of an agent, may be denied, suspended, nonrenewed, or otherwise withheld by the ~~department~~ division for failure to pay court-ordered payments as provided in par. (cm) on the part of an agent, and may be denied or revoked if the department of revenue certifies under s. 73.0301 that the applicant or licensee is liable for delinquent taxes or if the ~~department~~ division determines under par. (ct) that the applicant or licensee is liable for delinquent unemployment insurance contributions. Before suspending or revoking the license of the agent on the grounds of fraud or misconduct, the ~~department~~ division shall give notice in writing to the agent of the charges of fraud or misconduct and shall give the agent full opportunity to be heard in relation to those charges. In denying, suspending, restricting, refusing to renew, or otherwise withholding a license for failure to pay court-ordered payments as provided in par. (cm), the ~~department~~ division shall follow the procedure provided in a memorandum of understanding entered into under s. 49.857.

3. Unless otherwise suspended or revoked, a license issued under subd. 1. shall be in force from the date of issuance until the June 30 following the date of issuance and may be renewed by the ~~department~~ division from time to time, but each renewed license shall expire on the June 30 following the issuance of the renewed license.

(cg)

1. Except as provided in subd. 2m., the ~~department~~ division shall require each applicant for a license under par. (c) who is an individual to provide the ~~department~~ division with the applicant's social security number, and shall require each applicant for a license under par. (c) who is not an individual to provide the ~~department~~ division with the applicant's federal employer identification number, when initially applying for or applying to renew the license.

2. If an applicant who is an individual fails to provide the applicant's social security number to the ~~department~~ division or if an applicant who is not an individual fails to provide the applicant's federal employer identification number to the ~~department~~ division, the ~~department~~ division may not issue or renew a license under par. (c) to or for the applicant unless the applicant is an individual who does not have a social security number and the applicant submits a statement made or subscribed under oath or affirmation as required under subd. 2m.

2m. If an applicant who is an individual does not have a social security number, the applicant shall submit a statement made or subscribed under oath or affirmation to the ~~department~~ division that the applicant does not have a social security number. The form of the statement shall be prescribed by the ~~department~~ division. A license issued in reliance upon a false statement submitted under this subdivision is invalid.

3. The ~~department of workforce development~~ division may not disclose any information received under subd. 1. to any person except to the department of revenue for the sole purpose of requesting certifications under s. 73.0301 or the department of children and families for purposes of administering s. 49.22.

(cm) The ~~department of workforce development~~ division shall deny, suspend, restrict, refuse to renew, or otherwise withhold a license under par. (c) for failure of the applicant or agent to pay court-ordered payments of child or family support, maintenance, birth expenses, medical expenses, or other expenses related to the support of a child or former spouse or for failure of the applicant or agent to comply, after appropriate notice, with a subpoena or warrant issued by the department of children and families or a county child support agency under s. 59.53 (5) and related to paternity or child support proceedings, as provided in a memorandum of understanding entered into under s. 49.857. Notwithstanding par. (c), an action taken under this paragraph is subject to review only as provided in the memorandum of understanding entered into under s. 49.857 and not as provided in ch. 227.

(cr) The ~~department~~ division shall deny an application for the issuance or renewal of a license under par. (c), or revoke such a license already issued, if the department of revenue certifies under s. 73.0301 that the applicant or licensee is liable for delinquent taxes. Notwithstanding par. (c), an action taken under this paragraph is subject to review only as provided under s. 73.0301 (5) and not as provided in ch. 227.

(ct)

1. The ~~department~~ division may deny an application for the issuance or renewal of a license under par. (c), or revoke such a license already issued, if the ~~department~~ division determines that the applicant or licensee is liable for delinquent contributions, as defined in s. 108.227 (1) (d). Notwithstanding par. (c), an action taken under this subdivision is subject to review only as provided under s. 108.227 (5) and not as provided in ch. 227.

2. If the ~~department~~ division denies an application or revokes a license under subd. 1., the ~~department~~ division shall mail a notice of denial or revocation to the applicant or license holder. The notice shall include a statement of the facts that warrant the denial or revocation and a statement that the applicant or license holder may, within 30 days after the date on which the notice of denial or revocation is mailed, file a written request with the ~~department~~ division to have the determination that the applicant or license holder is liable for delinquent contributions reviewed at a hearing under s. 108.227 (5) (a).

3. If, after a hearing under s. 108.227 (5) (a), the ~~department~~ division affirms a determination under subd. 1. that an applicant or license holder is liable for delinquent contributions, the ~~department~~ division shall affirm its denial or revocation. An applicant or license holder may seek judicial review under s. 108.227 (6) of an affirmation by the ~~department~~ division of a denial or revocation under this subdivision.

4. If, after a hearing under s. 108.227 (5) (a), the ~~department~~ division determines that a person whose license is revoked or whose application is denied under subd. 1. is not liable for delinquent contributions, as defined in s. 108.227 (1) (d), the ~~department~~ division shall reinstate the license or approve the application, unless there are other grounds for revocation or denial. The ~~department~~ division may not charge a fee for reinstatement of a license under this subdivision.

Department Proposal 9

s. 102.18 (1) (bp)

- Current law in s. 102.18 (1) (bp), Wis. Stats., provides that the Division of Hearings and Appeals (DHA) may, by rule, define actions that demonstrate malice or bad faith. The actions that constitute malice or bad faith are contained in s. DWD 80.70 of the Wisconsin Administrative Code. Section DWD 80.70 of the Wisconsin Administrative Code provides that claims for malice or bad faith are penalties that may be imposed on an employer for unreasonably refusing or failing to report an alleged injury to its insurance carrier, or on an employer or insurance carrier who, without credible evidence which demonstrates that payment is fairly debatable, unreasonably fails to make timely payment of compensation or medical expense. Section 102.18 (1) (bp), Wis. Stats., provides the penalty to an employer or insurance carrier for an event or occurrence of malice or bad faith is the lesser of 200 percent of the compensation due with a maximum of \$30,000 for each event or occurrence of malice or bad faith.

The proposed amendment will authorize the Worker's Compensation Division (WCD) not DHA to define by rule the actions that demonstrate malice or bad faith. The definition of bad faith is a substantive matter and is best determined the Worker's Compensation Advisory Council (WCAC) and the Worker's Compensation Division (WCD). The proposed amendment will not change the requirement for DHA to conduct hearings on claims for malice or bad faith.

Proposed language for the amendment to s. 102.18 (1) (bp) is as follows:

s. 102.18 (1) (bp) If the division determines that the employer or insurance carrier suspended, terminated, or failed to make payments or failed to report an injury as a result of malice or bad faith, the division may include a penalty in an award to an employee for each event or occurrence of malice or bad faith. That penalty is the exclusive remedy against an employer or insurance carrier for malice or bad faith. If the penalty is imposed for an event or occurrence of malice or bad faith that causes a payment that is due an injured employee to be delayed in violation of s. 102.22 (1) or overdue in violation of s. 628.46 (1), the division may not also order an increased payment under s. 102.22 (1) or the payment of interest under s. 628.46 (1). The division may award an amount that the division considers just, not to exceed the lesser of 200 percent of total compensation due or \$30,000 for each event or occurrence of malice or bad faith. The division may assess the penalty against the employer, the insurance carrier, or both. Neither the employer nor the insurance carrier is liable to reimburse the other for the penalty amount. The ~~division~~ department may, by rule, define actions that demonstrate malice or bad faith.

Department Technical Change Proposals

s. 102.15 (1)

- The language used in the 2015 Wis. Act 55 amendment to this subsection only authorizes the division (DHA) to adopt its own rules of procedure and to change these from time to time. It is also necessary for the department (WCD) to have statutory authority to adopt administrative rules.

s. 102.16 (1) (b)

- In the second to last line of this paragraph in the 2015 Wis. Act 55 amendment "for the office" should be deleted because the non-adjudicative functions of the department (WCD) are not to be transferred to the Office of the Commissioner of Insurance (OCI) as was initially proposed.

s. 102.17 (1) (b)

- Both the department (WCD) and the division (DHA) should have statutory authority to conduct conferences before hearings are scheduled. The language used in the 2015 Wis. Act 55 amendment to this paragraph only authorizes the division (DHA) to conduct these conferences.

s. 102.17 (2)

- The language used in the 2015 Wis. Act 55 amendment to this subsection only authorizes the division (DHA) to set hearings on its own motion. Both the department (WCD) and the division (DHA) need to have statutory authority to have cases set for hearing on their own motion.

s.102.175 (2)

- The language used in the 2015 Wis. Act 55 amendment only authorizes the division (DHA) to determine which or two (2) or more parties is liable for the payment of compensation. Both the department (WCD) and the division (DHA) need to have statutory authority to resolve disputes under this subsection.

s. 102.18 (1) (bp)

- The language used in the 2015 Wis. Act 55 amendment only authorizes the division (DHA) to make determinations about bad faith. Both the department (WCD) and the division (DHA) should have statutory authority to do this.

s. 102.18 (5)

- The language used in the 2015 Wis. Act 55 amendment only authorizes the division (DHA) to take action where a mistake may have been made as to the cause of injury-accident or disease. Both the department (WCD) and the division (DHA) should have this authority since litigated and non-litigated cases will be involved.

s. 102.18 (6)

- The language used in 2015 Wis. Act 55 only authorizes the division (DHA) to review cases caused by occupational disease. Both the department (WCD) and the division (DHA) should have statutory authority because a number of these cases will be non-litigated.

s. 102.44 (2)

- The language used in the 2015 Wis. Act 55 amendment only authorizes the division (DHA) to find the facts on permanent total disability. Both the department (WCD) and the division (DHA) need to have this statutory because some cases will not be litigated.

s.102.44 (6) (b)

- The language used in the 2015 Wis. Act 55 amendment only authorizes the division (DHA) to reopen awards to make redeterminations for consideration of loss of earning capacity. Both the department (WCD) and the division (DHA) should have statutory authority.

s.102.61 (2)

- The language used in the 2015 Wis. Act 55 amendment authorizes the division (DHA), LIRC and the courts to determine rights and liabilities of the parties on claims for vocational rehabilitation training. The department (WCD) should also have this authority.

s. 102.62

- The language used in the 2015 Wis. Act 55 amendment to this section only authorizes the division (DHA) to award secondary liability in orders. Both the department (WCD) and the division (DHA) need to have this authority because the department (WCD) will issue orders in cases up to the point the cases are scheduled for hearings.