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Medicaid Liens

DWD has a policy that public assistance liens, such as Medicaid, must be protected by DWD when approving a worker's compensation settlement. DWD will return any agreement that does not specify how the lien is protected.

Please note that DWD has, at times, identified the existence of the lien even when the lien documentation is not attached the compromise agreement.

To deal with this lien, you have a couple of options: 1) applicant's attorney can put the funds into his/her trust account and then pay the lien when the order is issued; 2) the respondents can pay the lien directly. Under either scenario, the party responsible to pay the lien can negotiate a settlement.

Further Information Regarding the 2016 Changes to the Work Comp Act Starting Mar 2, 2016

In our previous newsletter, we outlined the statutory changes to the WC system in Wisconsin. We received several questions about a few of the specific changes. While the full impact of these changes still remains uncertain, some recent court decisions have helped to clarify them, as well.

Employer Alcohol/Drug Policies

Employers in Wisconsin are positioned uniquely compared to their colleagues in other states. Most states either prohibit or heavily regulate drug testing related to employment, whether that is pre-employment screening or post-incident testing. Wisconsin, on the other hand, does not regulate the use of employment-related drug screenings, meaning employers are free to screen employees as they see fit.

A 2006 change to Sec 102.43(9)(c) allowed for an employee's benefits to be discontinued when an employee was suspended or terminated for a violation of the employer's drug and/or alcohol policy while working with light duty restrictions during the healing period. This is further accomplished through the changes to Sec 102.43(9)(e), the limiting the collection of indemnity payments when an employee is returned to light duty, but is suspended or terminated due to misconduct or substantial fault.

The most recent changes to Sec 102.58 furthers this principle and bars recovery of indemnity and/or death benefits where a causal relationship is found to exist between a drug and/or alcohol policy violation and a workplace injury. These changes highlight a trend toward more "employer-friendly" regulations in Wisconsin.

However, there is a noteworthy exception. The Wisconsin Fair Employment Practices Act (Sec. 111.31) prohibits practices that discriminate on the basis of certain classifications, including disability. Certain forms of addiction may be protected disabilities for which an employee may not be discriminated against. This means an employee who has a documented

addiction that does not impact his/her performance and does not pose an immediate threat to the safety of the other employees may not be terminated on the basis of the addiction. Additionally, this may require an employer to accommodate the individual's addiction. Thus, employers may require all employees to adhere to a published workplace drug and alcohol policy prohibiting substance use or impairment while on the job.

What does this mean for Wisconsin employers? Employment policies that mandate drug testing after certain triggering events (i.e. workplace injuries), will not only survive a legal challenge, they will also help limit employer liability and exposure. Additionally, a well-drafted and regularly updated employee handbook outlining policies and procedures will assist employers in affording themselves the necessary protections made available under these changes.

TTD After Discharge/Suspension for Misconduct or Substantial Fault

TTD can be denied when an employee is released to light duty work and is suspended or terminated due to misconduct as defined in Sec. 108. 04 (5) or for substantial fault as defined in Sec. 108.04 (5g)(a) connected with the employee's work. [Sec. 102.43 (9)(e)]

While the referenced misconduct and substantial fault statutes are from the Unemployment Insurance chapter, any prior Unemployment decisions are not admissible in a worker's compensation hearing. Nonetheless, this issue has recently received additional attention, as the Wisconsin Supreme Court has agreed to review the Court of Appeals 4/14/16 decision in *Operton v. LIRC*, 2016 WI App 37.

Operton worked for Walgreens as a clerk for about 20 months between 2012 and 2014. She filed for Unemployment benefits after she was terminated for eight cash handling errors and failing to improve upon her errors during that time. Walgreens objected to Operton's UI benefit claim. Her claim was denied by the DWD on the grounds that she was terminated for misconduct.

Operton appealed; after a hearing, the ALJ found Operton's discharge was not for misconduct, as there was no evidence she intentionally or willfully disregarded her employer's interest by continuing to make cash handling errors. Rather, she was determined ineligible for benefits as she was discharged for "substantial fault."

Operton again appealed to LIRC who affirmed the ALJ's decision. LIRC also made a finding not included in the ALJ's decision that Operton's final cash handling error was a "major infraction" without further explanation. Operton appealed to the Circuit Court who again affirmed the ALJ's decision.

The Court of Appeals ultimately found that "inadvertent errors, even if repeated after a warning, do not constitute substantial fault," and overturned the Circuit Court's decision. Walgreens had the right to have high expectations of its employees and had the right to discharge an employee for not meeting those

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expectations, but such a discharge does not constitute or eliminate the "substantial fault" standard.

We will continue to follow this case, as the Wisconsin Supreme Court has agreed to review it, as well.

Note: At least one applicant's attorney is now filing the UI decisions in worker's compensation claims because of the 2016 changes. Although the UI decision is not supposed to be admissible, statements at UI hearings may be. Hence, employers may need to defend an UI case, for they now may impact the WC case, as well.

PPD Apportionment.

The new statutory changes identify that if a worker suffers a traumatic injury (after 3/2/16) resulting in a PPD rating, a physician's report on PPD must include an opinion regarding two things. First, the physician must address the approximate percentage of permanent disability caused by the traumatic work injury. Second, if applicable, the physician must address the percentage of disability caused by "other factors" before or after the work injury.

To clarify, the statutory changes did not overrule "as is" rules on legal causation for the entire claim. A work injury may still be compensable (along with medical treatment expense liability) if the traumatic injury aggravated, accelerated, and precipitated a pre-existing condition beyond normal progression.

By intent, apportionment law applies only for assignment of functional PPD. Permanency for a loss of earning capacity cannot be apportioned by the physician's opinions. Additionally, PPD apportionment applies only to traumatic injuries, not occupational injuries.

Applicants are now required to disclose all previous findings of permanent disability or other impairments that are relevant to their alleged injury. IME physicians should be instructed to ask applicants about this, and it may be helpful to remind applicants of this statutory requirement during initial contact interviews.

New Overtime Regulations

The new overtime regulations set out in the final rules issued in May of 2016 are temporarily delayed. A federal judge in Texas has temporarily blocked the rules, which raised the overtime exemption from $23,660 annually to $47,476 annually, from taking effect December 1, 2016, as planned.

Employers have spent the last several months anticipating this change, and this decision has denied, for the time being, overtime pay to an estimated 4.2 million additional employees. However, this is only a delay, and there is no guarantee that the rules will be amended or even reconsidered. Employers are encouraged to continue planning as though the rules, as proposed, will go into effect. If you have any questions regarding the implementation of the rule changes or how to pay your employees under the FLSA, please contact Atty Matthew Kurudza at (262) 782-3200 or mdk@workcomp-defense.com

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Recent LIRC Decisions

Please note LIRC has not updated their online decisions since May of 2016.

1. *Are Respondents precluded from challenging the requirement to pay providers written-off medical expenses after an order is issued finding a claim and medical expenses compensable?*

Larry v. Harley Davidson Motor Co., WC Claim No. 2014-031361 (5/23/16)

Applicant alleged a left wrist injury from her occupational exposure assembling engines as part of her employment. An ALJ found a compensable injury, and therefore, found respondents responsible for applicant's related medical expenses.

On respondents' appeal, LIRC confirmed applicant sustained a compensable work injury. More importantly, LIRC addressed respondents' concern regarding the language used by the ALJ requiring respondents to pay providers amounts that were previously written off if they requested it. LIRC also noted they used this language in their prior decisions, as well. Since it could have been argued that the language in the decision would deny respondents the right to dispute the reasonableness of any written-off charges, LIRC amended the language of the ALJ's order as follows:

"This order shall be left interlocutory to permit further appropriate action regarding the amount written off from expenses ordered paid in the event the provider attempts to collect the written-off amount. Otherwise, this order shall be final."

This appears consistent with a previous LIRC finding that respondents are not required to pay a provider for any amounts written off/adjusted when paid by group health. LIRC also noted providers can still pursue medical expenses that were previously written off for other reasons, such as being uncollectable due to an inability to pay.

2. *Are employers required to change their hiring practices to bring back an employee following an injury to avoid an unreasonable refusal to rehire penalty?*

Neitzke v. Miron Construction Co., WC Claim No. 2014-031361 (5/31/16)

Applicant worked as a general laborer on construction projects and was a union member. He sustained a conceded right shoulder fracture and continued to work light duty for the employer. After the specific job ended that the applicant was hired to do, he was let go by the employer. All employees working on that project were either let go or sent to other jobs. The applicant subsequently worked for the same employer on another job, as well.

After being released to work without restrictions, the applicant notified the employer and faxed over his work release. Applicant did not receive any job offers from the employer and pursued a URR claim. The applicant credibly testified that he was told by the business agent at his union hall that he would not work for the employer any further; he would have to look for work

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elsewhere. An ALJ found the applicant credible and found in his favor.

On respondents' appeal, LIRC reversed, as it found an employer was not required to deviate from past hiring practices to rehire an employee after he/she reached an end of healing for a work injury. Specifically, in this case, the employer hired on a first-come, first-served basis and did not request particular laborers by name. Not only would the employer have to change their hiring practices to accommodate a rehiring, but the hiring hall would also have to change hiring practices, as well.

TID BITS

100-mile radius for IMEs: The rule is the 100 miles is as a crow files. Here is a link to website that calculates as a crow files, since Google Maps does not have this as an option:
http://tjpeiffer.com/crowflies.html

URR claim: If you are doing a full and final settlement and want to close out the Unreasonable Refusal to Rehire claim, the agreement must specifically state the URR claim is included. If the agreement does not state this, then …

As of 1/1/17, the IRS mileage rate has decreased from $.54/mile to $.535/mile. The Wisconsin Work Comp mileage rate remains at $.51/mile.

ALJ Schaeve retired on 3/1/17.

Administrator Brian Hayes has determined that all "competent" judge is now allowed to do mediations.

Starting on 3/1/17, DWD/OWCH will no longer accept Applications just to toll the statute of limitations. This is a new administrative rule they are enacting on their own.

Look at notes on Fitzgerald from judge b/c was going to add something…

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