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

In our previous newsletter we briefly 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 section 102.43(9)(c) terminated an employee's benefits when an employee had been suspended or terminated for a violation of the employer's drug and/or alcohol policy while employed in a restricted type of work during the healing period. This is further accomplished through the changes to 102.43(9)(e), 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 Wis. Stat. 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 work place injury. These changes highlight a trend toward more "employer-friendly" regulations in Wisconsin.

That said, there is a noteworthy exception. The Wisconsin Fair Employment Practices Act (Wis. Stat. 111.31) prohibits practices that discriminate on the basis of certain classifications including disability. According to DILHR, 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. That said, employers may require all employees to adhere to a published work place drug and alcohol policy.

What does this mean for Wisconsin employers? Employment policies that mandate drug testing after certain triggering events (i.e. work place 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.

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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 Walgreen's as a clerk for about 20 months between 2012, and 2014. She filed for Unemployment benefits after she was terminated for 8 cash handling errors and failing to improve upon her errors during that time. Walgreen's 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 and a hearing was held before an ALJ who 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 Circuit Court'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. Walgreen's had the right to have high expectations of its employees and had the right to discharge an employee for not meeting those 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.

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 entire claim. A work injury is still compensable (along with medical

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treatment expense liability) if the traumatic injury aggravated, accelerated, and precipitated a pre-existing condition beyond normal progression.

By intent, apportionment law applies only if 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 that 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. That said, 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 in to 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

Recent LIRC Decisions

Please note LIRC has not updated their online decisions since May of 2016. Therefore, we do not have access to any decisions since that time.

1. *Are Respondent's 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, LIR confirmed the 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 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

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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 to be consistent with LIRC previous finding that respondents are not required to pay a provider for any amounts written off when paid by another health insurer. Additionally, LIRC has held that providers can pursue medical expenses that were previously written off as uncollectable due to an applicant's 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)

The 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 a the business agent at his union hall that he would not work for the employer any further; he would have to look for work elsewhere. An ALJ found applicant credible and issued an order in his favor.

On respondents' appeal LIRC reversed the ALJ's order, as it found an employer was not required to deviate from hiring practices to rehire an employee after they sustained a work injury. Specifically, the employer obtained laborers through a union hall and did not request particular laborer's by name (but by a first-come first-serve basis). 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

Worker's Compensation Administrative Law Judges Roberta Arnold, Mary Lynn Endter, and Janine Smiley retired in 2016. The DWD has announced a plan to hire 3 new ALJs out of the Madison office in the near future.

As of 11/1/16, the DWD launched a new online form to report suspected worker's compensation fraud. This is in addition to the new DOJ special prosecutor appointed earlier this year, specifically for worker's compensation fraud. The online reporting form can be found here: www.dwd.wisconsin.gov/WCFraudComplaint

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The DWD announced a state-wide 3.19 percent reduction in WC rates as of 10/1/16. Manufacturing industries saw an even greater 5 percent reduction. With falling rates, Wisconsin saw strong job growth as well, adding 25,119 total jobs between June 2015, and June 2016.

Newsletters will be linked our web site: www.workcomp-defense.com.

Questions or Comments: Contact Atty Steve McManus at (262) 782-3200 or sjm@workcomp-defense.com.