

WAWCA QUARTERLY

Quarter Ending March 31, 2002

Issue #2

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Message from the President

Greetings, and welcome to the Wisconsin Association of Worker's Compensation Attorneys. As many of you know, this organization came into existence through the efforts of Janell Knudsen and Tom McSweeney, Ron Aplin, John Neal and Trish Sandoz. The goal was to establish a vehicle for sharing information within the worker's compensation community and for affecting changes important to the worker's compensation practitioner. Through their hard work in 2001 that goal has been met, and I would like to extend our thanks to each of them. The responsibility now falls on the rest of us to make the most of this organization that has been created.

On November 30, 2001 the first annual meeting was held and the first full board of directors was elected. Elsewhere in this newsletter is information about who the officers and directors are, and how you can reach them. This is very important information because your input and participation are crucial to the success of this organization. It is our hope that each of you feels welcome to participate, and welcomes that opportunity. One of the first ways in which we would ask you to participate is to join. Complete the dues statement and make the nominal payment requested. The broader the base of our support, the better we will be able to serve.

The next, and perhaps more important, step is to get the word out. I was surprised to hear how many attorneys that regularly appear before the Worker's Compensation Division did not even know that this organization existed, let alone how to become involved. Ask those in your firm and in your community that practice in this field if they have received this newsletter. If not, please share it with them and invite them to provide their email and/or postal address with us so that they may be kept informed.

In the next few weeks I will be completing committee appointments. Anyone who has not yet expressed an interest should contact me and let me know. If there are substantive, procedural or organizational issues upon which you would like to be heard, committee involvement will afford an opportunity to contribute. As this organization is still in its infancy, it has not yet fully taken shape. We have the flexibility, therefore, reach out in a variety of directions. This organization is for the entire Wisconsin worker's compensation community. The organizers and the current board will not presume to know what is important to all of you.

To use the dreaded analogy: We are building something here, and each step of the process is important. The organizers drew up the blueprints in the form of the Bylaws that were adopted last November. The focus now shifts to the foundation. That is my personal goal as President this year: To help create a strong foundation on which the future success of this organization can be built. In the weeks and months to come, we will call upon many of you for your support, your input and your involvement. I hope that you will accept the opportunity to contribute.

Thanks,

John Griner IV (email: John.A.Griner@travelers.com)

Minutes of First Annual Meeting of the Wisconsin Association of Workers Compensation Attorneys

The first meeting of the members of the Wisconsin Association of Workers Compensation Attorneys was held on November 30, 2001, at the Monona Terrace & Convention Center, Madison, in the State of Wisconsin.

I. Call to Order: Janell Knutson, President, called the meeting to order, stated the purpose of the meeting and took roll call. All officers and members of the board of directors were present.

II. Reading of the Minutes: Patricia J. Sandoz, Secretary, read the minutes of the first meeting of the incorporators of the WAWCA. The minutes were approved as read.

III. Report of Executive Director: Tom McSweeney, creator of the WAWCA

- a. The WAWCA has not applied for CLE approval from the State Bar of Wisconsin, but an application for approval can be filed at a later date. Approval will also be sought from the Board of Bar Examiners.
- b. Attorneys practicing workers compensation law often encounter unwritten policies of the Workers Compensation Department or receive letters stating Department policy that state conflicting Department policy on the same issue. The WAWCA will use this newsletter to communicate among its members those policies, written or unwritten, as members learn of these policies.
- c. The executive director position will be eliminated after the meeting, but Tom McSweeney will continue to participate on the CLE committee.

IV. Treasurer's Report: John Neal

Initial donations totaled \$3,075.00. After paying legal fees to prepare the articles of incorporation and paying initial costs for the meeting, the balance as of November 30, 2001 is \$287.05. Members attending were asked to pay dues for 2002, if possible, at the conclusion of the meeting to provide income to pay the costs associated with the meeting and reception.

V. Approval of By-Laws:

President Knutson stated that in order to proceed with the meeting and elect a board of directors, a motion needed to be made to proceed outside of the by-laws. The requisite quorum of two-thirds of the directors were present. Motion was made by J. Darnedier and seconded by J. Bartells.

VI. Voting for Officers and Directors:

Janell Knutson presided as nominations were taken from the membership, votes were cast and the following elected for the year 2002:

President: John Griner

Treasurer: Ray Clausen

Secretary: Patricia Sandoz

The following directors were elected by their respective districts:

- I. No director elected**
- II. Jim Bartells
- III. No director elected **

- IV. Mike Kulkowski
- V. Tom Siedow
- VI. Charles Hanson
- VII. Mark Shore
- VIII. Mark McGillis
- IX. Michelle Danielson

VII. Other new business:

- a. Amendments to the by-laws: Section 9b was amended to permit telephonic meetings of the board of directors. A new Article XII was approved to state as follows: “Any notice provision required under these by-laws may be made electronically.” Motion offered by J. Bartells, seconded by T. McSweeney, and approved by unanimous vote of the membership. The By-Laws as amended were thereafter unanimously approved by the membership.
- b. Motion approved permitting the President and the officers to solicit nominations and appoint directors for Districts I and III.
- c. Organization will seek approval and recognition by the State Bar.
- d. CLE committee will consider co-sponsoring a presentation at a State Bar Convention.
- e. CLE seminar may be held at the annual meeting in November. Attempt will be made to not conflict with Appleton Ethics CLE sponsored by ALJ Falkner, nor the WATL meeting/seminar.
- f. Topics to be addressed by newsletter:
 - i. Child support liens applying to TTD/PPD
 - ii. Respondent disclosure of surveillance tapes
 - iii. Calculation of wage issues
 - iv. DWD staffing announcements

VIII. Report of Vice President Ron Aplin and Director Julie Darnieder on officers and directors liability insurance:

Discussion was held as to whether the WAWCA and/or its officers and directors should purchase a policy(s) of liability insurance. Officers and directors liability insurance from St. Paul Insurance (A+ rated) was \$1,559.00 annually. General liability insurance for the organization of less than 300 members was \$331.00 annually from Auto Owners Group (A+ rated).

Discussion was had from the floor as to possibility of claims, to whom the group owed a duty, and that liability coverage would insure against claims by the public. Article X of the By-Laws addresses liability issues for officers, employees and agents. J. Bartells moved that liability insurance be purchased and the newly elected board of directors will decide whether to purchase officers and directors insurance. Motion was seconded by C. Hanson.

IV. Meeting was adjourned and reception followed

Directors Meeting held February 22, 2002

Telephonic meeting was held with all directors and officers attending except T. Siedow and M. McGillis. Board discussed filling District I and III director openings with President John Griner to make the appointments. Lots were drawn to determine the length of the terms for each director as the By-Laws provide for staggered years indicated in Article VI, Section 2.

I.	Cynthia Thurston (1)	ckt@mccollumlaw.com
II.	Jim Bartells (3)	JLB@bartellslaw.com
III.	Sam Bomier (3)	no email (920) 725-8464
IV.	Mike Kulkowski (3)	okgo2@aol.com
V.	Tom Siedow (2)	PSJSC@wwt.net
VI.	Charles Hanson (1)	ceh@haleskemp.com
VII.	Mark Shore (2)	shorem@dwd.state.wi.us
VIII.	Mark McGillis (1)	no email (262) 632-2300
IX.	Michelle Danielson (2)	mld@hallincayo.com

It was decided that the association needed a President Elect to serve so that at least one officer will continue from one year to the next. John Neal has agreed to serve. Mark Shore was elected Chairman of the Board to conduct the meetings of the Board of Directors.

Additional amendments to the By-Laws were unanimously approved to preserve the association's tax-exempt status. Article XIII is as follows:

Article XIII Non-profit Purpose

The Association is organized exclusively for charitable, religious, educational, and scientific purposes, including for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code.

No part of the net earnings of the Association shall inure to the benefit of, or be distributed to its members, trustees, officers, or other private persons, except that the Association shall be authorized or empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in the purpose clause hereof. No substantial part of the activities of the Association shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Association shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office. Notwithstanding any other provision of this document, the Association shall not carry on any other activities not permitted to be carried on (a) by an organization exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or (b) by an organization, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or corresponding section of any future federal tax code.

Upon dissolution of the Association, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not disposed of shall be disposed of by the Circuit Court of the county in which the principal office of the Association is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

The treasure reported that after all bills were paid for the annual meeting, the association has a balance of \$449.77 in its accounts. A notice to members providing for the payment of dues will be included in this newsletter. Secretary reported that the minutes for the annual meeting and the revised By-Laws will be published in the quarterly newsletter to be e-mailed March 2002. A membership list will be provided to members when it is in final form, attached to the newsletter, if possible.

The directors agreed that general liability insurance be purchased but not until a need arises; such as, an event open to the public. The President will appoint a committee to evaluate the need for officers and directors insurance and make a recommendation to the Board by September/October so that liability insurance will be in place prior to the annual meeting and CLE seminar.

The directors will try to hold meetings several times a year, with the next meeting to be held telephonically April 26, 2002 at 9 a.m. Meeting was adjourned.

Committee Appointments

John Griner will be making appointments to the committees in the next few months. They will be printed in the June newsletter.

2002 Membership Dues Notice

Dues for calendar year 2002 are being collected now. Please print this off and mail this section with your check for dues to:

Ray Clausen
4510 Regent, Suite B
Madison, WI 53705

Please make your \$20.00 check payable to WAWCA.

WAWCA MEMBERSHIP INFORMATION

Name: _____ Law Firm: _____

Address: _____ E-mail Address: _____

_____ Telephone: _____

_____ Fax: _____

Practice Area: _____ Applicant _____ Respondent _____ Both

Would you like to serve on a committee? _____

_____ Continuing Legal Education _____ Communications

Contribute to the Newsletter? _____

Any other way you would like to help? _____

Suggestions for the Association to address: _____

Department News

State of Wisconsin Department of Workforce Development

December 27, 2001

****Due to scanning problems, this document was recreated.****

To: Insurance Carrier and Self Insured Employer Claims Handling Offices
From: Judy Norman-Nunnery, Division Administrator
Subject: Worker's Compensation Rate Changes

Purpose: Announce 2002 maximum rates.

Background: As a result of changes in the law that will be effective January 1, 2002, certain rates and benefits will be increased as follows:

- The maximum rate will be increased to \$647 per week for temporary total disability, permanent total disability and death benefits for injuries occurring on or after January 1, 2002 and before January 1, 2003.
- The maximum weekly indemnity rate for permanent partial disability will increase to \$212 for injuries occurring on or after January 1, 2002.
- The new average weekly wage used to compute the maximum rate will be \$970.50. This new wage raises the maximum death benefit for fatal injuries occurring on or after January 1, 2002 to \$194,100.
- The weekly maximum benefit payable for supplemental benefits will be increased to \$202 for claims with injury dates prior to January 1, 1978.
- The mileage reimbursement rate will be increased to \$0.325 per mile.
- The maximum annual limit for 2002, for services provided by private vocational rehabilitation specialists will be increased to \$1,193.20.

Action Requested: Please inform all claims handlers of these changes and instruct them to use them as of the effective date. Request reimbursement of supplemental benefit payments under s. 102.44(1) Wis. Stats. on form WKC-140 for year 2001. You may copy the form from the reverse side of this letter.

Inquiries: A chart with more detailed benefit payment information is available on our web site at: http://www.dwd.state.wi.us/wc/about_us/publications/wkc_9572p.
If you have any questions, please contact us at (608) 266-1340.

Enclosures: None

References: None

Legal Update

New Legislation

The last issue of WAWCA Quarterly, circulated in November 2001 discussed 2001 Assembly Bill 505, which was to amend Chapter 102 of the Wisconsin Statutes. A companion bill containing identical language, 2001 Senate Bill 251, was introduced in the Senate at about the same time that 2001 AB 505 was introduced in the Assembly. The senate bill won the race. It was signed into law by the governor on December 17, 2001, as 2001 Wisconsin Act 37. The Act was initially set to be published on January 4, 2002, but the publication date was pushed forward to December 31, 2001, so the Act would be effective on the first of this year. The act is available on line in Adobe Acrobat Format:

<http://www.legis.state.wi.us/2001/data/acts/01Act37.pdf>.

New Cases

1. *Selaiden v. Columbia Hospital*, Appeal No. 01-2046, 2002 Wisc. App. LEXIS 308 (March 5, 2002). The circuit court has jurisdiction over an appeal of a LIRC decision under Wis. Stat. Sec. 102.23 when all of the necessary parties are named in the caption of the properly served and filed summons and complaint, including the worker's compensation insurer, but the body of the complaint does not reference the insurer. The omission in the body of the complaint, the court reasoned, was merely a technical defect, which in no way prejudiced the carrier's ability to participate in the appeal.

2. *American Manufacturers Mutual Insurance Company v. Hernandez*, Appeal No. 01-1519, 2002 Wisc. App. LEXIS 193 (February 13, 2002). The court of appeals upheld a LIRC finding that a motor-vehicle accident arose out of the employee's employment, under Wis. Stat. Sec. 102.03(1)(e), and that the injuries caused by said accident occurred while the injured employee was performing service growing out of and incidental to her employment, under Wis. Stat. Sec. 102.03(1)(c)1. The accident and resulting injuries occurred when the employee was, at the request of the worker's compensation insurer, traveling to her physician's office for a final evaluation of a previously conceded work injury to her thumb. LIRC found that the request by the carrier made the trip a requirement of the employee's employment, which satisfied subsection (1)(c)1. LIRC also found that this required trip put the employee in a place where she was injured by an outside force, which satisfied subsection (1)(e). Applying due weight deference, the court of appeals concluded that LIRC's determination was the most reasonable under the facts presented.

The court of appeals acknowledged the existence of an alternative analysis: that the connection between the physician appointment and the conceded work injury to the thumb was enough to place the motor-vehicle accident and injuries within the ambit of subsections 1(c)1 and 1(e), even in the absence of the carrier's request to attend the physician appointment at issue. The court

concluded, however, that it need not pursue this line of reasoning because LIRC's finding of fact that the physician appointment was at the carrier's request supports LIRC's decision.

3. ***Zentgraf v. The Hanover Insurance Company***, No. 01-0323, 2002 WI App 13; 2001 Wisc. App. LEXIS 1319 (December 27, 2001). The trial court erroneously exercised its discretion when, with regard to the Wis. Stat. Sec. 102.29 distribution, it issued an order allocating \$3,750 of a \$15,000 personal-injury settlement to the injured plaintiff's wife for loss of consortium in the absence of any evidence supporting the wife's claim. In addition, the amount allocated to "reasonable cost of collection" in a Wis. Stat. Sec. 102.29 distribution includes the attorney fees incurred by the worker's compensation insurer to enforce its Section 102.29 lien, even if the carrier's attorney's efforts did not assist the employee in obtaining a recovery from the third-party tortfeasor.

4. ***Beverly Enterprises, Inc. v. LIRC***, Appeal No. 01-0970, 2002 WI App 23; 2001 Wisc. App. LEXIS 1308 (December 20, 2001). In this case, the respondent withheld \$10,000 in payroll taxes from a \$30,000 LIRC award for unreasonable refusal to rehire, Wis. Stat. Sec. 102.35(3), when the order was silent on the issue of tax withholding. Applying great weight deference, the court of appeals affirmed LIRC's holding that respondent acted in bad faith, Wis. Stat. Sec. 102.18(1)(bp), and inexcusably delayed benefits, Wis. Stat. Sec. 102.22(1), by withholding the payroll taxes. LIRC's conclusion and analysis were reasonable according to the court. The crux of LIRC's reasoning was that respondent never requested a ruling on the issue of tax withholding, although it had numerous opportunities to do so. Thus, LIRC reasoned, respondent knew or should have known that it lacked a reasonable basis for withholding taxes.

5. ***Deminsky v. Arlington Plastics Machinery***, 2001 WI App 287, 249 Wis. 2d 441, 638 N.W.2d 331, 2001 Wisc. App. LEXIS 1225 *petition for review granted*, 2002 WI 23, 2002 Wisc. LEXIS 32. The court found that an employer's agreement to indemnify and hold harmless a plastics machinery seller from all liability arising out of the use of the seller's machine was valid and enforceable, even though the agreement circumvents, to some extent, the exclusive remedy clause in the Worker's Compensation Act, Wis. Stat. Sec. 102.03(2).

Note: Prepared as of 3-25-02.

Substantive Articles

Please contact either Larry Schifano or Patricia Sandoz if you have ideas for articles to be included in future issues.

Child Support Liens in workers compensation cases.

The issue of child support orders affecting the applicant's receipt of conceded benefits or those following settlement has been a problem for years. The Department, LIRC/Court of Appeals, and the child support agencies have different interpretations as to what benefits a child support lien applies. ALJ Mark Shore agreed to research the issue and provide this commentary. This represents his opinion and conclusion on the matter and does not necessarily reflect official department policy. He added, however, that Jim O'Malley concurs with this analysis.

InterOffice Memo

Department of Workforce Development

Date: March 7, 2002
To: Attorney Patricia Sandoz
From: Mark T. Shore, ALJ
Subject: Child support liability under §102.27, Wis. Stats.

We have recently received several inquiries regarding the Department's position on liability for child support payments under §102.27, Wis. Stats. While virtually everyone agrees that temporary disability compensation (TTD and TPD) is subject to assignment for court-ordered child support, the specific issue is whether permanent disability compensation is also subject to assignment for this purpose. Unfortunately, this is an unsettled issue and, consequently, is rather controversial.

The statute provides:

102.27 (2)(a) A benefit under this chapter is assignable under s. 46.10 (14)(e), 301.12(14)(e), 767.23(1)(L), 767.25(4m)(c), 767.265 (1), 767.51(3m)(c) or 767.62(4)(b)3.

For purposes of this review, the relevant language is "A benefit under this chapter" Notably, the statute does not define "benefit" or otherwise differentiate between temporary and permanent disability compensation. Thus, the Department's position is that both TTD/TPD and PPD are subject to assignment.

The problem / confusion, however, arises at the appellate level. The Wisconsin Court of Appeals, in an unpublished decision on a family law matter, distinguished permanent partial disability compensation from "income" or monies intended to replace lost income; noting that the PPD did not qualify as "gross income" subject to child support deductions, the court concluded that permanent partial disability compensation is not subject to the 102.27 child support assignment. *See, Bottomley v Bottomley*, No. 96-0486-FT (Wis. Ct. App. Oct. 17, 1996). Ergo, child support payments should not be deducted from monies payable as PPD; notably, a careful review of the decision disclosed that the court specifically addressed permanent partial disability compensation and was silent as to compensation for permanent total disability.

LIRC has accepted and abided by that ruling in at least one case, Thomas v Marigold Foods, Inc., WC Claim No. 98-004945 (LIRC, Dec. 6, 1999); monies were deducted from the TTD portion of the total award and paid toward a child support lien, but not from monies paid as PPD. While the Commission also referred to the subject in a review of compromise decision (Beaudoin v Rebar Placers, WC Claim No. 93-045798 (LIRC, Jan. 15, 1998)), it did not issue specific directives therein.

In short, there is a dichotomy: the Department posits that all monies paid as compensation for temporary and/or permanent disabilities, as well as consideration paid under a compromise, are subject to child support deductions. Conversely, the LIRC and appellate bodies hold a contrary position, to wit, that it is improper to deduct monies for child support from funds payable as permanent partial disability compensation.

Given these circumstances, Chief Judge O'Malley has recommended that a party not deduct child support from monies designated as permanent partial disability compensation; this advice is implicitly predicated on the assumption that the rule stated in the Bottomley case controls as good law. On the other hand, the Bottomley decision was not published and has no precedential value; by implication, LIRC's reliance thereon may be misplaced. Further, one could argue that LIRC's interpretation / adoption of the rule lacks any precedential value as this specific question - whether compensation paid for permanent disability constitutes "gross wages" under Chapter 80 of the Wisconsin statutes and therefore subject to child support deduction -- lies outside both its jurisdiction and its area of expertise.

My recommendation would be to deduct child support from any monies paid as compensation, that is, all temporary disability compensation (TTP & TPD), perm total disability compensation, any consideration paid under compromise and, as the subject of this discourse, any and all compensation for permanent partial disability (PPD). Thereafter, a [sufficiently] aggrieved party could challenge the deduction, appeal the matter through the Court of Appeals or even the Supreme Court, and we would eventually receive a dispositive published decision on the issue. My recommendation is premised on the following:

- (1) the failure of the statute to distinguish temporary from permanent disability compensation;
- (2) the notion that a non-custodial parent is obligated to support his/her children as best possible; and
- (3) the premise that monies to be paid for both scheduled and unscheduled permanent disabilities inherently include some amount intended to replace lost future income; indeed, the 1913 Wisconsin Workmen's Compensation Act (Chapter 599, laws of 1913 (Effective Sept. 1, 1913)), at footnote 41, specifically states that "Compensation laws are based upon loss of wage and it is believed that the amount fixed here [the scheduled injury section of the statute, now embodied at §102.52] for minor injuries will substantially take care of the loss of wage." (While some might argue that the amounts payable for scheduled and unscheduled injuries are insufficient insofar as adequately compensating one for a wage loss attendant to some permanent disability, that criticism pertains more to the amount of money needed to "make one whole" than to the question of whether some additional compensatory wage-loss money is "built into" the total amount of monies currently paid as permanent disability; i.e., whether the current PPD "schedule" includes some compensatory wage loss money.

As a parenthetical comment, child support liens are honored upon timely receipt of a written order from a Circuit Court or Family Court Commissioner. Thus, properly signed written orders should be received by the Department prior to issuance of any order, which should include provisions for child support payments. Out-of-state orders must be properly docketed / registered in the State of Wisconsin.

EDITORS

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If you have received this transmission more than once, please contact Patricia Sandoz so that we may correct our mailing list.

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