

MEMORANDUM

STATE OF WISCONSIN

DATE: March 3, 1993

TO: Abby Butler

FROM: Dick Smith

SUBJECT: 7% INTEREST ON LIRC ORDERS WHICH "AFFIRM" PART OF ALJ'S ORDER

The purpose of this memo is to clarify the Division's interpretation of the 7% interest provision with respect to ALJ orders "affirmed," but modified, by LIRC.

The 7% interest should be applied to any amount ordered by an ALJ which is affirmed by LIRC. If LIRC modifies the ALJ's order, up or down, the 7% applies to that portion of the ALJ's order which LIRC affirmed.

Section 102.22(3), Wis. Stats., created by 1985 Wisconsin Act 83, states in part:

"If upon petition for review the commission affirms an examiner's order, interest at the rate of 7% per year on the amount ordered by the examiner shall be due for the period beginning on the 21st day after the date of the examiner's order and ending on the date paid under the commission's decision." (Emphasis added.)

The 7% interest provision was effective November 27, 1985. In 1986, Carol McCann prepared a two-page, typewritten, document (attached; not dated or signed) which explains the process for computing and entering the information on the JU, CO and FC screens. Carol's memo states: "There is 7% interest due on claims appealed to LIRC by an employer or insurance company and subsequently affirmed by LIRC.... Interest is due if decision is in favor of applicant." (Emphasis added.) It does not address the question of ALJ orders which are affirmed, but modified.

From November 1985 to January 1989, when an award was affirmed and not modified, the 7% interest was computed and paid. However, when LIRC modified an examiner's award—up or down—no interest was paid.

When you assumed responsibility for computing the interest, you raised the issue of awards which are affirmed, but modified. Until the late-1980's the issue rarely arose because LIRC generally affirmed fully, reversed, or remanded ALJ orders. Only recently has LIRC routinely modified ALJ orders. You recorded the policy you were instructed to follow by the Director of the Bureau of Legal Services in a handwritten note dated January 23, 1989 as follows:

"There may be interest due on modified orders. If the amount awarded by LIRC is higher than the original award, LIRC interest is due on the original ALJ order. If the amount awarded by LIRC is lower than the ALJ order, no LIRC interest is due."

For example, if an ALJ awarded \$25,000, and LIRC increased the amount to \$35,000, the 7% interest award would be applied to the \$25,000 affirmed. However, if the \$25,000 awarded by the ALJ was reduced to \$15,000, no interest was awarded on the \$15,000 which was affirmed.

In November, 1992, in response to a letter from Attorney Marc Ashley complaining about the application of this interest policy to his client, State Representative Frank Boyle requested that the Department support a statutory amendment to provide interest whether an ALJ's award is affirmed in full or in part. (Mr. Ashley complained that no interest was paid where LIRC reduced an ALJ award from \$27,000 to \$10,800, despite a 16-month delay from the time of ALJ order to the time of the LIRC award.)

As a result of Rep. Boyle's letter, I have reviewed the policy with the Division Administrator, LIRC's General Counsel and the Worker's Compensation Advisory Council. They share my opinion that the informal policy developed in 1989 does not conform with the intent of the statute and should be revised to provide 7% interest on any amount affirmed by LIRC--regardless if the order is modified upward or downward from the ALJ's award.

First, the statute makes no distinction between orders affirmed in whole or in part, and it does not make the distinction between amounts modified up or down.

Second, a brief review of a dozen or so LIRC decisions which affirm, but modify, an ALJ's award shows that most LIRC awards state that LIRC "affirms...except as herewith modified." Some said, LIRC "affirms in part...modifies in part and reverses in part." One said, LIRC "adopts...except as modified." In all but one case, the LIRC order used the statutory term, "affirms." LIRC's General Counsel was surprised by Department's current handling of the interest award and agreed that where LIRC used the term, affirmed, it intended the interest award to be applied.

Third, our current policy does not prohibit the 7% interest on orders modified by LIRC if the amount is increased. No rationale has been documented or suggested for the 1989 decision to apply the 7% interest only on awards modified by LIRC to increase the amount.

Fourth, the Advisory Council agreed that the current statute was sufficiently clear, that it did not need revision, and that the Department should simply revise its policy based on this more careful review of the issue than was apparently undertaken in 1989 so that interest would be paid on any amount affirmed by LIRC, in whole or in part.

Finally, thank you for your help in sorting through the limited record which exists with respect to our prior interpretations of this statutory provision.