SB 251 10

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TO: Members of Senate Labor and Agriculture Committee and the Assembly Labor and Workforce Development Committee

FROM: David Newby, President, Wisconsin State AFL-CIO
James A. Buchen, Vice President, Government Relations, WMC

DATE: September 26, 2001

RE: Worker's Compensation Advisory Council Reform Proposals

The Wisconsin Worker's Compensation Advisory Council recommends the following reforms to the Wisconsin Worker's Compensation Act.

BENEFITS

Increase maximum Permanent Partial Disability (PPD) benefit rates over a four-year period. The Council recommends increasing the maximum rate for PPD from the current $184 per week to:

$212 January 1, 2002
$222 January 1, 2003
$232 January 1, 2004
$242 January 1, 2005

Provide a four-year, 10 percent increase for Temporary Total Disability (TTD), death, and permanent total disability. Currently, unless another rate is negotiated, the maximum rate for temporary disability, death benefits and permanent total disability is set by a formula in s. 102.11(1). The formula uses the state's average weekly wage earnings as determined by the Unemployment Insurance Division. For a four-year period effective January 1st, each year from 2002 to 2005 the maximum rate would be the formula amount under s. 108.05, plus 10 percent. For example, if the maximum weekly wage were $900 under s. 108.05, resulting in a $600 maximum weekly TTD payment, it would be raised to $990, resulting in a $660 maximum weekly TTD payment.

Authorize Administrative Law Judge (ALJ) to order prospective medical treatment. This authorizes an ALJ to order an employer or insurer to pay for reasonable and necessary future treatment that arises from the injury in cases where that is appropriate. The goal is to minimize litigation.

Provide cost-of-living increase for dates of injury prior to 1978. The question of providing cost-of-living increases to those receiving long-term benefits continued to receive considerable attention from the Council. This proposal increases the minimum supplemental benefit level in s. 102.44(1)(a) from $150 to $202 for employees with a date of injury prior to January 1, 1978. The Department estimates that this will increase the number of employees receiving some increase from the supplemental benefit fund from 135 employees in 2001 to 170 employees in 2002.

Authorizes voluntary direct deposit of benefits. Section 102.26(3)(a) currently requires compensation over $100 to be "delivered directly to the claimant." This prevents payment to a third party, for example, the claimant's attorney. Arguably, it prevents direct deposit in a claimant's bank account. Some states

specifically authorize direct deposit because it's faster and safer than mail delivered to the home. At least one state, Texas, mandates that insurers give employees a direct deposit option. The financial services consultant for one TPA that is setting up a system to offer the option in other states has requested permission to offer this option in Wisconsin. Their process to approve and generate payments is not changed. The employee must fill out a direct deposit authorization form and may revoke authorization at any time. The insurer may not be compelled to provide this service.

Assure prompt payment of PPD. In October 2000, the Department proposed codifying the 30-day payment standard and clarifying how to handle intermittent periods of PPD and temporary disability to a group of about 40 experienced insurance claims handlers and supervisors. The proposal was amended to provide an extension for Independent Medical Exams (IMEs), with 30 days to give notice of intent to schedule the IME and a 90-day limit on starting payments, even if the IME is not done by then.

This also clarifies that if PPD is due because of the minimum ratings in DWD 80.32, it is due during weeks in which no temporary disability is paid--regardless of whether there is an end of healing, permanency rating, or return to work.

ELIGIBILITY

Clarify the Employer and Insurer's right to an Independent Medical Examination by revising the Spencer doctrine in response to the Honthaners Restaurants decision. Spencer v. DILHR, 55 Wis.2d, 525, 200 N.W.2d 611 (1972) dealt with an employer's liability for medical expenses and disability benefits relating to unnecessary medical treatment.

In 1992, s. 102.16(2m) codified a peer-review system that allowed an insurer to dispute its liability to pay the provider for unnecessary medical treatment. Once the insurer disputes the necessity of the treatment, the provider may not bill or pursue collection against the employee for any unpaid balance. This proposal limits the application of the Spencer doctrine relating to the payment of temporary and permanent disability in certain cases.

The intent is not to disturb the Spencer doctrine as it relates to disability benefits for cases that look like Spencer--where the employer initially concedes a work injury; at some point, the employee undergoes invasive surgical treatment in good faith that later, on the basis of a respondent's medical examination, is determined to be unnecessary treatment; and as a consequence of this invasive and unnecessary surgical procedure, the employee has additional temporary or permanent disability for which the employer is liable.

The intent is to respond to the recent *Honthaners Restaurants* case so that, even in cases where employers and insurers concede a work injury, they may use an examining doctor's opinion to defeat liability for disability benefits that are a consequence of <u>non</u>-invasive and unnecessary medical treatment--even if the employee underwent the unnecessary treatment in good faith. See *Honthaners Restaurants, Inc. v. LIRC*, 2000 WI App 273, 240 Wis.2d 234, 621 N.W.2d 660.

Limit liability for retraining if employer offers "suitable employment." The intent is to apply the concept of an offer of "suitable employment" that is used in the private-sector-vocational-rehabilitation process to the public-sector-DVR-vocational-rehabilitation process. Under the private-sector system, if the injury-employer offers suitable employment--essentially, work within the employee's physical and mental restrictions and paying at least 85 percent of the pre-injury wage--the employer is not liable for retraining.

This proposal only borrows the definition of a "suitable employment" job offer from the injury employer and applies it to the DVR system with one modification. The employer's job offer must be at least 90 percent of the pre-injury wage rather than 85 percent as provided in DWD 80.49. The private-sector

system in DWD 80.49 also requires the employee to do a 90-day job search. This proposal does not require any job search.

Clarify that the offset against the expanded wage is only for workers who had more than one job at the time of injury. For people who get a second job **after** the injury the offset has always been taken against the **actual** pre-injury wage, not the wage expanded under s. 102.11(1)(a).

Two-job wage earners were clearly relying on the two-job wages prior to the injury. For this reason, in 1985, the offset was eliminated. In 1988, the offset was restored to prevent what some saw as unjust enrichment. However, the offset was intended to be against the expanded wage to prevent undue hardship. Unfortunately, the statutory language has never been clear. In recent years, there have been more and more arguments on this point. Recent Labor and Industry Review Commission (LIRC) decisions have added to the confusion, by adding wages from both jobs to determine both the TTD rate and the offset--something the department has never done. Typically, the problem addressed by this change occurs when the worker who is hurt on a part-time job is able to **partially** return to work at the full-time job. Once they have returned full-time to the full-time job, the offset will almost always reduce TTD to zero regardless of whether it is taken against the actual or expanded wage from the part-time job. The problem is that the higher wage from a partial return to the full-time job almost immediately offsets the actual wage from a (typically) lower paying part-time job. Even when the offset is made against the expanded wage, the worker is still making far less than prior to the injury from both jobs. That is, there is no unjust enrichment. In short, the department believes the 1988 offset against the **expanded** wage was a compromise between **no** offset and offsets against **actual** wage.

Eliminate the 12-year Statute of Limitations for certain injuries. Insurers formerly paid these claims voluntarily if the claim was meritorious, except for the statute of limitations. Now, insurers routinely defend against these claims citing the statute of limitations. Since these are pre-existing conditions group health carriers refuse coverage. There has been a significant increase in problems with serious eye injuries and the need for prosthetic devices, both of which essentially require life-long treatment. The need for future knee or hip replacements is a trap for the unwary. Doctors advise holding off surgery as long as possible. Claimants may not know to preserve their right to surgery by filing an application for hearing. Occupational injuries beyond the 12-year period are currently funded from WISBF. This would be similar.

Delete sunset provision relating to work-experience students. Current law authorizes schools to voluntarily insure work-experience students, but only if they get no wages from the work-site employer. The option is rarely used. The exclusive remedy provision immunizes the work-site employer from tort suits. The sunset provisions were enacted in 1996 and extended in 1998 and 2000. No problems have been reported to the Department.

ADMINISTRATION

Clarify the Department's authority to conduct safety investigations. The safety reports referenced in this statutory section have been performed by the Division of Safety and Buildings (Safety and Buildings) for the Worker's Compensation Division for many years. Until recently, both Divisions were in DILHR (now DWD). Several years ago Safety and Buildings moved to the Department of Commerce and continued the investigations under a memorandum of understanding (MOU) with the Worker's Compensation Division. There were no statutory changes to Chapter 102 after Safety and Buildings moved to Commerce. Effective January 1, 2002, Safety and Buildings may not renew it's MOU with the Worker's Compensation Division.

The Worker's Compensation Division in the Department of Workforce Development wants to clarify that it has the responsibility and authority to conduct, contract for or otherwise secure the services of safety inspectors in the public or private sector.

Codify current law of release of Rating Bureau records. The Council agreed to this change in principle in the last session. In 1982, the Attorney General (AG) determined that records of organizations like the Wisconsin Compensation Rating Bureau (WCRB) are not subject to Wisconsin's Open Records law. In April 1999, the AG supported the Department's refusal to release that WCRB insurer information from a database shared by WCRB and the WC Division. The AG encouraged the Department to clarify the statutory intent. This proposal codifies the long-standing working relationship between the Department and the Rating Bureau and is supported by both agencies.

Create uniform 21-day payment standard. Several years ago, the 10-day payment requirement in Wis. Admin. Code s. DWD 80.15 was changed to 21 days for orders issued by an ALJ after hearing. This conformed to the 21-day period for parties to petition LIRC to review an ALJ's decision. The 10-day payment standard remained for stipulations and compromise orders which, by their nature, would not be appealed. This creates a uniform 21-day payment standard for all orders.

Delete the requirement for an annual fraud report to the Governor and Legislature. The Department refers only about 15 cases of alleged fraud annually to district attorneys. They prosecute about three. This low level of fraud reported and prosecuted does not warrant annual reporting. The Department has issued reports covering the first five years of the program. There is currently nothing new to report.
Delete sunset for medical fee disputes. In 1992, the Department began using certified databases of CPT codes to resolve fee disputes between insurers and health-care providers. It had a two-year sunset. The sunset has been extended every session since 1994. The system was created in response to a dramatic increase in fee disputes and complaints from both providers and insurers that ALJs' decisions about providers' fees were too arbitrary and unpredictable when based only on a file review. Over the past decade, certified databases have been accepted as fairer and more efficient than the prior system of ALJs doing file reviews. The number of disputes has dropped dramatically.

Require that an injured employee receive a copy of any recorded statements. When an employee gives the employer or insurer a signed statement relating to a claim, the employee must be given a copy. When the statement is recorded and not immediately reduced to writing, Wis. Admin. Code s. DWD 80.24 provides that the employee or his or her attorney is entitled to a copy of the entire statement within a reasonable time after application for hearing is filed. If the employer or insurer do not comply, they may not use the statement in any manner in connection with the claim. The employer or insurer may comply by providing a copy of the recording or a transcribed copy.

This proposal deletes the phrase "after application for hearing" in DWD 80.24 so that the employer must provide the material within a reasonable time after the recording is done.

Restrict peer review requirement to certain disputes under 102.16(2m) Peer review in 102.16(2m)(c) is an option for compromise orders under 102.16(1) or for an ALJ issuing orders after hearing under 102.18(1), but it was never intended to be a requirement in those situations.

Codifies part-time, part-of-class. These changes codify the department's current procedures.

1. In a National Recovery Act case, the court distinguished a "class" of four part-time watchmen working staggered-days and staggered-shifts from a full-time watchman. See Allis Chalmers v Industrial Comm., 215 Wis. 616 (1934). See also, Carr's Inc. v. Industrial Comm., 234 Wis. 466 (1940).

2. The five-hour variance is less than the eight-hour variance approved by the Wisconsin Supreme Court in Carr's Inc., the leading part-time, part-of-class wage case.
3. 13 Weeks is borrowed from the 90-day period specified for full-time employment in DWD 80.51(1).
4. The department wage analysts have used the 10-percent concept and required more than one employee in a class at least since the 1980's when Harry Benkert wrote: "The class must be regularly scheduled. We have also administratively determined 'class' to mean more than one employee. There must be a significant number of employees relative to the employment to constitute a class." Until very recently, the department did not consider multiple locations in determining a class. Recently it has been allowed in some cases. Wage analysts are unanimous that the law would be simpler to administer if the long-standing policy excluding multiple locations were codified.

Define "workweek" for purposes of average weekly wage in s. 102.11. This is intended to codify the Department's longstanding interpretation that for purposes of counting a workweek in s. 102.11, the week is from Sunday to Saturday.

Defines how to treat overtime pay in determining the weekly wage. Overtime and premium pay are not synonymous. Overtime is not used to calculate earnings under par (a), but is used under par. (d). For most employees, earnings are the larger of paragraphs (a) or (d).

Clarifies the use of the "employers" work week. Whether one uses the employee's daily earnings (or hourly earnings) those earnings have always been multiplied by the days (or hours) in the **employer's** normal full-time workweek, not the days (or hours) worked by the claimant. True, the department uses the claimant's actual work days (or hours) as a starting point to audit the employer's workweek. But, that does not conclusively determine the workweek.

In 2000, LIRC and the circuit court refused to consider arguments from the employer regarding its regular schedule. Instead, LIRC and the court determined the workweek under 102.11(1)(a) is based on the "local labor market" not the injury employer's schedule. The department has never used the local labor market under par. (a). The labor market concept used in UI is not used in WC. In WC, the closest one comes to the local labor market is looking at "same or similar" employment under par. (c)--a rarely used section. See Diane Aronson v. Caregivers Home Health, No. 00-CV000615, Waukesha County, November 1, 2000.

Adding the hourly formula to the daily formula in the current statute will not change the average weekly earnings. However, for most insurers and employers the hourly formula will make more sense.

Codifies certain presumptions. The hourly formula makes it easier to phrase the 24-, 56- and 40-hour presumptions and the multi-week schedule in modern language. This proposal codifies the Department's 24-, 56- and 40-hour presumptions. They are widely accepted and ease the administration of a complex wage law. Insurers may rebut the presumption by providing reasonably clear and complete documentation.

Senate

Committee on Labor and Agriculture
Senator Dave Hansen, Chair

PAPER BALLOT

Date: **September 28, 2001**

Bill: **Senate Bill 251 -- Relating to: various changes to the worker's compensation law.**

Motion: **Passage**

Moved by: **Hansen**

Seconded by: **Lasee**

Aye: ✓ **No:** ______

Senator Alan Lasee
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Please return to Senator Hansen's office (by messenger) by **5 pm Friday, September 28, 2001.**

Thank you. Please call the Committee Clerk, Lisa Ellinger, at 266-5670 if you have any questions.

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Senator Sheila Harsdorf

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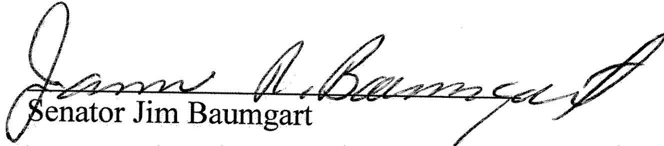

Senator Jim Baumgart

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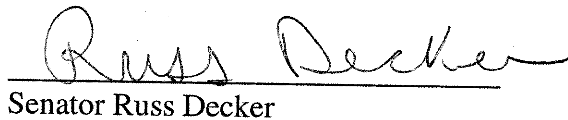

Senator Russ Decker

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