

WISCONSIN WORKER'S COMPENSATION BASICS

Presented by
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I. LIABILITY

A. Generally

1. Wis. Stat. §102.03
 - a. Employee must sustain an injury.
 - b. Employer/Employee relationship must exist.
 - c. At time of injury, employee must be in the course of employment.
 - d. Injury must arise out of the employment.
 - e. Injury cannot be self-inflicted.

If liability exists worker's compensation recovery is employee's exclusive remedy against employer

B. Injury

1. Accidental
 - a. An accident is defined as "a fortuitous event, unexpected and unforeseen by the injured person." Kaiser Lumber v. Industrial Comm'n, 181 Wis. 513 (1923).
 - b. This requirement is satisfied if either the cause was of an accidental character or if the effect was the unexpected result of routine performance of the worker's duties. School District No. 1 v. DILHR, 62 Wis. 2d 370 (1974).
2. Occupational Disease
 - a. A mental or physical harm which results from occupational exposure over a prolonged period of time which is not so sudden or traumatic to meet the definition of accident. The work exposure must be substantive cause or material causative factor of employee's disability.
 - (1) Date of injury is the first missed work day (or first doctor visit which occasion wage loss) or the last day of work for last employer who has caused the disability

- (2) Examples of occupational injuries:
 - (a) Silicosis
 - (b) Asbestosis
 - (c) Series of back injuries
 - (d) Repetitive motion diseases (CTS, Epicondylitis)
 - (e) Skin diseases
 - (f) Hearing loss

b. Occupational Mental Injury –Three Categories

- (1) Physical-Mental (Examples: post traumatic stress disorder, conversion disorder and phobias)
- (2) Mental-Mental (Example: Requirements of job must have been more stressful than others similarly situated or the “extraordinary stress test.”) School District No. 1 v. DILHR, 62 Wis. 2d. 370 (1974).
- (3) Mental-Physical (Example: Mental stress aggravates, precipitates and accelerates pre-existing condition). UPS v. Lust, 208 Wis. 2d. 306 (Ct. App. 1997).

C. Course of Employment

1. Generally

- a. To be a compensable injury, the worker must be performing services growing out of and incidental to his/her employment (in the course of employment).
- b. Worker’s compensation law is liberally construed in favor of including all services that can in any sense be said to reasonably come within it.

D. Common Issues in Regard to Course of Employment

1. Personal Comfort Doctrine (i.e. breaks, smoking breaks, drink of water)

- a. Factors:
 - (1) Location of injury
 - (2) Employer condonation
 - (3) Paid break
 - (4) Zone of danger

2. Private errands

- a. Motivation or reason for the errand and who benefits

3. Horseplay
 - a. Doesn't always bar benefits—Courts look to extent to which horseplay had become an accepted part of employment
4. Fights
 - a. Deliberately engaging in fight with co-worker bars recovery
5. Intoxication
 - a. Not always considered a deviation. May reduce benefits (15% or \$15,000.00 maximum) but not bar recovery. Wis. Stat. §102.58
6. Employer Premises
 - a. Coming and Going Rule (i.e. direct route to and from building on employer's premises)
 - b. What constitutes the employer's premise?
 - (1) The test is whether an employer controls the area in question, not whether it owns it.
 - c. Spillover Conditions- injured in immediate vicinity of premises while going to and from work is compensable.
7. Parking Lot
 - a. A designated parking lot is part of the employer's premises.
8. Traveling Employee
 - a. Doesn't always bar recovery. See CBS, Inc. v. LIRC, 219 Wis. 2d 564, 581, 579 N.W.2d 668 (1998) and Wisconsin Elec. Power Co. v. LIRC, 226 Wis. 2d 778, 595 N.W.2d 23 (1999) if employee paid wages for travel time is the test.
9. Recreational Activities
 - a. Occur on employer premises;
 - b. Employer expressly or implicitly condones participation;
 - c. Employer derives benefit
E.C. Styberg Engineering Company Inc. v. LIRC, 2005 WI App 20, 278 Wis.2d 540,692 N.W.2d 322 (Filed Dec. 22, 2004) Leipzig v. City of

E. Injury Arising Out of Employment

1. Generally

- a. An accident or disease that causes injury must not only occur while the employee is in the course of employment (COE), but must also arise out of the employment or be due to some hazard of employment.

(1) Factors

- (a) Hazard of employment
- (b) Medical cause of injury
- (c) Causal connection between employment and injury

This refers to the cause of the injury. The issue is whether there is something in the work environment (some hazard of employment) that caused the employee's injury

F. Common Issues in Regard to Arising Out of Employment

1. Positional Risk Doctrine – obligations of employment place employee in place where injured by a force not solely personal to employee.
2. Idiopathic Falls – personal condition caused injury not hazard or condition of employment thus employer not liable.
3. Intentional Injuries – distinguish between negligent which is compensable.
4. Suicides – must be clear link between suicide and compensable injury.
5. “As is” Rule
 - a. Lewellyn v. DIHLR, 38 Wis. 2d. 43 (1968).
 - (1) Breakage – Liability exists regardless of any pre-existing condition. (Structural change to injured area.)
 - (2) No breakage or physical change, but a manifestation of the underlying condition – no liability (temporary aggravation).
 - (3) If work activity precipitates, aggravates and accelerates beyond normal progression a progressively deteriorating condition – liability.
6. Re-injuries
 - a. If the residuals of a compensable on the job injury cause a subsequent off the job injury, the employer is liable for the later injury. Lange v. LIRC, 215 Wis. 2d 561, 573 N.W.2d 856 (Ct. App. 1997)

II. **BENEFITS**

A. **Temporary Disability**

1. Generally

- a. Calculation of TTD – 2/3 AWW (see Wis. Stat. §102.11 for wage calculation)
- b. Temporary Partial Disability
- c. Escalated TTD Rate
- d. Healing Period

(1) Healing period refers to period of time worker is convalescing from the injury, submitting to treatment, still suffering from his injury, and is unable to work because of the accident. It is the period prior to the time when the condition becomes stationary. Knobbe v. Ind. Comm'n, 208 Wis. 2d 185, 242 N.W. 2d 501 (1932).

- (a) TTD/TPD liability continues regardless of length of healing period.
- (b) TTD/TPD ceases once worker reaches healing plateau or MMI. Defined as the point where all improvement has likely occurred.
- (c) Three-day waiting period – worker must be disabled for more than 3 days before entitlement to benefits begins. If disability lasts more than 7 days, the three-day waiting rule is not applicable. Wis. Stat. §102.43.

B. **Permanent Partial Disability**

1. Generally

- a. Scheduled Injuries – See Wis. Stat. §102.52
- b. Non-Scheduled Injuries – See Wis. Stat. §102.44(3) (allows worker to bring LOEC claim)

Location of disability or impairment, not location of injury, determines whether schedule applies

See Handout—Maximum Wage and Rate Chart

III. MEDICAL EXPENSE LIABILITY

A. Generally

1. Wis. Stat. §102.42
 - a. Choice of treating physician
 - b. Worker has two physician choices
 - c. Out-of-state treatment

B. Liability

1. Subject to reasonableness of fees (amount charged) and necessity of treatment (medically indicated to cure and relieve).
2. Liable for treatment to prevent further deterioration in the condition or to maintain existing status of condition whether or not a healing plateau has been reached.
3. Liability for consequences of negligent medical treatment. Stiger v. Industrial Comm., 220 Wis. 653, 265 N.W. 678 (1936).
4. Liability continues after final payment or order but is subject to 12-year statute of limitation, pursuant to Wis. Stat. §102.17(4). But See Lisney v. LIRC, 171 Wis.2d 499, 493 Wis.2d 14 (1992).
5. Payments by third party medical carriers are reimbursable, pursuant to Wis. Stat. §102.30 (7)(a). However, third party carrier has no standing to intervene as a party in the worker's compensation proceedings. See Wis. Stat. §102.30(7)(b).
6. Travel expense to obtain treatment – .425 cents per mile currently and effective May 1, 2006 (determined by DWD).
7. DWD cannot disregard the consequences of treatment because it finds the treatment is either unreasonable or unnecessary, if the worker, in good faith, accepts the recommendation of treatment by one physician with whom another disagrees. Spencer v. DILHR, 55 Wis.2d 525, 200 N.W. 2d 611 (1972).
8. Unlimited liability in cost of treatment.

C. Defenses

1. Fee not reasonable and treatment not necessary to cure and relieve from the effects of the injury.
2. Determination by ALJ at worker's compensation hearing or LIRC upon review.
3. Matter can be submitted to the dispute resolution procedure outlined in Wis. Stat. §102.16(2), (2m).

IV. ADDITIONAL CLAIMS UNDER WORKER'S COMPENSATION ACT

A. Vocational Rehabilitation (DVR)

1. Wis. Stat. §102.43 and 102.61
2. Both scheduled and unscheduled qualify
3. Eligibility – return to work at less than 90% pre-injury
4. DVR and OSS

B. Loss of Earning Capacity

1. Wis. Stat. §102.44(3)
2. Unscheduled injuries only
3. Vocational expert necessary

C. Unreasonable Refusal to Rehire

1. Wis. Stat. §102.35(3)
2. Liability rests with employer only
3. Exposure – one year's wages (dollar amount not time frame)

D. Bad Faith and Delay in Payment Penalties

1. Wis. Stat. §102.18(1)(bp)
 - a. Exposure - \$15,000.00 maximum for each act
 - b. Defense – claim fairly debatable
2. Wis. Stat. §102.22(1)
 - a. Exposure – 10% of delayed benefits/payments
 - b. Defense – address change

E. Safety Violation

1. Wis. Stat. §102.57
 - a. Exposure \$15,000.00
 - b. Employer responsible

F. Disfigurement

V. PRACTICAL CONSIDERATIONS

- A. Initial Client Intake (*See Handout*)
- B. Discovery (very limited if at all)
- C. Jurisdiction and liability (SOL, Notice, etc.)
- D. Filing Hearing Application (necessary documentation to support claims and get hearing scheduled quicker, include WKC-16B, WKC-3, CMR's, etc.)
- E. Hearing Notice (all evidence filed 15 days in advance of Hearing; currently hearing notices giving less than 3 weeks)
- F. Certification of Readiness (See attached new form noting space for objection by defense counsel)
- G. Postponements
- H. Settlements – full and final compromises must have legitimate dispute which is defined as causation or more than 100 weeks in dispute
- I. Attorney's Fees—must be approved by Dept.
- J. Offsets—STD, LTD, SSDI and Medicare Set-Asides
- K. Appeals

VI. RESOURCES AND LINKS

- www.dwd.state.wi.us
- www.WAWCA.org