

## Department Proposals for WCAC Consideration – August 2021

### Department Proposal 1

s. 20.445 (1) (ra)

This proposal was previously approved by the WCAC and included in 2019 SB-673.

Appropriation 169 Create 0.2 SEG FTE with Associated Budget for Salary and Fringe. The Worker's Compensation Division (WCD) has a 0.8 FTE position that has been difficult to staff and has been vacant since 06/14/2018. As such, the WCD recommends making it a 1.0 FTE position by creating 0.2 FTE in appr. 169. The classification for the position will be Operations Program Associate with a minimum hourly rate of \$16.71. To fully fund this position, the increase in budget authority proportional to the 0.2 FTE increase is \$10,000 (\$7,000 salary, \$3,000 fringe). This change will not affect assessments or payments from this fund.

### Proposed language for nonstatutory provision in fiscal changes section

In the schedule under s. 20.005 (3) for the appropriation to the department of workforce development under s. 20.445 (1) (ra), the dollar amount for fiscal year 2021-22 is increased by \$10,000 to increase the authorized FTE positions for the department by 0.2 SEG position for the performance of services for the worker's compensation division.

### Department Proposal 2

ss. 46.275 (4m), 46.227 (3r), 46.281 (1k), 46.2897 (3) and 46.995 (3)

This proposal was previously approved by the WCAC and included in 2017 SB-665 and 2019 SB-673.

This proposal is for technical changes in the law. The language used to amend these subsections in 2015 Wis. Act 180 provided that individuals who perform services for persons receiving long-term care benefits under long-term care programs are employees of entities providing financial management services for those persons. The proposed amendments will include specific language in the subsections in ch. 46 that clearly states the individuals performing services for the long-term care programs will be considered to be employees of the entity that is providing financial management services for purposes of worker's compensation coverage.

### Proposed language for the amendments

The WCD suggests using the same language for these amendments as used in 2017 SB-665 and 2019 SB-673.

### **Department Proposal 3**

s. 102.04 (1) (b) 1. and 2.

This proposal was previously approved by the WCAC and included in 2017 SB-665 and 2019 SB-673.

Under current law every person who usually employs three or more employees for services performed in this state is subject to the worker's compensation law. The term "usually" is not defined in ch. 102., Wis. Stats., and is open to ambiguity, interpretation and lack of clarity. This proposal provides that every person who at any time employs three or more employees for services performed in this state is subject to the worker's compensation law and specifies that a person becomes subject to the worker's compensation law the day on which the person employs three or more employees for services performed in this state.

#### **Proposed language for the amendment to s. 102.04 (1) (b) 1. and 2.**

102.04 (1) (b) 1. Every person who ~~usually~~ at any time employs 3 or more employees for services performed in this state, whether in one or more trades, businesses, professions, or occupations, and whether in one or more locations. A person who employs 3 or more employees for services performed in this state becomes subject to this chapter on the day on which the person employs 3 or more such employees.

102.04 (1) (b) 2. Every person who ~~usually~~ employs less than 3 employees, provided the person has paid wages of \$500 or more in any calendar quarter for services performed in this state. Such ~~employer~~ a person shall become subject to this chapter on the 10th day of the month next succeeding such quarter.

### **Department Proposal 4**

s. 102.05 (3)

At this time there is currently no statutory authority for farmers who have not had an employee at any time within a continuous period of two (2) years to automatically withdraw from subjectivity to ch. 102, Wis. Stats. Current law provides that an employer who has had no employee at any time within a continuous period of (2) years shall be deemed to have withdrawn from subjectivity to ch. 102, Wis. Stats., effective on the last day of the period. See s. 102.05 (1), Wis. Stats. The rationale for this proposal is to provide the same statutory authority for farmers to withdraw from subjectivity as other employers who have had no employee in the previous two (2) years.

#### **Proposed language for the amendment to s. 102.05 (3)**

s. 102.05 (3) A person engaged in farming who has become subject to this chapter, and who has had no employee at any time within a continuous period of 2 years shall be deemed to have effected withdrawal, which shall be effective on the last day of such period. Any person engaged in farming who has become subject to this chapter may withdraw by filing with the department a notice of withdrawal, if the person has not

employed 6 or more employees as defined by s. 102.07 (5) on 20 or more days during the current or previous calendar year. Such withdrawal shall be effective 30 days after the date of receipt by the department, or at such later date as is specified in the notice. Such person may again become subject to this chapter as provided by s. 102.04 (1) (c) and (e).

### **Department Proposal 5**

s. 102.13 (1) (b) and 6.

Employers or insurer carriers have the right to request that an employee submit to a reasonable examination by a doctor or other specifically enumerated practitioner. Female injured employees are frequently required to submit to examinations under s. 102.13 (1), Wis. Stats., with male physicians, often directed to disrobe and wear paper gowns, and are subject to hands-on physical examinations. Under current law safety observers are often compelled to leave the room during examinations. The rationale for the proposal is the protection of injured employees who are required to submit to examinations at the direction of employers and worker's compensation insurance carriers under s. 102.13 (1), Wis. Stats.

### **Proposed language to amend s. 102.13 (1) (b) and create 6.**

102.13 (1) (b) An employer or insurer who requests that an employee submit to a reasonable examination under par. (a) or (am) shall tender to the employee, before the examination all necessary expenses including transportation expenses. The employee is entitled to have a physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist provided by himself or herself present at the examination and to receive a copy of all reports of the examination that are prepared by the examining physician, chiropractor, psychologist, podiatrist, dentist, physician assistant, advanced practice nurse prescriber, or vocational expert immediately upon receipt of those reports by the employer or worker's compensation insurer. The employee is ~~also~~ entitled to have a translator provided by himself or herself present at the examination if the employee has difficulty speaking or understanding the English language. The employee is also entitled to have an observer present at the examination provided by himself or herself. The employer's or insurer's written request for examination shall notify the employee of all of the following:

102.13 (1) (b) 6. The employee's right to have an observer provided by himself or herself present at the examination.

## **Department Proposal 6**

s. 102.15 (1)

This proposal was previously approved by the WCAC and included in 2017 SB-665.

The language used in 2015 Wis. Act 55 to amend s. 102.15 (1) only authorizes the division (DHA) to adopt its own rules of procedure and to change these from time to time. It is also necessary for the Worker's Compensation Division (WCD) to have statutory authority to promulgate administrative rules in ch. 102, Wis. Stats., that are necessary to carry out its duties and functions.

Administrative rules primarily related to worker's compensation adjudicatory functions that were contained in ch. DWD 80 were transferred to the DHA. There are a number of other rules contained in ch. DWD 80 that are not primarily related to adjudicatory functions that also apply to litigated cases.

The proposal is for an amendment to s. 102.15, Wis. Stats., that will authorize the WCD to promulgate rules necessary to carry out its duties and functions under ch. 102, Wis. Stats.

### **Renumber s. 102.15 (1) to (1) (a)**

### **Proposed language to create s. 102.15 (1) (b)**

102.15 (1) (b) The department may promulgate rules as necessary to carry out its duties and functions under this chapter. The provisions of s. 103.005 relating to the adoption, publication, modification, and court review of rules or general orders of the department shall apply to all rules promulgated or general orders adopted under this chapter.

## **Department Proposal 7**

s. 102.16 (1) (b)

This proposal was previously approved by the WCAC and included in 2017 SB-665.

There is currently no statutory authority in ch. 102, Wis. Stats., that specifically authorizes the WCD to conduct alternative dispute resolution (ADR) activities to resolve disputed worker's compensation cases. Currently, the WCD utilizes Dispute Resolution Specialists on its staff to work with pro se claimants (employees not represented by attorneys), employers and worker's compensation insurance carriers to resolve cases without the need for formal hearings.

The WCD has been very successful in conducting alternative dispute resolution activities in cases where injured employees are not represented by attorneys. With this proposal WCD staff will have specific statutory authority to conduct alternative dispute resolution activities in cases where no hearing application has been filed, and in cases where an application has been filed but the case is not ready to be scheduled for a hearing. Resolving worker's compensation cases using alternative dispute resolution

activities is less costly to stakeholders, provides resolution in much less time than formal hearings and is considerably more efficient to the stakeholders and the state.

**Proposed language to renumber s. 102.16 (1) (b) to s. 102.16 (1) (b) 1. and create s. 102.16 (1) (b) 2.**

102.16 (1) (b) 2. The department may conduct alternative dispute resolution activities for a case involving an employee who is not represented by an attorney with respect to which no application has been filed under s. 102.17 (1) (a) 1., or with respect to which an application has been filed, but the application is not ready to be scheduled for a hearing.

**Department Proposal 8**

s. 102.17 (1) (c), (cg), (cm), (cr) and (ct)

This proposal was previously approved by the WCAC and included in 2017 SB-665.

Section 102.17 (1) (c), Wis. Stats., provides statutory authority for the process to allow persons who are not attorneys licensed to practice law in Wisconsin to represent parties at worker's compensation hearings. Under current law the WCD is authorized to grant permission to persons who are not attorneys licensed to practice law in Wisconsin to appear at hearings in representation of the parties. The DHA now conducts worker's compensation hearings and should have statutory authority to regulate the process for authorizing persons not licensed to practice law in Wisconsin to appear at hearings before the DHA in representation of parties and to grant licenses to appear. Section DWD 80.20 of the Wisconsin Administrative Code is the administrative rule covering licenses to appear. Section DWD 80.20 of the Wisconsin Administrative Code could not be transferred to the DHA at the time other rules primarily related to adjudicatory functions were transferred because there is no current provision in ch. 102, Wis. Stats., for the DHA to have authority over this rule.

The proposed amendment to s. 102.17 (1) (c), Wis. Stats., will provide the DHA with statutory authority over the license to appear process and s. DWD 80.20 of the Wisconsin Administrative Code will be transferred to the DHA by a nonstatutory provision in the WCAC "Agreed Upon Bill". Section 102.17 (1) (cg), (cm), (cr) and (ct), Wis. Stats., also need to be amended to reflect the DHA will have statutory authority over approving licenses to appear at worker's compensation hearings.

**Proposed language for the amendment to s. 102.17 (1) (c), (cg), (cm), (cr) and (ct)**

The WCD recommends the same language to amend s. 102.17 (1) (c), (cg), (cm), (cr) and (ct) as was used in 2017 Senate Bill 665.

### **Department Proposal 9**

s. 102.33 (2) (b) 7.

This proposal was previously approved by the WCAC and included in 2019 SB-673.

Under current law the WCD may provide limited worker's compensation record information to the department of children and families or a county child support agency. The information is limited to the name and address of the employee who is the subject of the record, the name and address of the employee's employer, and any financial information about that employee contained in the record.

The proposed amendment allows the WCD to provide limited worker's compensation record information to the department of health services or a county department of social services. The information is limited to the name and address of the employee who is the subject of the record, the name and address of the employee's employer, and any financial information about that employee contained in the record.

#### **Proposed language to create s. 102.33 (2) (b) 7.**

102.33 (2) (b) 7. The requestor is the department of health services or a county department of social services under s. 46.215, 46.22, or 46.23, the request is made under s. 49.22 (2m), and the request is limited to the name and address of the employee who is the subject of the record, the name and address of the employee's employer, and any financial information about that employee contained in the record.

### **Department Proposal 10**

ss. 102.80 (1) (d), 102.81 (4) (b) and (5).

This proposal was previously approved by the WCD and included in 2019 SB-673.

The language in this paragraph provides the Uninsured Employers Fund (UEF) is to receive all of the proceeds from third party settlements less attorney fees and costs. This creates a disincentive for attorneys to represent employees in third party actions. The paragraph should be amended to provide the distribution of third party proceeds as stated in s. 102.29 (1), Wis. Stats. With this amendment the UEF would receive distribution of proceeds in a similar manner as a WC insurance carrier or self-insured employer.

#### **Proposed language to amend ss.102.80 (1) (d), 102.81 (4) (b) (intro), (4) (b) 2., and (5) and create s. 102.81 (4) (c).**

102.80 (1) (d) Accounts collected from employees or dependents of employees under s. 102.81 (4) (b) and (c).

102.81 (4) (b) (intro.) If the employee or dependent receives compensation from the employee's employer or a third party liable under s. 102.29, pay to the department the lesser of the following:

102.81 **(4)** (b) 2. The amount after attorney fees and costs that the employee or dependent received from the employer or 3<sup>rd</sup> party.

102.81 **(4)** (c) If the employee or dependent receives compensations from a 3rd party that is liable under s. 102.29, pay to the department the proceeds as specified under s. 102.29 (1) (b).

102.81 **(5)** The department of justice may bring an action to collect the a payment under sub. (4) (b) or (c).