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**How do worker's compensation claims work in Wisconsin?**

- 1. Employee files a claim by reporting injury to employer. Employer must report injury to its insurer when (1) disability persists for more than three days or (2) the employee has sought treatment outside of work and the insurer has primary liability for unpaid treatment expenses.
- 2. Insurer or self-insured employer either pays claim or, if it is fairly debatable, disputes liability (e.g., there are conflicting medical opinions or histories). Employee can contest a denial of liability by filing a hearing application.
- 3. After a hearing application is filed, the Division of Hearings and Appeals will schedule a hearing before an Administrative Law Judge. The parties can attempt to settle before the hearing. If no settlement is reached, the ALJ will conduct a hearing and issue a decision resolving the dispute.
- 4. Either party can appeal the ALJ decision to the Labor and Industry Review Commission. LIRC's findings of fact are final when supported by credible and substantial evidence. LIRC's legal conclusions are subject to judicial review.
- 5. Possible further appeal to Circuit Court, Wisconsin Court of Appeals, and then the Wisconsin Supreme Court.

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**What is an Administrative Law Judge?**

An Administrative Law Judge or ALJ is an individual who conducts the worker's compensation hearing. This position will resolve worker's compensation disputes, preside at pre-hearings, settlement conferences, mediations, conduct quasi-judicial hearings, make findings of fact and issue orders.




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### What is LIRC?

LIRC is a state administrative entity charged with reviewing worker's compensation, unemployment, and equal rights cases. In worker's compensation cases, LIRC reviews decisions by Administrative Law Judges. LIRC does not defer to the ALJ's findings or conclusions. Instead, LIRC makes its own decisions independently based on a review of the record developed before the ALJ and written briefs. There is generally no opportunity to submit additional evidence to LIRC.

LIRC is independent from employees and employers and attempts to provide a fair and impartial review of alleged worker's compensation injuries. Their goal is to allow all parties to be afforded a full and fair opportunity to be heard and have their proceedings carried out with proper application of law as enacted by the Wisconsin Legislature.

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### Who sits on LIRC?

- LIRC is comprised of three commissioners who are appointed on rotating terms by the Governor. Terms last six years, and are on a two-year rotating basis.
- **Commissioner Georgia Maxwell** – Background in public and private sector experience reviewing employment law decisions. Commissioner Maxwell previously worked at the DWD while serving as the Deputy Secretary.
  - 2023
- **Chairperson Michael Gillick** – Background representing injured workers in worker's compensation cases. Holds a JD from Marquette University Law School.
  - 2025
- **Commissioner Marilyn Townsend**– Professional background in public government. Holds a JD from the Potomac School of Law in Washington, D.C. In private practice, she represented employees with job related issues.
  - 2027

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### 2021 Wisconsin Act 232

- Effective April 10, 2022
- New PPD Rates
- New wage calculation for part-time workers
- DWD authority to conduct mediations and settlement conferences with unrepresented employees
- Various other changes

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### New PPD Rates

- PPD rates are adjusted periodically by statute
- For injuries occurring January 1, 2017, through April 9, 2022
  - \$362 per week, \$1,568.67 per month
- For injuries occurring April 10, 2022, through December 31, 2022
  - \$415 per week, \$1,798.33 per month
- For injuries on or after January 1, 2023
  - \$430 per week, \$1,863.32 per month

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### Wage Calculation for Part-Time Workers (regularly scheduled less than 35 hours/week)

- Old Method
  - Hourly Wage x Hours in Normal Full-time Workweek (presumed to equal 40 hours)
  - Part-time workers usually had wage "expanded" to full-time, unless "part of a class."
- New Method – higher of:
  - Hourly Wage x Average Hours worked per week in year before injury or
  - Gross Earnings / Weeks Worked in year before injury

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### Caveats (the fine print)

- Payroll records should show weekly hours worked and gross earnings
- When counting weeks, do not count weeks when no work was performed. Do count weeks when employee worked any part of the week.
- Use gross earnings, not net earnings
- New method does not apply when:
  - Employee had a second job at time of injury
  - Employee worked part-time for less than a year before injury
- Employer can rebut expansion by showing employee chose to restrict availability to part-time

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### Alternative Dispute Resolution

- DWD Dispute Resolution Specialists
- Settlement Conferences
- Mediation with an ALJ
- Mediation with a private mediator

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### Proposed Bills

2023 SB 113 and 2023 AB 115

- Amendment to PTSD statute passed in 2021
- Current law applies only to firefighters and law enforcement officers
- Amendment extends coverage to other employees:
  - Emergency Medical Responders
  - Emergency Medical Services Practitioners
  - Volunteer Firefighters
  - Correctional Officers
  - Emergency Dispatchers
  - Coroners and their staff
  - Medical Examiners and their staff

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### Proposed PPD Minimums (Upper Extremities)

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| • Shoulder prosthesis, total – 50%       | • Elbow flexor or extensor tendon repair – 5%  |
| • Shoulder prosthesis, partial – 45%     | • Elbow ulnar nerve transposition – 5%         |
| • Shoulder rotator cuff repair – 10%     | • Elbow cubital tunnel release – 2%            |
| • Shoulder labral repair – 5%            | • Wrist prosthesis, total – 40%                |
| • Shoulder distal clavicle excision – 3% | • Wrist prosthesis, partial – 35%              |
| • Shoulder proximal biceps repair – 3%   | • Wrist carpal tunnel release – 2%             |
| • Elbow prosthesis, total – 40%          | • Loss of Motion – various changes             |
| • Elbow prosthesis, partial – 20%        | • Peripheral Nerve Disorders – various changes |
| • Elbow distal biceps repair – 5%        |  |

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**Proposed PPD Minimums  
(Lower Extremities)**

- Hip joint resurfacing – 30%
- Hip labral repair – 5%
- Knee ankylosis – 50% (from 40%)
- Knee prosthesis, total – 40% (from 50%)
- Knee prosthesis, partial – 35% (from 45%)
- Knee joint resurfacing – 30%
- Knee removal of patella – 20%
- Knee meniscectomy (>50%) – 8%
- Knee meniscectomy (<50%) – 5%
- Knee meniscus repair w/ debridement – 3%
- Ankle prosthesis, total – 40%
- Ankle prosthesis, partial – 35%
- Loss of Motion – various changes
- Peripheral Nerve Disorders – various changes

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**Proposed PPD Minimums  
(Spine – Nonscheduled Disability)**

- Spinal fusion – 7% per level
- Removal of disc material and fusion – 12% per level
- Implantation of artificial disc – 10% per level
- Sacroiliac joint fusion – 7%
- Coccyx fracture -- 5%
- Pelvic fracture w/ symphysis pubis separation – 10%
- Disc herniation, treated conservatively – 2%
- Implantation of spinal cord stimulator – 2%
- Implantation of intrathecal pain pump – 2%

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**DWD v. LIRC, Wis. Ct. App. 2022  
Misconduct**

- Issue: whether a derogatory remark about a coworker constitutes "misconduct."
- Susan Wozniak called a coworker a "pretty boy" and "fruit loop" in a conversation with two other coworkers (outside the presence of the coworker about whom she made the remark). Subsequently, she was terminated and applied for unemployment benefits. (Although an unemployment case, worker's compensation has adopted the same definition of misconduct.)
- Misconduct includes "one or more threats or acts of harassment, assault, or other physical violence instigated by an employee at the workplace of his or her employer." Wis. Stat. § 108.04(5)(d). LIRC concluded, and the court of appeals agreed, that harassment means "words, gestures, and actions which tend to annoy, alarm, and abuse (verbally) another person," such as "epithets, and vulgar or derogatory language, display of offensive cartoons or materials, mimicry, lewd or offensive gestures, and telling of jokes offensive to protective class members."
- The court of appeals denied unemployment benefits, concluding that Wozniak was terminated for misconduct based on her derogatory remarks about a coworker.

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**Rood v. Selective Ins. et al., Wis. Ct. App. 2022  
Exclusive Remedy**

- Issue: whether a telescopic forklift is a "motor vehicle"
- Charles Rood sustained injury when a coworker drove a telescopic forklift (also known as a lull or telehandler) over his left foot and leg. The employer did not own or lease the forklift. Rood collected worker's compensation and then sued the coworker for negligence. The coworker (and his insurer) denied liability based on the "exclusive remedy" provision of the Worker's Compensation Act.
- Generally, worker's compensation is an employee's exclusive remedy against his employer, coworkers, and the WC insurer. However, an employee can sue a coworker when (as relevant here) the claim involves "negligent operation of a motor vehicle not owned or leased by the employer." Wis. Stat. § 102.03(2). Rood argued his claim can proceed because the liability policy grants coverage and because the telescopic forklift is a "motor vehicle" not owned or leased by his employer.
- The court of appeals rejected both arguments. Rood's tort claim is barred, the court concluded, because the telescopic forklift is not a motor vehicle.

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**Rood cont'd – Exclusive Remedy**

- Usual authorities provided little guidance
  - No definition of "motor vehicle" in Worker's Compensation Act.
  - No prior appellate case defining "motor vehicle" in context of worker's compensation.
  - Other statutory definitions not helpful because they differ based on context.
- Broad definition of "motor vehicle" –
  - Any self-propelled device or machine that is capable of transporting people or property on a public roadway.
  - This definition would increase potential coworker suits by expanding the exception to the exclusive-remedy provision.
- Narrower definition of "motor vehicle" –
  - Any self-propelled devices or machines that are designed and primarily used to transport people or property on a public roadway.
  - This definition would minimize coworker suits by limiting the exception to the exclusive-remedy provision.

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**Rood cont'd – Exclusive Remedy**

- Purpose of "exclusive remedy" provision = protection of coworkers against civil suits
  - Narrow definition of "motor vehicle" serves this purpose; broad definition does not.
  - The court adopts the narrower definition.
- Under the narrower definition, the telescopic forklift was not a "motor vehicle"
  - The forklift was capable of being driven on a public roadway. It had a tractor tires, headlights, signal lights.
  - However, its "primary purpose and intended use" was not transporting people or property on public roadway.
- The court held that Rood's tort claim is barred by the exclusive-remedy provision because the exception for negligent operation of a "motor vehicle" does not apply.
- A ruling for Rood might have opened the door to a variety of suits involving operation of manufacturing and agricultural machines "capable" of being driven on public roadway.

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### SK Management v. LIRC, Wis. Ct. App. 2022 Covered Employment

- Issue: whether a paid helper was an employee of a property management company that did not directly hire him.
- Donald King fell off a ladder and injured his right arm while working on a demolition project at a property managed by SK Management. SK had hired Brian Schweinert (d/b/a Mr. Phixitall) to do work such as demolition and maintenance at various properties. With SK's permission, Schweinert had brought on helpers, including King, to help with these projects.
- The SK manager usually relayed what jobs needed to be done through Schweinert and occasionally directed workers himself. Schweinert brought some tools to jobsites but SK supplied most equipment.
- SK paid Schweinert and all workers procured by Schweinert on an hourly basis. SK issued one check to Schweinert, who then distributed the pay appropriately to the other workers.
- If the SK manager was unhappy with a worker, he would direct Schweinert not to bring him back.

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### SK Management cont'd – Employment

- King claimed he (and Schweinert) were employees of SK Management.
  - If Schweinert was an independent contractor, he could have been King's employer. However, a worker is not an independent contractor unless nine conditions are met:
    - Maintains a separate business with its own office, equipment, materials, facilities
    - Holds or has applied for a federal employer identification number
    - Operates under contracts to perform specific services or work and controls the means of performing the service
    - Incurs the main expenses related to the service or work
    - Is responsible for the satisfactory completion of the service or work
    - Receives compensation for the service or work on a commission, job, or competitive bid basis
    - May realize a profit or loss
    - Has continuing or recurring business liabilities
    - The success or failure of the independent contractor depends on its business receipts and expenditures

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### SK Management cont'd – Employment

- Schweinert met only two of the nine independent-contractor conditions.
  - He possessed tools and equipment for his handyman business and had a federal employer identification number (conditions 1 and 2).
  - However, he was not at risk of suffering a loss and had no recurrent business obligations. SK maintained ultimate control over how work was to be done; paid wages on an hourly basis to Schweinert (who then distributed the pay to his helpers), and had primary responsibility for the satisfactory completion of the work.
- Accordingly, Schweinert was an employee, not an independent contractor, of SK Management.
- As an employee, he was not an employer of King or anyone else. (Wisconsin Statutes generally prohibit someone from being both an employee and an employer at the same time.)

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### SK Management cont'd – Employment

- Was King an employee of SK Management?
- An employee is anyone "in the service of another under any contract of hire, express or implied, [and] all helpers and assistants of employees, whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer." Wis. Stat. § 102.07(4).
- The "principal test" is whether the alleged employer has the right to control the details of the work. Secondary factors include (1) the exercise of that right to control the details, (2) the method of payment of compensation, (3) the furnishing of equipment or tools for the performance of the work, and (4) the right to fire or terminate the relationship.
- King was an employee of SK Management.
  - SK authorized Schweinert to hire King and had actual notice of King's work on the demolition project
  - SK had the right to control the details of King's work and had final say over whether it was satisfactory
  - SK controlled how much King was paid and indirectly paid his wages.
  - SK supplied the equipment for the demolition work.
  - SK had the right to terminate King and the other helpers.

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### Menasha Packaging v. LIRC, Wis. Ct. App. 2022 – Statute of Limitations

- Issue: whether the statute of limitations is "tolled" while a hearing application is pending.
- Matthew Frederick sustained an eye injury in 2001. Menasha last paid disability compensation in October 2006, starting the 12-year statute of limitations. Frederick filed a hearing application in July 2016. An ALJ eventually dismissed this application without prejudice in February 2017, after receiving communication that a payment issue had been resolved. Frederick then filed another hearing application in March 2018.
- Ordinarily, the time limit for filing a hearing application would have ended in October 2017, 12 years after the last disability payment. However, tolling is an equitable principle that can pause or delay the running of a time period set forth in a statute of limitations. Worker's compensation is generally considered to be a statutory system where equitable principles are not applicable.
- Nonetheless, the court of appeals, in a summary disposition (which cannot be cited in court as precedent or authority), determined the statute of limitations had been tolled for eight months while the July 2016 application was pending, extending the time limit for filing an application from October 2017 to June 2018.
- Accordingly, the application filed in March 2018 was timely.

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Questions?




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