



President's Message: Major, Destructive Changes to Workers' Compensation Proposed in Governor Walker's 2017-19 Biennial Budget

by: Laura M. Lyons, President, Wisconsin Defense Counsel

Imagine this scenario: You are defending a six-figure case involving bodily injuries. You have spent eight months preparing it for trial. Your case is strong. While you made a nominal settlement offer based on the cost of defense, it was rejected. Both parties agree that this is a case that needs to be tried. The carrier has invested thousands of dollars on medical records and defense fees to get to trial.

You are ready for hearing and present your case. It goes well. The witnesses testify exactly as you intend and the testimony is favorable to your case.

A few weeks later, the judge rules against you. You want to appeal the decision, but you learn that the recording device used at the trial failed, so there is no transcript. You appeal anyway, as the statutes allow you to do so based on a synopsis. However, the appeal that you bring is directed to the judge's supervisor, who affirms the decision.

You are now faced with the following unappealing choices: appeal to a higher court with an unfavorable standard of review, which will cost additional time and resources, or settle this defensible case for more than it is worth. To compound matters, the next level of appeal requires a transcript, so now it is uncertain whether you even have an appropriate record for your appeal due to the faulty recording. The result is unthinkable: you may now have to retry your case from the beginning.

Your defensible case has now mushroomed into a litigation nightmare due to factors outside of your control: 1) the lack of a transcript and 2) the lack of a knowledgeable and meaningful appellate

body. Picture having to explain these options to your clients. Consider the impact of these risk factors on case values, which are then distributed to consumers.

This is exactly the type of situation that could occur in the workers' compensation system if the Governor's recent budget proposal is adopted.

Even if you do not practice within the workers' compensation system, I urge you to continue reading. The Governor's proposed changes, if adopted, will affect insurers, businesses, and business owners. While your practice may not directly involve workers' compensation, these changes will likely impact your colleagues, your business clients, the insurance carriers that you work for, the ALJs whom you appear before, and the entire circuit court system.

The Two Proposals: Elimination of the LIRC and Elimination of Court Reporters

On February 8, 2017, Governor Walker introduced his proposed 2017-2019 Biennial Budget. As you may recall, the last state Budget Bill also contained major modifications to the workers' compensation system.

The current proposed budget contains two proposals that would substantially and detrimentally change the workers' compensation system. The two pertinent provisions are: 1) the elimination of the Labor and Industry Review Commission (the LIRC) and 2) the elimination of statutorily-mandated court reporters at workers' compensation trials.

A Brief History of the Wisconsin Workers' Compensation System

To fully understand the ramifications of these proposed changes, one must understand a bit of the history behind the system. The workers' compensation system in Wisconsin has existed since 1911. It was the first of its kind in the nation. The workers' compensation system is based on the "Grand Bargain" between employers and labor. The aim was to provide rights and benefits to employees in a no-fault system while protecting employers from tort claims and the uncertainty of jury trials.¹ There are no pain and suffering awards in workers' compensation; damages are based on statutory provisions that outline the value of the varying body parts. There is also no reduction for contributory negligence.²

Historically, changes to the workers' compensation system were vetted by the Wisconsin Workers' Compensation Advisory Council. The Advisory Council is comprised of five representatives from management, five from labor, and three non-voting insurance members. The goal of the system was to maintain stability within the workers' compensation system without regard to political changes. This balance has produced a system that is envied by other states: Wisconsin has swift return to work timeframes, access to quality health care, low and stable workers' compensation premiums for insurers, and low litigation rates. The Wisconsin system is a source of pride for its members. In fact, the collaborative nature of the system and its stability are referenced on the state's website.³

Prior to 2015, changes to the system were generally handled through legislation, as opposed to the budget process. However, the changes in the 2015-2017 Budget Bill were not run through the Advisory Council prior to their introduction, and the changes in the current budget proposal have not been either.

Workers' compensation cases are first heard by an Administrative Law Judge. While they are called "hearings," the proceedings are essentially shortened, streamlined trials. There is no jury, but

the cases may be heard over the course of several days and often involve exposures of six or seven figures.

The litigation side of the workers' compensation system was previously part of the Division of Workforce Development (DWD). As a result of the 2015-2017 Budget Bill, in 2016, a new agency was created to house the judicial side of the workers' compensation system: the Department of Administration (DOA), Division of Hearings & Appeals (DHA), Office of Workers' Compensation Hearings (OWCH, also called "the Division"). The ALJs who preside over workers' compensation trials are part of this system. Their supervisor is the Administrator of the Division of Hearings and Appeals (currently Brian Hayes).

Under the current system, if an ALJ decision is appealed, the Labor and Industry Review Commission (the LIRC) is the first level of appeal. The LIRC's primary duties are to decide appeals of decisions issued by ALJs in three areas: 1) workers' compensation; 2) unemployment; and 3) equal rights.

The LIRC is comprised of three members who are appointed by the Governor, subject to confirmation by the state senate, and who serve staggered six year terms. The LIRC is an independent agency of the State of Wisconsin. Though it was previously "attached" to the DWD for administrative purposes, the LIRC has been part of the DOA since the 2016-2017 changes.

The LIRC reviews the evidence from the workers' compensation trial, considers any briefs submitted by the parties, consults with the ALJ if the credibility of a witness is in question, and issues a written decision. Currently, the LIRC can affirm, reverse, or modify the decision of the ALJ, or direct further proceedings.

The LIRC's standard of review is currently *de novo*; it is not bound by the ALJ's findings of fact or conclusions of law. Rather, the LIRC provides an independent review of the evidence and makes factual findings.

The LIRC has substantial expertise in understanding and interpreting the Workers' Compensation Act and provides guidance to the rest of the system. Prior LIRC decisions are not binding on the LIRC, but are persuasive authority. The LIRC's decisions are available on Westlaw and select opinions are available on the LIRC's website. The decisions are used by the stakeholders to help provide guidance and predict outcomes throughout the system.

According to the LIRC's published statistics, in 2015 it received 214 appeals, issued 230 decisions, and had 104 cases pending at the end of the year.⁴

Appeals of the LIRC's decisions are decided by the circuit court in the county where the plaintiff resides, unless the plaintiff is a state agency. In that instance, it is the county in which the defendant resides.⁵ The circuit court has a deferential standard and will uphold the LIRC decision if there is any "credible and substantial evidence" to support it. Barring a legal issue, the circuit court generally upholds the factual and credibility findings of the LIRC.

1. Proposed Elimination of the Labor and Industry Review Commission

Under the proposed budget bill, the entirety of the LIRC would be eliminated. The basis for the proposed change is unknown. The full text of this proposal is available online,⁶ but the pertinent language is as follows:

Under current law, the Labor and Industry Review Commission (LIRC) reviews administrative decisions of DWD relating to unemployment insurance (UI) and discrimination in employment or in equal enjoyment of places of public accommodation (discrimination) and reviews administrative decisions of the Division of Hearings and Appeals relating to workers' compensation. Review by LIRC is a prerequisite to any judicial review. This bill eliminates LIRC and instead provides for administrative

review of administrative decisions relating to workers' compensation by the administrator of the Division of Hearings and Appeals and provides for administrative review of administrative decisions relating to UI and discrimination by the respective administrator of the division in DWD that administers the law in question.

If this budget proposal is accepted, workers' compensation appeals would be directed to one individual: the Administrator of the Division of Hearings and Appeals. The Administrator is actually the supervisor of the ALJs. Consequently, under this proposal, the first level of appeal would be heard by the direct supervisor of the ALJ who heard the case, as opposed to an independent panel. Importantly, there does not appear to be any additional staff or budgetary outlay for the additional workload being placed on the Administrator.

Another notable change is that, unlike in the current system, the budget proposal does not give the Administrator the right to reverse an ALJ's order. Rather, the Administrator would only be able to affirm, modify, or remand the decision back to the ALJ in question.

The proposal also includes language that indicates that the "findings of fact" by the "examiner" (presumably the ALJ)⁷ "shall, in the absence of fraud, be conclusive."⁸ Consequently, the ALJ's decision would have more weight under the proposed system.

The proposals have created a number of serious questions and concerns throughout the workers' compensation community. There are logistical questions of how the review process will actually work. It is also not clear whether additional staff would be provided to the Division Administrator to assess these appeals. If not, the system could face new challenges of a heavy caseload with fewer resources.

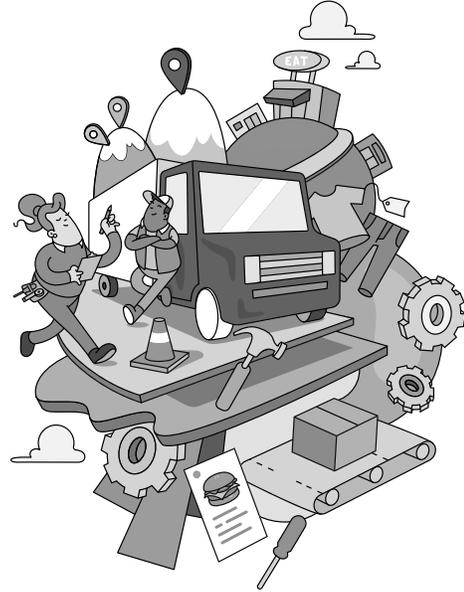


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Further, these changes could drastically change the way Wisconsin cases are handled, particularly by respondents. Under the current system, most cases resolve at either the ALJ level or at the LIRC. If the budget proposal is adopted and the Division Administrator is deferential to the ALJs' decisions, the new system would likely result in more appeals to the circuit court. This would be a major change. Consequently, respondents may find themselves playing the long game, anticipating appeals three steps or more ahead of the ALJ's decision. This translates into increased defense costs and a longer timeline to case resolution.

Additionally, circuit court judges may find themselves addressing workers' compensation cases far more often than they previously have. Based on data from past years, this could result in the circuit court system hearing an additional 200 workers' compensation cases per year. It may also lead to parties deciding to "test the system" and appeal more cases to circuit court than they previously have, which could increase this figure.

The proposal is silent on what would happen to the body of case law from the LIRC over the past 100 or more years. It is possible that this proposal could eliminate that precedential history, which would lead to uncertainty within the system.

The stakeholders can expect several impacts if this budget proposal is adopted. Insurers are likely to see the cost of handling claims increase due to less certainty in the system. Further, an increase in the frequency of appeals will lead to increased defense costs. Wisconsin businesses would likewise be affected in the form of insurance premium increases. This could also create long-standing instability: The makeup of the LIRC was structured to make it an independent body that was insulated from political changes. Adoption of the proposals could cause the workers' compensation system to become susceptible to partisan swings, resulting in further uncertainty for stakeholders on both sides.

2. Proposed Elimination of Court Reporters and the Adoption of Recording Devices

The Governor's proposed 2017-2019 budget would also eliminate the use of court reporters at workers' compensation trials and replace them with recording devices.⁹ As with the proposed elimination of the LIRC, the impetus for this proposal is unknown. Likewise, no information has been provided about the proposed recording system or its implementation.

Notably, the Wisconsin workers' compensation system is funded by the stakeholders. As such, taxpayer savings are not a factor in whether the workers' compensation system can afford court reporters.

Currently, court reporters are statutorily required at workers' compensation trials. Parties have the right to request a copy of a hearing transcript. Also, while there is no requirement that transcripts be prepared for appeals to the LIRC,¹⁰ many parties choose to order the trial transcript, and they retain the right to do so at a later date.

Many states require the attendance of court reporters at workers' compensation trials. Based on informal state surveys, at least 23 states require their appearance.¹¹

Court reporters at workers' compensation trials serve an invaluable function. Just like the court reporters in circuit court, they help maintain the orderly process of trials.¹² In fact, the court reporters in workers' compensation cases act both as court clerks and court reporters. They mark and control exhibits, transcribe testimony, keep the parties' testimony as clear and accurate as possible, and help maintain the official case record. Obviously, a recording device cannot handle these tasks.

Instead, these responsibilities will likely be put on the presiding ALJ, whose primary role currently is to make credibility assessments and weigh evidence. The new proposals will likely force the ALJs to carefully monitor the recording process and

protect the record, in addition to performing their official duties and maintaining order. This would never happen in the circuit court system and should not in the workers' compensation system either. It is asking too much of one person to require them to handle all of these conflicting responsibilities.

Additionally, even with a recording, the audio from the trial will likely still have to be typed if the matter is appealed. Parties could end up worse off than before. Although there may be a typed record of an audio recording, it would likely be a less accurate record due to the lack of a court reporter monitoring the process and protecting the record.

Further, all of this assumes that the recording device has in fact recorded the proceedings and that the audio is audible and complete. An incomplete or inaccurate record could also impact the parties' ability to appeal and could result in due process challenges.

Not only that, but no information is available as to the type of recording devices to be used under this budget proposal or how they would be implemented or maintained. It is unclear whether parties could choose to hire private court reporters to appear at the workers' compensation trials. If they could, there are questions regarding whether the transcripts would be accepted as part of the official record.

Questions also remain about whether this proposal would violate the due process rights of the parties involved in these cases. Notably, current statutory provisions require that court reporters be present at the workers' compensation trials. Further, a transcript is required for appeals to the circuit court.¹³ The budget bill does not speak to or alter these requirements.

The elimination of state-employed court reporters could significantly increase the cost to the stakeholders in the workers' compensation system. Under the current system, the Division employs seven court reporters. There are also contract reporters who are used in some instances. These reporters travel to hearing sites and transcribe workers' compensation trials. There is no cost to

the parties unless a transcript is requested. Further, no taxpayer money is funding this system—the stakeholders bear the cost through their assessments.

While the parties to a workers' compensation case do pay to order a transcript under the current system, it is far less expensive than if a private court reporting company were employed. Anecdotally, the cost of two copies of a 68 page transcript (roughly 2.5 hours of testimony) has been about \$180. The cost of a deposition transcript of similar length in a personal injury case in the circuit court system is more than \$450. In sum, it is difficult to see how cost can be a factor in the proposal to eliminate court reporters from the workers' compensation system.

Conclusions

Adoption of either of the two proposals outlined in the budget will have a significant effect on the workers' compensation system and beyond. If *both* provisions are adopted, it could result in the circuit courts hearing more workers' compensation matters with less accurate records than ever before.

Preliminary discussions indicate that practitioners and the stakeholders are not in favor of either of these changes and are concerned about the effects that they will have on the workers' compensation system.

The WDC Executive Board is monitoring these changes as they develop, as is our lobbying firm, Hamilton Consulting. We are also in the process of forming a workers' compensation committee to help monitor and address these and other issues in the workers' compensation system. If you or your colleagues would like to be part of this committee, please contact me at llyons@bmlrly.com or (608) 259-2306.

If you have questions or concerns regarding the issues outlined above, our initiatives, or Wisconsin Defense Counsel in general, please feel free to contact me. I look forward to seeing you at the Spring Seminar at the American Club on April 20th and 21st!



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Laura Lyons is the President of the Wisconsin Defense Counsel. She is a shareholder at Bell, Moore & Richter, S.C., located in Madison, Wisconsin. Laura has a statewide practice, representing and advising clients in a variety of areas, including civil litigation defense and workers' compensation. She has also handled appellate matters, including appeals to the Labor and Industry Review Commission and the Wisconsin Court of Appeals. She is admitted to practice in Wisconsin and before both the Eastern and Western U.S. District Courts of Wisconsin.

Laura is a member of the Dane County Bar Association, the Wisconsin Association of Workers' Compensation Attorneys (WAWCA), the Defense Research Institute (DRI), and the State Bar of Wisconsin. She is also a barrister in the James E. Doyle Inns of Court.

Laura and her husband live in Madison. She has been a Big Sister in Dane County's Big Brothers Big Sisters program since March 2006. Laura also volunteers as a coach for the Millennium Soccer Club, which brings affordable and accessible organized youth soccer to Madison's low-income, ethnically diverse neighborhoods. In her free time, she enjoys spending time with her family and friends, running, reading, and playing soccer.

References

- 1 See Thomas Domer & Charles Domer, *Wisconsin Workers' Compensation Law* (West 2016-17), for a more comprehensive summary of the history of the Wisconsin system.
- 2 There are reductions for certain infractions, such as violating drug/alcohol policies or violating safety policies.
- 3 <https://dwd.wisconsin.gov/wc/legal/>.
- 4 <http://lirc.wisconsin.gov/pdf/2015%20STATS.pdf>.
- 5 See Wis. Stat. § 801.50 for the proper venue in other circumstances.
- 6 <http://doa.wi.gov/Documents/DEBF/Budget/Biennial%20Budget/2017-19%20Executive%20Budget/ab64.pdf>. The budget brief can be found here: <http://doa.wi.gov/Documents/DEBF/Budget/Biennial%20Budget/2017-19%20Executive%20Budget/17-19%20BIB%20FINAL%20revised%20202082017.pdf>.
- 7 The statutory language says "examiner" instead of an ALJ. The intent and effect of the language is currently unknown.
- 8 <http://doa.wi.gov/Documents/DEBF/Budget/Biennial%20Budget/2017-19%20Executive%20Budget/ab64.pdf>.
- 9 For more information on these changes, please see the recent article published by the Wisconsin State Bar's publication "Inside Track," available at: <http://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=9&Issue=3&ArticleID=25357>.
- 10 See Wis. Admin. Code § LIRC 1.04.
- 11 This total is based on data compiled by an information poll of DRI members and WILG, the national bar for applicants' attorneys.
- 12 For those unfamiliar with the civil system, in circuit court, the state provides court reporters at trial and during motion hearings. Parties may order a transcript at their own cost. Also, parties contract with private court reporters for deposition testimony that is taken prior to trial.
- 13 Wis. Admin. Code § DWD 80.14.