

# WAWCA QUARTERLY

October 31, 2002

Issue #3

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## *Message from the President*

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Greetings, and welcome to the Wisconsin Association of Worker's Compensation Attorneys. As many of you know, this organization came into existence through the efforts of Janell Knudsen and Tom McSweeney, Ron Aplin, John Neal and Trish Sandoz. The goal was to establish a vehicle for sharing information within the worker's compensation community and for affecting changes important to the worker's compensation practitioner. Through their hard work in 2001 that goal has been met, and I would like to extend our thanks to each of them. The responsibility now falls on the rest of us to make the most of this organization that has been created.

On November 30, 2001 the first annual meeting was held and the first full board of directors was elected. Elsewhere in this newsletter is information about who the officers and directors are and how you can reach them. This is very important information because your input and participation are crucial to the success of this organization. It is our hope that each of you feels welcome to participate and welcomes that opportunity. One of the first ways in which we would ask you to participate is to join. Complete the dues statement and make the nominal payment requested. The broader the base of our support, the better we will be able to serve.

The next, and perhaps more important, step is to get the word out. I was surprised to hear how many attorneys that regularly appear before the Worker's Compensation Division did not even know that this organization existed, let alone how to become involved. Ask those in your firm and in your community that practice in this field if they have received this newsletter. If not, please share it with them and invite them to provide their email and/or postal address with us so that they may be kept informed.

In the next few weeks I will be completing committee appointments. Anyone who has not yet expressed an interest should contact me and let me know. If there are substantive, procedural or organizational issues upon which you would like to be heard, committee involvement will afford an opportunity to contribute. As this organization is still in its infancy, it has not yet fully taken shape. We have the flexibility; therefore, reach out in a variety of directions. This organization is for the entire Wisconsin worker's compensation community. The organizers and the current board will not presume to know what is important to all of you.

To use the dreaded analogy: We are building something here, and each step of the process is important. The organizers drew up the blueprints in the form of the Bylaws that were adopted last November. The focus now shifts to the foundation. That is my personal goal as President this year: To help create a strong foundation on which the future success of this organization can be built. In the weeks and months to come, we

will call upon many of you for your support, your input and your involvement. I hope that you will accept the opportunity to contribute.

We do anticipate holding an election for officers by letter in the upcoming weeks. Unfortunately, we cannot logistically hold a meeting for the election to take place with the members attending and voting personally. We hope that we will be able to have a meeting during the next year as we develop our organization further. Please look for your ballot and volunteer to participate as you are able. Please return ballots promptly so we can move forward with our organization.

Thanks,

John Griner IV (email: [John.A.Griner@travelers.com](mailto:John.A.Griner@travelers.com))

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## *Golf Outing*

Twenty members attended the golf outing on September 20 at the Washington County Golf Course. Although severe weather limited the game, most were able to play at least 9 holes. No prizes were given out, but everyone did receive a rain check for 9 holes. Hopefully, more members will be able to play next year and the weather will be nicer as well.

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## *Department News*

This article will summarize the Division's new litigated case management procedures including the ALJ pilot project, and will provide some other practice pointers for attorneys.

The Legal Services Bureau identified problem areas with litigated cases and developed proposed case management procedures to move litigated cases through the process toward resolution (settlement or a hearing) more quickly. Specifically, hearing applications are filed with no medical support, without correct parties identified, and with no information concerning what benefits are requested. In addition, applicant attorneys frequently request postponements, indicating the case is not ready for hearing or to effect a substitution of ALJ. This results in delays and inefficiencies in the scheduling process.

- An experienced ALJ is involved in a 6-month pilot project to assist in screening cases appropriate for ADR, conducting telephone pre-hearing conferences in selected cases and engaging in file reviews.
- Cases involving multiple parties can be reviewed to verify there is no dispute other than which party (insurer or self-insured employer) is liable, and determine if a pre-hearing conference should be scheduled under s. 102.175(2) to order

one party or all parties to share in making payments until a decision on reimbursement can be made.

- Following a PHC, the case will not be put into ready status until all documents that the ALJ indicated needed to be filed are contained in the file. If after a reasonable time, the applicant fails to file the required medical support, the hearing application is dismissed without prejudice and a new application may not be filed without the required documentation.
- When an applicant's attorney files a hearing application that is essentially blank (does not identify the issues or indicates "pending " or "to be submitted" for every benefit issue), the hearing application will be returned to the attorney, unserved, with a letter indicating that they must provide a reasonable statement as to what is being claimed.
- All applications for hearing filed by an attorney must include medical support for the claims listed and for each date of injury listed. If proper support is not filed with the application, the file will be placed in not ready status and a letter will be sent to the attorney, indicating that the medical support must be filed within given timeframes (60 or 90 days), or the hearing application will be dismissed without prejudice and a new application may not be filed without the required documentation. (An exception to this procedure will be allowed for applications for hearing that are filed to toll the statute of limitations.) In the event there is medical support for one date of injury but not the other alleged dates of injury, the case will proceed forward only on the date of injury with the medical support. Other parties and dates of injury will not be impleaded without proper medical support.
- For hearing loss cases, if at the time the application is filed, it lacks required information or contains misinformation (i.e. regarding the date of injury, employer or insurance carrier), the hearing application will be returned to the attorney, unserved, with a form letter indicating that the correct information must be included.
- Litigated files will be monitored for receipt of the answer from respondents. A standard letter will be sent to respondents when an answer is not received advising respondents that if no answer is received within 20 days, the Division will entertain a motion to issue an order by default without hearing and without further notice to respondents, for the relief requested in the hearing application.
- Following issuance of a dismissal without prejudice order, if a hearing application is subsequently filed without the required medical support, a letter will be sent to the applicant's attorney (or the applicant) and the hearing application will not be served until the medical support is received.
- If the hearing application or other correspondence from the applicant's attorney indicates the case is ready for hearing, a hearing is scheduled, and later the attorney requests a postponement indicating the case is not ready, the file will be

put in not ready status for at least 6 months and then only rescheduled in due course.

- Any case that is set for hearing and then postponed or cancelled and rescheduled, will be set before the same ALJ as originally assigned.

Other practice tips:

- Please use the new department forms, including the application for hearing. If you complete the form on computer and print it, please do so on yellow paper, it makes it easier to identify this document in the department's file.
- Attorneys are reminded of the department standard on approval of full compromise agreements. There must be an underlying liability dispute (arising out of, in the course of, incidental to employment) or AT LEAST 100 WEEKS of disability benefits in dispute. If you are submitting a compromise and the case is not currently in litigated status, medical evidence documenting the dispute should also be submitted. If there is a factual defense, that needs to be specified as well.
- If you have a trial coming up in another matter or a pre-planned vacation, you can notify the department in advance to avoid scheduling conflicts. Please be advised that requests to frequently block out days may not be honored by the department.

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## *Case Law Update*

*Vidal v. LIRC*, Appeal No. 00-3548, 2002 WI 72, 2002 Wis. LEXIS 466 (June 25, 2002). A commission order, under Wis. Stat. sec. 102.18(4)(c) (2000), re-opening and remanding for further hearing an earlier commission decision on grounds of newly discovered evidence is not immediately appealable to the circuit court, although the challenge to the order is that the commission lacked jurisdiction to re-open because the statutory time limits for re-opening had expired. The jurisdictional issue is, however, reviewable upon appeal from the order granting or denying compensation that arises out of the further litigation. The court's rationale for this holding can be divided into three main points:

1. The order is not immediately appealable under Wis. Stat. sec. 102.23 (2000) because it does not grant or deny compensation, and the statute only authorizes judicial review of commission orders granting or denying compensation.
2. Section 102.23(1)(e) allows for review of the jurisdictional question on appeal from the order granting or denying compensation that will eventually arise out of the further litigation. The statute expressly allows for reversal of a commission order when "the commission acted without or in excess of its powers." Moreover, judicial review of whether an administrative agency has exceeded its jurisdiction is a matter of constitutional dimension. *See Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911).
3. The order is not immediately reviewable via common law certiorari. When a statute, like sec. 102.23, provides for judicial review of an administrative-agency decision, the statute is

generally the exclusive means of review. Only in extraordinary circumstances will review be allowed on another legal theory. Extraordinary circumstances do not exist here. The jurisdictional issue is ultimately reviewable. The delayed review promotes judicial economy by ensuring that such jurisdictional issues are litigated only after a determination on the merits. In light of these two aspects, the additional delay and litigation costs that might result from delayed review are not, by themselves, extraordinary circumstances.

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## ***EDITOR***

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