MEMO

TO: The Correspondents

FROM: William R. Sachse, Jr.

DATE: August 4, 1987

RE: Law in Wisconsin Concerning Subtraction from Permanent Disability for Pre-existing Conditions

The March 30, 1987, memo Helen L. Schott prepared on the above subject must have been designed to address a recent trend where doctors, especially the so-called insurance doctors, apportion scheduled permanent partial disability between a pre-existing condition and a condition caused by a work injury. Schott's conclusion appears to preclude such apportionment. Before a blanket rule is adopted in unwritten fashion, the following comments are offered on behalf of the employers and insurers of this state.

Apportionment of both temporary and permanent disability is allowed in Wisconsin worker's compensation law. Wis. Stat. Sec. 102.175 requires apportionment of disability in all cases where two or more "accidental injuries" contribute to disability. The second injury statute, Wis. Stat. Sec. 102.59, mandates apportionment of permanent disability between a pre-existing non-industrial disability and a subsequent work-connected disability (so long as each is worth 200 weeks of PPD).

The Wisconsin Supreme Court has permitted apportionment in several cases. In Giant Grip Mfg. Co. v. Industrial Comm., 271 Wis. 583, 74 N.W.2d 182 (1956), the court apportioned both TTD and PPD equally between two work-related back injuries. The treating doctor testified that both injuries caused the disability. According to the doctor, the first injury predisposed the worker to developing disability after the second injury so it was 50% responsible for the second period of TTD and the resulting PPD. In Mednis v. Industrial Comm., 27 Wis. 2d 439, 134 N.W.2d 416 (1965), a worker lost all but 4% of the function in one eye when he sustained injury as a youth. The doctors later testified that the pre-existing impairment rendered the worker susceptible to further harm, including predisposition to developing a detached retina. The subsequent work injury indeed caused a detached retina and total blindness in one eye. But the ultimate PPD award was limited to the 4% lost as a result of the work injury. "The rule is that the applicant shall not be compensated for that portion of his disability which, clearly established, is due to a pre-existing industrial or non-industrial diability." Mednis v. Industrial Comm., 27 Wis. 2d at 442.

There can be no doubt that apportionment of disability is allowed by law. On the other hand, the so-called "as is" rule makes an employer liable for all disability where a pre-existing condition renders a worker susceptible

to a disabling work injury. Lewellyn v. ILHR Dept., 38 Wis.2d 43, 155 N.W.2d 678 (1968). There is a distinction in the concept between a pre-existing disability, which may be apportioned, and a pre-existing condition, which may not be apportioned. The esteemed Professor Arthur Larson recongizes that to be apportioned "an impairment must have been independently producing some degree of disability before the accident, and must be continuing to operate as a source of disability after the accident." Larson, "The Law of Workmen's Compensation," Sec. 59.22(c), p. 10-401.

Disability is a difficult concept for worker's compensation practitioners to understand. This is espcially true of the professionals in the system, doctors, and lawyers, because what is at stake is money for their respective patients and clients. The applicant's side argues that a physical impairment must be shown to have caused a wage loss prior to the work injury before the employer is entitled to a credit for pre-existing disability. Employers and insurers counter that pre-existing wage loss is not always apparent because people accommodate their impairments. For example, a man born without an arm has a severe impairment that clearly rises to the level of a disability. The man cannot perform two-handed work. The man may not sustain an actual wage loss before his work injury, however, because he will find one-handed work. But the one-armed man does not enjoy the same earning capacity as a two-armed man

of similar age, education and experience. In relation to the two-armed man, the one-armed man is disabled. This point is made in the Mednis case. The worker had a 96% disability to his left eye prior to the work injury. He had no central vision, no binocular vision and limited side vision. Despite this disability, the applicant was able to work and had not sustained an actual wage loss before the work injury. No one can claim that the applicant could do all available work prior to the injury. His pre-existing left eye impairment reduced his ability to find work requiring two good eyes. Thus, it was appropriate to apportion the disability.

Disability is defined by the supreme court as "a physical incapacity to work as results in a wage loss." Montello Granite Co. v. Industrial Comm., 227 Wis. 170, 278 N.W. 391 (1938). An actual wage loss need not be shown. This is a theoretical concept that can be proved by expert testimony, medical or vocational. Simply put, a doctor may opine that a physical impairment limited the worker's ability to perform certain physical functions before the work injury. That would constitute a pre-existing disability because the limitations prevented the worker from performing certain jobs prior to his work injury. Why should a man with a 50% impairment to his right arm after a work injury be any more disabled than a man with a similar impairment

prior to his work injury? Both impairments limit his capacity to perform certain employment activities. The law already accepts this theory by permitting an injured worker to receive PPD even though he has returned to his old job with no wage reduction. See Green Bay Drop Forge Co. v. Industrial Comm., 265 Wis. 38, 60 N.W.2d 409, 61 N.W.2d 847 (1953).

Doctors are permitted to estimate disability in Wisconsin. The vocational expert has surfaced as a disability estimator in non-scheduled injuries and that is the better practice. But a doctor can still declare a person totally disabled. Balczewski v. ILHR Dept., 76 Wis. 2d 487, 251 N.W.2d 794 (1977). In fact, doctors estimate disability with both functional and vocational components in almost all disabilities covered by the schedule in Wis. Stat. Sec. 102.52. The vocational component is part and parcel of the schedule. Mednicoff v. ILHR Dept., 54 Wis.2d 7, 194 N.W.2d 670 (1972). And, as previously indicated, the injured worker collects his PPD even if he returns to his old job without an actual wage loss because the lost function may cause a wage loss in the future.

The one thing the cases tell us is that the debate between the "as is" and "apportionment" rules will rage on into the future. The applicant's attorneys will most likely point to a lack of evidence that the pre-existing impairment caused a wage loss before the work accident. The defense

will counter that the worker was forced to accommodate the impairment prior to the injury, but that it still constitutes a disability because it limited the capacity to work. The final result will turn on credibility of the applicant and the experts. The resolution of this conflict, however, should be determined in the judicial forum before an Administrative Law Judge.