Wisconsin Worker's Compensation Claims

Permanent Disability Claims

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1.0 Introduction and Sources for Additional Information

In Wisconsin, whenever an injured employee has more than three weeks of temporary disability you are required to address the issue as to whether the employee has any resulting permanent disability. You must obtain and file a final medical report from a treating practitioner that indicates whether there is any resulting permanent partial disability and, if so, that evaluates the extent of that resulting permanent disability.[1]

In dealing with permanent disability claims, you need to have a clear understanding of the rules that apply under the Wisconsin worker's compensation system. You cannot rely upon treating practitioners to know what is a reasonable and appropriate assessment of permanent disability in a particular case, since the vast majority of Wisconsin practitioners do not have an adequate understanding of the rules that would apply. You cannot rely upon the Wisconsin Worker's Compensation Division of the Department of Workforce Development to advise you, since they rarely have enough information about any particular claim to make a determination as to what is a reasonable and appropriate assessment of permanent disability for that claim. Therefore, you need to have at least a solid understanding of the basics if you are going to be involved in the management of worker's compensation claims.

2.0 Scheduled and Non-Scheduled Injuries Defined

Wisconsin recognizes two basic categories of injuries: scheduled injuries and non-scheduled injuries. They are also sometimes referred to as scheduled disabilities and non-scheduled disabilities. The distinction between the two categories is very important because scheduled injuries are compensated very differently from non-scheduled injuries. The difference is especially important because for scheduled injuries there is no additional compensation allowed for a resulting loss of earning capacity (LOEC). Only certain employees with permanent disability resulting from a non-scheduled injury may be entitled to additional permanent disability benefits in the form of compensation for a resulting loss of earning capacity.

For a period during 1996–97 there was a problem in defining scheduled and non-scheduled injuries. For more than 80 years shoulder injuries were treated as scheduled injuries to the arm, and hip injuries were considered scheduled injuries to the leg. However, a 1996 decision by the court of appeals held that shoulder injuries are non-scheduled injuries because the shoulder is not part of the arm. The same reasoning would apply to hip injuries. *Hagen v. LIRC* was appealed

[1] Wis. Admin. Code § DWD 80.02(2)(e)4 and (j), as amended effective January 1, 1998. The requirements for final medical reports are discussed at page 17 of this outline.

and the Wisconsin Supreme Court reversed the court of appeals.[2] Therefore, shoulder and hip injuries are still to be treated as scheduled injuries.

However, you should note that there can still be problems in distinguishing between scheduled and non-scheduled injuries, because the site of injury is not always the location of the resulting disability and the distinction between scheduled and non-scheduled injuries is supposed to made on the basis of the location of the resulting permanent disability. This is discussed further in the section of this outline on Exceptions: Scheduled v. Non-Scheduled at page 7 below.

2.1 Scheduled Injuries Defined

Scheduled injuries are injuries that are listed in the statutory schedules of Wis. Stat. §§ 102.52–102.555. The primary schedule of injuries appears in section 102.52:

> **102.52 Permanent partial disability schedule**. In cases included in the following schedule of permanent partial disabilities indemnity shall be paid for the healing period, and in addition, for the period specified, at the rate of two-thirds of the average weekly earnings of the employe, to be computed as provided in s. 102.11:
>
> (1) The loss of an **arm at the shoulder**, 500 weeks;
>
> (2) The loss of an **arm at the elbow**, 450 weeks;
>
> (3) The loss of a **hand**, 400 weeks;[3]
>
> (4) The loss of a **palm where the thumb remains**, 325 weeks;
>
> (5) The loss of a **thumb and the metacarpal bone** thereof, 160 weeks;
>
> (6) The loss of a **thumb at the proximal joint**, 120 weeks;
>
> (7) The loss of a **thumb at the distal joint**, 50 weeks;
>
> (8) The loss of **all fingers on one hand** at their proximal joints, 225 weeks;
>
> (9) Losses of **fingers** on each hand as follows:[4]
>
> (a) An index finger and the metacarpal bone thereof, 60 weeks;
>
> (b) An index finger at the proximal joint, 50 weeks;
>
> (c) An index finger at the second joint, 30 weeks;
>
> (d) An index finger at the distal joint, 12 weeks;
>
> (e) A middle finger and the metacarpal bone thereof, 45 weeks;

[2] *Hagen v. LIRC*, 210 Wis. 2d 12, 563 N.W.2d 454 (1997), *reversing* 201 Wis. 2d 51, 547 N.W.2d 812 (Ct. App. 1996).
[3] For injuries to the dominant hand, also see Wis. Stat. § 102.54 at 26 page of this outline.
[4] For multiple injuries to one hand, also see Wis. Stat. § 102.53(2) at page 24 of this outline. For fingertip amputations, also see Wis. Admin. Code § DWD 80.33 at page 26 of this outline.

(f) A middle finger at the proximal joint, 35 weeks;

(g) A middle finger at the second joint, 20 weeks;

(h) A middle finger at the distal joint, 8 weeks;

(i) A ring finger and the metacarpal bone thereof, 26 weeks;

(j) A ring finger at the proximal joint, 20 weeks;

(k) A ring finger at the second joint, 15 weeks;

(l) A ring finger at the distal joint, 6 weeks;

(m) A little finger and the metacarpal bone thereof, 28 weeks;

(n) A little finger at the proximal joint, 22 weeks;

(o) A little finger at the second joint, 16 weeks;

(p) A little finger at the distal joint, 6 weeks;

(10) The loss of a **leg at the hip joint**, 500 weeks;

(11) The loss of a **leg at the knee**, 425 weeks;

(12) The loss of a **foot at the ankle**, 250 weeks;

(13) The loss of the **great toe** with the metatarsal bone thereof, 83 1/3 weeks;

(14) Losses of **toes** on each foot as follows:[5]

(a) A great toe at the proximal joint, 25 weeks;

(b) A great toe at the distal joint, 12 weeks;

(c) The second toe with the metatarsal bone thereof, 25 weeks;

(d) The second toe at the proximal joint, 8 weeks;

(e) The second toe at the second joint, 6 weeks;

(f) The second toe at the distal joint, 4 weeks;

(g) The third, fourth or little toe with the metatarsal bone thereof, 20 weeks;

(h) The third, fourth or little toe at the proximal joint, 6 weeks;

(i) The third, fourth or little toe at the second or distal joint, 4 weeks;

(15) The **loss of an eye** by enucleation or evisceration, 275 weeks;

(16) Total **impairment of one eye** for industrial use, 250 weeks;[6]

(17) **Total deafness** from accident or sudden trauma, 330 weeks;[7]

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[5] For multiple injuries to one foot, also see Wis. Stat. § 102.53(3) at page 24 of this outline.

[6] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: See rule DWD 80.26 for determining loss of visual efficiency.

> (18) **Total deafness of one ear** from accident or sudden trauma, 55 weeks.[8] [Emphasis added.]

The schedule for occupational hearing loss is part of Wis. Stat. § 102.555:

> **(4)** Subject to the limitations provided in this section, there shall be payable for total occupational deafness of one ear, 36 weeks of compensation; for total occupational deafness of both ears, 216 weeks of compensation; and for partial occupational deafness, compensation shall bear such relation to that named in this section as disabilities bear to the maximum disabilities provided in this section. . .

Thus, scheduled injuries are injuries to:

- the upper extremities: arms (including the shoulder joint), hands or fingers;
- the lower extremities: legs (including the hip joint), feet or toes;
- vision; or
- hearing.

2.2 Non-Scheduled Injuries Defined

Non-scheduled injuries are injuries that are not listed in the statutory schedules of Wis. Stat. §§ 102.52–102.555. Non-scheduled injuries are also referred to as non-schedule and unscheduled injuries. Thus, non-scheduled injuries are injuries to:

- the neck or torso (back injuries are the most common non-scheduled injuries);
- the head (*except for* injuries to the vision or hearing);
- the whole body (for example, heart or lung conditions that affect the entire body); or
- the mind (mental injuries).

Permanent disability resulting from non-scheduled injuries is evaluated by comparing it to permanent total disability. The percentage of permanent partial disability as compared to permanent total disability is then multiplied by a theoretical maximum of 1,000 weeks:[9]

> **102.44 Maximum limitations.** Section 102.43 shall be subject to the following limitations:

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[7] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: See rule DWD 80.25 for determining loss or impairment of hearing.

[8] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: See sec. 102.555 for occupational deafness schedule.

[9] It is a theoretical maximum because no one reaches the maximum. To reach the maximum you would need a 100% loss of earning capacity, which is permanent total disability. Permanent total disability benefits are paid at the same rate as temporary total disability benefits and they are payable for life, so the limitation of 1,000 weeks does not apply.

> (3) For permanent partial disability not covered by ss. 102.52 to 102.56, the aggregate number of weeks of indemnity shall bear such relation to 1,000 weeks as the nature of the injury bears to one causing permanent total disability and shall be payable at the rate of two-thirds of the average weekly earnings of the employe, the earnings to be computed as provided in s. 102.11.[10] The weekly indemnity shall be in addition to compensation for the healing period and shall be for the period that the employe may live, not to exceed 1,000 weeks.

There are two different ways of measuring the percentage of resulting permanent partial disability from a non-scheduled injury. First, there is the medical impairment or functional disability evaluated by a physician, as a percentage of the body as a whole. Second, there is the resulting loss of earning capacity, in terms of the impact of the injury on the employee's ability to earn a living. The loss of earning capacity is usually evaluated by a vocational expert.

2.3 Exceptions: Scheduled v. Non-Scheduled

Although we commonly refer to scheduled and non-scheduled *injuries*, it is more accurate to refer to scheduled and non-scheduled *disabilities*. It is more accurate to refer to disabilities because the distinction between scheduled and non-scheduled injuries is made on the basis of the location of the resulting disability or impairment, rather than the location of the injury. In most cases the site of the injury is also the location of any resulting disability, but there are exceptions where the resulting disability is not at the site of the injury.

A 1975 decision by the Wisconsin Supreme Court in *Vande Zande v. ILHR Department*[11] made it clear that permanent partial disability is to be evaluated based upon the location of the resulting disability rather than the site of the injury. In *Vande Zande* the employee sustained a head injury in a motor vehicle accident. As a result of the injury he sustained a skull fracture, loss of sense of taste and smell, facial paralysis, intermittent headaches, dizziness, and vertigo, and 100 per cent loss of hearing in his left ear. A head injury is a non-scheduled injury, but hearing loss is a scheduled injury.

The employee in *Vande Zande* argued that he should be compensated for permanent partial disability of the body as a whole for the head injury upon taking into account all of his resulting medical problems, including the hearing loss. The supreme court disagreed. The supreme court held that the hearing loss had to be separated out and compensated solely as a scheduled injury, even though it resulted from the non-scheduled head injury. All of the other problems resulting from the head injury were to then be considered in evaluating a percentage of permanent partial disability of the body as a whole, after excluding consideration of the scheduled hearing loss.

As noted by the Labor and Industry Review Commission (LIRC) in a 1995 decision:

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[10] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: Compensation is to be paid at the full weekly rate but is to be proportioned to the total number of weeks provided for permanent partial disability. For example, 10 percent permanent partial disability because of a back injury entitles the injured employe to 100 weeks of compensation. The basis of weekly payment for all compensation cases is uniform.

[11] *Vande Zande v. ILHR Department*, 70 Wis. 2d 1086, 1092–93, 236 N.W.2d 255 (1975).

> The doctors agree that the applicant has permanent disability on a functional basis. The first issue is whether the applicant has sustained a scheduled disability, an unscheduled disability, or both. Sections 102.44 (3) and 102.52 to 102.56, Stats. This issue is discussed in Neal & Danas, *Worker's Compensation Handbook*, sec. 5.18 (3d ed. 1990). As the authors point out, whether the permanent disability schedule under sec. 102.52, Stats., applies is determined by the location of the disability, not the location of the injury.[12]

For example, thoracic outlet syndrome (TOS) is a condition that originates in the thorax (the chest cavity). It is described by a medical textbook as:

> **Thoracic Outlet Compression Syndromes**
>
> A group of ill-defined syndromes characterized by symptoms of pain and paresthesias in the hand, neck, shoulder, or arms.
>
> Syndromes include the neurovascular compression syndromes of the shoulder girdle, scalenus anticus syndrome, and cervical rib syndrome. They are more common in women, usually between ages 35 and 55. Pathogenesis is unknown. Changes may be due to compression of the subclavian vessels and sometimes of the lower or medial trunks of the brachial plexus against a cervical rib, an abnormal 1st thoracic rib, or a putatively abnormal insertion or position of the scalene muscles.
>
> The distribution of symptoms suggests the syndrome. Symptoms of pain and paresthesias are most often distributed medially in the arms and sometimes extend into the adjacent anterior chest wall. Many patients have mild to moderate sensory impairment in the C-8 to T-1 distribution on the painful side, and a few have prominent vascular-autonomic changes in the hand, including cyanosis, swelling, and (rarely) Raynaud's phenomenon or distal gangrene.[13]

TOS would ordinarily be considered a non-scheduled injury because the injury site is the thorax, which is part of the torso. However, the effects of TOS may be limited to problems in the arm or hand. Thus, there have been some cases in which TOS was treated as a scheduled injury rather than a non-scheduled injury.

For example, in a 1993 decision the Labor and Industry Review Commission held that,

> Although the TOS injury was located in the applicant's torso, the physicians have determined the elements of permanent disability to be exclusively located in his right arm and shoulder. Based upon the medical opinions and the location of the disability, the applicant is found to have sustained a 5 percent

[12] *Sayoomporn Ostrum v. Ore Ida Foods Inc.*, WC Claim No. 89024090 (LIRC June 1, 1995). The decision by LIRC was appealed. The circuit court set aside LIRC's decision and remanded the case. However, the court of appeals then reversed the decision by the circuit court. In an unpublished decision the court of appeals reinstated the original decision by LIRC. *Ostrum v. Ore Ida Foods Inc.*, No. 96-0621 (Wis. Ct. App. Oct. 16, 1997).

[13] *The Merck Manual of Diagnosis and Therapy* (17th ed. 1999), § 14 Neurologic disorders, Ch. 183 Disorders of the peripheral nervous system, Thoracic Outlet Compression Syndromes. The *Merck Manual* claims to be the world's most widely used general medical text. An online version is available for free at the Merck & Co. Web site on the Internet (http://www.merck.com/pubs/mmanual/).

> permanent partial disability at the right shoulder attributable to his occupational TOS. This constitutes a scheduled disability under section 102.52 (1), Stats.[14]

In a 1992 decision LIRC reviewed a claim involving an injury to the torso when a chain saw cut through the employee's clavicle (collarbone) in the upper chest area. The evidence indicated that the location of the resulting disability was limited to the left arm so LIRC held that it was to be treated as a scheduled injury.[15]

In a 2003 decision, LIRC reviewed a claim in which the employee sustained an injury to his right upper extremity, but he claimed that his resulting reflex sympathetic dystrophy (RSD) is an unscheduled injury so that he is entitled to permanent total disability benefits. LIRC disagreed and held that the evidence established his disability was limited to his right upper extremity so that he was only entitled to be compensated for the scheduled injury.[16]

A mental injury would usually be treated as a non-scheduled injury, but even with a mental injury there can be exceptions. For example, in an unpublished 1985 decision the court of appeals affirmed LIRC in treating a mental injury as a scheduled disability. The employee suffered a knee injury with subsequent vascular and psychological complications. LIRC treated it as a scheduled injury only and awarded 40% loss of use of the leg at the knee: 15% for the knee injury itself, 15% for the vascular disorder, and 10% for a psychogenic pain disorder. The court of appeals held that there was credible evidence to support LIRC's finding that the employee's mental disorder was a psychogenic pain disorder limited to the knee area, rather than a depressive disorder of general disabling impact. Therefore, the court held the finding that the disabling psychological symptoms occurred only in the knee area justified an award of benefits for only a scheduled injury.[17]

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[14] *Paul R. Loisel v. Unisys*, WC Claim No. 88014908 (LIRC Mar. 12 ,1993). Also see *Sayoomporn Ostrum v. Ore Ida Foods Inc.*, WC Claim No. 89024090 (LIRC June 1, 1995), another case involving TOS that affected only one arm so that LIRC held it was to be treated as a scheduled disability. The decision by LIRC in *Ostrum* was appealed. The circuit court set aside LIRC's decision and remanded the case. However, the court of appeals then reversed the decision by the circuit court. In an unpublished decision the court of appeals reinstated the original decision by LIRC. *Ostrum v. Ore Ida Foods Inc.*, No. 96-0621 (Wis. Ct. App. Oct. 16, 1997).

[15] *Donovan Richard Smith v. Rodney Tim Logging*, WC Claim No. 86030920 (LIRC Aug. 4, 1992).

[16] Michael S. Murawski v. Contract Transport Services, WC Claim No. 2000-041229 (LIRC Nov. 26, 2003) [http://www.dwd.state.wi.us/lirc/wcdecsns/774.htm].

[17] *Pagel v. LIRC*, No. 84-448 (Wis. Ct. App. Mar. 5, 1985). Note that this is an unpublished decision. Only a limited number of the decisions by the court of appeals are published. Wis. Stat. § 809.23 provides that,

> An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

3.0 Ratings of Permanent Disability

3.1 Scheduled v. Non-Scheduled Injuries

3.11 Determining the Location of Resulting Disability

Before rating the extent of resulting permanent partial disability it is first necessary to determine the location of the disability. Injuries are to be rated on the basis of the location of the resulting permanent disability, which is not always the same as the site of the injury. This important distinction is discussed in the section above on Exceptions: Scheduled v. Non-Scheduled, at page 7. Such an assessment is important because it determines whether the injury should be rated as a scheduled injury or a non-scheduled injury. In some cases it might even be necessary to make separate ratings for both a scheduled and a non-scheduled injury, if the location of the resulting disability is broad enough to overlap both categories.

In rating a purely scheduled injury to an extremity, determining the location of the resulting permanent disability is important because it would determine at which joint you would rate the disability, in terms of loss of use of the affected extremity as compared to amputation at the joint. As discussed below, injuries to the extremities are to be rated at the nearest proximal joint of the affected member. Thus, you might have an injury to the ulnar nerve at the elbow with resulting disability limited to the hand. Permanent partial disability would then be rated in terms of loss of use of the hand as compared to amputation at the wrist, even though the site of the injury was at the elbow.

3.12 Scheduled Injuries

Scheduled injuries are compensated upon the basis of the statutory schedules.[18] The schedules set forth the number of weeks of permanent partial disability benefits to be paid for:

- total loss of the affected extremity,
- for total loss of hearing in one or both ears, or
- total loss of vision in one or both eyes.

For injuries to members of the body that do not result in total loss of the member, compensation is determined by computing the relative percentage of disability as compared to total loss (amputation). This is referred to as a relative scheduled injury. Wis. Stat. § 102.55(3) provides:

> (3) For all other injuries to the members of the body or its faculties which are specified in this schedule resulting in permanent disability, though the member be not actually severed or the faculty totally lost, compensation shall bear such relation to that named in this schedule as disabilities bear to the disabilities named in this schedule. Indemnity in such cases shall be determined by allowing weekly indemnity during the healing period resulting from the

[18] Wis. Stat. §s 102.52, 102.53, 102.55 and 102.555.

> injury and the percentage of permanent disability resulting thereafter as found by the department.[19]

Injuries to the extremities are to be evaluated by comparing to amputation at the nearest proximal joint of the affected part of the extremity:

> **102.55 Application of schedules**. (1) Whenever amputation of a member is made between any 2 joints mentioned in the schedule in s. 102.52 the determined loss and resultant indemnity therefor shall bear such relation to the loss and indemnity applicable in case of amputation at the joint next nearer the body as such injury bears to one of amputation at the joint nearer the body.
>
> (2) For the purposes of this schedule permanent and complete paralysis of any member shall be deemed equivalent to the loss thereof.

Thus, a hand injury would be compared to amputation at the wrist, not at the elbow. An elbow injury would be compared to amputation at the elbow, not at the shoulder.[20] If an employee suffered a knee injury that caused some permanent partial disability, a physician would have to evaluate the percentage of loss of use of the lower leg, as compared to amputation at the knee.

However, you must again keep in mind that the injury is to be rated on the basis of the location of the resulting disability, rather than the site of injury. Refer to the section above at page 10 on Determining the Location of Resulting Disability.

There are special rules for evaluating permanent disability for hearing loss[21] and for loss of vision.[22]

3.13 Non-Scheduled Injuries

For non-scheduled injuries disability is evaluated by a physician or other practitioner in terms of the percentage of loss of use of the body as a whole, as compared to permanent total disability.[23] That is, practitioners evaluate permanent disability for non-scheduled injuries in terms of the resulting loss or impairment of bodily function by assessing an estimated percentage of permanent disability of the body as a whole. Such an estimate by a practitioner is referred to as medical impairment or functional disability or loss of bodily function. An estimate of functional impairment by a practitioner is based upon a loss of function of a human body, but without taking into consideration whose body it is and what that person does with the body to earn a living.

This can also be explained by saying that practitioners should evaluate "impairment" rather than "disability." The Wisconsin Worker's Compensation Division has tried to explain this for

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[19] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: See rule DWD 80.33 for fingertip amputation.
[20] Wis. Stat. § 102.55.
[21] Wis. Admin. Code § DWD 80.25.
[22] Wis. Admin. Code § DWD 80.26.
[23] Wis. Stat. § 102.44(3).

treating practitioners in a pamphlet entitled *How to Evaluate Disability Under Wisconsin's Worker's Compensation Law*.[24] The Division's pamphlet states that:

> It is very important for doctors to understand the distinction between "disability" in a "workplace sense" and "impairment." In evaluating disability, this is very significant. The American Medical Association and the American Academy of Orthopedic Surgeons have recognized the distinction as follows:
>
> > 1. "Permanent disability is not a purely medical condition. A patient is 'permanently disabled' if 'under a permanent disability' when his (or her) actual or presumed ability to engage in gainful activity is reduced or absent because of 'impairment' and no fundamental or marked change in the future can be expected.
> >
> > 2. Physical impairment is purely medical condition. Permanent physical impairment is any anatomical or functional abnormality or loss after maximum medical rehabilitation has been achieved and which abnormality or loss the practitioner considers stable or nonprogressive at the time the evaluation is made."
> >
> > AMA GUIDE: Journal of American Medical Assoc. (The American Academy is in the process of revising this definition, and the language will be updated in future editions of this document.)
>
> Some idea of this important difference can be gleaned from the fact that the AMA guidelines evaluate a blind person as having an 85 percent impairment of the whole person, while the Worker's Compensation Law states the disability is 100 percent of permanent, total disability.

Physicians and other practitioners should avoid rating permanency in terms of the occupational disability. That is, practitioners should not rate permanent disability in terms of the impact upon the employee's ability to earn a living. Not all employees who sustain permanent partial disability from a non-scheduled injury are entitled to compensation based upon a resulting loss of earning capacity.[25] Therefore, it is necessary to first establish the percentage of resulting permanency in terms of purely medical impairment or functional disability, without considering the impact upon the employee's ability to earn a living.

Even when an employee is entitled to additional compensation for permanent partial disability based upon a resulting loss of earning capacity, very few physicians and other practitioners would be considered qualified to assess the resulting loss of earning capacity.[26] Therefore, an assessment of an injured employee's resulting loss of earning capacity is usually made by a vocational consultant, and it takes into consideration a much broader range of factors. An assessment of a loss of earning capacity is an attempt to estimate the impact of the resulting permanent physical or mental limitations upon an employee's ability to earn a living. A loss of

[24] The pamphlet is WKC-7761P (Rev. 1/96). The pamphlet is available from the Division's Web page on the Internet at http://www.dwd.state.wi.us/wc/.
[25] This is discussed at page 31 of this outline in the section on Non-Scheduled Injuries: The 85% Rule and LOEC Claims.
[26] *Balczewski v. DILHR*, 76 Wis. 2d 487, 497, 251 N.W.2d 794 (1977).

earning capacity is sometimes referred to as a reduced earning capacity, which means exactly the same thing.

A vocational consultant evaluates a loss of earning capacity by first taking into consideration the resulting permanent physical or mental limitations that have been imposed by a practitioner. The practitioner's estimated percentage of permanent disability of the body as a whole is not a very significant factor. The vocational consultant instead needs to consider the specific exertional or environmental limitations that have been imposed by a practitioner as permanent limitations. For example, a restriction of no lifting more than 25 pounds is an exertional limitation. A restriction of avoiding exposure to dust or fumes is an environmental limitation.

For example, a low back injury might result in a practitioner opining that the employee should be subject to permanent exertional limitations of:

- no lifting more than 20 pounds frequently,
- no lifting more than 40 pounds occasionally, and
- no bending at the waist more than 10 times per hour at an angle of more than 45 degrees.

In addition to the resulting permanent physical or mental limitations, as evaluated by a practitioner, the vocational consultant also takes into consideration the various other factors that affect occupational disability, such as age, education, work experience, pre-injury earnings, earnings after the injury, etc. [27] The vocational consultant then estimates the percentage of loss of earning capacity that has resulted from the employment injury.

3.2 Guidelines for Rating Disability

Wisconsin does not recognize any of the disability or impairment rating systems developed by medical organizations. For example, many physicians attempt to rely upon the *AMA Guides to the Evaluation of Permanent Impairment*, but Wisconsin law simply does not recognize such guidelines. Nevertheless, a physician's use of the *AMA Guides* in assessing permanent impairment does not always completely invalidate the evaluation.

For example, in a claim involving a head injury, one of the employee's physicians used the *AMA Guides* and the Labor and Industry Review Commission noted that:

> With respect to Dr. Levine's reference to the AMA standard, the commission acknowledges that *it normally rejects medical reports which rate disability based on the AMA standards* rather than the rating system developed under Wisconsin law (including the department of workforce booklet[1]). However, as the ALJ pointed out, the DWD booklet covers mostly orthopedic disabilities. The booklet does not cover head injuries or mental disability such as those present here. Moreover, all three doctors mention substantially the same factors in rating permanent disability: cognitive loss, loss of emotional control, and physical symptoms (headaches and dizziness). Dr. Levine's disability

[27] Wis. Admin. Code § DWD 80.34.

> rating is not made incredible solely by his reference to the AMA standards. [Emphasis added.][28]

> *Text footnote*: [1]"How to Evaluate Disability under Wisconsin's Worker's Compensation Law."

The Wisconsin guidelines are not nearly as detailed as *AMA Guides to the Evaluation of Permanent Impairment.* They instead consist of some general standards set forth in Wis. Stat. § 102.55 and Wis. Admin. Code § DWD 80.32.

Section 102.55 provides that:

> **102.55 Application of schedules**. (1) Whenever amputation of a member is made between any 2 joints mentioned in the schedule in s. 102.52 the determined loss and resultant indemnity therefor shall bear such relation to the loss and indemnity applicable in case of amputation at the joint next nearer the body as such injury bears to one of amputation at the joint nearer the body.
>
> (2) For the purposes of this schedule permanent and complete paralysis of any member shall be deemed equivalent to the loss thereof.
>
> (3) For all other injuries to the members of the body or its faculties which are specified in this schedule resulting in permanent disability, though the member be not actually severed or the faculty totally lost, compensation shall bear such relation to that named in this schedule as disabilities bear to the disabilities named in this schedule. Indemnity in such cases shall be determined by allowing weekly indemnity during the healing period resulting from the injury and the percentage of permanent disability resulting thereafter as found by the department.[29]

The administrative rule, DWD 80.32, establishes some minimum mandatory ratings for certain types of conditions. Those ratings are used to establish some baselines for the guidance of physicians rating permanent disability. The minimum ratings are also used as general guidelines for determining whether a physician has made an appropriate evaluation in a particular case. Those minimum mandatory ratings are discussed in the next section below.

For example, in a 1995 decision LIRC rejected a rating of permanent partial disability by a treating chiropractor, by evaluating the PPD rating against the standards established by DWD 80.32 (formerly Ind 80.32):

> [The treating chiropractor]'s report, on the other hand, is rendered somewhat less credible by the fact that he assesses a 15% permanent partial impairment of the spine and pelvis. The commission infers that this rating, which affects "unscheduled" parts of the applicant's body, was meant to be compared to permanent total disability to the body as a whole. However, the commission notes that the administrative code provides a rating of 5 percent for a back injury treated by a successful laminectomy surgery. Section Ind 80.32(11),

[28] *Lawrence Lang v. Consolidated Papers, Inc.*, WC Claim No. 89048039 (LIRC Sept. 8, 1997).
[29] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: See rule DWD 80.33 for fingertip amputation.

> Wis. Adm. Code. Here, of course, the applicant did not need surgery and was able to return to work without restrictions only ten days after the injury. Under theses circumstances a disability rating at 15 percent is excessive.[30]

Note that there are special rules for evaluating permanent disability for hearing loss[31] and for loss of vision.[32]

3.3 Mandatory Minimum PPD Ratings: DWD 80.32

The Wisconsin rules for rating resulting permanent partial disability are mainly in the form of various administrative rules. There is a general administrative rule that provides mandatory *minimum* ratings of permanent partial disability for various types of injuries: Wis. Admin. Code § DWD 80.32. As noted above, there are separate rules that apply for rating hearing loss and loss of vision.[33]

For example, assume that an employee sustains a low back injury and then has low back surgery with removal of disc material at one level. If the surgery is successful, such that the employee has no undue symptomatic complaints or any objective findings, then Wis. Admin. Code § DWD 80.32(11) provides for a *minimum* rating of 5% of the body as a whole.

The minimum mandatory ratings mean that if a particular injury is listed in the rule, then the rule establishes the absolute *minimum* percentage of permanent partial disability for that injury. For example, if the rule provides for minimum PPD of 5% but a treating practitioner rates the PPD at 2%, then the rule supersedes the rating by the treating practitioner and the insurer is required to pay the minimum 5% under the rule.

If you are involved in management of worker's compensation claims in Wisconsin, you must understand and be able to apply the mandatory minimum ratings of Wis. Admin. Code § DWD 80.32. If you are dealing with a compensable employment injury, failure to automatically pay conceded benefits for the mandatory minimums may result in the imposition of penalties.

For example, until the rule was revised in 1994,[34] Wis. Admin. Code § DWD 80.32(11) provided a minimum rating of 5% of permanent total disability for a low back injury with a laminectomy. Thus, in such cases the insurance carrier was expected to automatically begin payment of conceded permanent partial disability benefits for 5% of permanent total disability (50 weeks) as soon as the temporary disability benefits were terminated.

In *Employers Insurance of Wausau v. LIRC and Wilsey*[35] the employee sustained a conceded employment injury to the low back and underwent a laminectomy. She received temporary total disability benefits until she returned to work on June 15, 1987. No permanent partial disability benefits were paid until November 1987. Penalties were assessed against the insurer for bad

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[30] *Jack Grew v. Barko Hydraulics Inc.*, WC Claim No. 90007181 (LIRC June 1, 1995).
[31] Wis. Admin. Code § DWD 80.25.
[32] Wis. Admin. Code § DWD 80.26.
[33] Wis. Admin. Code sections DWD 80.25 and 80.26.
[34] Wis. Admin. Code § DWD 80.32 was substantially revised and updated, effective July 1, 1994.
[35] *Employers Insurance of Wausau v. LIRC and Wilsey*, Case No. 90-CV-1441 (Wis. Cir. Ct. Dane County October 29, 1990).

faith[36] and for late payment.[37] Upon appeal the circuit court upheld imposition of the penalties because of the insurer's failure to promptly begin payment of the minimum mandatory permanent partial disability benefits for 5% of permanent total disability as provided by Ind 80.32(11).[38]

A number of the minimum mandatory ratings are based upon certain operative procedures having been performed. In such cases you will ordinarily need to obtain a copy of the operative report to submit to the Worker's Compensation Division with a request for a computation of the minimum permanent partial disability rating that would apply under DWD 80.32.

Many of the minimum mandatory ratings cannot be applied without first obtaining an expert opinion from a practitioner such as the treating physician. For example, you may need a physician to provide you with an opinion as to losses of range of motion for a particular injury. Even then you would probably need to submit the physician's report to the Worker's Compensation Division with a request for a benefit calculation worksheet.

However, there are at least a few minimum ratings under section DWD 80.32 that you are expected to know and to automatically apply in appropriate cases. When these rules apply you are expected to at least know enough to obtain a copy of the operative report or an opinion from the treating practitioner as to the extent of loss of motion, to submit to the Worker's Compensation Division so they may complete a benefit calculation worksheet. In particular, you should have some familiarity with the following subsections of DWD 80.32:

(3) Hip
(4) Knee
(11) Back

You will note that many of the minimum percentages are on the basis of loss of motion at a joint. There are numerous references to "ankylosis," so you probably ought to know that ankylosis means, "stiffening or fixation of a joint as the result of a disease process, with fibrous or bony union across the joint."[39]

Wis. Stat. § 102.32(6) sets some specific time limits for payment of the minimum mandatory PPD ratings under Wis. Admin. Code § 80.32 on conceded claims. Section 102.32(6) provides:

> 102.32 (6) (a) If compensation is due for permanent disability following an injury or if death benefits are payable, payments shall be made to the employee or dependent on a monthly basis as provided in pars. (b) to (e).
>
> (b) Subject to par. (d), if the employer or the employer's insurer concedes liability for an injury that results in permanent disability and if the extent of the permanent disability can be determined based on a minimum permanent

[36] Wis. Stat. § 102.18(1)(bp).
[37] Wis. Stat. § 102.22.
[38] The corresponding rule, as revised, is now DWD 80.32(11).
[39] Webster's New World/Stedman's Concise Medical Dictionary, Prentice Hall Press (1987).

> disability rating promulgated by the department by rule, compensation for permanent disability shall begin within 30 days after the end of the employee's healing period.
>
> (c) Subject to par. (d), if the employer or the employer's insurer concedes liability for an injury that results in permanent disability, but the extent of the permanent disability cannot be determined without a medical report that provides the basis for a minimum permanent disability rating, compensation for permanent disability shall begin within 30 days after the employer or the employer's insurer receives a medical report that provides a basis for a permanent disability rating.
>
> (d) The department shall promulgate rules for determining when compensation for permanent disability shall begin in cases in which the employer or the employer's insurer concedes liability, but disputes the extent of permanent disability.
>
> (e) Payments for permanent disability, including payments based on minimum permanent disability ratings promulgated by the department by rule, shall continue on a monthly basis and shall accrue and be payable between intermittent periods of temporary disability so long as the employer or insurer knows the nature of the permanent disability.[40]

3.4 Final Medical Reports

Wis. Admin. Code sec. DWD 80.02(2)(e)4[41] provides that the insurer is required to submit a final report from a practitioner whenever:

- temporary disability exceeds 3 weeks, *or*
- any permanent disability has resulted.

The administrative rule also requires that a copy of the final practitioner's report must be sent to the employee.

Wis. Admin. Code sec. DWD 80.02(2) (e)4 and (j) provide that:

> (2) SELF-INSURED EMPLOYERS AND INSURANCE COMPANIES. Except as provided in sub. (3m), for injuries under sub. (1)(a) self-insured employers and insurance companies shall submit all of the following reports to the department:
>
> (e) A report within 30 days after each of the following events occurs, *with a copy to the employe*, using form WKC-13 indicating all worker's compensation payments to date and the periods of time for which these payments were made:
>
> 4. Final payment of compensation is made. *If there are more than 3 weeks of temporary disability or any permanent disability, the insurance carrier or self-insured employer shall submit a final treating*

[40] Wis. Stat. § 102.32(6), as amended by 2003 Wisconsin Act 144, §§ 22, 23, effective 3/30/04.
[41] Note that DWD 80.02 was substantially revised, effective January 1, 1998.

> *practitioner's report together with the final WKC-13 or shall explain why the report is not being submitted and shall estimate when the final practitioner's report will be submitted.*
>
> (j) If the employe fails to return to a practitioner for a final examination, written notice within 30 days, with a copy to the employe, advising the employe that in order to determine permanent disability, if any, the final examination is necessary. [Emphasis added.][42]

The Worker's Compensation Division, DWD, interprets the administrative rule to require that for a medical report to be *final*:

1) it must be completed by a *treating* practitioner,
2) it must be based upon an examination *after* the end of healing and after the employee has been released from treatment (unless the employee is continuing to receive maintenance treatment),
3) it must include an opinion by the treating practitioner stating whether any permanent disability resulted from the employment injury, *and*
4) it must include a rating of the estimated percentage of any resulting permanent disability (and the rating must comply with DWD 80.32 as to applicable minimum ratings for certain conditions).[43]

You should send the treating practitioner a WKC-16 form to complete and return as the final medical report.[44] A suggested letter to solicit a final medical report from a treating practitioner appears at the end of this outline in Appendix A.

Note that for finger injuries you need the treating practitioner to fill in the information on the *back* of the WKC-16 form to show the limitation of motion at various joints of the finger, so that the Worker's Compensation Division can use that information to compute the permanent partial disability benefits.[45]

Also note that for eye injuries you should send the treating practitioner a WKC-16A form, instead of the usual WKC-16.

3.5 Pre-Existing Disability

You are entitled to credit for pre-existing disability, at least in terms of computing the resulting medical impairment or functional disability. As noted by the supreme court in a 1971 decision:

> This court has held that a workmen's compensation applicant should not be compensated for a pre-existing disability where the pre-existing disability can

[42] Wis. Admin. Code sec. DWD 80.02(2) (e)4 and (j), as revised effective January 1, 1998.
[43] DWD memo by the Worker's Compensation Division: *Wisconsin Worker's Compensation Medical Report Handling Guidelines*, October 19, 1998. A copy of that memo appears at the end of this outline as Appendix B.
[44] Note that the WKC-16 form (Medical Report on Industrial Injury) should not be confused with the WKC-16-B form (Practitioner's Report on Accident or Industrial Disease in Lieu of Testimony). The WKC-16-B form is only used on contested claims for a physician or other practitioner to certify a report so that it will admissible in evidence, without the practitioner having to be present to testify in person at the final hearing.
[45] Wis. Admin. Code § DWD 80.32(12).

> be separated from the effects of the later accidental injury. *Employers Mut. Liability Ins. Co. v. Industrial Comm.* (1933), 212 Wis. 669, 250 N. W. 758; *Mednis v. Industrial Comm.* (1965), 27 Wis. 2d 439, 134 N. W. 2d 416. However, the department cannot divide liability for compensation among successive employers for the effects of successive injuries in the absence of evidence to sustain a finding that the disability arose from successive injuries. *South Side Roofing & Material Co. v. Industrial Comm.* (1948), 252 Wis. 403, 31 N. W. 2d 577. The department can neither assess all the liability against one of several employers nor divide liability equally among each of several employers where there is no evidence in the record to support a finding that the injury or injuries contributed to the disability in that manner. *Merton Lumber Co. v. Industrial Comm.* (1951), 260 Wis. 109, 50 N. W. 2d 42.[46]

In claiming credit for pre-existing disability you also need to understand that a pre-existing "condition" is not the same as a pre-existing "disability." That is, a person may have a pre-existing medical condition that is not causing any disability, so that it has no effect on the person's ability to earn a living. The pre-existing condition may be dormant and asymptomatic. If an employment injury acts upon a pre-existing condition and thereby makes it into a disability, then under the as-is rule the employer is liable for that disability.

The as-is rule comes from the case law:

> From the foregoing we conclude that there was ample credible evidence to sustain the finding of the commission that Rankin's injury of March 10, 1949, while in the employ of the M. & M. Realty Company, was the one which caused his disability arising out of his employment by that employer. The fact, that the structures which previously had held the disk in place between the vertebrae of his back had been weakened by a prior injury, or injuries, so as to make his back more susceptible to injury, does not preclude holding the M. & M. Realty Company and its insurance carrier liable for the entire disability. Numerous decisions of this court have held that an employer takes an employee 'as is' and the fact that he may be susceptible to injury by reason of a preexisting physical condition does not relieve the last employer from being held liable for workmen's compensation benefits if the employee becomes injured due to his employment, even though the injury may not have been such as to have caused disability in a normal individual. On this point, we need only quote from our decision in *General Accident Fire & Life Assur. Corp. v. Industrial Comm.*, 1937, 223 Wis. 635, 652, 271 N.W. 385, 392:
>
> 'This court has frequently found that the fact that there was a pre-existing physical condition without which there would not have been serious injury is immaterial. *City of Milwaukee v. Industrial Comm.*, 160 Wis. 238, 151 N.W. 247; *Milwaukee Electric Ry. & Light Co. v. Industrial Comm.*, 212 Wis. 227, 247 N.W. 841; *Employers' Mut. Liability Ins. Co. v. Industrial Comm.*, 212 Wis. 669, 250 N.W. 758; *Malleable Iron Range Co. v. Industrial Comm.*, 215 Wis. 560, 255 N.W. 123.'

M. & M. Realty Co. v. Industrial Commn., 267 Wis. 52, 63–4, 64 N.W.2d 413 (1954).

[46] *Semons Department Store v. ILHR Department*, 50 Wis. 2d 518, 524–5, 184 N.W.2d 871 (1971).

> The fact, that a former injury may have produced a weakness in the employee's body making him more susceptible to further injury than would a normal individual, does not necessarily in itself establish a partial permanent disability of a compensable nature. Such employee might never sustain a further injury, in which case he never will be disabled.

M. & M. Realty Co. v. Industrial Commn., 267 Wis. 52, 65, 64 N.W.2d 413, 418–9 (1954).

On claims involving substantial pre-existing disability an injured employee may be entitled to some compensation from the state's "second injury fund" within the terms of Wis. Stat. sec. 102.59:

> **102.59 Preexisting disability, indemnity**.[47] (1) If an employe has at the time of injury permanent disability which if it had resulted from such injury would have entitled him or her to indemnity for 200 weeks and, as a result of such injury, incurs further permanent disability which entitles him or her to indemnity for 200 weeks, the employe shall be paid from the funds provided in this section additional compensation equivalent to the amount which would be payable for said previous disability if it had resulted from such injury or the amount which is payable for said further disability, whichever is the lesser.[48] If said disabilities result in permanent total disability the additional compensation shall be in such amount as will complete the payments which would have been due had said permanent total disability resulted from such injury. This additional compensation accrues from, and may not be paid to any person before, the end of the period for which compensation for permanent disability resulting from such injury is payable by the employer, and shall be subject to s. 102.32 (6) and (7). No compromise agreement of liability for this additional compensation may provide for any lump sum payment.[49]
>
> (1m) A compromise order issued under s. 102.16 (1) may not be admitted as evidence in any action or proceeding for benefits compensable under this section.
>
> (2) In the case of the loss or of the total impairment of a hand, arm, foot, leg or eye, the employer shall pay $10,000 into the state treasury. The payment shall be made in all such cases regardless of whether the employe, the

[47] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: This subsection has a two-fold purpose: First to eliminate any incentive for discrimination against the employe who has serious previous disability when he or she comes to seek re-employment because of the employer's fear, real or otherwise, that the loss of another member may subject the employer to very large indemnities on the ground that such loss would cause total or near total disability; second, to secure to the employe sustaining the loss or total impairment of a second member such amount of indemnity as the seriousness of the combined disabilities calls for. Direct liability of the employer in case of the loss of the second member is made the same as for the loss of the first member, and the injured employe's rights are conserved by orders drawn on the fund for the balance of the indemnity. Primary liability of the employer for payment of $7,000 to the fund is insurable.

[48] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: To illustrate, one who has previously lost an arm at the shoulder would have been entitled to 500 weeks compensation. By second injury he or she loses the hand at the wrist and becomes entitled to 400 weeks compensation. Over and above payment for second injury the employe may receive an additional 400 weeks for compensation from the fund.

[49] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: This amendment clarifies that the benefits are to be paid monthly as they accrue after primary benefits are accrued rather than in lump sum or advancement.

> employe's dependent or personal representative commences action against a 3rd party as provided in s. 102.29.[50]
>
> (3) All payments received under this section shall be deposited in the fund established by s. 102.65.

A discussion of the second injury fund is beyond the scope of this outline.[51]

3.6 Mental Injuries

Mental injuries are ordinarily treated as non-scheduled injuries. However, in a 2002 decision, LIRC reviewed a claim arising out of a non-traumatic mental injury[52] and held that:

> Here, the applicant has returned to work for his time-of-injury employer at more than 85 percent of his pre-injury wage. Thus, even if he otherwise had a loss of earning capacity, his claim is barred as long as he works for the employer and earns 85 percent of his pre-injury wage.
>
> Regarding an award for functional disability apart from loss of earning capacity, Wis. Stat. § 102.44(6)(a) and (h) and DWD's interpretative footnote state that such an award may be allowed even where an award for loss of earning capacity is barred, based on the worker's physical limitations. However, in this case the applicant's claim for permanent partial disability is not based on "physical limitations." The commission assumes that "permanent partial disability . . . imposed by the physical limitations" means a permanent partial disability rating based a *physical* as opposed to a *mental* limitation.
>
> Indeed, the legislature and department used the term "physical limitations" in Wis. Stat. § 102.44(6)(a) and (h), but the term "physical and mental limitations" in Wis. Stat. § 102.44(6)(b) and Wis. Admin. Code § DWD 80.34(a). Thus, it can only be reasonably concluded that the legislature and department intend to allow a functional-based permanent partial disability award only for physical impairment, while a loss of earning capacity-based award may be based on physical or mental impairment (or both.)
>
> *In short, the commission does not believe the law permits awarding permanent partial disability on a disability rating based solely on mental or psychological limitations when a loss of earning capacity award is barred under Wis. Stat. § 102.44(6).* [Emphasis added.][53]

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[50] Wis. Stat. § 102.59(2), as amended by 2003 Wisconsin Act 144, § 31, effective 3/30/04.
[51] See John D. Neal & Joseph Danas, Jr., *Worker's Compensation Handbook* (4th ed. 1997), § 5.37.
[52] A non-traumatic mental injury is one that does not involve any physical injury. Such injuries are sometimes referred to as mental-mental injuries, because the cause and the effect are both mental.
[53] *Patrick B. Walls v. Wis. Electric Power Co.*, WC Claim No. 1999-046193 (LIRC Dec. 17, 2002) [http://www.dwd.state.wi.us/lirc/wcdecsns/709.htm], affirmed by the Circuit Court for Kenosha County on July 15, 2003.

4.0 Computation of Permanent Disability Benefits: In General

4.1 Permanent Partial Disability Rates

The permanent partial disability (PPD) rate is based upon 2/3 of the employee's average gross weekly earnings at the time of the injury, but there is a maximum rate.[54] The maximum permanent partial disability (PPD) rate usually changes each year, but the rate payable is always based upon the date the injury occurred.[55] Permanent *total* disability (PTD) benefits are payable at the same rate as for temporary total disability (TTD) benefits.[56]

Year of injury:	**2000**	**2001**	**2002**	**2003**
Maximum wage for temporary disability or permanent *total* disability	$823.50	$873.00	$970.50	$1,003.50
	x 2/3	x 2/3	x 2/3	x 2/3
Maximum weekly rate for temporary disability or permanent *total* disability	$549.00	$582.00	$647.00	$669.00
Maximum wage for permanent *partial* disability	$276.00	$276.00	$318.00	$333.00
	x 2/3	x 2/3	x 2/3	x 2/3
Maximum weekly rate for permanent *partial* disability	$184.00	$184.00	$212.00	$222.00

If the employee is under 27 years of age at the time of injury, there is a presumption that the employee is entitled to the maximum permanent disability rate. Wis. Stat. § 102.11(1) provides that:

> (g) If an employe is under twenty-seven years of age, the employe's average weekly earnings on which to compute the benefits accruing for permanent disability or death shall be determined on the basis of the earnings that such employe, if not disabled, probably would earn after attaining the age of twenty-seven years. Unless otherwise established, said earnings shall be taken as equivalent to the amount upon which maximum weekly indemnity is payable.

[54] Wis. Stat. § 102.11(1).
[55] Wis. Stat. § 102.03(4).
[56] Wis. Stat. § 102.11(1).

4.2 Sample Computations

4.21 Scheduled Injury

If the employee was earning a gross average weekly wage of $261.00 or more and the employee suffered an injury in 1997 that resulted in permanent partial disability, then the employee would qualify for the 1997 maximum PPD rate of $174 per week.

The statutory schedule provides 425 weeks of PPD payments for loss of a leg at the knee.[57] Assume that an employee suffered an injury in 1997 that resulted in amputation of a leg at the knee, and the employee qualified for the 1997 maximum PPD rate. The employee would receive $174 per week for 425 weeks, for a total amount of $73,950.[58]

Alternatively, assume that an employee sustained a 1997 knee injury with some resulting permanent partial disability. If a physician evaluated the knee injury at 7% loss of use of the lower leg as compared to amputation at the knee, the employee would receive:

425 weeks x 7% = 29.75 weeks of PPD benefits

If the employee qualified for the 1997 maximum PPD rate, the PPD benefits would be:

29.75 weeks x $174 per week = $5,176.50

4.22 Non-scheduled Injury

Assume that an employee sustained a low back injury in 1997 and the employee earned enough to qualify the maximum 1997 PPD rate of $174 per week. A back injury is a non-scheduled injury so that permanent partial disability is computed as a percentage of 1,000 weeks.[59] If the back injury results in permanent partial disability of 5% of the body as a whole as compared to permanent total disability, the employee would then receive:

5% x 1,000 weeks = 50 weeks of PPD benefits

50 week x $174 per week = $8,700

4.3 Special Rules for Certain Injuries

4.31 Multiple Injury Computations

There are some additional computations necessary for situations involving multiple injuries. Wis. Stat. § 102.53 deals with multiple injuries resulting from a single employment injury:

[57] Wis. Stat. § 102.52(11).
[58] Wis. Stat. § 102.52(intro).
[59] Wis. Stat. § 102.44(3).

> **102.53 Multiple injury variations**. In case an injury causes more than one permanent disability specified in ss. 102.44 (3), 102.52 and 102.55, the period for which indemnity shall be payable for each additional equal or lesser disability shall be increased as follows:[60]
>
> (1) In the case of impairment of both eyes, by 200%.
>
> (2) In the case of disabilities on the same hand covered by s. 102.52 (9), by 100% for the first equal or lesser disability and by 150% for the 2nd and 3rd equal or lesser disabilities.
>
> (3) In the case of disabilities on the same foot covered by s. 102.52 (14), by 20%.
>
> (4) In all other cases, by 20%.
>
> (5) The aggregate result as computed by applying sub. (1), and the aggregate result for members on the same hand or foot as computed by applying subs. (2) and (3), shall each be taken as a unit for applying sub. (4) as between such units, and as between such units and each other disability.

For example, assume that you have an employment injury resulting in permanent partial disability of 8% of the *right* arm at the elbow and 5% of the *left* hand at the wrist. The computation would be as follows:

36	wks. for the right elbow injury (450 wks.[61] x 8%)
20	wks. for the left hand injury (400 wks.[62] x 5%)
4	wks. for multiple-injury adjustment[63] (20 wks. for hand x 20% = 4 wks.)
60	wks. final total payable on PPD

Note that the calculation would different if the elbow and hand injuries were both to the *same* arm rather than on opposite sides. An example appears below. The calculation is also different if you have an employment injury resulting in both a scheduled and a non-scheduled injury. An example of such a calculation appears at page 35 of this outline in the discussion of combined scheduled and non-scheduled injuries.

Wis. Admin. Code § DWD 80.50 provides that:

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[60] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: This provides for "stepping up" the value of disabilities to two or more fingers or portions of them so that in case of disabilities to fingers on one hand the increase is an additional 100 percent for the first equal or lesser disability and 150 percent for the second and third equal or lesser disabilities. In case of toes on one foot the corresponding increase is 20 percent as it is in all other cases of multiple injury except for impairment of both eyes, where the increase is 200 percent. When the aggregate result for members on the same hand or foot or for the eyes has been computed, it is taken as a unit and there is increase as between that and other units by 20 percent for each equal or lesser injury unit (except as between both eyes or both ears).

[61] Wis. Stat. § 102.52(2).

[62] Wis. Stat. § 102.52(3).

[63] Wis. Stat. § 102.53(4).

DWD 80.50 Computation of permanent disabilities. (1) In computing permanent partial disabilities, the number of weeks attributable to more distal disabilities shall be deducted from the number of weeks in the schedule for more proximal disabilities before applying the percentage of disability for the more proximal injury, except that:

(a) Such a deduction shall not include multiple injury factors under s. 102.53, Stats.; and

(b) Such a deduction shall include preexisting disabilities.

(2) The number of weeks attributable to scheduled disabilities shall be deducted from 1,000 weeks before computing the number of weeks due for a non-scheduled disability resulting from the same injury. This deduction shall not include multiple injury factors under s. 102.53, Stats.

(3) Multiple injury factors under 102.53, Stats., do not apply to compensation for disfigurement under s. 102.56, Stats.

History: Cr. Register, August, 1981, No. 308, eff. 9-1-81; r. and recr. Register, September, 1982, No. 321, eff. 10-1-82.

Section DWD 80.50(1) means that when you have more than one injury to one arm or one leg there is a special calculation required that reduces the amount payable for PPD. For example, assume that you have an employment injury resulting in permanent partial disability at two different points on the same arm: PPD of 8% of the *right* arm at the elbow and 5% of the *right* hand at the wrist. The right elbow injury is the proximal injury and the right hand injury is the distal injury.[64] Therefore, you start by subtracting the number of weeks attributable to the more distal injury from the maximum number of weeks for the proximal injury. The computation would be as follows:

450	wks. for complete loss of an arm at the elbow[65]
(20)	wks. for the right hand injury (400 wks.[66] x 5%)
430	wks. adjusted subtotal for computing PPD to elbow
x 8%	loss of use of the right arm at the elbow
34.4	wks. for the right elbow injury

34.4	wks. for the right elbow injury
20.0	wks. for the right hand injury (400 wks.[67] x 5%)
4.0	wks. for multiple-injury adjustment[68] (20 wks. for hand x 20% = 4 wks.)
58.4	wks. final total payable on PPD

[64] Distal means furthest from the body torso, and proximal means closest to the body torso.
[65] Wis. Stat. § 102.52(2).
[66] Wis. Stat. § 102.52(3).
[67] Wis. Stat. § 102.52(3).
[68] Wis. Stat. § 102.53(4).

Section DWD 80.50(2) means there is a special calculation that applies when you have a combined scheduled and non-scheduled injury. A sample computation appears at page 35 of this outline in the discussion of such combined injuries.

4.32 Dominant Hand Injuries

Wis. Stat. § 102.54 provides for increased compensation for injuries to the dominant hand.

> **102.54 Injury to dominant hand**. If an injury to an employe's dominant hand causes a disability specified in s. 102.52 (1) to (9) or amputation of more than two-thirds of the distal joint of a finger, the period for which indemnity is payable for that disability or amputation is increased by 25%. This increase is in addition to any other increase payable under s. 102.53 but, for cases in which an injury causes more than one permanent disability, the increase under this section shall be based on the periods specified in s. 102.52 (1) to (9) for each disability and not on any increased period specified in s. 102.53.

There is a Department footnote to this statutory provision, contained in DWD's pamphlet edition of the Worker's Compensation Act (WKC-1-P):

> This provides an increase for injuries to the dominant hand that result in any amputation beyond 2/3 of a distal phalanx or 100 percent loss of use of any joint on the hand or arm. This multiple is in addition to the multiples in secs. 102.53(2), (4) and (5) but is not applied on those multiples. This multiple will be treated the same as those in s. 102.53 for computing permanent disabilities per rule DWD 80.50.

In reading the foregoing statute you might think that it applies to any injury that results in permanent partial disability to any part of the dominant hand or arm. However, as you can see from the Department's footnote to the statute, the Department interprets this statute very narrowly so that it only applies to a limited number of claims.[69]

4.33 Fingertip Amputations

There is a special administrative rule that applies for fingertip amputations:

> **DWD 80.33 Permanent disabilities; fingertip amputations**. In estimating permanent disability as a result of fingertip amputations, amputation of the distal one-third or less shall be considered the equivalent of 45% loss of use of the distal phalanx, amputation of not more than the distal two-thirds but more than the distal one-third shall be considered the equivalent of 80% loss of use of the distal phalanx, and amputation of more than the distal two-thirds shall be considered as 100% loss of the distal phalanx, provided there is not added disability as a result of malformed nail or tissue. In no case shall the allowance be greater than it would have been for amputation of the entire distal phalanx.

[69] The Department's interpretation of the statute has been upheld by the Labor and Industry Review Commission. See *Nelson v. Associated Milk Producers Inc.*, WC Claim No. 1994040617 (LIRC Sept. 30, 1998) and *Schaalma v. B R Metal Tech Inc.*, WC Claim No. 1996-060887 (LIRC Apr. 5, 2001). LIRC's decision in *Schaalma* was affirmed in an unpublished decision by the court of appeals in *Schaalma v. LIRC*, No. 01-3210 (Wis. Ct. App. May 23, 2002) [http://www.wicourts.gov/html/ca/01/01-3210.htm].

History: Cr. Register, October, 1965, No. 118, eff. 11-1-65; am. Register, November, 1970, No. 179, eff. 12-1-70.

4.34 Complete Paralysis of Affected Extremity

Wis. Stat. § 102.55(2) provides that:

> (2) For the purposes of this schedule permanent and complete paralysis of any member shall be deemed equivalent to the loss thereof.

4.35 Injuries to the Eyes (Vision)

Wis. Stat. §§ 102.52(15) and (16) list the permanent partial disability benefits for loss of vision:

> (15) The loss of an eye by enucleation or evisceration, 275 weeks;
>
> (16) Total impairment of one eye for industrial use, 250 weeks;

Note that there is a special rule for impairment of both eyes. Wis. Stat. § 102.53 provides that:

> **102.53 MULTIPLE INJURY VARIATIONS.** In case an injury causes more than one permanent disability specified in ss. 102.44(3), 102.52 and 102.55, the period for which indemnity shall be payable for each additional equal or lesser disability shall be increased as follows: . . .
>
> (1) In the case of impairment of both eyes, by 200%.

The rules for evaluating permanent disability for loss of vision appear in Wis. Admin. Code § DWD 80.26. The WKC-16A form is used for a practitioner to report on the extent of any resulting loss of vision, instead of the standard WKC-16 form.

4.36 Injuries to the Ears (Hearing)

Wis. Stat. §§ 102.52(17) and (18), list the permanent partial disability benefits for traumatic hearing loss that results from a specific accidental injury, such as an explosion:

> (17) Total deafness from accident or sudden trauma, 330 weeks;[153]
>
> (18) Total deafness of one ear from accident or sudden trauma, 55 weeks.

Wis. Stat. § 102.555 deals with occupational deafness that results from an appreciable period of work exposure to noise:

> (4) Subject to the limitations provided in this section, there shall be payable for total occupational deafness of one ear, 36 weeks of compensation; for total occupational deafness of both ears, 216 weeks of compensation; and for partial occupational deafness, compensation shall bear such relation to that named in this section as disabilities bear to the maximum disabilities provided in this section. . . .

The rules for evaluating permanent disability for loss of hearing appear in Wis. Admin. Code § DWD 80.25.

4.37 Loss or Total Impairment of Hand, Arm, Foot, Leg or Eye

Wis. Stat. § 102.59(2) provides that:

> (2) In the case of the loss or of the total impairment of a hand, arm, foot, leg or eye, the employer shall pay $10,000 into the state treasury. The payment shall be made in all such cases regardless of whether the employe, the employe's dependent or personal representative commences action against a 3rd party as provided in s. 102.29.[70]

5.0 Accrual, Payment and Reporting of Permanent Disability Benefits

Wis. Stat. § 102.32 provides, in part:

> (6) If compensation is due for permanent disability following an injury or if death benefits are payable, payments shall be made to the employe or dependent on a monthly basis.[71] The department may direct an advance on a payment of unaccrued compensation or death benefits if it determines that the advance payment is in the best interest of the injured employe or his or her dependents. In directing the advance, the department shall give the employer or the employer's insurer an interest credit against its liability. The credit shall be computed at 7%.

Note that permanent partial disability and permanent total disability benefits are payable monthly as they accrue. We ordinarily say that permanent disability benefits accrue and become payable from the date of the end of healing, since that covers the most common situations. It is more accurate to say that permanent disability benefits accrue and become payable from the date of the injury, *except* for periods during which the employee is receiving temporary disability benefits.

For example, assume that an employee is injured on January 1, 1995, and the employee has intermittent periods of temporary total disability for a total of 84 weeks of TTD over a period of two years. On January 2, 1997, the employee reaches an end of healing and a treating practitioner rates resulting permanent partial disability of 5% of the body as a whole, which equals 50 weeks of permanent partial disability benefits. During the two-year period (104 weeks) from January 1, 1995, through January 1, 1997, the employee has been paid temporary total disability benefits for a total of 84 weeks.

Therefore, there would be 20 weeks of accrued permanent partial disability benefits payable immediately on January 1, 1997, when the treating practitioner rates permanent partial disability:

104 weeks	Date of injury to end of healing with PPD rating (Jan. 1, 1995–Jan. 1, 1997)
(84 weeks)	Temporary disability benefits paid through Jan. 1, 1997
20 weeks	PPD benefits accrued as of Jan. 1, 1997

[70] Wis. Stat. § 102.59(2), as amended by 2003 Wisconsin Act 144, § 31, effective 3/30/04.

[71] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: This gives the department authority for its longstanding policy to have permanent disability and death benefits paid monthly.

The remaining balance of 30 weeks of permanent partial disability benefits would then be paid out in monthly installments as they accrue.

The reporting requirements for payment of permanent disability benefits appear in Wis. Admin. Code § DWD 80.02. That rule provides, in part:

> (2) SELF-INSURED EMPLOYERS AND INSURANCE COMPANIES. Except as provided in sub. (3m), for injuries under sub. (1)(a) self-insured employers and insurance companies shall submit all of the following reports to the department:
>
> (e) A report within 30 days after each of the following events occurs, with a copy to the employe, using form WKC-13 indicating all worker's compensation payments to date and the periods of time for which these payments were made:
>
> 1. *Payment of compensation is changed from temporary disability to permanent disability.*
>
> 2. Temporary disability benefits are reinstated.
>
> 3. Temporary partial disability is paid. The insurance carrier or self-insured employer shall also include the information required by form WKC-7359.
>
> 4. *Final payment of compensation is made.* If there are more than 3 weeks of temporary disability or any permanent disability, the insurance carrier or self-insured employer shall submit a final treating practitioner's report together with the final WKC-13 or shall explain why the report is not being submitted and shall estimate when the final practitioner's report will be submitted.
>
> (j) If the employe fails to return to a practitioner for a final examination, written notice within 30 days, with a copy to the employe, advising the employe that in order to determine permanent disability, if any, the final examination is necessary. [Emphasis added.][72]

Most employees very much prefer to receive permanent partial disability benefits in the form of a lump-sum payment rather than having the PPD paid out monthly as it accrues. However, the Department disfavors such lump-sum advancements and only permits them when there is a solid basis for doing so.[73] An employee may seek approval of a lump-sum advancement by filing a WKC-136 Advancement or Lump Sum Request form with the Worker's Compensation Division. If the Department approves the request they will send a letter to the insurer directing payment of the lump sum amount. That letter will also advise the insurer as to the amount of the interest credit that is being allowed to the insurer for the advance payment.

[72] Wis. Admin. Code sec. DWD 80.02, as revised, effective January 1, 1998.
[73] Lump-sum advancements are subject to the provisions of Wis. Stat. § 102.32(6) and Wis. Admin. Code § DWD 80.39. Lump-sum advancements as part of a compromise settlement are subject to Wis. Admin. Code § DWD 80.03(1)(d)–(e).

6.0 Scheduled Injuries and a Loss of Earning Capacity

Compensation for scheduled injuries is limited to the amounts provided in the statutory schedules.[74] There is no additional compensation payable for permanent disability that takes into account the effect of the injury on the employee's ability to earn a living. Any compensation for a resulting loss of earning capacity from a scheduled injury is considered to be included in the statutory schedules.[75]

> **102.44 Maximum limitations.** Section 102.43 shall be subject to the following limitations:
>
> (4) Where the permanent disability is covered by ss. 102.52, 102.53 and 102.55,[76] such sections shall govern; provided, that in no case shall the percentage of permanent total disability be taken as more than 100 per cent.

Exception: There is an exception provided by Wis. Stat. § 102.44(2) for rare cases involving certain combinations of multiple scheduled injuries:

- total loss of the industrial use of both eyes, or
- loss of both arms at or near the shoulder, or
- loss of both legs at or near the hip, or
- loss of one arm at the shoulder and one leg at the hip.

In such cases, the employee is entitled to permanent *total* disability benefits.[77] The applicable statute, section 102.44(2), also provides that, "This enumeration is not exclusive, but in other cases the department shall find the facts." In a 2000 decision the supreme court ruled the statutory language means that an employee may claim permanent total disability based upon the combined limitations resulting from a non-scheduled injury together with a scheduled injury.[78]

It is also possible for a scheduled injury to cause a non-scheduled injury. The resulting non-scheduled injury would then be compensable just like any other non-scheduled injury.[79] For example, assume that an employee suffers an employment injury that results in complete amputation of a leg at the knee. The employee then suffers a psychological reaction in the nature of a post-traumatic stress disorder, as a result of losing the leg at the knee.

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[74] Wis. Stat. §s 102.52-102.555.

[75] *Mednicoff v. ILHR Department*, 54 Wis. 2d 7, 12–16, 194 N.W.2d 670 (1972). However, keep in mind that an employee with resulting permanent partial disability from a scheduled injury may still be entitled to vocational retraining benefits, which are considered to be separate from the permanent partial disability benefits. Vocational retraining benefits are discussed at page 45 of this outline.

[76] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: This provides for applications of the "multiple injury" feature of the law as between scheduled and non-scheduled injuries as well as merely between scheduled injuries.

[77] Permanent total disability benefits are discussed at page 39 of this outline.

[78] *Mireles v. LIRC*, 2000 WI 96, ¶ 63–70, 237 Wis. 2d 69, 613 N.W.2d 875 (2000). Mireles involved a claim in which a non-scheduled injury was followed by a later scheduled injury while still working for the same employer. However, the same reasoning would apply to a single employment injury that resulted in both a scheduled and a non-scheduled injury. Also see, *Secura Insurance v. LIRC*, 2000 WI App 237, 239 Wis. 2d 315, 620 N.W.2d 626 (Ct. App. 2000).

[79] *Wagner v. Industrial Commission*, 273 Wis. 553, 565–566, 79 N.W.2d 264 (1956).

In the above example, if there is resulting permanent disability from the mental condition, that mental condition is a non-scheduled injury. Thus, the employee would be able to bring a claim for a loss of earning capacity, subject to the same limitations that apply to any other non-scheduled injury. However, the loss of earning capacity resulting from the mental injury would have to be evaluated separately, without consideration of the limitations from the scheduled injury (loss of the leg at the knee).[80]

7.0 Non-Scheduled Injuries: The 85% Rule and LOEC Claims

If an employee sustains a non-scheduled injury with resulting permanent disability, then the employee may be entitled to compensation for permanent disability in terms of a loss of earning capacity. For most employees, the percentage for the loss of earning capacity is substantially higher than the percentage for medical impairment (functional disability). Under section 102.44(6), the 85% rule determines whether such an employee is entitled to compensation for a loss of earning capacity:

> **102.44 Maximum limitations.** Section 102.43 shall be subject to the following limitations:
>
> (6) (a) Where an injured employe claiming compensation for disability under sub. (2) or (3) has returned to work for the employer for whom he or she worked at the time of the injury, the permanent disability award shall be based upon the physical limitations resulting from the injury without regard to loss of earning capacity unless the actual wage loss in comparison with earnings at the time of injury equals or exceeds 15%.[81]
>
> (b) If, during the period set forth in s. 102.17 (4) the employment relationship is terminated by the employer at the time of the injury, or by the employe because his or her physical or mental limitations prevent his or her continuing in such employment, or if during such period a wage loss of 15% or more occurs the department may reopen any award and make a redetermination taking into account loss of earning capacity.
>
> (c) The determination of wage loss shall not take into account any period during which benefits are payable for temporary disability.
>
> (d) The determination of wage loss shall not take into account any period during which benefits are paid under ch. 108.

[80] Combined scheduled and non-scheduled injuries are discussed in this outline at page 35.

[81] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: 102.44(6) provides that in cases of non-scheduled injury permanent partial disability is to be determined on the basis of the physical limitations without regard to loss of earning capacity where the employe has returned to work for the same employer as at the time of injury at a wage loss of less than 15 percent. A good faith offer of employment refused by the employe without reasonable basis has the same effect as actual reemployment. The claims subject to this section including those upon which an award is issued remain open for the period of the statute of limitations in the event that there is a termination of the employment or a wage loss of 15% or more occurs.

> (e) For the purpose of determining wage loss, payment of benefits for permanent partial disability shall not be considered payment of wages.
>
> (f) Wage loss shall be determined on wages, as defined in s. 102.11. Percentage of wage loss shall be calculated on the basis of actual average wages over a period of at least 13 weeks.
>
> (g) For purposes of this subsection, if the employer in good faith makes an offer of employment which is refused by the employe without reasonable cause, the employe is considered to have returned to work with the earnings the employe would have received had it not been for the refusal.
>
> (h) In all cases of permanent partial disability not covered by ss. 102.52 to 102.56, whether or not the employe has returned to work, the permanent partial disability shall not be less than that imposed by the physical limitations.

If an employee is not able to return to work with the same employer or returns to work with the same employer but only earns a wage that is 85% of the pre-injury wage or less, then the employee is entitled to be compensated for a loss of earning capacity.

7.1 Non-Scheduled Injuries Without a Loss of Earning Capacity

Under the 85% rule, an employee may be barred from claiming compensation for a loss of earning capacity. Such employees are limited to receiving compensation for permanent disability only on the basis of medical impairment, as evaluated by a physician. An employee is not entitled to compensation for a loss of earning capacity if:

- the employee sustains a non-scheduled injury with resulting permanent disability, and
- the employee returns to work for the same employer, and
- the employee is earning more than 85% of the pre-injury wage.[82]

For example, consider the following fact situation:

- An employee has a low back injury in 1996.
- The employee qualifies for the maximum PPD rate.
- The employee undergoes a laminectomy with a good result.
- The treating physician evaluates permanent disability of 5% of the body as a whole.

[82] Wis. Stat. § 102.44(6)(a).

- The employee returns to work for the same employer that the employee had been working for at the time of injury.

- The employee has some resulting permanent limitations, so that the employee is no longer able to perform the original job.

- The employer places the employee on a different job that the employer has available, and that is within the employee's resulting permanent limitations.

- The new job being performed by the employee pays a wage equal to 90% of the wage that the employee was earning on the date of injury.

In the fact situation described above, the employee would be limited to receiving compensation only for medical impairment (functional disability) as evaluated by a physician. The employee would be barred from receiving additional compensation for a loss of earning capacity.[83]

Therefore, the employee would receive compensation for permanent disability on the basis of the medical impairment of 5% of the body as a whole, as evaluated by the treating physician. The percentage is then multiplied times a theoretical maximum of 1,000 weeks for permanent partial disability (PPD) that results from a non-scheduled injury. The weekly rate for PPD is the same as the rate for PPD for scheduled injuries. Assuming that the employee qualified for the 1996 maximum PPD rate, the compensation would be computed as follows:

1,000 weeks x 5% = 50 weeks of PPD benefits

50 weeks x $169 per week (1996 max. PPD rate)= $8,450

7.2 Non-Scheduled Injuries With a Loss of Earning Capacity

Under the 85% rule, an employee may be entitled to compensation for a loss of earning capacity. An employee is entitled to compensation for a loss of earning capacity if:

- the employee sustains a non-scheduled injury with resulting permanent disability; and

- the employee is not able to return to work for the same employer; or

- the employee does return to work for the same employer, but is earning a wage that is 85% of the pre-injury wage or less.

For example, consider the following fact situation:

- An employee is a 45-year-old factory worker with a high school education and a work history of doing only unskilled factory labor.

- The employee has a low back injury in 1996.

[83] Wis. Stat. § 102.44(6)(a).

- On the date of injury, the employee is earning enough to qualify for the 1996 maximum PPD rate of $169 per week.

- The employee undergoes a spinal fusion from L4 to S1, with a fair result.

- The treating physician evaluates permanent medical impairment of 20% of the body as a whole.

- The treating physician imposes permanent restrictions of no lifting over 25 pounds, no frequent bending, and no repetitive twisting of the torso.

- Because of the resulting permanent limitations the employee is no longer able to perform the original job.

- The employer places the employee on a different job that the employer has available and that is within the employee's resulting permanent limitations.

- The new job being performed by the employee pays a wage equal to 75% of the wage that the employee was earning on the date of injury.

In this example, the employee would initially be entitled to compensation for the medical impairment, as evaluated by a physician. If the treating physician's estimate of 20% of the body as a whole is used, then the permanent disability benefits for the medical impairment would again be based upon the percentage of permanent disability applied to a theoretical maximum of 1,000 weeks for a non-scheduled injury. The computation would be as follows:

1,000 weeks x 20% = 200 weeks of PPD benefits

200 weeks x $169 per week (1996 max. PPD rate)= $33,800

In the above example, if the employee has returned to work for the same employer and is earning 75% of the pre-injury wage, then the employee would have a 25% loss of earning capacity.[84] If the loss of earning capacity is considered to be 25% for the 1996 injury, then:

1,000 weeks x 25% = 250 weeks of PPD benefits

250 weeks x $169 per week (1996 max. PPD rate)= $42,250

Note that any amounts paid on the 20% PTD for medical impairment would be credited against the 25% loss of earning capacity, so that there would only be a balance of 5% (50 weeks) of permanent partial disability benefits payable. The compensation for medical impairment and the compensation for loss of earning capacity are both forms of compensation for permanent partial

[84] It can be argued that the loss is even greater than 25%, because the resulting permanent limitations are such that they would substantially limit the employee's other job opportunities in the future. However, if the employer has offered work at 75% of the pre-injury wage, then section 102.44(6)(g) would appear to limit the compensation for an LOEC to 25%.

disability so they overlap. Medical impairment and loss of earning capacity are just different methods of measuring the resulting permanent partial disability.

Now assume that the same employee is not able to return to work for the same employer, and that the employee has not yet found other employment. If would then usually be necessary to retain a vocational consultant to do an evaluation as to the extent of the resulting loss of earning capacity.

In the above example, the vocational consultant would consider the functional limitations on lifting and bending that had been imposed by the treating physician. The vocational consultant would also consider the other relevant factors that affect occupational disability, such as age, education, work experience, pre-injury earnings, earnings after the injury, prospects for vocational rehabilitation, etc.[85] Assume that the vocational consultant then concludes there is a 40% loss of earning capacity as a result of the back injury. The compensation for permanent disability would then be:

1,000 weeks x 40% = 400 weeks of PPD benefits

400 weeks x $169 per week (1996 PPD rate) = $67,600

Once again, the compensation for a loss of earning capacity includes the compensation for the medical impairment, since they are both forms of compensation for permanent disability. Therefore, if the employee in the above example had already received compensation for medical impairment of 20% of the body as a whole, then the employee would receive an additional 20% (200 weeks at $169) to compensate for a 40% loss of earning capacity.

8.0 Combined Scheduled and Non-Scheduled Injuries

It is fairly common to find claims in which there is both a scheduled and a non-scheduled injury resulting from the same employment injury. For example, the employee sustains a knee injury and a low back injury, with resulting permanent disability from each of the two injuries. This is only a problem if the employee does *not* return to work for the same employer, earning more than 85% of the pre-injury wage. If not, the employee is then entitled to compensation for a loss of earning capacity.

The problem in such cases arises out of trying to assess the resulting loss of earning capacity. For example, assume you have a serious knee injury resulting in a permanent limitation that severely limits standing and walking, and a low back injury resulting in a permanent limitation of no lifting more than 50 pounds. Obviously, the greatest impact on the employee's ability to earn a living is going to be the knee injury, because of the limitation on standing and walking. How do you attempt to assess the resulting loss of earning capacity?

[85] Wis. Admin. Code § DWD 80.34.

The permanent partial disability claim for a loss of earning capacity must be evaluated solely on the basis of the non-scheduled injury to the low back, while completely ignoring the resulting permanent limitations from the scheduled injury to the knee. Otherwise, if you based the loss of earning capacity upon the combined limitations from both injuries you would be allowing compensation for a loss of earning capacity from the scheduled injury to the knee, and there is no additional compensation for a loss of earning capacity on a scheduled injury. *Vande Zande v. ILHR Department*, 70 Wis. 2d 1086, 1092–93, 236 N.W.2d 255 (1975); *Langhus v. LIRC*, 206 Wis. 2d 493, 557 N.W.2d 450 (Ct. App. 1996).[86]

Exception: There is now an exception for claims of permanent *total* disability. Section 102.44(2) lists certain rare combinations of scheduled injuries that result in an award for permanent total disability. That same statute provides that, "This enumeration is not exclusive, but in other cases the department shall find the facts." In a 2000 decision the supreme court ruled the statutory language means that an employee may claim permanent total disability based upon the combined limitations resulting from a non-scheduled injury together with a scheduled injury.[87] However, that decision would only apply to a claim for permanent total disability, and not to a claim for permanent partial disability.

There is an administrative rule that applies for computing the number of weeks payable for permanent partial disability when you have a claim that includes both a scheduled and a non-scheduled injury. The rule provides for a reduction in the total number of weeks of permanent partial disability benefits payable. Wis. Admin. Code § DWD 80.50(2) provides that:

> (2) The number of weeks attributable to scheduled disabilities shall be deducted from 1,000 weeks before computing the number of weeks due for a non-scheduled disability resulting from the same injury. This deduction shall not include multiple injury factors under s. 102.53, Stats.

For example, assume that an employment injury results in permanent partial disability of 45% loss of use of the leg at the knee together with a back injury rated at 5% of the body as a whole. Ordinarily, the scheduled knee injury would result in 191.25 weeks of PPD benefits (425 weeks x 45% = 191.25) and the non-scheduled back injury would result in 50 weeks of PPD benefits (1,000 weeks x 5% = 50 weeks). However, when you have both injuries resulting from the same employment injury, the calculation is little different.

You would first calculate the PPD for the scheduled injury to the knee in the usual way, yielding 191.25 weeks. You would then subtract that from the 1,000-week maximum for a non-scheduled injury to the back, and then compute 5% of the balance.[88] After that, you still need to compute

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[86] In *Langhus v. LIRC*, 206 Wis. 2d 493, 557 N.W.2d 493 (Ct. App. 1996), the employee's claim for permanent total disability on the basis of a combined knee injury and a back condition was rejected because of a failure to apportion what specific permanent limitations, if any, were attributable to the back condition.

[87] *Mireles v. LIRC*, 2000 WI 96, ¶ 63–70, 237 Wis. 2d 69, 613 N.W.2d 875 (2000). Mireles involved a claim in which a non-scheduled injury was followed by a later scheduled injury while still working for the same employer. However, the same reasoning would apply to a single employment injury that resulted in both a scheduled and a non-scheduled injury. Also see, *Secura Insurance v. LIRC*, 2000 WI App 237, 239 Wis. 2d 315, 620 N.W.2d 626 (Ct. App. 2000).

[88] Wis. Admin. Code § DWD 80.50(2).

the usual multiple injury adjustment for the second lesser or equal disability, which in this case would be 20% of the back injury.[89] Thus, the computation would be as follows:

1,000.00	wks. maximum for a non-scheduled injury to the back
(191.25)	wks. for the scheduled knee injury (425 wks. x 45%)
808.75	wks. subtotal after subtracting PPD for the scheduled injury
x 5%	PPD for back injury
40.44	wks. adjusted total for the back injury

191.25	wks. for the knee injury
40.44	wks. adjusted total for the back injury
8.09	wks. for multiple-injury adjustment (40.44 wks. for back x 20% = 8.09)
239.78	wks. final total payable on PPD

9.0 Disfigurement Claims

There is also an additional allowance for injuries with resulting disfigurement, if the disfigurement is such that it would be likely to cause future wage loss. Note that the award for disfigurement only applies to disfigurement (usually scarring) of parts of the body that are exposed in the course of the employment. Wis. Stat. § 102.56 provides as follows:

> **102.56 Disfigurement**. (1) If an employe is so permanently disfigured as to occasion potential wage loss, the department may allow such sum as it deems just as compensation therefor, not exceeding the employe's average annual earnings as defined in s. 102.11. In determining the potential for wage loss and the sum awarded, the department shall take into account the age, education, training and previous experience and earnings of the employe, the employe's present occupation and earnings and likelihood of future suitable occupational change. Consideration for disfigurement allowance is confined to those areas of the body that are exposed in the normal course of employment. The department shall also take into account the appearance of the disfigurement, its location, and the likelihood of its exposure in occupations for which the employe is suited.
>
> (2) Notwithstanding sub. (1), if an employe who claims compensation under this section returns to work for the employer who employed the employe at the time of the injury at the same or a higher wage, the employe may not be compensated unless the employe shows that he or she probably has lost or will lose wages due to the disfigurement.[90]

Note that Wis. Admin. Code § DWD 80.50(3) provides that:

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[89] Wis. Stat. § 102.53(4). The statute appears at page 24 of this outline.

[90] *Department footnote (from DWD's pamphlet edition of the Worker's Compensation Act, WKC-1-P)*: This amendment provides that if an injured employe returns to work for that employer for whom he or she worked at the time of the injury without any wage loss, then the employe is not entitled to compensation for disfigurement. However, the employe may show that he or she has or will sustain a wage loss because the disfigurement has impaired his or her ability to obtain other employment. The standard of proof at this level is "probable" rather than "potential."

> (3) Multiple injury factors under 102.53, Stats., do not apply to compensation for disfigurement under s. 102.56, Stats.

You need to keep in mind that compensation for disfigurement under Wis. Stat. § 102.56 is based only upon consideration of the *appearance* of his injury, insofar as the appearance of the injury would impact upon the employee's ability to earn a living. Such compensation does not take into account any resulting disability in terms of loss or impairment of bodily function, since that disability is separately compensated by the permanent partial disability (PPD) benefits.

Section 102.56 allows an award for disfigurement in an amount up to a maximum of the employee's average annual earnings as defined in section 102.11. Section 102.11(2) provides that the average annual earnings referred to in the Worker's Compensation Act shall consist of fifty times the employee's average weekly earnings.

The statute, section 102.56, allows compensation for disfigurement but does not define that term. *Black's Law Dictionary* defines disfigurement as:

> That which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.[91]

Wis. Stat. § 102.56(1) allows compensation for disfigurement and provides that in determining the potential for wage loss and the sum awarded, the Department shall take into account various factors including the injured employee's:

- age,
- education,
- training,
- previous experience and earnings,
- present occupation and earnings, and
- likelihood of future suitable occupational change.

The statute further requires consideration of the appearance and location of the disfigurement, as well as the likelihood of its exposure in occupations for which the employee is suited.
An employee seeking compensation for disfigurement may claim to have applied for various jobs but without being hired. The employee will then contend that the disfigurement from the employment injury had prevented him or her from being hired. However, it may be more likely that the employee's resulting permanent partial disability in terms of loss or impairment of bodily function was the reason the employee was having trouble finding or keeping a job.

The case law has established that the question of whether disfigurement would occasion potential wage loss is a mixed question of law and fact. The nature of the disfigurement and the extent to which the occupation requires public contact are questions of fact. Whether the employee's disfigurement will occasion potential wage loss is a question of law.[92]

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[91] H. Black, *Black's Law Dictionary* (4th ed. 1968).
[92] *Kenwood Merchandising Corp. v. LIRC*, 114 Wis. 2d 226, 230, 338 N.W.2d 312, 314 (Ct. App. 1983), *Evans Bros. Co. v. LIRC*, 113 Wis. 2d 221, 225–26, 335 N.W.2d 886, 888 (Ct. App. 1983), *Eaton Corp. v. LIRC*, 122 Wis. 2d 704, 708, 364 N.W.2d 172, 174 (Ct. App. 1985).

As noted by the court of appeals in *Eaton Corp. v. LIRC*, 122 Wis. 2d 704, 709, 364 N.W.2d 172, 174 (Ct. App. 1985):

> Eaton also argues that the examiner failed to articulate any reasons for the $12,000 award. Section 102.56, Stats., provides in part as follows: "If an employe is so permanently disfigured as to occasion potential wage loss, the department may allow such sum as it deems just therefor, not exceeding the employe's average annual earnings . . . ." This section affords the department substantial leeway in calculating a sum to compensate workers who most likely will never know the full extent to which their disfigurements reduced their wages.

Thus, the resulting permanent partial disability in terms of loss or impairment of bodily function is compensated separately from the disfigurement. The impact of the disfigurement on the employee's earning capacity must be evaluated independently of the consequences of the loss or impairment of bodily function. In a particular case other factors, such as the employee's lack of education and vocational training together with the employee's limited previous work experience, may have already caused the employee to have very limited occupational opportunities. The employee's resulting permanent partial disability in terms of loss or impairment of bodily function may have resulted in even more limited employment prospects. On that basis it may difficult to see how the appearance of the disfigurement alone would itself be likely to result in significant potential wage loss beyond that which already existed because of the various other factors.

10.0 Permanent Total Disability (PTD) Claims

When an employee sustains permanent disability that results in a 100% loss of earning capacity, the employee is then considered permanently totally disabled. Keep in mind that only certain employees with permanent disability resulting from a *non-scheduled* injury may be entitled to additional permanent disability benefits in the form of compensation for a resulting loss of earning capacity. The same is true for permanent total disability claims. That is, the employee must have sustained permanent disability resulting from a *non-scheduled* injury.[93] Furthermore, such a claim is still subject to the 85% rule.[94]

For permanent total disability (PTD), the employee receives weekly benefits for life. Wis. Stat. § 102.44(2) provides:

> (2) In case of permanent total disability aggregate indemnity shall be weekly indemnity for the period that the employe may live. Total impairment for industrial use of both eyes, or the loss of both arms at or near the shoulder, or of both legs at or near the hip, or of one arm at the shoulder and one leg at

[93] There is an exception for rare cases involving certain combinations of multiple scheduled injuries: (1) total loss of the industrial use of both eyes, (2) loss of both arms at or near the shoulder, (3) loss of both legs at or near the hip, (4) loss of one arm at the shoulder and one leg at the hip. In such cases, the employee is entitled to permanent *total* disability benefits. Wis. Stat. § 102.44(2). We also have a 2000 decision by the supreme court holding that a claim for *permanent total disability* may be based upon the combined limitations resulting from a non-scheduled injury and a scheduled injury. *Mireles v. LIRC*, 2000 WI 96, ¶ 63–70, 237 Wis. 2d 69, 613 N.W.2d 875 (2000).

[94] The 85% rule under Wis. Stat. § 102.44(6) is discussed at page 31 of this outline.

> the hip, constitutes permanent total disability. This enumeration is not exclusive, but in other cases the department shall find the facts.

Permanent total disability (PTD) benefits are payable at the same rate as for temporary total disability (TTD) benefits.[95] That is, the employee receives 2/3 of the gross average weekly wage on the date of injury — up to the maximum rate for the year of injury — for life. For injuries in 1999 the maximum rate for TTD and PTD is $538 per week. For injuries in 2000 the maximum rate for TTD and PTD is $549 per week.

For example, assume that an employee suffered a non-scheduled injury in 1999; the employee was earning enough to qualify for the maximum 1999 rate for permanent total disability ($538 per week); and the employee was permanently, totally disabled as a result of the injury. The employee would then receive $538 per week, for life.

When an employee is permanently totally disabled there is also a substantial death benefit payable when the employee dies, as provided by Wis. Stat. §§ 102.46 and 102.47(1). The death benefit is 200 times the average weekly earnings.[96] The death benefit is paid to the surviving dependents of the deceased employee, in weekly installments at the same rate as the permanent total disability benefits.[97] If there are no surviving dependents as defined by statute, then the death benefit is paid to the state work injury supplemental benefit fund in five equal annual installments.[98]

Thus, if an employee has an average weekly wage of $500 and becomes permanently total disabled as a result of a 1997 injury, then the death benefit is $500 x 200 = $100,000. The statutory maximum average weekly wage for the year of injury applies. For example, if an employee earns $800 and becomes permanently totally disabled as a result of a 1997 injury, the 1997 maximum weekly wage of $763.50 applies. The death benefit would be $763.50 times 200, for a total of $152,700.

The death benefit payable is reduced over a period of time as the employee receives permanent total disability benefits. That is, there is a cap on the maximum death benefits payable. Wis. Stats. section 102.46 provides that the permanent total disability benefits paid to the employee plus the death benefit, may not exceed 1,000 weeks of permanent total disability benefits. Thus, if the employee receives a full 1,000 weeks (19.23 years) of permanent total disability benefits, then the death benefit is reduced to zero.

For example,

- An employee has a gross average weekly wage of $600. The employee becomes permanently totally disabled as a result of a 1996 injury.

---

[95] Wis. Stat. § 102.11(1).
[96] Wis. Stat. §s 102.46 and 102.47(1) provide for a death benefit that is four times the average annual earnings. The average annual earnings are defined by Wis. Stat. § 102.11(2) as 50 times the average weekly earnings.
[97] Wis. Stat. 102.48(3).
[98] Wis. Stat. 102.47(1) and 102.49(5). Note that in many recent years the state work injury supplemental benefit fund has been over-funded, so that no contribution was required.

- The employee then dies after receiving permanent total disability benefits of $400 per week for 800 weeks (about 15.4 years), for a total of $320,000.

- The total of the PTD benefits plus the death benefit may not exceed the statutory maximum: 1,000 weeks x $400 = $400,000.

- Therefore, the death benefit is *not* 200 times $600 for a total of $120,000. The death benefit would instead be reduced to $80,000. That is, the death benefit would capped at the maximum of $400,000 when added to the PTD benefits paid:

$320,000	paid on PTD benefit up to the time of death (800 weeks @ $400)
80,000	payable as the death benefit
$400,000	the combined maximum under Wis. Stat. § 102.46

There is also a burial expense payable, based upon the year of injury. For injuries in 1996–1999 the burial expense is subject to a maximum of $6,000 under Wis. Stat. sec. 102.50. If the death was unrelated to the injury that caused permanent total disability then section 102.47(1) provides that the burial expense is subject to the cap on the maximum payable under section 102.46. For example, in the example described above the death benefit would be reduced to $80,000, and up to $6,000 of that amount would be applied first on the burial expense, leaving a net death benefit of $74,000.

If the death is a result of the injury that caused the permanent total disability, then the burial expense is in addition to the death benefit, as provided by Wis. Stat. § 102.46 and 102.50.

If the death resulted from the same injury that caused the permanent total disability, then there is an additional payment of $5,000 to the state treasury, as provided by Wis. Stat. 102.49(5)(a).

11.0 Benefit Calculation Worksheets

When you receive a report from a physician or other practitioner that evaluates resulting permanent disability and you submit the report to the Worker's Compensation Division, you then receive back a benefit calculation worksheet. The benefit calculation worksheet merely shows the dollar amount that would be due for the permanent disability benefits on the basis of the physician's report that has been submitted.

There is a great deal of confusion about such benefit calculation worksheets. Far too many people doing worker's compensation claims management do not understand what a benefit calculation worksheet represents. Some people actually think the Worker's Compensation Division is "approving" a practitioner's rating of permanent partial disability as being a reasonable and appropriate assessment of the resulting permanent disability. Some people think it is a formal order for payment that cannot be disputed. Some people think that payment according to a benefit calculation worksheet somehow finalizes a claim. They are all mistaken.

A benefit calculation worksheet is merely a mathematical computation of the permanent disability benefits that would be payable on the basis of the practitioner's report that has been submitted. The benefit calculation worksheet does *not* mean that the Worker's Compensation Division is "approving" a practitioner's rating of permanent partial disability as being a reasonable and appropriate assessment of the resulting permanent disability. In the vast majority of claims the Division doesn't have nearly enough information available to make a meaningful determination as to whether the rating is reasonable and appropriate.

Keep in mind that the Division does not independently investigate worker's compensation claims. Ordinarily, they only have the medical reports and records that have been filed by the insurer. In many cases they would only have one single page of medical information, in the form of a final report by a treating practitioner on a WKC-16 form. For that reason they are in no position to determine whether a particular practitioner's report is a reasonable and appropriate assessment of the resulting permanent disability.

For example, assume that the injured employee has suffered a minor back strain with four weeks of lost time and the treating chiropractor submits a final report evaluating permanent partial disability of 15% of the body as a whole. Such a rating is obviously ridiculous, but when you submit it to the state they will just send you a benefit calculation worksheet showing the calculation for 15% PTD, equaling 150 weeks of PPD benefits. The benefit calculation worksheet is just a mathematical calculation and it tells you absolutely nothing about whether the rating is reasonable and appropriate.

A benefit calculation worksheet is usually accompanied by a form letter (WC93F), that states, "Our computation of the permanent partial disability due is attached. Let us know immediately if you do not make payment as shown." The form letter may also note that, "This worksheet is final. When the final payment is made, send a final WKC-13."

Are you required to make payment of the amount calculated on the benefit calculation worksheet? Notwithstanding the wording of the form letter, neither the form letter nor the benefit calculation worksheet is an order for payment. Whether you have to make payment according to the benefit calculation worksheet depends upon whether you have a valid basis for refusing to make payment.

For example, if you believe the treating practitioner's rating of permanent disability is excessive, you have the option of scheduling an independent medical exam to seek another opinion on the extent of any resulting permanent partial disability. If you have a report on an independent medical exam that evaluates a lower percentage of resulting permanent disability then you are, of course, entitled to rely upon that report in refusing to make payment of any other percentage that has been rated by a treating practitioner.

You also need to understand benefit calculation worksheets that are computed on a mid-point as between two different ratings of permanent disability. For example, assume the treating practitioner submits a report evaluating resulting permanent partial disability from a shoulder injury as being 30% loss of use of the arm, as compared to amputation at the shoulder. The insurer has an independent medical exam performed and obtains a PPD rating of 10% at the

shoulder. If you submit both reports to the Worker's Compensation Division you will receive a benefit calculation worksheet showing the computation of PPD for 20% at the shoulder. The 20% is merely the mid-point as between 10% and 30%. Again, such a benefit calculation worksheet is just a mathematical calculation and it does *not* mean that the Division is approving such a rating a being the appropriate figure for the particular injury.

Whether you should make payment on the mid-point figure as calculated in the benefit calculation worksheet depends upon whether you feel it is likely to conclude the claim. This depends upon whether the employee is likely to just accept payment of the mid-point figure without demanding more. Using the above example, if the employee with the injured shoulder is already indignantly demanding to be paid the full amount on the basis of the treating practitioner's rating, then why would you want to pay the mid-point figure? The employee will then just file a Hearing Application to start a contested worker's compensation proceeding and you will be in a poor position to negotiate a reasonable settlement if you have already made payment on the mid-point figure.

12.0 Disputes as to the Extent of Resulting Permanent Disability

12.1 Disputing PPD Ratings by Treating Practitioners

An amendment to Wis. Stat. § 102.32(6), as to payment of permanent disability benefits, also provides that the Department is supposed to promulgate an administrative rule for conceded injuries when an insurer wishes to dispute the permanent disability rating by a treating practitioner.[99] Therefore, as of May 2004, there is a proposed administrative rule that is tentatively to be effective July 1, 2004.[100] The proposed new rule, Wis. Admin. Code § DWD 80.52, provides as follows for the payment of permanent disability benefits:

> **DWD 80.52 Payment of permanent disability where the degree of permanency is disputed.** Where injury is conceded, but the employer or the employer's insurer disputes the extent of permanent disability, payment of permanent disability shall begin:
>
> (1) Within 30 days of a report that provides the permanent disability rating, in the amount of the permanency set forth in the report; or
>
> (2) Within 30 days after the employer or insurer receives a report from an examination performed under s. 102.13(1)(a), Stats., in the amount of the permanent disability found as a result of that medical examination, if any. If such an examination had not previously been performed, the employer or employer's insurer must give notice of a request for such an examination within 30 days of a receiving a report that establishes the permanent disability under sub. (1), and in the event that a report from the examination is not available within 90 days of the request for the examination, the employer and insurer

[99] Wis. Stat. § 102.32(6), as amended by 2003 Wisconsin Act 144, § 23, effective 3/30/04.
[100] Proposed Amendments to Wis. Admin. Code Chapter DWD 80, Wisconsin State Legislature, Revisor of Statutes Bureau, Clearinghouse Rule 03-125.

> shall begin payment of the permanent disability set forth in the report under sub. (1).

12.2 Litigated Claims

If there is a dispute as to the extent of resulting permanent partial disability in terms of medical impairment or functional disability, the claim may be litigated before an administrative law judge (ALJ). The ALJ is limited in deciding what percentage of permanent partial disability should be awarded as between the lowest figure and the highest. Wis. Stat. § 102.18(1) provides, in part:

> (d) Any award which falls within a range of 5% of the highest or lowest estimate of permanent partial disability made by a practitioner which is in evidence is presumed to be a reasonable award, provided it is not higher than the highest or lower than the lowest estimate in evidence.

For example, assume that one physician evaluated resulting PPD of 5% loss of use of the arm at the shoulder and another physician rated the same injury at 25% loss of use of the arm at the shoulder. If the claim is litigated, in making an award of PPD the ALJ could go up as much as 5% from the lowest figure (5% + 5% = 10%), or could come down as much as 5% from the highest figure (25% - 5% = 20%). The ALJ would *not* be able to just split the difference and award the mid-point figure of 15% PPD.

If a claim is being litigated as to extent of a resulting loss of earning capacity the ALJ has considerably more latitude. Such claims are ordinarily decided on the basis of evaluations by vocational consultants, but the ALJ can instead make his or her own determination as to the extent of the resulting loss of earning capacity on the basis of all of the evidence at the hearing.[101]

12.3 Compromise Settlements

A disputed worker's compensation claim may be resolved on a compromise settlement but the settlement must be approved by the Worker's Compensation Division or it is invalid. To obtain approval of a compromise settlement you must have a *bona fide* dispute. Wis. Admin. Code § DWD 80.03 lists some of factors considered by the Department in deciding whether to approve a compromise settlement. If the only dispute is the extent of resulting permanent partial disability in terms of medical impairment or functional disability, there must be a substantial difference as between the ratings of disability. DWD 80.03(3) provides, in part:

> (3) Section 102.16(1), Stats., places upon the department the responsibility for reviewing, approving, modifying, setting aside and issuing awards on compromise agreements. The action that is taken on any individual claim is dependent upon the facts, circumstances and judgment of the merits of compromise in that specific case. In arriving at a judgment of the merits the department will take into account the following general considerations:
>
> (a) Medical reports, statements or other information submitted by the parties to show that there is a genuine and significant basis for a dispute between the parties.

[101] Wis. Stat. § 102.17(7)(a).

> (b) Estimates of the disability by the physicians, chiropractors or podiatrists which do not vary significantly in estimates of the scheduled or nonscheduled disability will not be presumed to demonstrate a basis for dispute.

As a general rule the Department requires that there must be at least a 10-point difference between ratings of PPD. Thus, if one practitioner rated the PPD at 5% and another practitioner rated the same injury at 10%, you would only have a 5-point difference and that would not be considered enough of a dispute to obtain approval of a compromise settlement.

13.0 Vocational Retraining Claims

If an employee has resulting permanent partial disability from either a scheduled or non-scheduled employment injury, the employee would ordinarily have the option of claiming vocational retraining benefits, especially if the employee was not able to return to work with the same employer. Such employees may claim the costs of retraining on a rehabilitation program through the Wisconsin Division of Vocational Rehabilitation (DVR).[102]

The costs of retraining would include maintenance, meals, and mileage, during the retraining program. The "maintenance" is paid at the same rate as the temporary total disability benefits, while the employee is being retrained. DVR ordinarily pays for the tuition and books.[103]

The goal of such a vocational retraining program is to restore the employee to the pre-injury earning capacity.[104] If the employee suffered a non-scheduled injury with a resulting loss of earning capacity, then upon completion of a successful retraining program, the loss of earning capacity should be reduced to zero.

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[102] Wis. Stat. §s 102.43(5) and 102.61, and Wis. Admin. Code § DWD 80.49.
[103] There is now a separate private vocational retraining program for employees who are not eligible for DVR services because they are considered to be non-severely disabled. On such private retraining programs the insurer or self-insured employer is liable for all of the expenses of the retraining, including books and tuition. Wis. Stat. § 102.61(1m) and Wis. Admin. Code § DWD 80.49.
[104] Wis. Admin. Code § DWD 80.49(1) and (3).

About the author . . .

Philip Lehner received his undergraduate degree from Northwestern University in 1970 and his J.D. from the University of Wisconsin Law School in 1973. He practices with the Racine firm of GRAHOVAC & KALLENBACH, S.C. His practice is limited exclusively to the defense of worker's compensation claims for employers and insurance carriers throughout the state. He is a frequent lecturer and author on Wisconsin worker's compensation law and claims management. He served as the chairperson of the Wisconsin Manufacturers & Commerce (WMC) Worker's Compensation Council for 1994–1999. He served as the president of the Wisconsin Association of Worker's Compensation Attorneys (WAWCA) for 2003.

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Sample letter to treating practitioner to request final medical report

May 24, 2004

{ name and address of treating practitioner }

Employee: _____
Employer: _____
Insurer: _____
Social Security No.: _____
WC Claim No.: _____
Our Claim No.: _____
Date of Injury: _____
Re: **Request for final medical report**

Dear _____:

We are the [insurance carrier][self-insured employer][claims adjusting company][third party administrator] on the worker's compensation claim described above. We are writing to request a final medical report on this claim.

Whenever an injured employee has more than three weeks of temporary disability we are required by Wisconsin law to obtain a final medical report from the treating practitioner. The required report must address the issue as to whether there is any resulting permanent disability and, if so, to provide an estimate as to the extent of the resulting permanent partial disability. (Wis. Admin. Code § DWD 80.02(2)(e).) We are now writing to request that you provide us with a final medical report on this claim.

We are enclosing the state's standard WKC-16 form for your use. We particularly need your response to the question, "Has permanent disability resulted?" If you answer "Yes" to that question we then need you to fill in the next section as to the "Description of permanent disability." Please be sure to sign and date the form.

{ *Describe type of evaluation needed:* }

{ *Sample 1: non-scheduled injury* }

In view of the nature of the injury on this claim it would appear that the appropriate rating of any resulting permanent partial disability would be your estimated percentage of disability of the body as a whole, in terms of medical impairment or functional disability. May we now please have a final medical report on this claim.

{ *Sample 2: scheduled injury to arm/hand @ shoulder/elbow/wrist* }

Injuries to the extremities are to be evaluated by comparing to amputation at the nearest proximal joint of the affected part of the extremity. (Wis. Stat. § 102.55.) In view of the nature of the injury on this claim it would appear that the appropriate rating of any resulting permanent partial disability would be your estimated percentage of loss of use of the [arm as compared to amputation at the shoulder][arm as compared to amputation at the elbow][hand as compared to amputation at the wrist]. May we now please have a final medical report on this claim.

{ *Sample 3: scheduled injury to leg/foot @ hip/knee/ankle* }

Injuries to the extremities are to be evaluated by comparing to amputation at the nearest proximal joint of the affected part of the extremity. (Wis. Stat. § 102.55.) In view of the nature of the injury on this claim it would appear that the appropriate rating of any resulting permanent partial disability would be your estimated percentage of loss of use of the [leg as compared to amputation at the hip][leg as compared to amputation at the knee][foot as compared to amputation at the ankle]. May we now please have a final medical report on this claim.

Your assistance as the treating practitioner is essential. We appreciate your cooperation.

Very truly yours,

{ name of company }

{ name of claims representative/adjuster }

Wisconsin Department of
Workforce Development

Worker's Compensation Division
201 E. Washington Ave., Rm. C100
P.O. Box 7901
Madison, WI 53707-7901
Telephone: (608) 266-1340

MEDICAL REPORT ON INDUSTRIAL INJURY

Personal information you provide may be used for secondary purposes, (Privacy law, s. 15.04(1)(m).

PATIENT

WC Claim Number	Employee name	
Social Security Number	Employee Address	
Injury Date	Employer Name	Insurance Company

HISTORY

History as described by patient

DIAGNOSIS
(Please be as detailed as possible)

PERMANENT DISABILITY

(Describe permanent elements of disability such as limitation of motion, pain, weakness, etc. and describe effect on working ability.)

What amputation present?	Comparative x-rays taken? ☐ Yes ☐ No	Stump: ☐ hardy or ☐ tender

Has permanent disability resulted? ☐ No ☐ Yes	Date of Last Exam	Has healing period ended? ☐ Yes ☐ No	Patient discharged? ☐ Yes ☐ No

Description of permanent disability. (Record finger motion losses on reverse.)

Was surgery performed as a result of accident? ☐ Yes ☐ No If Yes, state type of surgery:

If healing has not ended, what is minimum permanent disability expected?

PRIOR DISABILITY

What previous disability?

PROGNOSIS

Prognosis:

Date injured was or will be able to return to a limited type of work, and state any limitations:

Date injured was or will be able to return to full-time work subject only to permanent limitations:

What further treatment should be given?

Additional comments, if any:

Date	City	Signature of physician or chiropractor (in own writing)
	Phone No. ( )	Typed or Printed Name

WKC-16 (R. 10/2000)

*Claimant Name:*_____ *Claimant Social Security #:*_____-____-_____

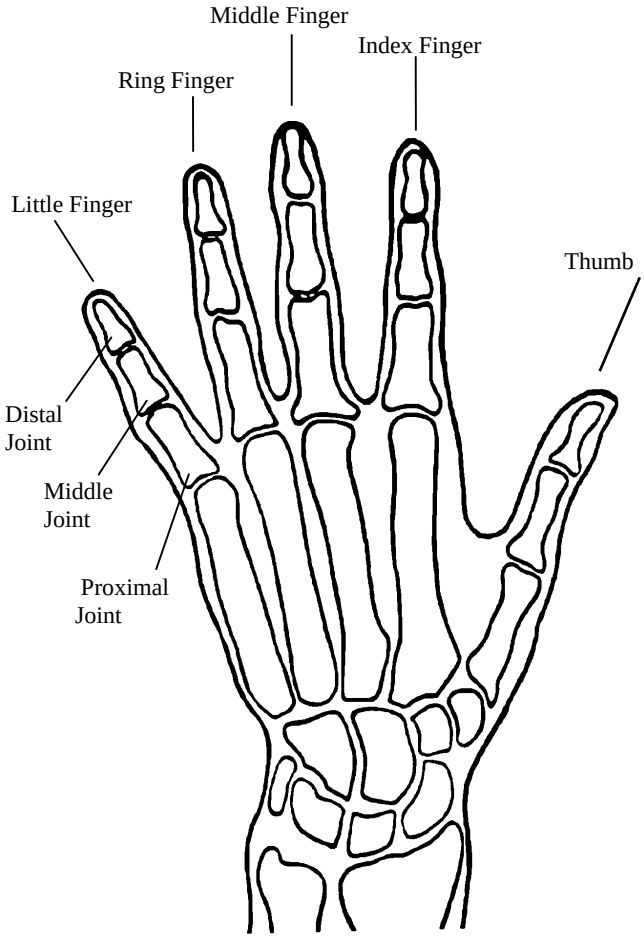
Instructions for finger injuries

Please use statutory terms in referring to fingers, such as thumbs, index, middle, ring, and little fingers, and distal, middle, and proximal joints. Where there is limitation of motion, list separately the normal range of motion in degrees, the "degrees" loss of flexion, and the "degrees" loss of extension for each joint of each finger. The Worker's Compensation Division will evaluate the loss of use due to loss of motion of the fingers.

Where there are other elements of disability of the fingers, such as deformity, weakness, pain, or lack of endurance, give your opinion on the percentage loss of use as compared to amputation for such elements of disability and specify the joint at which such loss is estimated.

Digit	**Joint**	**Angle Ext./Flex.**	**Normal Range of Motion**	**Degrees Loss Extension**	**Degrees Loss Flexion**	**Estimate** % loss of use for additional factors at joint involved and reason for additional allowance.
Thumb	Dist					
	Prox					
Index	Dist					
	Mid					
	Prox					
Mid	Dist					
	Mid					
	Prox					
Ring	Dist					
	Mid					
	Prox					
Little	Dist					
	Mid					
	Prox					

CIRCLE HAND INVOLVED: Right Left **DOMINANT HAND**: Right Left



Upon recommendation of the Disability Evaluation Committee consisting of members of the Wisconsin Orthopedic Society, DWD 80.32 (formerly Ind 80.32) was amended in 1975 to clarify and increase references to disabilities where a consensus exists. See this rule published in the Worker's Compensation text for guides to evaluation for amputations, restrictions of motion, ankylosis, sensory loss, and surgical results for disability to the hip, knee, ankle, toes, shoulder, elbow, wrist, fingers and back.

If fingertip amputation is present, submit comparative x-rays or a statement indicating whether the bone loss was less than one-third, between one-third and two-thirds, and more than two-thirds of the distal phalanx.

If amputation is below the distal joint, submit comparative x-rays.

WISCONSIN DEPT. OF WORKFORCE DEVELOPMENT

WORKER'S COMPENSATION DIVISION

Wisconsin Worker's Compensation Medical Report Handling Guidelines

October 19, 1998

A. Medical Reports -- Prompt Reporting

When are medical reports required and when should they be sent to the Division?

Medical reports are required, under Wis. Admin. Code § DWD 80.02(2)(e) whenever:

1. temporary disability exceeds 3 weeks; or
2. permanent disability has resulted from the injury.

Medical reports should be sent to the Division once the worker has been released to return to work or has reached maximum medical improvement at the end of the healing period.

When does the Division follow up to ensure medical reports are received?

The Division will routinely follow up to request a medical report eight months after it receives information, usually from a WKC-13, indicating:

1. the worker has met the requirements of Wis. Admin. Code § DWD 80.02(2)(e); and
2. the worker been released to return to work or has reached the maximum medical improvement level.

Does the Division make "non-routine" requests for medical reports?

Yes. The Division will make non-routine requests for medical reports, especially when it receives information that there has been an evaluation of permanent disability and the worker is requesting payments or an advancement on payments due for a permanent disability.

When does the Division assess a forfeiture for failure to submit a medical report?

The Division will issue a $100 forfeiture under sec. 102.35, Wis. Stats., for any failure to respond to requested information, including medical reports, within 30 days of such request. If a carrier or employer is unable to obtain a medical report within the 30-day period, it must notify the Division of the circumstances to avoid issuance of the forfeiture.

B. Medical Reports -- Final and Complete

Why does the Division request medical reports after one has already been submitted?

Some medical reports that are submitted to the Division routinely by medical providers or by carriers and employers do not clearly indicate that there is no permanent disability or that maximum medical improvement has been reached. In such instances, the Division considers the medical report to be a "not-final" report and will request a "final" medical report.

What criteria does the Division use to determine that a medical report is final?

Final medical reports:

a) include a statement by the doctor stating whether or not any permanent disability resulted from the work injury; and,

b) must be based on an examination after the end of healing and after the employee has been released from treatment or is receiving treatment strictly to maintain the health of the worker, not to improve the worker's condition;

c) must be completed by the treating doctor;

d) must be based on Admin. Code § DWD 80.32 (formerly Ind 80.32) when applicable.

Not-final medical report includes:

a) those dated prior to the release to return to work;

b) IME medical reports;

c) medical reports based on AMA guidelines rather than Admin. Code § DWD 80.32;

d) final medical reports which are followed by a renewed period of temporary total or partial disability.

Note: You will receive better assistance as to when an additional medical report is required when you identify the medical report you are submitting as final or not final.

What are the most common areas where the Division requests further information on medical reports, especially those involving permanent disabilities?

When submitting medical reports showing permanent disability, the Division needs completed medical reports in order to do the estimated benefit calculation worksheet. Admin. Code § DWD 80.32 (formerly Ind 80.32) provides complete detailed rules concerning permanent disabilities. The following are areas for which we most often need to request additional information:

Finger injuries:
Both sides of the WKC-16 (medical report) should be completed when there is any motion loss. This includes all degrees of loss of motion and percentages for any other elements;

Comparative x-rays for all amputations beyond the distal joint;

Identification of dominant hand for amputations after January 1, 1994.

Eye injuries:
The WKC-16A, Physician's Report for Eye Injuries, should be completed.

Knee injuries:
When any surgery was performed, name the type of procedure and include a copy of the operative report.

Back injuries:
When any surgery was performed, state the type of procedure, the number of levels involved and a copy of the operative report(s).

C. Medical Reports -- Internal Division Processes Only

Do Worker's Compensation Division staff have some form of desk guide or "cheat sheet" that helps them decide how to interpret medical reports?

Yes. The following guide is currently being used by staff as a day to day desk reference and has been used as a training tool:

NOT FINAL MEDICAL REPORTS

Permanent Disability (possible ppd)
When the medical report contains any of the following words, it is likely there will be some ppd:

surgery	meniscectomy	loss of motion	
inversion	eversion	ankylosis	limitation of motion
radial nerve	sensory loss	fusion	motor
torn	articular	ACL (anterior cruciate ligament)	keloid scarring (could be possible disfigurement)

Send these reports to a specialist to request more information at a later date or do a "not final" estimate. If you see a word that ends in, "ectomy" or "otomy" it means part of the body has been removed and the report should also be sent to a specialist as a possible case for an estimate of permanent disability.

FINAL MEDICAL REPORTS

Definite Permanent Disability (ppd)
When the medical report contains any of the following words, consider it as a final report and assume that there will be ppd:

amputation
ulnar nerve paralysis
loss of extension
contracture (scarring which pulls causing loss of motion)
arthroscopic (examination of the interior of a joint) note: you must read the report further to see if the meniscus was removed. If not sure, send to a specialist.

laminectomy or fusion (send to a specialist)
carpal tunnel (ppd unless the doctor states there is no permanent disability. Usually there is some % of disability given)

No Permanent Disability (accept as no ppd)

When the medical report contains any of the following words, assume that there will not be any ppd:

myofascitis (muscle strain)
hernias (no ppd unless a doctor gives a disability rating)

MIXED-FINAL AND NOT FINAL MEDICALS

Special Instructions for Specific Injuries

Dermatitis:

a. If worker HAS returned to work, treat the medical as final and close the claim.

b. If worker HAS NOT returned to work, treat the medical as not final and send medical to a specialist.

Burns on face and/or arms:

a. Send GL07 (possible disfigurement) to worker asking for information regarding disfigurement for a possible wage-loss situation. This will be reviewed later by a law judge even if the claim is litigated.

Eye injuries:

Refer all to a specialist whether or not it says ppd to assess permanent disability or set a follow-up.

Miscellaneous Special Instructions

When the doctor checks NO PPD on the report but the worker is still being treated except strictly for maintenance, and is not discharged from treatment, enter as a not final medical. The MONINS (quarterly follow-up system) will generate the follow-up to these reports.

The words “return to work without restrictions” is only to be considered as a final if the report includes a statement from the physician that permanent disability does not exist. Whenever there is a possibility or indication of permanent disability, treat it as a not-final medical report and refer it to a specialist and do not close the claim.

If you receive information from a carrier or employer that an injured worker does not cooperate and goes back to the doctor, send a GL10 letter instructing him/her to go back to the doctor for a final medical. If there is no reply to the GL10 in 30 days, close the claim.

Treat all IME reports as not final and send to a specialist.

When in doubt, treat the medical as not final and send medical reports to a specialist.