

# **APPEALS TO LIRC--WHAT THE COMMISSION IS LOOKING FOR<sup>1</sup>**

## **WAWCA Worker's Compensation Seminar--July 17, 2003**

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### **1. General procedural requirements for appeal to LIRC**

#### **1.1 Petition for commission review--Wis. Stat. § 102.18(3); Wis. Admin. Code §§ LIRC 1.02, 3.01**

**1.11** An interested party may file a petition for commission review of an ALJ decision "awarding or denying compensation." To be timely, a party's petition for review must be received by LIRC or the Worker's Compensation Division (WC Division) within 21 days after the department mailed a copy of the ALJ's order to the party's last known address. Wis. Stat. § 102.18(3). "Received" means physical receipt. Wis. Admin. Code § LIRC 1.02. A postmark is not sufficient.

**1.12** A petition for review may be filed at: the central administrative office of WC Division, the Appleton or Milwaukee offices of the WC Division, or LIRC.

The commission's address is: 3319 West Beltine Highway  
PO Box 8126  
Madison, WI 53708

The addresses for the Worker's Compensation Division offices are at Wis. Admin. Code § LIRC 3.01.

**1.13** A petition for review may be faxed; the date of filing is the date of transmission. Wis. Admin. Code § LIRC 1.025.

The commission's fax number is (608) 267-4409.

**1.14** The 21-day period for filing a petition for review is calculated by excluding the first day and including the last. Wis. Stat. § 990.001(4)(a). Legal holidays and other "last" days extending the 21-day deadline are set out at Wis. Admin. Code § LIRC 1.02.

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<sup>1</sup> These materials, prepared for a continuing legal education seminar by a LIRC staff attorney, should not be construed as an official statement of commission policy on any issue.

**1.15** LIRC must dismiss an untimely petition unless the petitioner shows probable good cause that the reason for failure to timely file was beyond the petitioner's control. Wis. Stat. § 102.18(3).

**1.16** There are no statutory or rule requirements for the form or content of a petition. However, the WC Division provides form WKC-28 "Petition for Review of Findings and Order of Administrative Law Judge." If briefs are not requested, the petition should follow the WKC-28 format by setting out the specific findings which the petitioner claims are in error.

A party may use the petition--or the cover letter accompanying the petition--to request briefing (and a copy of the hearing synopsis) if desired.

**1.17** "Cross-petitions" are subject to the statutes and rules governing petitions for review generally, including the requirement of receipt within 21 days after the ALJ's order is mailed. Wis. Admin. Code DWD § 1.026.

**1.18** The petitioner should send copies of the petition to opposing counsel. The WC Division sends a notice to all attorneys and interested parties on form WKC-128-E after LIRC or the WC Division has received a petition.

## **1.2 Answers to a petition for review--Wis. Admin. Code § LIRC 1.027**

**1.21** A party may file an answer to the petition with the commission within 21 days after the party receives the petition. Wis. Admin. Code § LIRC 1.027

**1.22** Answers to a petition for review are not required, but should be filed if no one has requested briefs. A party may wish to use the answer to request briefs if the other party has not requested briefing.

**1.23** An answer should not be used as a substitute for a petition to challenge the ALJ's order, especially if the 21-day period for a timely petition for review has passed.

**1.24** A copy of the answer should be sent to opposing counsel.

### **1.3 Briefs--Wis. Admin. Code § LIRC 1.07**

**1.31** Either party may, in the petition or the answer or in writing afterward, request briefs. Wis. Admin. Code § LIRC 1.07. Requests (other than in petitions filed with the WC Division) should be sent to the commission directly.

**1.32** Requests for briefs made in a timely petition or answer are always granted. Requests for briefs thereafter may be denied if the commission has already reviewed the case but not yet issued its decision.

**1.33** The commission issues a briefing schedule about a week after the WC Division forwards the hearing record and ALJ synopsis to the commission. The commission usually gives 21 days for the petitioner's main brief, 21 days more for the opposing party's response, and 14 days more for the petitioner's reply.

**1.34** A party may request an extension for time to file a brief in writing; extensions are granted for good cause shown. Obviously, getting the other parties to agree to an extension will expedite an extension request, but the commission discourages parties from simply setting their own briefing schedules without prior approval from the commission.

**1.35** There are no rules regarding compliance with briefing deadlines. LIRC considers a brief--unlike a petition--timely if postmarked by the last day to file. Briefs--again unlike petitions--should not be faxed.

**1.36** The brief should be sent to LIRC directly. Send a copy of a request for briefs, an extension request, and your brief to opposing counsel.

**1.4 Oral argument.** Oral argument to the commission is provided for under Wis. Admin. Code § LIRC 1.06, but in practice has been rarely granted.

**1.5 Questions.** Nonsubstantive questions about filing a petition or a brief may be directed to Sue Brown, LIRC's legal secretary, at (608) 266-0694.

## **2. How the commission reviews a file--Informal internal operating procedures**

**2.1 Generally.** The commission is an independent fact finder. It does not act as an appellate body, but under its own powers, and it makes its own decisions and findings. *State v. Industrial Commission*, 233 Wis. 461, 465, 289 N.W. 769 (1940). See also: *Anheuser Busch, Inc., v. Industrial Commission*, 29 Wis. 2d 685, 692, 139 N.W.2d 652 (1966); *Hakes v. LIRC*, 187 Wis. 2d 582, 589, 523 N.W.2d 155 (Ct. App. 1994).

The commission has the duty to find facts and determine the compensation, irrespective of the presentation of the case by counsel. *Miller Brewing Co. v. LIRC*, 173 Wis. 2d 700, 719-200, 495 N.W.2d 660 (1993); *United Parcel Service, Inc. v. Lust*, 208 Wis. 2d 306, 313-314, 560 N.W.2d 301 (Ct. App. 1997).

**2.2 The “LIRC appeal file.”** After a petition is received, the WC Division assembles a “LIRC appeal file” containing among other things the application for hearing, answer to the application, hearing notice, hearing exhibits, “WC summary sheet,” and ALJ’s decision.

The presiding ALJ prepares a synopsis of the hearing, which serves as a basis for the commission’s review. *Vasquez v. ILHR Department*, 39 Wis. 2d 10, 15, 158 N.W.2d 331 (1968); Wis. Admin. Code § LIRC 1.04. In general, LIRC does not obtain a transcript from the official reporter for review. However, the commission may direct preparation of a transcript if a party shows that the synopsis is not sufficiently complete and accurate to reflect relevant testimony. Wis. Admin. Code § LIRC 3.02.

**2.3 Initial commission review.** Upon completion of the synopsis, the “LIRC appeal file” is sent to LIRC. If briefs have not been requested the individual commissioners do their initial review. If briefs have been requested, LIRC issues the briefing schedule, and the individual commissioners do their initial review after receipt of the last brief.

**2.4 “Discussion case” versus “no-discussion affirmance.”** Following their initial review, the commissioners track a case either for the preparation of a “discussion memo” by a staff attorney or for the preparation of a decision affirming the ALJ without a discussion memo.

**2.5 No-discussion affirmance.** If the commission directs affirmance without a discussion memo, a staff attorney reviews the case. If the

attorney believes a discussion memo is warranted, he or she prepares one. Otherwise, the attorney drafts a decision affirming the ALJ's findings and order.

**2.6 Discussion case.** If the commission directs the preparation of a discussion memo, a staff attorney reviews the case and prepares a discussion memo. The commissioners review the discussion memo and the case file. In general, unless the commissioners all agree to affirm the ALJ's decision after reading the discussion memo and reviewing the file, they meet to discuss the case with the staff attorney. Where necessary, the commission consults with the presiding ALJ concerning witness credibility or demeanor. *Transamerica Ins. Co. v. ILHR Department*, 54 Wis. 2d 272, 282-84, 195 N.W.2d 656 (1972); *Hermax Carpet Mart v. LIRC*, 220 Wis. 2d 611, 617-18, 583 N.W.2d 662 (Ct. App. 1998). The commission then reaches a decision, and the staff attorney drafts the appropriate findings and order.

**2.7 Decision review and signature.** The commissioners review the draft of the decision, and contact the staff attorney about any desired changes. A dissent, if any, is drafted. The final decision is signed.

### **3. Commission/Staff comments on briefs**

**3.1 Generally.** A brief to LIRC differs from a brief to court; remember the commission does a *de novo* review. Assume LIRC has some familiarity with worker's compensation law. Do not spend a lot of effort on background discussion.

LIRC only has Wisconsin reports; avoid bare cites to the Northwest. We also have a copy of Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*. While we have LEXIS, the staff attorneys prefer cites to the actual books rather than LEXIS, where possible.

#### **3.2 Format of brief.**

There are no formal requirements for captioning, content, format, spacing, font size, or length. Tables of authority and separate sections reproducing the full text of Wisconsin Statutes or Administrative Code are not necessary. Letter briefs are fine.

While the commission has no rules on format, it goes without saying that your brief should be readable, so your choice of font, font size, and spacing does matter. Two attorneys expressed a preference for text justified on both

sides. One attorney wrote “I am too old to be reading 10-point type.” One commissioner indicated a strong preference for 12-point, double-spaced type.

Subsection headings in the body of the argument help the reader return to the important points quickly, and are preferred. They almost always make the brief more readable and coherent, especially if short and to the point. However, remember that the commission will rely on your headings, and may not look elsewhere for arguments that should have been included under the heading as named.

Avoid the use of footnotes to make arguments or set out facts. Footnotes in general distract to the reader, requiring more time and effort to read than if the same text were just included in the body of the brief. Footnotes are fine for record, statute, or case cites.

Most reviewers view the general use of word-processing features like bulleted or numbered lists, tables, and boxed text, as a distraction, particularly when overdone. Some reviewers view the use of such features as an aid to organization, but the general feeling is that text is generally best left unadorned and unemphasized.

Most staff attorneys regard attaching exhibits or portions of exhibits as an appendix to the brief as unnecessary. Others find it helpful, at least in moderation. The commissioners, on the other hand, find such attachments most helpful, especially when tabbed and well-organized. One commissioner pointed out that attaching copies of exhibits allows the party to highlight the relevant portions of the exhibit with marker.

### **3.3 Elements of a brief.**

**3.31 Statement of case/Introduction.** Formal procedural recitals are not necessary.

An introduction should be as short as possible, but still set out the issues, the positions of the parties, and the specific action the petitioner wants the commission to take. In other words: Why are we here? What is the controlling issue? What does the party want?

**3.32 Facts.** The general preference, of course, is for brevity. An ALJ’s decision will often provide an adequate summary of the facts that does not need supplementation.

Consider limiting the separate “Facts” section to a highlight of the most salient facts, with a more detailed development of the facts--including disputed facts--in the applicable “Argument” section.

Stay within the record. Include clear cites to the record, especially for disputed or dispositive facts. (One reviewer notes that a discussion of the facts is helpful *only* if it includes record cites.)

Try to provide honest summaries of the facts that don't simply ignore the facts that help the other side

**3.33 Burden of proof.** Since it is an independent factfinder, the commission applies the "burden of proof" rather than a "standard of review." Unlike the court of appeals, whose standard of review varies depending on the issue or the type of case, LIRC applies the same general burden of proof--set out in *Leist*, *Bumpas*, *Erickson*, *Beem*, *etc.*--on most factual issues in most cases.

The commissioners and the attorneys are familiar with the cases setting out the standard of proof. A short accurate recital of the burden of proof is all that is needed in most cases. Regarding sections setting out the burden of proof, the general view of the staff attorneys may be best summed up by the comment: "Often unnecessary, but we can't very well ask the attorneys to dispense with them."

A recital of the standard of review that a court will apply to LIRC's decision in the event of further appeal is not necessary.

**3.34 Argument.** Make your point in general terms up front, then expand. WHERE FACTS ARE DISCUSSED IN AN ARGUMENT, INCLUDE RECORD CITES. When the application of the facts to a statute or case is involved, set out the legal framework by reciting the applicable statutory language or holding and explain how the facts apply to that framework. Don't just do one or the other.

In dealing with legal issues, case and statute cites are important. However, only one or two cases on a given point are necessary, as long as they are good law. An accurate restatement of the holding on point is critical, but long quotations or discussions of tangentially-related statutes or holdings should be avoided.

If there are several issues, organize them logically and discretely. For example, use separate paragraphs or sections to deal sequentially with the compensability of the alleged injury, TTD, functional PPD, LOEC, and medical expense. Make each argument only once.

Include "housekeeping" issues, even where not disputed such as mathematical errors in the computation of the award, in the argument section of the brief so they are not overlooked. A one-page,

post-hearing letter to the ALJ that raises a calculation error may not always be included in the “LIRC appeal file” or may be overlooked when the decision is being drafted.

The tone of the argument may be informal, but should be dispassionate and objective. Avoid exaggeration and unnecessary “oratorical flourish.”

Take the “high road.” Avoid characterizing the other side’s arguments as ridiculous or incomprehensible; citing the contrary authority makes the point more persuasively. Briefs with a personal or insulting tone lead the reviewer to wonder why the writer isn’t just concentrating on the facts and law.

Remain respectful of the ALJ even though you disagree with him or her. Even phrases like “The ALJ deliberately chose to ignore...” are unpersuasive to a reviewing attorney or commissioner who figures the ALJ was just doing his or her job.

Including short statements of alternative or “fall back” arguments for the same or similar result on an issue may be helpful depending on the case. The commission understands that including an alternative argument is not a concession that the main argument is deficient. On the other hand, this can be overdone, or “invite the commission to err” by basing its decision on a weaker argument which may be doomed on judicial review.

Remember the practical effect of the relief you seek. Where appropriate, provide the information necessary to draft the order or award. For example, when an applicant seeks reversal of an order dismissing the application, the brief should state what periods of TTD are claimed, and what percentage of PPD should be paid, not simply ask for reversal.

**3.35 Conclusion.** A lengthy restatement of the brief’s arguments, of course, is not necessary. In fact, an attempt to summarize an argument that was well stated in the body of the brief may diminish its force. Rather, specifically list each action you want the commission to take. Again, include “housekeeping” corrections, even though minor.