

WISCONSIN WORKER'S COMPENSATION UPDATE

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NEW FACE IN THE ARTHUR CHAPMAN WORKER'S COMPENSATION GROUP

MEET JESSICA L. RINGGENBERG



Jessica assists insurers, self-insureds, and third-party administrators with navigating the workers compensation claims process in both Minnesota and Wisconsin. Clients know Jessica to be the quiet force working for them behind the scenes and advocating on their behalf.

Jessica's experience working with the Conflict Resolution Center mediating cases in both Spanish and English serves her current clients well. She brings strong, active listening skills paired with the critical thinking skills to each case, working to find the best resolution possible.

With a travel list that includes Australia, Spain, China, Morocco, Italy, the United Kingdom, Ireland, France, and Germany, Jessica also brings international knowledge and acute curiosity to all she does.

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CASE LAW UPDATE

DECISIONS OF THE WISCONSIN SUPREME COURT

SUBROGATION

Adams v. Northland Equipment Company, Inc., 850 N.W.2d 272 (Wis. 2014). The applicant was a snowplow operator for the Village of Fontana. Approximately one year before the applicant sustained a work-related injury as a result of this employment, Northland Equipment had replaced the springs in the snowplow. The springs were designed to allow the snowplow to trip if it hit a solid object, such as a curb, so that it would slide over the object and then reset in proper position. The applicant was using this snowplow, struck a curb and alleged he sustained compression fractures to his spine as a result of the impact with the curb because the plow did not trip. The League of Wisconsin Municipalities Mutual Insurance Company (the worker's compensation insurer) was joined in a civil action that was brought by the applicant against Northland. As the claim proceeded through the civil litigation process, the applicant's likelihood of success in a jury trial became questionable. Northland Equipment's insurer made an offer of \$200,000.00 to settle the claim. The applicant refused to accept the settlement proposal. However, the League of Wisconsin Municipalities Mutual Insurance Company (the worker's compensation insurer) accepted the offer and sought court approval of the settlement. The court approved the settlement. The applicant appealed the court's decision approving the settlement. He argued that his constitutional right to a jury trial was denied. The applicant also asserted the court inappropriately exercised its discretion when he was not provided a mini-trial with respect to the merits of the case. The Court of Appeals affirmed the trial court's decision approving the settlement. The Court of Appeals held that the right to a jury trial applied only to causes of actions which existed in common law. The cause of action involved in this case was owned jointly by the worker's compensation insurer and the injured employee. This cause of action did not exist in common law at the time the Wisconsin Constitution was adopted, and instead only came into being when the Worker's Compensation Act was adopted. Therefore, the constitutional right to a jury trial did not apply. Additionally, the applicant had no right to a mini-trial in this situation because courts frequently have not required such a mini trial when an injured employee (as opposed to the worker's compensation insurer) seeks approval of a settlement. The court appropriately exercised its discretion because it clearly had in front of it significant evidence in regards to the risk of a jury returning a no liability verdict.

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2015 WORKERS COMPENSATION SEMINARS

Thursday, June 11, 2015

McNamara Alumni Center, Minneapolis, Minnesota

Thursday, June 18, 2015

Crowne Plaza, Wauwatosa, Wisconsin

Contact Marie Kopetzki at

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mkkopetzki@arthurchapman.com for more details or to register.

DECISIONS OF THE WISCONSIN COURT OF APPEALS

OCCUPATIONAL DISEASE

The Boldt Company v. Labor and Industry Review Commission, 856 N.W.2d 347 (Wis. Ct. App. 2014) (*unpublished*). The applicant first worked for The Samuel's Group, Inc. and subsequently worked for The Boldt Company. He had a progressive knee condition that worsened over his career as a result of occupational activities as a carpenter. The applicant did not have any wage loss caused by this condition until he worked for The Boldt Company. The applicant worked seasonally for these various companies. During a winter layoff from The Samuel's Group in 2007-2008, Dr. Hebl advised the applicant that his knees were such that he should not return to performing the same job duties without significant restrictions. The applicant returned to work for The Samuel's Group after the seasonal layoff and mentioned nothing about his restrictions. Dr. Hebl also assigned 15% permanent partial disability, but the applicant did not advise The Samuel's Group of this permanency rating. He continued to work, performing all of the same job duties without wage loss or making a worker's compensation claim. The applicant last worked for The Samuel's Group after the 2009 season. He began to work for The Boldt Company in spring 2010, without restrictions. He retired after that season was completed. The applicant retired because he determined he could no longer perform the job duties due to his knee condition. Dr. Hebl opined

the seven months of employment at The Boldt Company significantly worsened the applicant's knee condition, and resulted in an increase of 5% permanent partial disability. The applicant filed a worker's compensation claim with a date of injury of his last date of employment for The Boldt Company. Administrative Law Judge Emnemuoh-Trammell awarded benefits against The Samuels Group and dismissed the claim against The Boldt Company. The Labor and Industry Review Commission affirmed but ordered all benefits due to the applicant to be paid by The Boldt Company. There must be actual physical incapacity to work, not a mere medical disability, in order to recover compensation in a case of occupational disease. The last date of employment from The Boldt Company was the applicant's first wage loss, and thus the appropriate date of injury. The employer on risk at the time was The Boldt Company. The Circuit Court and the Court of Appeals affirmed. This is the same situation that was presented in *Virginia Surety*. That decision resolves this matter. Liability for a progressive condition is not apportioned. Liability is imposed upon the employer and insurer whose policy was in force at the time the disability occurred, without contribution from prior employers or insurers whose employment was also a cause of the disease. Merely having restrictions assigned, when those restrictions result in no claim being filed and no actual wage loss, is not sufficient to trigger a date of injury because there is

no entitlement to temporary disability compensation or any actual disability. Lack of earnings due to a seasonal layoff does not suffice for purposes of calculating a date of injury because there is no wage loss that is attributable to the effects of the occupational disease. Additionally, the assignment of permanent partial disability by Dr. Hebl did not trigger a date of injury. The statutes providing for calculation and payment of temporary and permanent disability benefits address payment and calculation of benefits after a date of injury is determined, and do not provide guidance or law on how to determine the actual date of injury.

PROCEDURAL ISSUES

Stewart v. Labor and Industry Review Commission, 851 N.W.2d 472 (Wis. Ct. App. 2014). (*unpublished*). A hearing was held on the merits of the applicant's claims for benefits. Administrative Law Judge Kaiser awarded worker's compensation benefits. The employer was awarded a credit of approximately \$14,000.00 for payments made under sick and long term disability plans. The portion of the decision awarding a credit to the employer for benefits previously paid to the applicant for sick and long term disability benefit payments was appealed. The Commission affirmed the award of this credit. Wis. Stat. §102.30(7)(a) allows the Department to reimburse

an employer for “payments made under a non-industrial insurance policy covering the same disability and expenses compensable under §102.42...when it is established that the payments under the non-industrial insurance policy were improper.” The Commission held that the testimony of the employer’s Human Resources manager was sufficient to establish the terms of the policy and the fact that said policy should not pay benefits for injuries covered by worker’s compensation. On appeal to the Circuit Court, the applicant asserted there was insufficient evidence to establish that the involved insurance policy was a non-industrial policy and that the employer was given a subrogation right under said disability policy. The Circuit Court reversed the Commission’s decision. The testimony of the Human Resources manager only established the practice of the employer. This testimony did not

establish the terms or conditions of the relevant policy. Therefore, there was no evidence in the record which demonstrated a subrogation clause existed in the plan. The Circuit Court’s order simply “reversed” the decision of the Commission. Neither party appealed that decision. Thereafter, the employer’s attorney requested that the Commission interpret the Circuit Court’s decision to be an order for remand with the right to further hearing regarding the issue of what exactly the non-industrial policy covered. The Commission, without waiting for a reply from the applicant’s attorney, remanded the case for further evidence on that issue. The applicant appealed the Commission’s order for a new hearing, to the Circuit Court. The Commission filed a motion to dismiss. That motion was granted by the Circuit Court. The dismissal was then

appealed by the applicant to the Court of Appeals, resulting in the instant case. The Court of Appeals reversed the decision of the Circuit Court’s granting of the motion to dismiss and the decision of the Commission. The Commission acted in excess of its powers because it was clear that the initial Circuit Court decision was for a reversal and not for remand. The only avenue for relief from the original decision by the Circuit Court would have been to appeal that decision to the Court of Appeals. [In October 2014, the Commission issued a decision indicating it assumed that it was supposed to order that the money that the Commission had previously ordered reimbursed to the employer’s self-funded non-industrial disability plan be instead paid to the applicant, with appropriate deduction for attorney’s fees. These payments were so ordered.] ♦

DECISIONS OF THE WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION

APPORTIONMENT

Konop v. Wright Products, Claim No. 2002-052801 (LIRC October 30, 2014). The applicant sustained an admitted, specific, low back work-related injury in 1999. He underwent surgery and then returned to work for that employer for several years. He later obtained employment with another employer. The applicant subsequently underwent a lumbar fusion procedure, in 2008. His treating physician opined the 1999 work injury directly caused the disability post 2008 fusion. However, the treating physician also marked the occupational disease causation box. Dr. O’Brien performed an independent

medical examination, and opined no injury was sustained in 1999. He also opined the work at the subsequent employer did not cause a work-related injury. Administrative Law Judge Lake credited the treating physician’s opinions. However, she interpreted his opinion to be that the work exposure at the subsequent company resulted in the need for fusion surgery in 2008. She concluded the applicant’s back condition around the time of the 2008 surgery was not the result of the 1999 work-related injury. The applicant appealed to request an award of additional permanency against the 1999 employer and insurer for the

2008 procedure. The applicant requested a remand of the case to allow an apportionment between the two employers. The respondents disputed the ability of the Department to apportion permanency between an initial accidental injury and subsequent occupational exposure, and disagreed with the remand for that purpose. The Commission remanded the case to implead the subsequent employer and insurer for a new hearing based on a fresh slate. Application of the non-apportionment rule assumes that some later occupational exposure was a material contributory causative factor in the applicant’s disability. To apply that rule, the Commission would basically need

to determine that employment at the subsequent employer played a causal role in the applicant's disability without allowing that subsequent employer and insurer the opportunity to present a defense. This was not proper and a new hearing was therefore necessary.

ARISING OUT OF

Sanchez v. Cooper Power Systems, LLC, Claim No. 2012-009085 (LIRC May 15, 2014). The applicant alleged he sustained an injury when he was cleaning a mold at work with a wire brush. He alleged that a piece of metal had broken off from the brush, become imbedded in his finger, and that he eventually developed a significant infection. Administrative Law Judge Enemuoh-Trammel held the applicant did sustain a work-related injury, and awarded benefits. The Commission reversed after performing a detailed evaluation of very technical medical evidence. There was no medical evidence that clearly established that there had ever been a wire in the applicant's finger or a puncture through the applicant's skin. The applicant used the brush on November 14, 2011. The medical evidence demonstrated that the development of the type of infection involved in this case would normally occur somewhere between two and four days after the material entered a wound. Instead, the applicant alleged that he experienced a significant infection the day after the alleged injury.

Andrews v. Leeds Exteriors, Inc., Claim No. 2012-001363 (LIRC May 29, 2014). The applicant was hired by a Minnesota employer to perform cleanup duties from a siding installation project at a casino on the Red Cliff Reservation in Wisconsin.

The applicant alleged he was injured after falling off of a ladder. However, Administrative Law Judge Minix held that the applicant was employed by the Minnesota employer and was not an independent contractor. He held the Minnesota employer was subject to the Wisconsin Worker's Compensation Act. Administrative Law Judge Minix held that the applicant's testimony and medical records were so inconsistent that he could not determine that the alleged injury had actually occurred. The applicant's claims were completely denied. The Commission reversed. Each case is carefully reviewed to determine whether or not inconsistencies in the medical records are substantial enough to undermine the credibility of the applicant's description of his/her injury. Here, the inconsistencies in the descriptions were "relatively minor." Therefore, the Commission determined that the injury had occurred.

Henderson v. Quad Graphics Inc., Claim No. 2013-003205 (LIRC June 12, 2014). The applicant worked as a finishing technician for the employer. He alleged that he sustained a work-related injury. At the time he reported his alleged work-related injury, the employer noted that the applicant had a scratch and a knot on his forehead that he alleged was from a puppy. Additionally, the applicant's blood alcohol concentration level was taken twice. His level was 0.091 the first time and 0.08 the second time. Administrative Law Judge

Phillips, Jr. held that the applicant's lack of credibility demonstrated that he had not sustained a work-related injury. The Commission reversed. A work injury's existence is not determined on the basis of character. The applicant's medical records revealed he sustained a precipitation, aggravation and acceleration of a pre-existing shoulder condition which was related to his work activities.

Ricciardi v. Madison Metropolitan School District, Claim No. 2011-026170 (LIRC July 22, 2014). The applicant alleged his job duties for the employer resulted in an elbow injury. The specific physical activities performed by the applicant at the time he alleged that he developed the elbow symptoms were disputed by the employer. Administrative Law Judge O'Connor dismissed the applicant's claim. The testimony of the supervisor, who had testified on behalf of the employer, regarding the applicant's job duties was more credible than the applicant's testimony. Additionally, the applicant's report of the alleged nature of the job duties and activities varied from time to time, depending on which doctor she spoke to. The testimony of the treating physicians was therefore without proper foundation. The Commission affirmed.

Hoyer v. Milwaukee Board of School Dir., Claim No. 2011-008113 (LIRC August 28, 2014). The applicant alleged that a student brushed up against her and the physical contact put her off balance and she fell. She did not report anything about a student in her initial contacts with medical providers, even though they were seeking a reason for the fall. The medical records demonstrated she fell on a number of occasions. The medical treatment considered a number of potential causes for her falling over her course of treatment. Her

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treating physician opined she sustained a hip fracture due to the fall, which necessitated surgery. Dr. Rolnick performed an independent medical examination and opined the hip condition was a stress fracture and the result of minute everyday activities. Administrative Law Judge Martin held there was no evidence the applicant was fabricating the basis for the fall and awarded benefits based upon the treating physicians' opinions. The Commission reversed. The applicant's fall was unexplained. Even if the treating physician's opinions were credited instead of Dr. Rolnick, the applicant is not entitled to any benefits because she had either an unexplained or idiopathic fall. It is not credible that the applicant would omit the fact that a student was at least partly responsible for the fall when discussing the situation with medical providers, particularly when those medical providers demonstrated the providers were clearly seeking a reason for her fall. Further, Dr. Rolnick's opinions regarding causation were more well-reasoned and persuasive.

BURDEN OF PROOF

Jones Jr. v. R&D Laser Processing, Claim No. 2011-027261 (LIRC May 15, 2014). The applicant last worked for the employer on July 30, 2009. The following morning, he woke with severe pain to his upper back and shoulder, and sought medication treatment. The applicant's treating physician opined the applicant sustained a right wrist carpal tunnel syndrome condition caused by his regular job duties for the employer. The physician initially noted "yes" as causation, and then crossed off that affirmative response, and specifically noted the applicant's repetitive wrist movements could predispose him to develop carpal tunnel syndrome. The physician opined

that it was unknown whether the cervical disease was work related. The same physician later noted "yes" in response to an inquiry from the applicant's attorney regarding whether the applicant's job duties were either a cause or at least a material contributory causal factor in the onset or progression of the applicant's carpal tunnel syndrome. Dr. Novom performed an independent medical examination, and opined carpal tunnel syndrome was not work related. Administrative Law Judge O'Connor denied all benefits and dismissed the application with prejudice. The applicant had the minimum evidence needed to form a causation opinion to support a carpal tunnel claim, but the treating physician failed to check any causation boxes on the WKC-16b report, to indicate the condition could pre-dispose the applicant to develop carpal tunnel syndrome. While this opinion was more solidified later on, the initial use of the word "could" demonstrates some doubt in the treating physician's opinions regarding whether the work duties were in fact a material contributory causal factor in the condition's onset or progression. The Labor and Industry Review Commission

affirmed. The applicant did not meet his burden of proving all the facts necessary to sustain his claim of injury beyond a legitimate doubt.

CONSEQUENTIAL INJURY

Gentili v. J&J Mail Service, Inc., Claim No. 1989-005037 (LIRC May 29, 2014). The applicant alleged that his pre-existing right knee condition was precipitated, aggravated and accelerated beyond normal progression by the effects of his 1988 work-related left knee injury due to an altered gait. [This was brought against the Fund.] He alleged this caused the need for a right knee replacement. The applicant's treating physician opined the applicant's chronic right knee pain and chondromalacia were likely related to a permanent exacerbation of his prior left knee injury due to an altered gait pattern after multiple left knee injuries. The applicant's pre-existing right knee condition was related back to a 1976 football injury and 1977 surgery. Dr. Xenos performed an independent medical examination at the respondent's request. He opined the right knee condition was the result of calcification deposits in the applicant's right knee. The operative report noted there was chondrocalcinosis throughout the right knee. Dr. Xenos opined all of the degenerative findings outlined in the operative report were related to the pre-existing right knee condition, the applicant's obesity, and unrelated to any work-related left knee injury. Administrative Law Judge Minix denied all benefits sought by the applicant and dismissed his application. The treating physician's opinion is based upon a flawed view of the applicant's medical history. The causation opinion is grounded on the assumption the applicant had

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a long history of gait problems, which over time aggravated and accelerated the pre-existing degenerative arthritis in the right knee beyond normal progression. However, a detailed review of the medical records undercuts this physician's opinion. While applicant alleged he had a limp in 1999-2000, there was a normal gait on examination in 2001. Further, there was no gait abnormality noted during treatment in 2008. The first note of gait abnormality was in late 2010. By that time, the applicant was already intending to undergo the right knee replacement (which is what he alleged was causally related to the left knee injury in this litigation). The treating physician also failed to address Dr. Xenos' opinion that the right knee injury and disability developed entirely independently of the left knee work-related injury. The Labor and Industry Review Commission affirmed. The treating physician provided a conclusory opinion regarding causation and Dr. Xenos provided a detailed medical explanation of why there was no causation relationship.

CREDIT FOR OVERPAYMENT

Wittmann v. Consolidated Lumber Co., Claim No. 2007-035429 (LIRC September 30, 2014). The applicant sustained an admitted right ankle injury and alleged right knee injury. The applicant sought temporary total disability benefits, permanent partial disability benefits and medical expenses. He also sought an interlocutory order for future benefits. Administrative Law Judge Schaeve opined the applicant did not sustain a right knee injury. He awarded additional permanent partial disability benefits for the admitted right ankle condition. Administrative Law Judge Schaeve held that an interlocutory order would be issued only with respect to a potential

future vocational retraining claim and disfigurement claim. The order was not interlocutory with respect to future medical expenses. The insurer paid \$1,154.00 for an MRI for the right knee. Administrative Law Judge Schaeve opined this payment was made under mistake of fact because the right knee condition was not work-related. The insurer was credited with the amount paid under mistake of fact for the right knee MRI, against the permanent partial disability awarded at the time of the hearing because there was no future medical treatment compensable as the Department did not retain jurisdiction for future medical treatment.

EMPLOYMENT RELATIONSHIP

Schneider v. D2J2 LLC d/b/a Rox Sports Bar, Claim No. 2012-014230 (LIRC November 11, 2014). The applicant was shot in the left ankle in the early morning while working security at the alleged employer's facility. The employer leased out the facility to promoters who hosted events at the bar. The employer entered into an agreement with Trapsational Entertainment LLC which intended to host hip hop and R&B events at the bar in January and February 2012. The lease required Trapsational to pay a nominal hall rental fee and pay for alcohol sold to patrons. The lease agreement shifted responsibility from the alleged employer to Trapsational to provide security during the events. The alleged employer and Trapsational agreed a maximum of 12 security guards would be present, and payment for security was due prior to the start of events. Trapsational was responsible under the lease to provide money for security. Prior to the start of its first event, Trapsational contacted the alleged employer to advise the security company he

planned to use had fallen through. Trapsational sought assistance in finding other companies to provide security. The employer contacted several individuals to see if they were potentially available. Mr. Luna and Mr. Finn agreed to provide security. Mr. Finn was asked to provide the requisite number of people. The alleged employer reviewed the terms of the lease with Mr. Finn, including the compensation provision. The applicant was recruited by Mr. Finn to provide security for the event. Mr. Finn reviewed the compensation agreement with the applicant. The alleged employer met with the security individuals at the beginning of each event, to advise where he wanted security coverage. The alleged employer then left it up to the security people to decide who would work in which area. The applicant worked several days without incident. Mr. Finn paid the applicant. On the date of injury, the alleged employer again reviewed the security needs and locations where someone from security needed to be present. After the alleged employer left, Mr. Finn and Mr. Luna orchestrated and ran the security detail for the evening. The individuals from the security group stated their preferences and took their positions. The applicant got into a confrontation with a patron of the bar after a period of time, and that patron shot the applicant in the ankle. Mr. Finn paid the applicant for his services that evening. Administrative Law Judge Enemuoh-Trammell held the applicant was not an employee of the alleged employer for purposes of worker's compensation benefits. The Commission affirmed. The employer properly rebutted the *Scholtz* presumption of an employment relationship that exists when an individual shows he or she is injured while rendering services to another. Once the presumption was rebutted, the

individual must produce evidence to demonstrate he or she was in fact the putative employer's employee. The applicant did not meet his burden in this case. The primary test for determining the existence of an employer-employee relationship, under *Kress Packaging Co. v. Kottwitz*, is whether the alleged employer had a right to control the details of the work. The secondary tests include (1) direct evidence of the exercise of the right of control, (2) method of payment of compensation, (3) furnishing of equipment or tools for performance of the work, and (4) right to fire or terminate the employment relationship. Here, the alleged employer had an interest in ensuring that security was provided at the facility. He delegated the task of providing security to the promoters of the event under the lease agreement. He invited several individuals to provide security at the event when the promoter was unable to secure a security company. The alleged employer left it to those individuals to bring a team to provide security. The alleged employer did not directly solicit or recruit the applicant. The alleged employer did not instruct the applicant when to arrive for the event or how much he would be compensated. The alleged employer did not compensate the applicant, nor tell him what to wear. While the alleged employer initially met with the security teams to advise of the facility's security needs, he left it to the people providing the security to organize and position themselves within the provided guidelines.

EXPERT FOUNDATION

Lucas v. GGNCS Rib Lake LLC, Claim No. 2012-015746 (LIRC June 12, 2014). The applicant sustained an admitted work-related injury. The treating physician opined the applicant sustained a possible

meniscal tear and recommended a diagnostic arthroscopy. Dr. Timothy O'Brien performed an independent medical examination. He reviewed several scans and numerous medical records. Dr. O'Brien opined the mechanism of injury was innocuous in one portion of his report. The applicant, however, testified that she was pinned by an obese resident and could not change position while the resident put pressure on her knee. Dr. O'Brien opined this incident was minor. He later opined the incident was significant but that it occurred while the applicant was at home sleeping. He did not explain how sleeping in bed was more stressful to the knee than having it pinned during the transfer of an obese resident. Dr. O'Brien outlined two MRI scans he reviewed, and opined one was normal. However, the records reflected the applicant only underwent one MRI. Administrative Law Judge Sass awarded all benefits sought by the applicant. Whatever report Dr. O'Brien reviewed that was not included in the medical records was not of the applicant's knee. In light of his flawed history, erroneous assumptions, internal contradictions and questionable rationale, Dr. O'Brien's report is not credible. The Labor and Industry Review Commission affirmed with respect to the majority of the award of benefits sought by the applicant and the basis for the same.

PENALTY

Pozorski v. White Bear Lake Lumber, LLC, Claim No. 2009-009901 (LIRC June 24, 2014). The applicant compromised a pending worker's compensation claim. Subsequently, Administrative Law Judge Cathy Lake issued an Order awarding a 15% penalty on uncontested compensation

benefits paid. She also awarded the applicant a 15% penalty on amounts paid pursuant to the compromise. This award was made on the assumption that it was required by the Supreme Court's decision in *R.J. Wilson Co. v. Industrial Commission ETA*, 219 Wis. 463 (1935). The Commission reversed. It is the longstanding policy of the Commission that a penalty for violation of a safety provision, pursuant to Wis. Stat. §102.57 (which allows a 15% increase in "compensation"), does not apply or include those amounts paid as part of a compromise of the claim. An amount paid under a compromise agreement is not "compensation" within the meaning of the statute. The *Wilson* court held that the compromise agreement allegedly entered into in that case, was not a valid compromise agreement. Instead, that court determined the sums paid under that agreement were "compensation." Therefore, the Commission's policy of not awarding safety penalties on amounts paid pursuant to a compromise is in accordance with *Wilson*.

PERMANENT PARTIAL DISABILITY

Simplot v. City of Beloit, Claim No. 2011-012413 (LIRC May 6, 2014). The applicant sustained a work-related low back injury when she fell four feet on March 30, 2011. That fall caused permanent partial disability. The applicant had undergone three prior lumbar fusion procedures (in 1976, 2003 and 2010). Dr. Keehn opined the applicant sustained 15% permanent partial disability to the body as a whole as a result of the March 2011 work-related injury. Dr. Keehn opined the applicant had no prior permanent partial disability because she did not require opiates prior to the injury and was able to work full time prior to the injury, whereas the need for the assigned permanency post injury

was the pain medication regiment, injection therapy and continued severe pain that interfered with her function. Dr. Lyons performed an independent medical examination at the request of the respondents. He initially opined the applicant sustained only a temporary injury. Following a re-examination, he agreed she had a permanent aggravation. He rated the applicant with 3% permanent partial disability. Administrative Law Judge Arnold rated the applicant with 8% permanent partial disability. The Labor and Industry Review Commission affirmed. The rating was within the presumed reasonable range of permanency under Wis. Stat. Section 102.18(1)(d), which provides that an award that 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. While the Commission is not bound by the rating assigned by the judge because it is the ultimate finder of fact, here, it is the most reasonable. A rating over 5% is not unreasonable just because the applicant here did not have surgery and a minimum rating in the rules for a discectomy procedure is 5%. The rules do not provide that a non-surgical situation must result in permanency less than the minimum for surgery to the same body part.

Gustin v. Wausau Paper Mills, LLC, Claim No. 2012-023928 (LIRC June 12, 2014). The applicant sustained an admitted work-related injury in the nature of hearing loss, as a result of his exposure to loud noise at the employer's facility. The nature and extent of the hearing loss was disputed. Four audiograms were performed. First, on January 26, 2012, the applicant

had a 23.47% hearing loss based upon an audiogram performed in an on-site trailer by OSHA. Next, on February 2, 2012 an audiogram performed in OSHA's on-site trailer revealed a 24.33% hearing loss. The respondents paid this amount based upon their independent medical examiner's (Dr. Nordstrom) opinions that this was the most accurate of the four audiograms. The applicant last worked for the employer on February 17, 2012. Subsequently, on April 20, 2012, the applicant underwent another audiogram which revealed a 30.67% hearing loss. Dr. Nordstrom performed an audiogram on September 14, 2012 which revealed a 29.33% hearing loss. Dr. Nordstrom opined the additional hearing loss on the April and September 2012 audiograms were attributable to inter-test variability or age-related hearing loss that occurs naturally. The physician who performed the April 2012 audiogram only reviewed her own, and did not opine which of the four was most accurate. Administrative Law Judge Sass opined the April 2012 audiogram was most reliable because it was performed in a hospital setting versus a mobile OSHA trailer. The Labor and Industry Review Commission reversed and adopted Dr. Nordstrom's opinions which resulted in no additional permanent partial disability benefits being payable to the applicant. Dr. Nordstrom's opinion was the only medical opinion on record regarding which of the four audiograms should be accepted. Further, it is speculative at best to reject an OSHA certified audiogram over one performed in a hospital, solely for the location of where the audiogram was performed. There is no factual basis upon which to question the medical competency of the OSHA performed audiogram. Additionally, the Commission's prior decision has

referred to a known medical fact that audiograms performed while an employee is still exposed to the offending industrial noise tend to overstate permanent hearing loss because there is typically a short term bounce back period after noise exposure ends and the employee's hearing somewhat recovers.

PROCEDURAL ISSUES

Dent v. Bristol Bay Native Corp., Claim No. 2011-031788 (LIRC May 15, 2014). The applicant filed a claim for a specific traumatic injury as a result of falling down stairs, with a date of injury of June 2, 2011. The only mention of any mechanism of injury noted in the medical records considered as exhibits at the hearing, was in one section where a treating physician noted the applicant slipped and fell at work, and landed on his back. The respondents admitted a specific incident occurred. The nature and extent of the injury was in dispute. Dr. Yuska performed an independent medical examination at the request of the respondents. Dr. Yuska opined the applicant did not sustain any permanent work-related injury and that the applicant's ongoing condition was caused, at least in part, by hard work. He also opined the applicant was severely deconditioned and had some significant respiratory insufficiency that contributed to his ongoing condition. Administrative Law Judge O'Connor denied all benefits sought. No treating physician identified any specific structural damage or other breakage that occurred during the fall. No permanency was sustained, no additional treatment required and no restrictions necessary as a result of the work-related injury. The Labor and Industry Review Commission affirmed the denial of benefits. The Commission declined to grant the applicant's request

for a remand for a hearing to determine whether the applicant sustained an occupational disease. The Commission held that, if the applicant wanted to bring a claim for occupational disease, he could file a new application for hearing. However, the date of injury could not be the date the applicant fell.

Arvanites v. G P Construction, Claim No. 1998-056392 (LIRC September 8, 2014). The applicant filed a second Hearing Application one day prior to the expiration of the 12 year statute of limitations. The applicant did not file a Certificate of Readiness after numerous requests by the Department of Workforce Development. Administrative Law Judge Roberts dismissed the Hearing Application without prejudice due to failure to file a Certificate of Readiness. Nine days later, Administrative Law Judge Roberts set aside his dismissal order. The Respondents asserted he had no jurisdiction to do so, because the statute of limitations expired the day after the order was issued dismissing the claim. Administrative Law Judge Endter opined the Department retained jurisdiction because the application was reinstated and had been filed one day before the statute of limitations had expired. Administrative Law Judge Roberts disagreed and held he had no jurisdiction to reinstate the hearing application. Wis. Stat. §102.18(3) states, in part, that “if no petition is filed within 21 days from the date that a copy of the findings or order of the examiner is mailed to the last-known address of the parties in interest, the findings or order shall be considered final unless set aside, reversed or modified by the examiner within that time. If the findings or order are set aside by the examiner the status shall be the same as

prior to the findings or order set aside.” The Commission agreed with Administrative Law Judge Endter. The order dismissing the application was set-aside within the 21 days permitted under the statute. The status is that which existed prior to the order dismissing the hearing application, which results in a valid pending hearing application that was filed one day prior to the expiration of the statute of limitations.

REFUSAL TO REHIRE

Bozich v. Doral Corp., Claim No. 2007-012878 (LIRC June 30, 2014). The applicant sustained an admitted work-related injury. He was not returned to work when he was released without restrictions. The employer witnesses testified that its reasonable cause for not doing so was because more field workers were needed and fewer shop workers were needed. The employer asserted that the applicant was not suited for shop work. Administrative Law Judge Martin held the employer wrongfully refused to rehire the applicant. He was awarded benefits in the amount of one year's worth of wages minus the wages actually earned between the release without restrictions and the date of the hearing. The Commission affirmed the award of benefits, but modified the award amount. The employer witnesses were inconsistent in the basis for not re-hiring the applicant. Additionally, one of the employer witnesses testified that a mod rate affected whether the employer can work on some job sites, and that the worker's compensation claims affected the mod rates. The testimony was inconsistent regarding whether the applicant was not re-hired because the employer did not know the applicant was looking for work or because there was

no work. The employer asserted the skill set of some of the other hired employees was better than the applicant's skills; however, the employer was unable to explain why some of the other hired individuals were hired instead of the applicant. The award is temporal in nature and not monetary. Less than one year passed between the date of release without restrictions and the date of the hearing. The applicant was awarded benefits consistent with the difference between the average weekly wage and actual earnings during this period of time. The award was interlocutory for additional benefits to potentially be awarded post hearing, as appropriate, within the one year post release without restrictions.

Hope v. 5 D Promotions, Inc., Claim No. 2011-012442 (LIRC August 4, 2014). The employer's business involved promoting snowmobile races. The applicant sustained an injury when he slipped and fell on ice. The employer terminated the applicant on the basis that they did not need him and could not use him if he was not 100%. The applicant saw the manager of the employer's facility a few months after surgery. The applicant advised the manager that he no longer had work restrictions. The manager did not offer the applicant any employment. Administrative Law Judge Endter held that the applicant had sustained a work-related injury. She also held the applicant had been terminated without cause, in violation of Wis. Stat. §102.35. The employer did not appear at the hearing. On appeal, the employer argued it failed to appear at the hearing because of excusable neglect. The employer argued it had been busy from November 2013 through February 2014 with a snowmobile race and had not had an opportunity to read the mail. The Commission held that, even though the employer was extremely busy, it could have taken

a few minutes to sort through the mail, look for important mail and read it. The decision of excusable neglect, as laid out in *Brantner v. Brick Oven Bakery* was not extended.

Salas v. FCS Fab Inc., Claim No. 2011-005495 (LIRC August 4, 2014). The applicant sustained a conceded work-related injury. The employer had several branches, including Texas and Milwaukee. The manager of the Milwaukee branch was the brother of the Vice President who managed the Texas branch. The manager of the Milwaukee branch told the applicant to bring all medical bills to him, and said that the employer would pay the bills. The applicant did so, but the bills were not paid. The applicant was told the employer would not pay for a recommended surgery and that the employer would not report the injury to its insurer. The applicant contacted attorneys and the Milwaukee office of the Wisconsin Worker's Compensation Division to report the incident himself. The applicant was temporarily sent to Texas to work for several weeks. The employer arranged for and paid for the travel. He had not yet completed treatment at the time of this employment. While in Texas, the applicant was pressured to remain in Texas by the manager of the Texas branch. The applicant refused to stay in Texas longer than the time frame initially contemplated. The applicant denied quitting his job. He expected he would be back at work in a few weeks in Milwaukee. He stopped by the shop once in a while over the next few weeks. The applicant was then asked to come to a meeting. He attended the meeting along with several other employees. They were shown plans for a large project the company would be working on. He spent 2½ hours talking about this plan. He arrived several days

later, at the appointed time for the project to start. He was told by the Milwaukee manager that the Texas manager said he did not want the applicant in the shop. The applicant was given a choice to give up his legal claim or give up his job. Administrative Law Judge Martin determined the employer did not have reasonable cause for terminating the applicant and awarded one year's worth of wages. The Commission affirmed. There was never any documentation submitted to support the assertion that the applicant abandoned his job. The evidence reflects little reason to conclude an assertion of job abandonment was anything more than an excuse or fabrication. The employer did not have the manager of the Milwaukee branch testify. This was not viewed as inconsequential and instead raises definitive inferences which are not favorable to the employer's position. The demeanor of the employer's witness was questionable at best. The substance of the testimony was inconsistent, evasive and ambiguous.

Roberts v. Stevens Construction Corp., Claim No. 2012-019455 (LIRC September 30, 2014). The applicant sustained an admitted right knee injury after working for the employer for approximately three months. The applicant was hired to be a superintendent to oversee a large student housing project. Approximately three months post injury, the applicant was released to work without restrictions. He was immediately terminated for failing to perform up to the employer's expectations. There was no evidence that he was previously told his performance was lacking or his job in jeopardy because he was not meeting expectations. He was not given any other reason for the termination at the time it occurred. Evidence at the hearing reflected that

the work at the student housing project was winding down at the time of the separation. Other similarly situated employees were moved to the limited number of jobs available or took paid time off because no work was available. Administrative Law Judge Doody held that the termination was, in part, about ongoing work although not expressly stated to the applicant. The employer was not obligated to create a job for the applicant. If work was not available, and the employer credibility established that no ongoing work was available, lack of work does not have to be formally expressed as a reason for failing to return the employee to a job. The Commission affirmed. The employer showed reasonable cause, in the nature of lack of work, for terminating the applicant's employment. The student housing project for which he was hired was coming to an end. Other workers were laid off or not offered rehire at the time. While the employer required its employees to use their paid time off between work assignments, that does not establish that there was work available for the applicant to perform.

Corrao v. Guarding Your Angels, Inc., Claim No. 2010-033054 (LIRC November 11, 2014). The applicant alleged she sustained a work-related injury on December 9, 2010. Several hours prior to the alleged injury, the owner of the respondent observed the applicant talking on her telephone in violation of the company rules. The owner immediately contacted the administrator that afternoon (prior to the alleged injury) and directed that the applicant be terminated. The administrator waited until the afternoon of the following day to advise the applicant of her termination because of the need to have a certain teacher/student ratio at the program. The applicant reported her injury at

the time of the termination. She was very upset about the termination, asked the owner to reconsider the termination and offered to withdraw her injury claim in order to keep her job. The owner was not persuaded and the termination proceeded. Administrative Law Judge Smiley held that a compensable injury did occur on December 9, 2010. She further held that the employer had good cause for the termination and that termination did not have anything to do with the alleged injury. The applicant's application for wrongful termination was dismissed. The Commission affirmed. The applicant was terminated for violating a provision outlined in the Employee Manual, which indicated that use of cell phones onsite is prohibited and grounds for termination. The employer credibly testified that the rule was regularly enforced. The rationale behind the rule was reasonable. There was a violation of a legitimate work rule that provided the employer with reasonable cause to discharge the applicant.

SUPERSEDING INTERVENING CAUSE

Lewandowski v. O'Reilly's Auto Parts, Claim No. 2012-004444 (LIRC June 24, 2014). The applicant lifted an approximately eight pound object at work and felt a sudden pain in her low back. At the hearing, there was a dispute in testimony regarding whether or not the applicant had a surgical disc. Administrative Law Judge Minix ordered a tiebreaker examination. Dr. Robbins performed this examination. Dr. Robbins opined the applicant had sustained a herniated disc as a result of the lifting at work. Dr. Robbins opined

that, if she had the proposed discectomy, she would probably ultimately be able to return to work without restrictions. Dr. Robbins opined that, if she did not have the surgery, she would probably require permanent 20-pound lifting restrictions. Administrative Law Judge Minix subsequently held that the applicant sustained a disc injury at work. He issued an interlocutory order that required the insurer to pay for the discectomy and any further tests or treatment associated with the surgery. The Commission affirmed the holding regarding causation. However, the respondent's attorney was notified the night before the final hearing that the applicant had fallen in her tub in December of 2013. This fall required an in-patient hospitalization. The records regarding this hospitalization were provided to the attorney for the Respondents the night before the hearing. The Administrative Law Judge mainly addressed what medical treatment would most benefit the applicant. The Commission held that the fall in the tub may have impacted the issue of appropriate future medical treatment. The case was remanded to the Department for further hearing on the issue of temporary disability and medical treatment, including the need for any future medical treatment in light of potential intervening causes (which included the fall in the tub).

TEMPORARY TOTAL DISABILITY BENEFITS

Griffin v. Harley-Davidson Motor Co. Group LLC, Claim No. 2012-023285 (LIRC May 27, 2014). The applicant sustained an admitted left hip injury on September 12, 2012. Prior to the injury, the applicant applied for a separation agreement, which was offered as a result of the employer's plant

closure. Also prior to the work injury, she was scheduled for a right knee total replacement procedure to take place on September 24, 2012. She was awarded the agreement at the end of September, and her employment ended October 1, 2012. The applicant was paid just over \$30,000.00 for this agreement. She also received \$12,000.00 after her employment ended. This lump sum was paid to all employees. The applicant continued to treat for her right knee and left hip. She was assigned permanent restrictions in May 2013. The applicant sought temporary total disability between the date of injury and the date when her permanent restrictions were assigned in May 2013 (apart from a period when she was not under the effects of restrictions and a few days in this period, prior to the end of September 2012, when she worked). Administrative Law Judge Phillips, Jr. awarded benefits sought by the applicant. The Labor and Industry Review Commission affirmed in part and reversed in part. The applicant would have been temporarily disabled due to her left hip injury, regardless of any overlap with her right knee surgery disability. The fact that some of the disability may have overlapped does not reduce her entitlement to disability benefits during the period of time that she was disabled from the effects of the work injury. The amount paid to the applicant for her separation agreement was a buyout and did not constitute earnings. The additional lump sum paid after her employment ended was the result of a collective bargaining agreement and was a liquidated contractual payment that did not constitute earnings. Further, the payments were not issued under any type of policy covering the same disability as the work injury, and were not contingent on any disability. Neither of these benefits offsets temporary total disability benefits. The Administrative Law Judge's refusal to allow questioning

regarding job search was harmless error because the applicant's age and work history makes it clear that an argument she had withdrawn from the labor market would not be credible. ♦

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