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WISCONSIN WORKER'S COMPENSATION UPDATE

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WISCONSIN WORKER'S COMPENSATION PRACTICE GROUP

Susan E. Larson, Shareholder
Charles B. Harris, Sr. Attorney
Jessica L. Ringgenberg, Associate

Bao Vang, Paralegal

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CASE LAW UPDATE

DECISIONS OF THE WISCONSIN SUPREME COURT

Operton v. Labor and Industry Commission, 2017 WI 46, ___ N.W. 2d ___, 2017 WL 1743039 (May 4, 2017). The applicant worked as a clerk for Walgreens over a 21 month period. She was engaged in over 80,000 cash transactions. She made eight handling mistakes. Walgreens lost money on each of the eight mistake transactions. The losses ranged from a low of a few cents to a high of approximately $400.00. The administrative law judge held that the applicant's conduct constituted "substantial fault" and determined that she was terminated on that basis. Therefore, she was denied unemployment benefits. The Labor and Industry Review Commission adopted the judge's decision. The Circuit Court affirmed the Commission's decision. The Court of Appeals reversed after determining the Commission's interpretation was not consistent with the statute. The Supreme Court agreed with the Court of Appeals and affirmed its decision. The Court considered first of all the issue of what standard

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Susan E. Larson
SELarson@ArthurChapman.com

Charles B. Harris
CBHarris@ArthurChapman.com

Jessica L. Ringgenberg
JLRinggenberg@ArthurChapman.com

ABOUT OUR ATTORNEYS

Our group of worker's compensation law attorneys has extensive experience representing employers, insurers, third-party administrators, and self-insured employers in all phases of worker's compensation litigation. Contact us today to discuss your worker's compensation needs.

811 1st Street
Suite 201
Hudson, WI 54016
Phone 715 386-9000 Fax 612 339-7655

500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402
Phone 612 339-3500 Fax 612 339-7655

www.ArthurChapman.com

of review it should use. Under the historical law of Wisconsin, an agency's interpretation of a statute may be awarded great weight deference in certain circumstances, a due weight deference in certain circumstances where the agency had some expertise and is charged with administrating the law, and no deference if the agency lacked expertise or is not involved in administering the law. Here, the Supreme Court held that neither the administrative law judge nor the Commission set forth an interpretation of the provisions of Wis. Stat. §108.084 in the decisions denying benefits. Therefore, the Supreme Court interpreted the statute on a *de novo* basis. An employee can be denied unemployment benefits if the employee was terminated for "misconduct" (which involves intentional actions and tended to work against the employer's interest) or "substantial fault." Wis. Stat. §108.04 (5g) defines substantial fault as including acts or omissions of an employee, over which the employee exercised reasonable control, which violated reasonable requirements of the employer. The administrative law judge held the applicant's actions in this case, including failure to verify the identification of persons using credit cards, violated reasonable requirements. The Supreme Court noted, however, that the Legislature further provided three specific types of conduct which the applicant worked as a clerk for Walgreens over a 21 month period. She was engaged in over 80,000 cash transactions. She made eight handling mistakes. Walgreens lost money on each of the eight mistake transactions. The losses ranged from a low of a few cents to a high of approximately $400.00. The administrative law judge held that the applicant's conduct constituted "substantial fault" and determined that she was terminated on that basis. Therefore, she was denied unemployment benefits. The Labor and Industry Review Commission adopted the judge's decision. The Circuit Court affirmed the Commission's decision. The Court of Appeals reversed after determining the Commission's interpretation was not consistent with the statute. The Supreme Court agreed with the Court of Appeals and affirmed its decision. The Court considered first of all the issue of what standard of review it should use. Under the historical law of Wisconsin, an agency's interpretation of a statute may be awarded great weight deference in certain circumstances, a due weight deference in certain circumstances where the agency had some expertise and is charged with administrating the law, and no deference if the agency lacked expertise or is not involved in administering the law. Here, the Supreme Court held that neither the administrative law judge nor the Commission set forth an interpretation of the provisions of Wis. Stat. §108.084 in the decisions denying benefits. Therefore, the Supreme Court interpreted the statute on a de novo basis. An employee can be denied unemployment benefits if the applicant was terminated for "misconduct" (which involves intentional actions and tended to work against the employer's interest) or "substantial fault." Wis. Stat. §108.04 (5g) defines substantial fault as including acts or omissions of an employee, over which the employee exercised reasonable control, which violated reasonable requirements of the employer. These were not included within "substantial fault." Those three exceptions included "one or more minor infraction unless the infraction is repeated after a warning; one or more inadvertent errors; or failure to perform the work because of insufficient ability. The applicant claimed all of her errors were "inadvertent." The statute did not provide that an employee could be discharged for an "inadvertent error" whether the employer had warned the employee of such errors or not. The Court held that legally inadvertent errors do not constitute substantial fault. Therefore, the applicant was entitled to unemployment benefits. [Editor's note: A number of the justices had doubt about the wisdom of assigning deference to administrative interpretation of legal issues in any circumstance. These issues will be revisited by the Court on appeal involving such issue in the future per the Court's direction in other pending cases before the Supreme Court to brief the issue of deference to administrative agencies.] ✦

Decisions of the Wisconsin Court of Appeals

End of Healing

Wittmann v. Consolidated Lumber Co. D/B/A Arrow Building Center, 2016 AP 1228 (Wis. Ct. App. 2017)(unpublished). The applicant sustained a right ankle injury on October 31, 2017. He treated conservatively with Dr. Wikenheiser. He was a salaried employee and lost no wages because of the work injury. He was not assigned any restrictions. On February 27, 2008 the x-rays showed evidence of healing with normal alignment. The applicant was terminated from his employment in November 2008. He was referred to Dr. McGarvey in early 2009. An MRI revealed possible cartilage and ligament defects. The applicant declined a recommendation from Dr. McGarvey for surgery on December 2010. Dr. O'Brien performed an independent medical examination. He opined the initial fibular fracture had healed on February 27, 2008, based upon Dr. Wikenheiser's medical records and films. The unnamed administrative law judge held the applicant reached the end of healing on February 27, 2008. The applicant's claims for ongoing temporary disability benefits were denied. The Labor and Industry Review Commission adopted the judge's findings and conclusions. The Circuit Court and Court of Appeals affirmed. The Commission's determination that the healing period ended on February 28, 2008 is supported by substantial evidence and therefore upheld. The courts have long held that the healing period is understood to mean the period prior to the time when the condition becomes stationary. The courts have further held that this period can continue until the employee is restored so far as the permanent character of his injuries will permit. The mere fact that the applicant continued to seek treatment for other problems with his leg after his termination does not make a factual finding that the healing period ended on February 27, 2008, unreasonable. The applicant returned to work without restriction after the injury, and worked for almost one full year. There were delays between the applicant's subsequent medical treatment visits and the applicant declined the offer for surgery. This all supports the determination that the injury became stationary on February 27, 2008.

Exclusive Remedy

Fitzgerald v. Karen Capezza, 2016Ap518 (Wis. Ct. App. 2017). The applicant sustained a compensable work-related injury, under Minnesota jurisdiction, as a result of a motor vehicle accident during travel to a work site in Iowa. She was a passenger in a vehicle driven by Karen Capezza. The settlement paperwork in Minnesota specifically indicated the applicant was employed by All-Star Catering, LLC and that her injuries arose out of and in the course of that employment. She also agreed not to seek a recovery of any award or settlement amount from All Star Catering, the owner of the company or Ms. Capezza. One year later, she filed a personal injury claim in St. Croix County against Ms. Capezza and the auto insurer of the vehicle. The circuit court granted a motion for summary judgement on the basis that the matter was precluded by the exclusive remedy provision of the Wisconsin Worker's Compensation Act ("Act"). The Court of Appeals affirmed. Wis. Stat. §102.03(2) establishes a general rule that worker's compensation is an employee's exclusive remedy against an employer, co-employees, and the worker's compensation insurance carrier for a work-related injury. There is a strong public policy in favor of co-employee immunity and any exceptions to the statutory exclusive are construed narrowly. The owner of the employer considered Ms. Capezza to be a volunteer. She was not paid wages. She worked 20 weekends for the employer during the year of the injury. She received paid expenses, food, lodging and free admission into events. However, the Act does not require a cash wage and payment may be anything of value. Ms. Capezza performed work that one might expect to be performed by an employee under contract of hire and met the definition of an employee under Wis. Stat. §102.07(4). Because Ms. Capezza was an employee, the applicant and Ms. Capezza were co-employees, and the applicant was barred from bringing her action due to co-employee immunity. Further, the applicant executed a legally binding agreement that stated she would not seek a recovery of any award or settlement from a number of parties, including Ms. Capezza.

Occupational (Repetitive)

Payne v. Sentry Insurance, 372 N.W.2d 834 (Wis. Ct. App. 2016) *(unpublished)*). The applicant worked as a welder/fabricator at the employer's facility from 1999 to 2011. His job did involve carrying and welding heavy and awkward parts, as well as significant repetitive lifting, bending, and twisting. In 2003, he began treating with a chiropractor for back pain. In November 2011, he voluntarily left his employment for the employer. He did not report his back symptoms as a reason why he was leaving this employment. In May 2012, his treating physician referred the applicant for an MRI. The MRI revealed severe degenerative changes. Two treating providers opined that the applicant's chronic back pain was causally related to his employment for the employer. An independent medical examiner disagreed and opined his symptoms were personal in nature. An unnamed administrative law judge adopted the opinion of the treating care providers and awarded the applicant the claimed benefits. The Labor and Industry Review Commission reversed. The Commission held the report of the independent medical examiner was more credible. The Circuit Court and Court of Appeals affirmed the opinion of the Commission. These decisions were based on *Llewellyn v. DILHR*. In *Llewellyn*, the Supreme Court held that, if an employee was engaged in normal exertive activity and there was no definite breakage or demonstrable physical change which occurred at the time, but only a manifestation of a definitely pre-existing condition of a progressively deteriorating nature, recovery should be denied. This is true even if the manifestation or symptomification of the condition became apparent during normal employment activity. The *Llewellyn* analysis applies in worker's compensation cases which involve pre-existing degenerative conditions. Referral to the *Llewellyn* rule was a proper basis upon which the Commission could have a legitimate doubt as to whether or not the problems of the applicant were work related. [Editor's note: traditionally, the *Llewellyn* case has applied only to specific injuries and not occupational/repetitive injuries such as that which occurred in this case because the *Llewellyn* case held it was "not here concerned with an occupational disease." The Court of Appeals expanded that evaluation in this case.]

Refusal to Rehire

Roberts v. Stevens Construction Corporation, 372 N.W.2d 458 (Wis. Ct App. 2016)*(unpublished)*. The applicant sustained an admitted work-related injury. He remained employed by the employer while he underwent medical treatment for approximately one month. He was released to return to regular duty. The same day the applicant advised his employer that his restrictions had been lifted, the applicant was advised by the employer that things had not gone as well as expected and his employment was terminated. The rationale given was that the applicant's performance at the project pre-injury was not what the employer had hoped for or expected. The unnamed administrative law judge held the employer did not unreasonably refuse to rehire/terminate the applicant. The Labor and Industry Review Commission

affirmed. The Circuit Court and Court of Appeals affirmed the Commission's decisions. There was factual testimony by the employer that the student housing project for which the applicant had been hired as superintendent was winding down, and it did not have other projects starting up for which it needed the applicant's services. The established law is that an employer can establish a reasonable cause for not rehiring a previously injured worker by proving that there had been a business slow down or that the employee's prior performance had been poor.

Barry v. Labor and Industry Review Commission, 374 Wis.2d 435 (Wis. Ct. App. 2017) *(unpublished).* Prior to the work-related injury, the applicant had worked for the employer as a driver. She delivered freight from Milwaukee to Appleton. She then took freight from Appleton to other cities such as De Pere and Marionette. During the time she was injured and off work, the employer restructured its routes. At the time the applicant was released to work, she was advised that she would no longer be compensated for transporting freight from Milwaukee to Appleton. The remainder of the prior route was still available for the applicant. The applicant met with her supervisor after she was released to return to work. She refused to accept that position. The employer wrote to the applicant subsequent to that meeting. The letter outlined the restructuring and informed the applicant that the employer understood the applicant had rejected the job offer. The applicant was advised that she had one month to accept an offered separation agreement. The employer did not fill the applicant's position until that separation agreement was signed and returned to the employer. The unnamed administrative law judge determined the employer had not unreasonably refused to rehire the applicant. The Labor and Industry Review Commission affirmed. The Circuit Court and Court of Appeals affirmed the Commission's decision. The applicant was offered a position, which she refused. This position is supported by the applicant's testimony that she did not correct what she perceived to be an inaccurate statement about her refusal to accept an offered position (in the letter sent to her, which summarized the discussion held, the job offered and the rationale for the restructuring).

Unemployment

Cockrell v. Labor and Industry Review Commission, 2016AP448 (Wis. Ct. App. 2016)(slip copy/ summary disposition order). The applicant sustained a work-related injury in October 2014. He was provided restrictions on January 13, 2015. A transitional duty plan was in place. On January 14, 2015, the applicant's supervisor instructed the applicant not to report for work the morning until after his follow up medical appointment scheduled for 8:30 a.m., so they could discuss his schedule in accordance with the restrictions. The supervisor indicated this was because the applicant was scheduled to put away stock, which would violate his restrictions. He understood those instructions and did not indicate he had any concerns about not beginning work on January 15, 2015 at his normal time. The applicant reported to work the following day at 5:11 a.m. The applicant testified he reported to work knowing his supervisor had instructed him not to do so, because he did not want to lose his wages for the day. His supervisor arrived at 7:45 a.m. and asked him to return after his doctor's appointment. When he returned, he was suspended and later discharged for insubordination for having reported to work when he was told not to so report. The Labor and Industry Review Commission held that the insubordination was misconduct. The Commission generally holds that refusal to follow a reasonable employer directive is misconduct unless the employee has a defensible reason for refusing to follow the directive. The applicant's reason in this case was not a defensible reason. The circuit court and Court of Appeals affirmed. The applicant was insubordinate when he reported for work the morning of January 15, 2015. Insubordination amounts to "misconduct" under Wis. Stat. 108.04(5) because it is conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees.

Josellis v. Labor and Industry Review Commission, 2015AP2532 (Wis. Ct. Ap. 2016)(not reported). The applicant received a copy of the employer's employment relations act which contains a provision stating an employee may be suspended or terminated for unacceptable conduct. As defined in the act, this includes

violation or neglect of safety rules. The applicant received written counseling reports for confrontational behavior in August 2014. In February 2014, the applicant received another report for driving at a high speed and failing to observe a stop sign in the parking lot. He was placed on a performance improvement plan which required him to follow all safety precautions while performing duties. Three months later he was suspended for three days for failing to properly place wet floor signs when mopping a restroom floor, in violation of safety rules. The following month, he was discharged after going without a hard hat into an area that was undergoing construction, despite posted signs saying hard hats were required. The applicant's failure to comply with the safety requirement of wearing a hard hat was the only action considered to constitute substantial fault. He was determined to be ineligible for unemployment benefits under Wis. Stat. §108.04(5g). The Labor and Industry Review Commission affirmed the judge's decision. The circuit court and Court of Appeals affirmed. The applicant entered a restricted area without wearing a hard hat despite knowledge that a hard hat was required, and in violation of the employer's safety rules. The applicant's decision to enter the area was not inadvertent. His decision was not attributable to a lack of skill, ability or equipment. He was, therefore, discharged for substantial fault as connected with his employment.

Easterling v. Labor and Industry Review Commission, 893 N.W.2d 265 (Wis. Ct. App. 2017). The applicant was employed as a driver of a van which transported individuals with special needs. The employer had a wheelchair tip policy. This policy provided that failure to properly secure a wheelchair, which then caused the wheelchair to tip during transport, would result in termination of the driver's employment. The applicant failed to secure a wheelchair, the wheelchair tipped over and the applicant was terminated the following day. Her claim for unemployment benefits was denied because the examiner determined she was discharged for substantial fault. The Labor and Industry Review Commission also determined she was discharged for substantial fault and held she was, therefore, ineligible for unemployment benefits under Wis. Stat. §108.04(5g). The Circuit Court affirmed. The Court of Appeals reversed. The Commission determined that the applicant had mistakenly failed to secure a passenger's wheelchair in place on the floor of the van. The Commission determined she had made sure the wheelchair was positioned properly and the brakes were applied, but in her haste to attend to other passengers, she forgot to secure the straps of the floor mount to the wheelchair. The Commission further held that contributing factors included the lack of an experienced volunteer, the presence of three additional passengers who were not expected, a feeling of pressure to hurry because the passengers were eager to get onto the van and the van was parked in a crosswalk. There was no evidence that the applicant had intentionally or willfully disregarded the wheelchair policy. In Operton, the court held the term "inadvertent" meant "failing to act carefully or considerately, inattentive; resulting from heedless action, unintentional." There is no pattern of conduct, no admission or action inconsistent with inadvertence on the part of the applicant. There was no other substantial evidence that could support a finding that the applicant acted intentionally. The inference was that the applicant's failure to secure the wheelchair was not an affirmative decision, but was the result of heedless action and unintentional. She mistakenly failed to secure the wheelchair and forgot to do so, which is an inadvertent error. Substantial fault does not include one or more inadvertent errors. Therefore, the actions by the applicant were not substantial fault and the denial of her claim for benefits must be reversed.

Wisconsin Department of Workforce Development v. Wisconsin Labor and Industry Review Commission, No. 2016AP1365 (Wis. Ct. App. 2017) *(final publication decision pending).* The employer had a policy, in its manual, that employees in their probationary period may have their employment terminated for one instance of no call/no show. The applicant did not show up for work once while in her probationary period because of flu-like symptoms. Her employment was terminated. She filed for unemployment benefits. Wis. §108.04(5) provides that an employee is not eligible for unemployment benefits if she is terminated because of misconduct

or substantial fault. Misconduct is defined by statute to include various intentional wrongful acts, in addition to seven specific situations. Included in the seven specific circumstances that are deemed to be misconduct, is "absenteeism by an employee on more than two occasions within the 120 day period before the date of the termination, unless otherwise specified by his or her employer in an employment manual, of which the employee has acknowledged receipt with his or her signature..." *See Wis. Stat. 108.04(5)(e).* An administrative law judge held the applicant violated the employer's policy and thus met the definition of misconduct. The Labor and Industry Review Commission adopted the position that the intent of the language regarding "otherwise specified...in an employment manual" was intended to allow a manual to provide that an employee could be absent on a more frequent basis without threat of discharge. It interpreted the two absences in 120 days to be a statutory minimum below which an employer could not go and still have a situation be considered misconduct. The Court of Appeals affirmed the Commission's interpretation of the statute. Thus an employer, by its manual, cannot provide that one absence in 120 day period is "excessive" for purposes of meeting the misconduct definition in Wis. Stat. §108.04(5). ✦

Decisions of the Wisconsin Labor and Industry Review Commission

Arising Out Of

Sorensen v. Wal-Mart Associates, Inc., Claim No. 2015-017216 (LIRC October 24, 2016). The applicant alleged he sustained a repetitive low back injury on or about August 10, 2009. He did not report the alleged injury until June 2011. During the almost two year period of time, he underwent significant medical treatment including pain management injections, MRIs and surgical consultations. The applicant reported his injury did not occur at work as part of a questionnaire during a surgical consultation in 2010. None of the other records during that period mentioned any type of work-related injury was sustained. Subsequent to litigation commencing, the treating physician opined both that the work injury directly caused the condition and that it caused the condition by an appreciable period of exposure. Eight months later, the same physician opined the work injury caused the condition by precipitation, aggravation and acceleration of a pre-existing condition and by an appreciable period of exposure. Dr. Hsu performed an independent medical examination. He opined no work-related injury occurred. Dr. Hsu opined that workplace exposure was not a sole cause or material contributory factor in his back condition. Administrative Law Judge Konkol opined the applicant did not meet his burden of demonstrating an occupational injury occurred. There was no job description in the record or anything indicating the applicant's job was strenuous. The applicant did not report the injury until fourteen months after his last date of employment. Dr. Hsu was credible and his opinions were the same as one treating physician. Three treating surgeons did not mention a work injury. The surgeon who treated him over three years after he stopped working was the only physician who opined his condition was related. The doctor's opinion regarding the nature of causation was inconsistent and, therefore, not credible. The Labor and Industry Review Commission adopted the findings and conclusions. The applicant was not an accurate historian. He testified that he did not have pain while working for the employer prior to August 10, 2009, but also stated that he did have pain for some weeks prior to that date, and that the pain worsened on that date. He testified that he received treatment during the second half of 2009 but was unable to verify his assertion. This leads to the inference that he did not treat with the claimed physician or that the physician did not opine the applicant sustained a work-related injury as claimed. Further the applicant alleged several films were incorrect because the doctors mistakenly mixed his films with another person. While the applicant testified that his physicians repeatedly agreed that his conditions were work related, he presented no evidence in support of this assertion. The applicant did not report the work injury for almost two years. He alleged he reported it to an assistant manager but could not name that person. He had no explanation for his failure to timely complete an incident report. The Commission was not persuaded the applicant was truthful in any of these

assertions. The Commission will elevate the substance of a narrative explanation over the marked boxes on the WKC-16b form. However, when a treating physician has changed his mind regarding causation, that opinion is not persuasive.

Pipkin v. Nick H. Hull, Claim No. 2015-010177 (LIRC October 31, 2016). The applicant worked as a long haul over-the-road truck driver. While he was on his reasonable and customary route to his drop off destination, the applicant exited his vehicle at a red light. He took a tire thumper (akin to a small baseball bat) and confronted an individual who happened to be an off duty police officer. The applicant was eventually subdued and held until law enforcement arrived. He was injured in the scuffle. The applicant was charged with aggravated assault and endangerment. Administrative Law Judge Doody held that the applicant deliberately stepped out of his course of employment by exiting his truck with a bat, with the intent to assault an individual. To remain in the course of his employment, he should have remained in his truck and continued on the route to the drop site. The applicant was not acting in furtherance of the employer's interests. He was the aggressor. He did not have to do what he did in order to perform his job for the employer. Therefore, the applicant was not in the course of his employment when he was injured. The Commission adopted the findings entirely. Being responsible for a truck at all times is not the same as being in the course of employment, as alleged by the applicant in support of his appeal. Initiating and engaging in a fight causes an employee to step out of the course of his or her employment. *See Volmer v. Industrial Comm*, 254 WI 162 (1948). Further, the fact that the respondents' attorney arrived at a hearing location before the applicant and engaged in conversation with the court reporter and judge, does not establish (as alleged by the applicant as evidence he did not receive a fair trial) that the attorney was a friend of the judge or that the judge made his decision based on anything other than the record. Further, the fact that the respondents' attorney was able to obtain information the applicant tried unsuccessfully to get on his own does not provide sufficient evidence to support the claim that the police filed false reports. The applicant failed to provide any credible evidence of any type of cover up by the police officers involved. His argument relies upon hearsay statements from persons in a group called Phoenix Cop Watch and the opinions of his ex-wife and priest who told him what they thought after reading the statements of the police officer and his wife, and is incredible.

Verkuilen v. Pierce Manufacturing, Inc., Claim No. 2010-026264 (LIRC January 13, 2017). The applicant alleged he sustained a work-related injury on September 29, 2010. He initially alleged he was lifting the first of two hatch walls (67 pounds) when he experienced pain in his lower back. He asked his co-worker to lift the second piece because he was unable to do so. The co-worker testified this occurred. The applicant completed his work day. He then cut grass on a riding lawn mower, off work time, and had a severe onset of low back pain. The applicant's medical records from right after the incident reflected he reported a gradual onset history of symptoms over one week. However, the nurse triage notes from the same day indicate he reported increased lower back pain after lifting something and cutting lawn. Another medical record from a few days later indicated the lifting incident did not trigger immediate back pain. At the Hearing, the applicant's testimony was inconsistent with the initial report. He did not recall asking a co-worker to assist in lifting a hatch wall. He testified that he had pain when he lifted the second wall. Dr. O'Brien performed an independent medical examination. He determined the inconsistencies were evidence that no injury was sustained. Administrative Law Judge Falkner held the applicant did sustain a work-related injury. He opined the applicant was an unreliable historian, had his facts wrong at the Hearing, and there were inconsistent medical records. However, the co-worker's credible testimony and report of injury were sufficient support for the claimed injury. Dr. O'Brien's report read more like a trial brief than a medical opinion. He wrote more as an advocate than a disinterested writer. Dr. O'Brien's real basis for controverting the claim was his reading of the applicant's credibility regarding whether an incident occurred and not a reading as to whether the incident, as described, could have been injurious. Dr. O'Brien either ignored or did not read the triage nurse note (referenced above) which was from the same date of service as records he did review. There was no explanation as to whether he ignored it or just did not read it. There was no way to save Dr. O'Brien's opinions from his error because there was sufficient credible evidence in the record that a lifting occurrence occurred. The Labor and Industry Review Commission affirmed. The question of which doctors' opinion is most credible, turns on whether the applicant actually sustained an injury. While the records reflect reports of pain before the alleged incident, the co-worker testimony and the injury report

was sufficient to demonstrate that the incident precipitated, aggravated and accelerated a pre-existing degenerative condition beyond normal progression, resulting in the herniation.

Knight v. ABM Janitorial, Claim No. 2014-016340 (LIRC January 20, 2017). The applicant worked for five hours as a janitor for the employer. At no time during those five hours did she report any symptoms or problems. Administrative Law Judge Schaeve held the applicant did not sustain a work-related injury. The Labor and Industry Review Commission affirmed. Disability caused by "precipitation, aggravation and acceleration" of a pre-existing, progressively deteriorating condition beyond normal progression can be compensable. However, all three of those elements need to be present. Not every "aggravation," however slight, justifies allowing a recovery. The medical opinion relied upon by the petitioner did not meet that threefold requirement.

Rogers v. Meyers Electric, Inc., Claim Nos. 2015-010853, 2013-025125 (LIRC January 20, 2017). When the applicant was 18 years old, he sustained a knee injury. This required a left ACL reconstruction at the age of 19 years old. He subsequently underwent additional surgeries to his left knee. He sustained at least two nonwork-related left knee injuries. In 2002, he told his doctor that his knee always hurt him. The applicant began working for the employer in 2005 as an electrician. In 2008, x-rays revealed bone on bone condition. He underwent subsequent ACL reconstruction. In 2011, he was advised that he required a total knee replacement. He fell down steps in September 2013 at work. He underwent the knee replacement in October 2013. His treating physicians initially opined that the specific incident resulted in precipitation, aggravation and acceleration of a pre-existing progressively deteriorating or degenerative condition. His doctors issued a supplemental report and opined the work duties were a sole cause or material contributory factor in the condition's onset or progression. Dr. Grossman performed records reviews at the respondent's request, and opined the degenerative arthritic condition began with the injury at age 18 and with the surgery at age 19, and followed a predicted and relentless trajectory toward arthroplasty. Administrative Law Judge Enemuoh-Trammell held the applicant sustained a traumatic left knee injury as a result of a specific fall down the stairs. She held that this would not have directly caused the need for the total left knee replacement. The order was left interlocutory with respect to whether an occupational injury occurred. Administrative Law Judge Phillips, Jr., held the date of injury for the occupational incident was the first date of wage loss, which happened to also be the date of the traumatic knee injury. Judge Phillips held the conflicting opinions regarding the date of injury, and whether a traumatic injury or occupational injury was sustained, by the treating physicians, made it difficult to accept the physician's opinions. Instead, Dr. Grossman's opinions were held to be more credible and were adopted. The claim was denied. The Labor and Industry Review Commission adopted the findings and conclusions of Judge Phillips, Jr. There is no doubt the applicant felt increased left knee pain while at work, given his prior surgeries, injuries and the bone on bone condition. However, symptoms are not synonymous with cause.

Rassel v. County of Ozaukee, Claim No. 2011-000151 (LIRC February 28, 2017). The applicant did not originally tell his treating physician about his history of left knee problems. In fact, he specifically told his treating physician that he had no prior history of left knee symptoms. Dr. Kaplan did become aware of the applicant's prior history, and outlined that history in his report. Specifically, the prior history included that the applicant was referred for an orthopedic evaluation prior to the work-related injury, and declined that referral because he did not want surgery. The applicant reported different histories to different physicians. Administrative Law Judge Mitchell dismissed the applicant's claims on the basis that he was not credible. The Labor and Industry Review Commission affirmed. The applicant's failure to voluntarily tell his treating physician about a pre-existing history casts doubt on the applicant's credibility and his claims, even though his treating physician ultimately became aware of the history. Further, the applicant's declination of a referral to an orthopedic surgeon because he did not want to have surgery is tantamount to being offered surgery prior to the injury, and refusing the recommendation.

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Riendeau v. Manheim Remarketing, Inc., Claim No. 2015-003248 (LIRC April 21, 2017). The applicant shoveled snow for five to ten minutes with a few coworkers. He stopped shoveling and waited for the plow to arrive. The plowing (not performed by the applicant) took approximately 30 minutes. The applicant then left the area, carrying his shovel, to go assist with shoveling elsewhere on the work site. Approximately 20 minutes later, he was found collapsed, pulseless and non-breathing. His shovel was underneath him. He could not be revived. An autopsy revealed more than 90 percent stenosis in two of three major heart arties. The cause of death was sudden cardiac death as a consequence of atherosclerotic coronary vascular disease. The respondents' expert, Dr. Zwicke, opined the cause of death was not in any way related to his work activities. Dr. Weisman also issued an opinion. He assumed the applicant was performing physical exertion at the time of the death, and that the applicant shoveled snow off multiple cars and up to nine inches of snow. Dr. Weisman opined these activities would lead to significant physical exertion, and that the exertion contributed to the heart attack. He also opined it was likely the work activity precipitated, aggravated and accelerated a pre-existing condition beyond normal progression. Dr. Schaper also completed a WKC-16b. He also agreed there was a causal connection on the same basis as Dr. Weisman. The applicant had no surviving dependents. The Work Injury Supplemental Benefit Fund filed an application to claim the death benefit under Wis. Stat. §102.49(5)(9) and the additional $20,000.00 payment due for death cases under Wis. Stat. §102.49(5)(a). The respondents originally reimbursed the applicant's companion for final treatment expenses and burial expenses. The unnamed administrative law judge awarded death benefits. The Labor and Industry Review Commission reversed. Dr. Zwicke's opinion is more credible. He opined a cardiac event could have happened at any time, even at rest, given the amount of stenosis in the two major arteries. Dr. Weisman agreed that the applicant could have had a fatal myocardial infarction on the same date, regardless of shoveling. It is not clear that Dr. Weisman had an adequate timeline of the events that occurred. He relied heavily on the timing of the work activity (and that the applicant was engaged in physical exertion at the time of the heart attack). The courts have generally held that, if heart failure is caused by employment or employment related exertion, it is compensable regardless of whether there was a pre-existing myocardial degeneration or arteriosclerosis. The evaluation generally becomes whether there was aggravation, acceleration and precipitation of a progressively degenerative condition beyond normal progression. Here, the evidence did not establish this standard was met. The applicant had not shoveled snow for approximately 45 minutes prior to his collapse. Several of the experts opined there was physical exertion at the time of the collapse. The foundation of those opinions is flawed. The Commission does not have any authority to order repayment of any payments made by mistake of fact, including the final treatment expenses and burial expense.

Causal Connection

Ports v. Vesta Intermediate Funding, Inc., Claim No. 2015-007288 (LIRC November 29, 2016). The applicant alleged she sustained an occupational work-related injury. Dr. Trinkl provided a WKC-16b report indicating that the applicant sustained a work-related injury because of direct causation and on an occupational injury basis. Dr. Boyd provided a WKC-16b report and indicted causation by checking the occupational injury box and writing "per patient" next to the box. The applicant underwent an examination by Physicians Assistant Serrano. He opined it was more likely the applicant's history of weight lifting and not the alleged work-related injury which caused her symptoms. Dr. Bax performed an independent medical records review. Dr. Bax opined the applicant's symptoms were personal and that she had not sustained a work-related injury. Administrative Law Judge O'Connor held the applicant did not sustain a compensable work-related injury. The causation opinion of Physician's Assistant Serrano could not be considered because he did not have the requisite medical credentials to provide a causation opinion under Wis. Stat. 102.17(1)(d). Further, the causation opinion of Dr. Boyle must be disregarded because he added "per patient." The applicant is not qualified as an expert. Dr. Boyle cannot delegate causation opinions to his patient. Dr. Bax opined the applicant's job duties were not causative in her symptoms. He is qualified to provide such an opinion. Dr. Trinket did not attach medical records to his WKC-16b report and did not indicate, on the form, that the overuse injury occurred in an occupational setting. The Labor and Industry Review Commission adopted the entirety of the judge's decisions. Wis. Stat. 102.17(1)(d)(1) provides that the contents of certified medical and surgical reports by practitioners including physician assistants, which are presented by a party, constitute prima facie evidence as to the matters contained in the reports. However, certified reports by

dentists, physician's assistants and advanced nurse practitioners are only admissible as evidence of the diagnosis and necessity of treatment but not the cause and extent of disability. The judge, therefore, properly determined he could not consider the causation opinion of Physicians Assistant Serrano. However, Dr. Bax could properly review or consider those same notes when reaching his own conclusion on causation. Further the applicant's opinion regarding the cause of her symptoms/condition is not sufficient because she is not a medical expert and has only lay opinions. Dr. Boyle did not indicate his opinions were the same as the applicant or otherwise indicate he opined the condition was work related. Therefore, his opinions are not persuasive.

Ringmeier v. City of Manitowoc, Claim No. 2015-000649 (LIRC January 13, 2017). The applicant alleged he sustained a cervical injury as a result of performing a training exercise known as the Denver Drill. The independent medical examiner referenced a website/URL of a video of a Denver Drill being performed. Neither party brought a CD of the video to the Hearing. This was not entered into the record as an exhibit. Both parties appear to have agreed that the judge could review the YouTube video on the website for demonstrative purposes. The independent medical examiner opined the applicant sustained only a temporary injury as a result of the mechanism of injury reflected in the demonstrative exhibit. The treating physician did not reference reviewing any type of video or otherwise having information about the same mechanism of injury. The treating physician opinion was, therefore, flawed and the independent medical examiner's opinion was adopted. Administrative Law Judge Falkner, denied the applicant's claim that he sustained a cervical injury. He, however, noted that the records also referenced a potential shoulder injury. Judge Falkner did not issue any findings with respect to the alleged injury and reserved the applicant's right to pursue such a claim at a later date, subject to the inability to re-litigate any specific findings made by the judge with respect to the mechanism of injury, etc. The Labor and Industry Review Commission adopted the judge's decision and reserved jurisdiction for potential additional claims.

Kalinowski v. Aurora Healthcare, Inc., Claim No. 2011-001165 (LIRC February 9, 2017). The applicant worked in food service. She alleged that she sustained an injury to her right neck, shoulder and arm while bending over at work to pick up food trays in order to place them on a cart. The alleged date of injury was on November 9, 2011. The record, however, reflected numerous visits to care facilities starting as early as October 2010. The applicant initially reported she had experienced symptoms since October 2010. There was no initial reference in the medical records to any type of injury on November 9, 2011. She later told a different physician that she had significantly different symptoms post injury as compared to pre-injury. The records reflect the symptoms reported pre and post injury were identical. Administrative Law Judge Konkol held the applicant's treating physician's reports had insufficient foundation, and, therefore, were not credible. He dismissed the applicant's claims. The Commission affirmed.

Bush v. County of Washington, Claim No. 2015-012544 (LIRC February 24, 2017). The applicant alleged he sustained a work-related injury when he moved a patient from the bathroom back into his bed. The applicant worked as a CNA. The applicant had a history of back pain similar to that he claimed to have experienced as a result of the work-related injury. The applicant, however, failed to mention that history to a number of his physicians. The applicant's treating physician assigned permanent restrictions and assessed permanent partial disability. The applicant alleged he could no longer work as a CNA because of his symptoms. A witness testified that the applicant was a main caregiver at a child care business he owned and operated. The testimony supported this employment required physical exertions which were significantly greater than the restrictions the treating physician assigned. Administrative Law Judge Martin held the applicant sustained a work-related injury and was entitled to all benefits sought. The Labor and Industry Review Commission reversed. Given the lack of proper history provided to the treating physician, and that the restrictions exceeded the work done by the applicant in his own business, the treating physician's opinions were not credible. Instead, the independent medical examiner's (Dr. O'Brien) opinions, that merely a temporary injury was sustained and no restrictions were necessary, were adopted.

McRoberts v. McMillan Electric Co., Claim No. 2015-012655 (LIRC February 28, 2017). The applicant alleged she was odd lot permanently and totally disabled as a result of a fall in the employer's parking lot. Dr. Barron performed an independent medical examination. He referenced MRIs that had been performed prior to the incident. He stated in his report that "her subsequent MRI scan and x-rays did not show any objective change..." It was stipulated at the Hearing that there was not an MRI performed subsequent to the accident. The applicant

argued that the doctor's medical opinion was based upon the non-existent subsequent MRI and that Dr. Barron's report, as a matter of law, could not be considered credible and substantial evidence to support the judge's decision. The employer asserted there was merely a typographical error. Dr. Fitzgerald submitted a WKC-16B on behalf of the applicant. There was no evidence introduced that demonstrated that Dr. Fitzgerald was ever made aware of the applicant's pre-existing significant history of back pain, including visits to another physician for the symptoms shortly before the work-related incident. Administrative Law Judge Smiley denied the applicant's claims. The Labor and Industry Review Commission affirmed. The reference to the subsequent MRI was simply a typographical error or a standard type of provision put in reports. Dr. Barron's report was worthy of being deemed credible. The opinion of Dr. Fitzgerald was not credible because there was no evidence introduced that showed the doctor was ever made aware of the applicant's pre-existing condition. The applicant was also not credible because her testimony was vague and inconsistent.

Compromise Agreements

Amos v. Mentor Management, Inc., Claim Nos. 2012-02855; 2012-027283 (LIRC January 13, 2017). The applicant sought to reopen his compromise agreement. He alleged the settlement amount was far less than his claim was worth based on his alleged medical conditions and treatment expenses. He also alleged the respondents engaged in fraud and that he was under duress at the time of the settlement. Administrative Law Judge Sass denied the request. The Labor and Industry Review Commission adopted the judge's decision in its entirety. Gross inequity means more than agreeing to a bad deal, because that is an inherent risk of settlement. A bad deal encompasses a situation in which, at the time of the settlement, there existed the possible need for future treatment. The possibility that an injured worker's condition may worsen or improve or that the parties may rely upon a premature or inaccurate diagnosis is simply a risk of compromise. The applicant did not present any evidence at the Hearing supporting his allegations of fraud. The fact that one date of disability was initially used, and that date later changed because of additional medical records, does not amount to fraud. The applicant's disagreement with the respondent's expert's opinions and the foundation of the same does not amount to fraud. Further, an applicant's dire financial situation at the time of settlement does not constitute duress by the respondents. Many applicants enter into settlement agreements based upon dire financial circumstances. If that was sufficient to set aside compromises, then doing so would be the rule instead of the exception. The applicant had weeks to consider the settlement amount between the date of settlement and the date he signed the agreement. Any issues involving the underlying merits of the claim are irrelevant and not to be considered as part of an evaluation of re-opening of a compromise agreement.

Day v. NewPage Wisconsin Systems, Inc., Claim No. 2002-021031 (LIRC May 26, 2017). The applicant stopped working for the employer in 2001. An application for hearing was not filed at that time; however, the applicant alleged he sustained an occupational hearing injury as a result of employment for the employer. The claim was compromised in May 2002. The compromise outlined the date of injury as November 30, 2001 and the claim as hearing loss arising out of and in the course of employment. The compromise provided that bilateral hearing aids would be reimbursed at a usual and customary rate when receipt of purchase of such was presented to the insurer's office and the hearing aids are medically indicated. An order approving the agreement was issued in June 2002. The applicant filed an application for hearing in February 2015 alleging that he sustained occupational hearing loss on November 30, 2001. An unnamed administrative law judge held that the February 2015 application was the original application and the claim could be brought against the Supplemental Benefit Fund because the claim was otherwise time barred as against the employer and insurer. The judge found the compromise only required the employer to be liable for hearing aids for 12 years after the compromise and the Fund to be responsible for any additional claims for benefits. The Labor and Industry Review Commission reversed. Submission of a compromise agreement suffices as an action to proceed with a worker's compensation claim under Chapter 102 even if a hearing application was not previously filed. Therefore, the finding that the 2015 application was the original claim proceeding was incorrect. Further the order approving the compromise bound the applicant and employer to the terms of the same. The compromise agreement specifically provided that the employer would reimburse the applicant for the cost of medically indicated hearing aids. The compromise agreement did not provide for any time limitation for the employer's provision of the hearing aids. Therefore, the employer is required to reimburse the applicant for all hearing aids reasonably required as a result of the occupational hearing loss claim throughout the applicant's lifetime, upon submission of receipts by the applicant.

Employment Relationship

Wanless v. McCullick Construction, Claim No. 2014-028083 (LIRC March 30, 2017). The respondents filed a reverse application to obtain a decision regarding whether the applicant was an employee of the employer, a joint venture or independent contractor. The employer was a sole proprietorship. The only type of work the employer did was to build decks for one particular company. In the past, the employer did other types of work. The employer and applicant's relationship goes back several years. The employer initially did work framing houses. He hired the applicant as a foreman. Later, the applicant began his own construction business and had his own employees. When that business fell off, the applicant built decks for the employer as an independent contractor for a period of time. The employer acknowledged that, beginning in March 2014, the applicant built decks as an employee of the employer. However, at the time of the October 1, 2014 alleged injury, the applicant was not building a deck for the employer. Instead, he was doing framing work on a duplex as part of a project being done for another entity. The employer testified that the applicant had gone to the employer and indicated the other company offered to pay for a duplex framing job. The employer indicated the applicant asked the employer if he was interested in the job. The employer acknowledged the money was good but that he did not have time and did not want to do the job because he needed to keep the other company (for which he built decks) happy. The employer told the applicant he could take a month off to do the other job if he wanted to. He also told the applicant he could use another employer employee for the project. According to the applicant, when he was approached about this framing job, he indicated that he worked for the employer and would need to take the job to the employer. The applicant testified he did not want to lose the security of the job he had with the employer. The applicant testified that, after he told the employer about the job, the employer took over handling the details, and contacted and corresponded with the company about the framing project. According to the employer, the employer and applicant agreed that, after the men were paid and the job was done, whatever was left of the payment for the project, would be split between the employer and the applicant. The applicant testified that he did not understand that to be the case. Instead, he understood that he would only receive his regularly hourly wages, apart from potentially a bonus. The employer continued to pay the applicant and the other employees normal wages. The employer asserted the payments were advanced on the money that the employer and applicant expected to receive from the job because the applicant did not have the funds to pay wages while the job was in progress. The employer admitted he provided a certificate of insurance to the company for the job which he believed included worker's compensation coverage (although it did not). The employer considered this to be lending the applicant his insurance. The employer testified that he and the applicant pooled their resources and both brought equipment and tools to the job site. The employer indicated he did not direct the workers as he would on the deck building job sites. The employer considered the applicant to be running the job. The applicant testified that, to the extent he directed or controlled work, he did so as a foreman, just as he did on the regular deck jobs for the employer. After the applicant was injured, the employer told the company that the employer could not finish the job, that he was sorry and that he had never walked away from a job before but that he did not have enough people to finish it. Judge Michelstelter held the applicant was an employee of the employer, not an independent contractor and not engaged in a joint venture. The Labor and Industry Review Commission affirmed. An employee is "every person in the service of another under any contract of hire, express or implied" except for domestic servants and persons whose employment is not in the course of any trade, business, profession or occupation of the employer. Wis. Stat. §102.07(4)(a). The primary test for determining the existence of an employer-employee relationship is whether the alleged employer has a right to control the details of the work; and among the secondary tests which should be considered are (1) the direct evidence of the exercise of the right to control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right to fire or terminate the relationship. *See Kress Packing Co. v. Kottwitz.* This test remains viable in determining whether a person is an employee, even though, for purposes of the act, the test was supplanted by another statute for deciding independent contractor status. Under Wis. Stat. §102.07(8)(b) an independent contractor is not an employee of an employer if the independent contractor meets all 9 enumerated statutory conditions. One of those is the requirement that the putative independent contractor receive compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis. Also relevant is 102.07(8m) which provides that an employee who is

subject to the chapter is not an employee of another employer for whom the first employer performs work or services in the course of the other employer's trade, business, profession or occupation. This only excludes from coverage individuals who are acting as employers in the work or service they perform for the other employer in that other employer's trade, business, profession or occupation. With respect to partnership and joint ventures, the Supreme Court has held that normally a partnership is not intended for a one-shot temporary joint business activity or a single transaction. Instead, the following four requisites are necessary to recognition as a joint venture: (1) contribution of money or services but not necessarily in equal proportion by each of the parties; (2) joint proprietorship and mutual control over the subject matter of the venture; (3) an agreement to share profits through not necessarily the losses; and (4) a contract, express or implied, establishing the relationship. A joint venture is not a legal entity separate from the participants in the venture as a partnership is. An employee of a joint venture is the employee of all members of the venture, while in a partnership, the partnership is the employer. *Ins Co. of N. Am v. Dept' of Indust., Labor and Human Relations.* The applicant was more credible in his testimony than the employer and, therefore, his testimony is adopted. Further, even accepting the employer's testimony alone, the applicant could not be an independent contractor because the employer admitted to paying the applicant his normal payroll per week. He could not meet all nine requirements under the statute to be an excluded independent contractor. Further, just because the applicant was previously an employer does not mean he is automatically excluded from the definition of an employer. To be excluded, he would need to have provided services on this particular job as an employer. The applicant's testimony was adopted and there was no such relationship. Further, there was no joint proprietorship and mutual control when considering the applicant's testimony, and therefore, no joint venture.

Evidence

Monty v. ABF Freight Systems, Inc., Claim No. 2010-0004425 (LIRC January 31, 2017). The applicant alleged he sustained a permanent right shoulder injury. He alleged this occurred as a result of a specific incident (pulling on a chain to raise a metal dock). The employer denied the injury occurred on factual basis and further denied that any incident would have caused anything more than a temporary injury. Administrative Law Judge Schneiders held that an incident occurred but that the incident was temporary in nature. The Labor and Industry Review Commission affirmed. [Editor's note: Judge Schneiders' decision is instructive in this case in that she held that, for an undisclosed and unknown reason, the employer decided to turn a relatively simple accidental right shoulder claim into an odyssey encompassing four hearings and more than 40 exhibits. Two treating physicians were subpoenaed. One physician testified at a hearing and another testified via a video deposition. The employer brought in an investigator who viewed the alleged accident scene, four years post injury, and produced 36 photos and a video of the loading dock area in question. Additionally, she held the employer made completely unsubstantiated allegations of some type of nefarious conspiracy or collusion between the applicant's attorney and a treating physician. These types of exhibits, witnesses, etc. are not commonplace in Wisconsin worker's compensation hearings, and at least this particular judge, seemed to be frustrated by the extent of the evidence produced.]

Jurisdiction

Malone v. Heartland Express, Claim Nos. 2005-013564 and 2005-015905 (LIRC May 19, 2017). The applicant maintained residences in Wisconsin and Georgia. On June 13, 2001 she spoke on the phone with a recruiter for the employer. The employer had an Iowa address and no terminals in Wisconsin. They discussed rate of pay, and made arrangements for the applicant to attend orientation in Georgia. On July 11, 2001, she attended orientation in Georgia. She signed employment eligibility verification documentation and listed an address in Georgia. She also took a drug test and a road test. She completed orientation two days later and accepted an offer of work as an over the road truck driver on that date. She reported leg pain and buttock pain during an August 2002 run. She filed a worker's compensation claim in Georgia and listed her Georgia address. In October 2002, she was in Wisconsin and hit a deer with her truck. Medical records and reports of injury conflict with respect to symptoms reported. She alleged back pain after waking up the following day. She continued to perform work for the employer, but also began to receive medical treatment. She filed a Hearing Application in Wisconsin alleging a traumatic and occupational injury. The traumatic incident occurred in Wisconsin and jurisdiction was not disputed. The employer disputed jurisdiction for the occupational injury. The unnamed administrative law judge determined there was jurisdiction for an occupational injury. The Labor and Industry Review Commission reversed.

The employer is principally located outside of Wisconsin. Therefore, the applicant is only covered for occupational disease if she can show that she was working under a contract of hire made in Wisconsin. Under Wis. Stat. 102.03(5), if an employee, while working outside of the territorial limits of Wisconsin sustains an injury that would be compensable if the injury had occurred within Wisconsin, the employee is only entitled to benefits in Wisconsin if (1) his or her employment is principally localized in Wisconsin; (2) he or she was working under a contract of hire made in Wisconsin in employment not principally located in any state; (3) he or she is working under a contract of hire made in Wisconsin for employment outside of Wisconsin. Case law has held that the place where an employment offer is accepted determines where the contract is made. A contract made by telephone is made where the accepter speaks. *See Horton v. Haddow.* Here, the judge determined the applicant was in Wisconsin when she spoke to the employer's recruiter, discussed the rate of pay and agreed to work for the employer. The judge determined there was no evidence to rebut the applicant's testimony to that effect. However, the Commission questions the testimony because she provided a Georgia address and telephone number in her job application and subsequent contacts with the employer. Further, the employer testified that, had the applicant advised the recruiter that she was in Wisconsin at the time, she would have been scheduled for orientation in Iowa or Ohio instead of Atlanta because the employer pays for the transportation to the orientation. This suggests the call took place when the applicant was in Georgia. Further, the applicant did not testify why she believed she had the job and had entered into a contract for hire when she made the initial call to the recruiter. An applicant's subjective belief does not establish a contract of hire in the absence of evidence clearly indicating the employer extended an offer of work. The employer testified that the recruiter has no hiring authority, that job offers are not extended over the phone and that employment is offered only after orientation. The job offer was made to the applicant after orientation, when she was in Georgia. Therefore, there is no jurisdiction over a claim for occupational disease.

Loss of Earning Capacity

Zaldivar v. Hallmark Drywall/Gypsum Floors, Claim No. 2010-10154 (LIRC December 28, 2016). The applicant sustained an admitted work-related injury which necessitated permanent restrictions. The issue in dispute was whether he sustained any loss of earning capacity, and if so, the extent of the same, because he did not have legal permission to work in the United States. Upon remand from the Court of Appeals, the Labor and Industry Review Commission held the applicant sustained 45% loss of earning capacity. This opinion was based upon the applicant's vocational expert's opinion. The respondent's vocational expert opined the applicant would have a slightly higher loss of earning capacity if he was legally able to work in the United States. Her opinion regarding the reduced loss of earning capacity when considering the Mexican job market could not overcome the applicant's vocational expert's opinion because the respondent's expert acknowledged she had no real expertise in the Mexican labor market and did not provide any specific information supporting a generalized opinion that the loss of earning capacity would be less in that market. Further, the record did not contain any persuasive evidence about how the applicant's immigration status affected his personal pre and post injury earning capacity in the United States in relative percentage terms, differently than other employees with similar post injury restrictions.

Hintz v. Aurora Health Care Metro, Inc., Claim No. 2002-007154 (LIRC April 27, 2017). In November 2001, the applicant sustained a work-related injury when she helped move a 400 pound patient. In 2005, Administrative Law Judge Schneiders held that the November 2001 injury caused a left shoulder and cervical spine injury. She determined that the applicant required restrictions and that those restrictions prevented her from returning to work in the date of injury position. She held the applicant sustained 15% loss of earning capacity as a result of the restrictions. This was based upon the vocational expert reports. Jurisdiction was reserved for any future orders and awards. The applicant continued to work for the same new post injury employer until May 2010. She was discharged for reasons reportedly unrelated to her restrictions. She underwent additional medical treatment a few years later. She obtained an opinion that she was unable to continue working, and was discharged from employment in 2010, because of the ongoing symptoms. Her vocational expert opined she was permanently and totally disabled because of the effects of the new restrictions. The respondents obtained an expert opinion that the applicant's condition had not changed since 2005, and that she required no additional restrictions. The respondent's vocational expert opined there was permanent and total disability under the new 2012 restrictions, but

that no loss of earning capacity was sustained as a result of the independent medical examiner's opinions. Administrative Law Judge Mitchell held the applicant required additional restrictions and sustained a total of 60% loss of earning capacity (45% higher than previously awarded in 2005). The Labor and Industry Review Commission reversed. The evidence demonstrated the applicant required the same restrictions as she did in 2005. She did not sustain any additional loss of earning capacity as a result of the work-related injury. The medical records did not rule out that the applicant may incur additional disability or incur additional medical expenses related to the work-related injury in the future. Therefore, the order was left interlocutory.

Favel v. Great West Dedicated Transport, III, Claim Nos. 2013-011690, 2015-002824 (LIRC April 27, 2017). The applicant performed heavy work as a mechanic. In 2004, he felt something "pop" while at work. He underwent a fusion at C5-6. He received worker's compensation benefits. That case eventually was resolved by a full compromise. In June 2011, the applicant, as part of his job, had to work with a rather heavy tarp. Thereafter, he developed substantial problems in his neck. He underwent a fusion from C3 to C7. He also required a second surgery at those levels. The Administrative Law Judge held the application was *odd lot* permanent total disability. The Commission affirmed the vital parts of the decision. Dr. Karr opined that the need for fusions on the immediately adjacent levels to the original fusion was a result of the natural deterioration of the levels after the original fusion. This would have resulted in the additional surgeries being the result of the initial specific work-related injury, which had been fully compromised. The Commission gave credence to that view. However, Dr. Pannu opined that the stresses of work subsequent to the 2004 surgery were substantial causes in aggravating, accelerating and initiating an occupational disease. The employer can be held liable for the occupational disease, even though the exposure is not the sole cause or main factor in the applicant's disability disease. The date of injury was the first day of wage loss due to the alleged occupational disease condition.

Medical Issue

Nichols v. Generac Power Systems, Inc., Claim No. 2014-027684 (LIRC March 30, 2017). The applicant fell from a platform. The harness he was wearing kept him suspended. He, thereafter, reported significant back pain. He underwent surgery. His treating physician opined the applicant sustained a work-related injury and assessed permanent partial disability. Dr. Karr performed an independent medical examination. He opined there was no acute trauma. He opined the applicant sustained merely a temporary work-related injury. Dr. Karr opined the applicant's personal, pre-existing condition, was the need for the surgery. Administrative Law Judge Smiley held the incident occurred as alleged. She adopted the opinions of the treating physician. The Labor and Industry Review Commission affirmed with respect to the incident but reversed with respect to the nature and extent of the injury. The Commission held Dr. Karr's opinions regarding the injury being temporary in nature were more credible. The Commission was cognizant of the Court of Appeals decision in *Flug v. Labor and Industry Review Commission*, which suggests that if the applicant underwent surgery in good faith belief that he was treating the work injury, the disability resulting from the surgery would be compensable even though the Commission determined the surgery was not performed to treat the injury. However, the *Flug* decision was not published and is currently pending before the Supreme Court. Instead, the Commission based its decision regarding compensability of additional benefits on *City of Wauwatosa*, which held that, when medical experts disagree about whether a surgery is performed to treat a work injury or an unrelated condition, the resulting disability is not compensable when the trier of fact agrees with the expert who opined the surgery was done to treat the unrelated condition. Therefore, the Commission declined to award the disability compensation related to the fusion surgery.

Notice

Ehmke v. Meridian Industries, Inc., Claim No. 2013-002809 (LIRC April 21, 2017). The applicant was a 73 year old woman who alleged she sustained a 2003 occupational cervical injury in the Hearing Application that she filed in 2012. The date of injury was the last date she worked before the disability. Prior to the alleged date of injury, the applicant had sustained an earlier injury which involved her shoulder. She also treated for cervical symptoms at the time of that prior shoulder injury. Dr. Borkowski had previously examined the applicant at the respondents' request and submitted a report in 2001. This report was supplemented the following month, after Dr. Borkowski went to the employer's facility and reviewed the actual job duties performed by the applicant. He opined the job duties were not causative of the applicant's condition. Dr. O'Brien performed a record review in 2015. He opined the applicant's job duties were not causative of the cervical condition. He relied upon Dr. Borkowski's evaluations

and opinions. Administrative Law Judge Martin held that the applicant's claim was not barred by the notice of injury exception in Wis. Stat. §102.12. Judge Martin determined the applicant sustained a compensable, occupational, cervical, work-related injury. The Labor and Industry Review Commission affirmed with respect to the determination of the notice of injury exception. The Hearing Application was filed almost ten years after the alleged cervical injury. However, the respondents have the burden of showing they were misled by any lack of notice, under Wis. Stat. §102.12. The employer did not have any witness at the hearing or other evidence to explain how it was allegedly misled by the applicant's delay in filing. The records failed to demonstrate that the employer carried that burden. (*See Res Judicata* for additional information.)

Occupational Injury

Lasso v. MillerCoors LLC, Claim No. 2013-016913 (LIRC December 28, 2016). The applicant worked as a brewer for the employer's brewery, in an area where yeast was added to wort to ferment. In early 2013, the employer began using water containing chlorine dioxide to sterile the yeast and fermentation vessels. The applicant testified that he was exposed to chlorine dioxide as part of his job duties. The employer did not dispute the testimony. The applicant experienced various respiratory symptoms and contacted the employer's hazmat team. One week after that contact, the employer changed some of its procedures as related to working with chlorine dioxide. The testing prior to the changes had revealed the levels of chlorine dioxide exceeded OSHA recommendations. There were no tests actually performed on the date of alleged injury. After the procedural change, various additional tests were performed of the equipment and areas where the applicant worked. These revealed reduced exposure levels. Some of the changes were made despite the levels being higher in an area where the employees were not supposed to have their faces while performing the job duties. The respondents obtained an expert opinion from Dr. Levy. Dr. Levy opined the applicant did not sustain a work-related injury. Administrative Law Judge Phillips Jr. held the applicant did sustain a work-related injury. The Labor and Industry Review Commission adopted the entire findings of the judge. Dr Levy's opinions were based upon testing performed after changes to the sterilization procedure were made. There is no evidence that any testing was performed prior to the change in process or that Dr. Levy was provided such information. This completely undercut Dr. Levy's credibility. Testing on the date of injury is not necessary. Testing performed later, when supported by the record as being done in circumstances equivalent to those in existence on the date of injury would be sufficient. That was not done here. Further, the fact that a worker disobeys an employer's orders while performing a service growing out of and incidental to his or her employment does not defeat recovery of worker's compensation benefits.

Occupational Injury (Repetitive)

Goldman v. Joy Global Surface Mining, Inc., Claim No. 2015-016759 (LIRC February 28, 2017). The applicant alleged he sustained a work-related injury as a result of standing on a mat and operating a foot pedal on a machine for a period of time. The treating physician provided expert support that these job duties caused a work-related injury. An unnamed administrative law judge awarded benefits. The Labor and Industry Review Commission reversed. The treating physician gave an extremely brief description of the occupational exposure, which did not include any explanation as to whether or not the mat referred to by the doctor was significant in any fashion in causing any claimed injury, nor did it explain how the nature or intensity of any twisting involved in the job might cause a tear of the meniscus. (Editor's note: this case is one of several cases that have come down recently where the Commission had pointed out the lack of explanation by the applicant's physicians as to how the work exposure actually affected the applicant and his or her condition, resulting in a denial of benefits.) *See Lischefski v. Angelo Loppino, Inc.*, Claim No. 2009-027616 (May 26, 2017) and *Segerstrom v. School District of Mondovi*, Claim No. 2014-014235 (May 26, 2015)).

Permanent Partial Disability

Reish v. Federal Express Corporation, Claim No. 2011-014388 (LIRC October 24, 2016). Administrative Law Judge O'Connor had previously determined the applicant sustained a work-related injury to her left hip and that the medical treatment to-date was reasonable, necessary and causally related to the work-related injury. The application underwent left hip surgery. After some additional treatment, the applicant's ongoing pain was alleviated in 2014. He had no plans for additional medical treatment, and was released without restrictions in 2014. However, the treating physician opined the applicant sustained 10% permanent partial disability because of ongoing left hip symptoms. Subsequently, in 2015, the applicant had additional symptoms and was referred for additional surgery. The applicant

declined that recommendation and proceeded with an injection instead. The applicant had no additional plans to undergo additional medical treatment. Dr. Lemon performed an independent medical examination and opined no permanent partial disability was sustained as a result of the work injury and corresponding left hip condition. He also opined no additional medical treatment was necessary. Administrative Law Judge McKenzie opined the applicant required additional medical treatment, in the form of surgery, and that the assessment of permanent partial disability was, therefore, premature. The Labor and Industry Review Commission modified and affirmed. The Commission determined the applicant did reach the end of healing and that she sustained 5% permanent partial disability to the left hip. The fact that the applicant might require additional surgery in the future does not change the fact that she reached the end of healing at this time. The 10% permanent partial disability benefit rating was excessive given that the applicant still had fairly good range of motion, with problems mainly at the limits of internal rotation and that the surgery was generally successful.

Procedural Issues

Beschta v. Asten Johnson, Inc., Claim No. 2002-050788 (LIRC October 31, 2016). The applicant sustained a conceded injury on May 15, 2001. The last indemnity benefit payment was made on December 31, 2002. The applicant's attorney mailed a letter to the Department of Workforce Development on June 13, 2014, with an Application for Hearing. An Answer was filed in response to the Hearing Application. Neither the Application nor the Answer were returned as undeliverable. In February 2015, in response to January and February inquiries by the applicant's attorney, the Department advised it did not have a copy of the Hearing Application or the Answer. In May 2015, the applicant was advised to file a new Hearing Application. The 2014 Application was re-filed and a Notice of Application sent to the parties in June 2015. There was testimony that the Application was mailed in 2014, and that the respondents received and answered the Application in 2014. The Department had a fire shortly before the Application was mailed. An unnamed administrative law judge determined that the Application had been timely filed and that the claim could proceed on its merits. Given the significant disruption with the fire, it is understandable paperwork could have been misplaced. The issue involved was whether the applicant's mailing of an Application for Hearing, without the Department having possession of the Application until after the statute had run, was sufficient to meet the statute of limitations requirements under Wis. Stat. 102.17(4). The Labor and Industry Review Commission may only review decisions that award or deny compensation. Petitions for Review which do neither must be dismissed, which is what the Commission did in this case. However, even if that were not the case here, the Commission would not reverse the judge's decision in this case. There is a presumption that a letter placed in the postal stream will be delivered and received. There is ample support for the judge's conclusion that the overwhelming evidence was that the Application was received by the Department. The applicant filed the Application with the Department. The law does not state that the Application is not filed until the Department sends copies of the Application to all parties. Holding this would cause harm to a party that fulfilled its obligation if the Department, thereafter, fails to fulfill its obligation.

Psychological Injury

Barber v. Art Institute of Wisconsin, Claim No. 2014-013533 (LIRC November 17, 2016). The applicant worked for four months as a student affairs coordinator. She alleged a number of incidents occurred and that she developed post-traumatic stress disorder as a result of these incidents. These included students reporting their personal items were being taken, a student with prior felony convictions making threats of violence, dealing with students who previously had attempted suicide and who became distressed, etc. The Dean had previously held this position and discussed the nature of the position and job duties before the applicant accepted the position. This specifically included a discussion about the job involving addressing student conduct issues. The Dean testified the applicant indicated she could handle conduct issues because she was the daughter of a police officer. The Dean further testified the issues the applicant testified to dealing with, were those which a person in this position could expect to handle and deal with on a daily basis. Administrative Law Judge Konkol held the applicant did not sustain an occupational psychological injury as a result of her work duties for the employer. He specifically opined the applicant and her treating physician were not credible. Further, Judge Konkol noted the treating physician refused to provide prior treatment records despite acknowledging the applicant treated with this physician prior to her alleged injury. The Labor and Industry Review Commission affirmed. A compensable non-traumatic mental injury results from a situation of greater

dimensions than the day to day emotional strain and tension which all employees must experience. While the applicant may have been stressed because of having to deal with the issues involved in this case, she admittedly lived a sheltered life growing up. She was not assaulted nor overtly threatened with physical harm. The issues she dealt with were those she could have reasonably expect to face and, therefore, she did not meet her burden of showing she was subjected to greater stress than those who are similarly situated, and thus did not sustain a compensable injury.

Tews v. School District of Hortonville, Claim No. 2014-004809 (LIRC March 30, 2017). The applicant was a teacher. She alleged that her supervising principal, had exacerbated the applicant's pre-existing depression and anxiety disorders. She alleged that, after an incident wherein the principal disciplined her, the principal was frequently angry and critical of her, berating and harassing her at work. The applicant alleged that she was inappropriately disciplined for behaviors that other teaches were permitted to perform. The experts agreed that the applicant experienced stress at work, that the stress was injurious and that the residua of the stress led to permanent restrictions. However, the experts disagreed as to whether the extraordinary stress test was met for compensable non-traumatic mental stress injuries. Administrative Law Judge Falkner held the applicant had not met the necessary burden of demonstrating she sustained a compensable injury. The Labor and Industry Review Commission affirmed. The long standing rule in non-traumatic mental injury cases is that recovery is not allowed unless the strain, tension and stresses to which the employee are subjected are much greater in dimension than those normal strains, stresses and tensions which all employees must experience. Here, the direction and teacher improvement plans to which applicant was subjected were found to not be such strains, tensions, or stressors. The measure of stress is not intended to be measured subjectively, by the severity of the applicant's reaction to it, but is to be measured objectively wherein the factfinder makes a comparison of stresses between the applicant's claimed stress and the stresses that the factfinder determines are within the bounds of what most employees in that same profession must experience.

Res Judicata

Ehmke v. Meridian Industries, Inc., Claim No. 2013-002809 (LIRC April 21, 2017). The applicant was a 73 year old woman who alleged she sustained a 2003 occupational cervical injury in the Hearing Application filed in 2012. The date of injury was the last date she worked before the disability. Prior to the alleged date of injury, the applicant had sustained an earlier injury which involved her shoulder. She also treated for cervical symptoms at the time of that prior shoulder injury. Dr. Borkowski had previously examined the applicant at the respondents' request and submitted a report in 2001. This report was supplemented the following month, after Dr. Borkowski went to the employer's facility and reviewed the actual job duties performed by the applicant. He opined the job duties were not causative of the applicant's condition. Dr. O'Brien performed a record review in 2015. He opined the applicant's job duties were not causative of the cervical condition. He relied upon Dr. Borkowski's evaluations and opinions. The respondents asserted the applicant's claims in 2012 were barred by a prior compromise agreement which resolved the previous shoulder injury. Administrative Law Judge Martin held that the applicant's claim was not barred by a prior compromise. The Labor and Industry Review Commission affirmed. The Compromise at issue fully compromised the applicant's claims for an alleged right shoulder injury of September 9, 2000. There was no indication that the compromise addressed any type of cervical claim. The medical records referenced in the agreement included an opinion by a physician that the condition was attributable to the shoulder and the neck. However, that is not sufficient to raise a legal issue that is not otherwise raised by the parties. Only the shoulder claim was delineated and fully resolved in the approved compromise agreement. ✦

Arthur Chapman
Kettering Smetak & Pikala, P.A.
ATTORNEYS AT LAW

811 1st Street
Suite 201
Hudson, WI 54016
Phone 715 386-9000
Fax 612 339-7655

500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402
Phone 612 339-3500
Fax 612 339-7655

www.ArthurChapman.com

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