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Arthur Chapman
Kettering Smetak & Pikala, P.A.

ATTORNEYS AT LAW

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Wisconsin Worker's Compensation Update

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Wisconsin Worker's Compensation Practice Group

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Temporary Disability Benefits in Concurrent Employment Situations

By: Charles B. Harris

While the calculation of temporary disability payments due is frequently straightforward, cases involving employees who work more than one job frequently require us to stop and think in order to determine the benefit which is owed. In cases involving such employees, the benefit paid or payable is typically "not fair"; however, in this factual area, the law is as likely to treat the employee "unfairly" as it is to treat the employer "unfairly."

Wis. Stat. Section 102.43(6)(b) provides "in the case of an employee whose average weekly earnings are calculated under s. 102.11 (1) (a), wages received from other employment held by the employee when the injury occurred shall be considered in computing actual wage loss from the employer in whose employ the employee sustained the injury as provided in this paragraph. If an employee's average weekly earnings are calculated under s. 102.11 (1) (a), wages received from other employment held by the employee when the injury occurred shall be offset against those average weekly earnings and not against the employee's actual

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For over 30 years, Arthur Chapman Attorney Charles Harris has handled a broad range of litigation matters in Wisconsin and Minnesota, including medical negligence, personal injury, products liability, worker's compensation, fire and wind claims, fire subrogation, coverage disputes, construction disputes and real estate disputes. Due to his background in agriculture, he has a particular interest in cases involving agricultural issues. To contact Chuck with questions, please call 715 497-6303 or email CBHarris@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.

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earnings in the employment in which the employee was engaged at the time of the injury." Wis. Stat. Section 102.43(6)(c) provides "wages received from the employer in whose employ the employee sustained injury or from other employment obtained after the injury occurred shall be considered in computing benefits for temporary disability."

Evaluating this issue in "real life" scenarios helps to understand how the results in situations that seem to have similar facts can vary significantly. Consider for example a situation where Mary works in a medium or heavy duty factory job. Mary sustains an injury which takes her off such work for three months. Mary struggles to meet her family's financial obligations using her temporary total disability benefits and savings for a month. She is, however, industrious enough to locate a job working ten hours per week as a hostess in a local restaurant. Mary assumes those earnings will go totally to help make up for the monthly loss of income her family has suffered. Mary considers it quite "unfair" when she learns that the earnings from the hostess job function to reduce the temporary disability benefits paid by the workers' compensation carrier of her factory job. Mary's disability benefits are converted from temporary total disability benefits to temporary partial disability benefits. This particularly upsets Mary when she learns how her co-worker, Bob, is being treated by her employer, which is quite different. The factory, however, believes Mary is being treated totally fairly, but is outraged at how Bob is being treated.

Bob works in the same type of job as Mary at the factory. He, on the other hand, has always worked ten hours a week as a host at the same restaurant where Mary eventually came to work. On the exact same day Mary was injured, Bob sustained the exact same type of injury and was also taken off his factory job for three months. Bob and his family struggled to meet their financial obligations for one month before Bob was allowed to return to light duty. Bob's host job at the restaurant was within the light duty restrictions. Because Bob had held his host job before, and at the time of, his injury at the factory, and because he was injured in his factory job, Bob gets to continue to receive his entire temporary total disability benefit sum from the insurer for the factory, even after he returns to his second job.

A third employee, Ralph, who holds a supervisory position at the factory, is irate at how the factory's worker's compensation insurer is treating him. Ralph believes that Bob and Mary have "made out like bandits." Ralph also had a second job at the time of the injury. He worked a heavy job, at a low wage, in order to pay for his sons to play hockey. His job duties in the second job involved loading trucks for ten hours per week in the evening. Ralph hurts his back while unloading trucks. He was taken off work completely for three months. Ralph's temporary total disability benefit was paid by the insurer for the company where he loaded trucks. The calculation of his average weekly wage was based only on the expansion of the earnings from his low paying wage. His earnings from the factory were not considered in calculating the average weekly wage or his temporary disability compensation rate. When Ralph is allowed to return to his factory job, because the hourly rate he is paid at the factory greatly exceeds the rate at his truck loading job, he loses 98% of what his temporary total disability rate had been. The insurer for the company where Ralph loaded trucks is pleased to be essentially relieved of paying disability to a worker who "just wanted a little extra cash."

Situations where an employee has concurrent employment often requires the person handling the claim to make multiple phone calls to verify facts. After having completed the investigation, a determination needs to be made as to what is owed for temporary wage disability benefits. If the amount owed is not "fair," you probably have the calculations right.✦

Check out the new dedicated Wisconsin Worker's Compensation Practice Area page on the Arthur Chapman website!

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Click on Practice Areas and Workers Compensation.

New Faces in the ACKSP Worker's Compensation Group
Meet Jennifer Homer and Molly Tyroler

Jennifer S. Homer
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Arthur, Chapman, Kettering, Smetak & Pikala, P.A. is pleased to announce the addition of Jennifer S. Homer as an associate in the firm's worker's compensation practice group. Prior to joining the firm, she practiced in the areas of personal injury, Veterans law, criminal defense, social security, family law, and workers compensation.

In addition to worker's compensation cases, Jennifer also serves the needs of veterans, assisting veterans seeking service-connected disability benefits. Jennifer works hard to keep clients' best interests at the forefront of the her work and is happy to answer client questions at any time.

Molly N. Tyroler
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Arthur, Chapman, Kettering, Smetak & Pikala, P.A. is pleased to announce the addition of Molly N. Tyroler as an associate. Molly joins the firm's worker's compensation practice group and represents employers, insurers, self-insured employers and third-party administrators in the defense of worker's compensation claims in Minnesota. Molly brings a wealth of varied experience to her practice and is an active writer and presenter, keeping clients informed on those statutes and research relevant to their cases.

Molly obtained her undergraduate degree in Business Administration from the University of Wisconsin-Green Bay and her Juris Doctorate from William Mitchell College of Law. During her time at William Mitchell, Molly also attended courses in Rome, Italy, studying Alternative Dispute Resolution, focusing on settling disputes through negotiation, mediation, and arbitration.

2013 Workers Compensation Seminars

Thursday, June 6, 2013
McNamara Alumni Center, University of Minnesota
Minneapolis, Minnesota

Thursday, June 13, 2013
Crowne Plaza, Wauwatosa, Wisconsin

8:30 a.m. - 3:30 p.m.
Registration 8:00 a.m., Reception to follow seminar

Formal invitations and complete agenda information will be available mid-April.

For more information or to register, please contact Marie Kopetzki at mkkopetzki@ArthurChapman.com or *612 225-6768*

Case Law Update

Decisions of the Wisconsin Supreme Court

There were no decisions from the Wisconsin Supreme Court during this reporting period.

Decisions of the Wisconsin Court of Appeals

Independent Contractor

Petrovic v. Labor and Industry Review Commission, 826 N.W.2d 123 (Wis. Ct. App. 2012) (unpublished). The applicant sustained an injury in November 2009 while hauling cargo as a truck driver. The applicant alleged that DBG Trucking was his employer. That company had no worker's compensation insurance. The Wisconsin Worker's Compensation Uninsured Employers Fund, therefore, handled the claim. The evidence revealed that DBG Trucking was a middleman for entities with cargo to ship, and for truck drivers under contract with DBG Trucking. Drivers under contract with DBG Trucking could drive for other companies but needed to first notify the owner of DBG Trucking (due to the need to remove DOT numbers assigned to DBG Trucking from the truck). The entity with cargo to ship contacted DBG Trucking to advise where the cargo was located, when pickup and delivery was requested and the proposed fees. Drivers told DBG Trucking when they were available and how far they were willing to drive. DBG Trucking then offered proposals to an available driver. The driver could refuse the job, accept the proposal or ask DBG Trucking to try and negotiate a higher fee. The contract between the applicant and DBG Trucking identified the applicant as an independent contractor. The applicant received 90 percent of gross receipts of the delivery. Taxes were not deducted from the amount paid to the applicant. There was a deduction for cargo liability insurance. DBG Trucking secured insurance to allow the drivers to take advance of multiple contractor discounts, but the drivers were responsible for the cost. The applicant owned the truck he used to haul cargo for DBG Trucking and paid all associated maintenance fees. The drivers chose their own routes for each assignment, and were responsible for all associated expenses. The applicant had a federal tax identification number and filed tax returns that included profit or losses from a business. He deducted business expense, including insurance. The Administrative Law Judge and the Labor and Industry Review Commission denied worker's compensation benefits on the basis that the applicant was an independent contractor and not an "employee" of DBG Trucking. The Court of Appeals affirmed. Wis. Stat. §102.07(8)(b) outlines nine factors (which all must be met) to determine whether an individual is an independent contractor, rather than an employee. This is the sole test to determine whether an individual is an independent contractor. The applicant argued that he did not meet the first of these criteria (in the nature of maintaining a separate business with his own office, equipment, materials or other facilities). The applicant conceded that the other eight factors were met. Great deference is extended to the Commission's decision because of its experience in interpreting and applying these factors in the past. The Commission's decision (that the first criteria under Wis. Stat. §102.07(8)(b) was met) was reasonable, which is all that is required under the standard of review.

Insurance Coverage

Ritter, et al. v. Penske Trucking Leasing Company, et al., 826 N.W.2d 122 (Wis. Ct. App. 2012)(unpublished). Mr. Ritter worked as a delivery driver for his employer. His employer leased a delivery truck from Penske Trucking on a temporary basis. The light in the cargo area of the truck did not function properly when the truck was picked

up. The people who had earlier rented the truck from Penske Trucking had complained of the problem. While attempting to unload the truck in the course of his employment, Mr. Ritter was injured. General Casualty Insurance had issued a policy of worker's compensation coverage to Mr. Ritter's employer. General Casualty Insurance also issued to Mr. Ritter's employer a commercial automobile insurance policy. This policy did name Penske Trucking as an additional insured. The liability policy insured a lessor such as Penske Trucking only for bodily injury caused by the act or omission of the named insured (which would be Mr. Ritter's employer or his employer's employees). Mr. Ritter commenced a tort action against Penske Trucking for its negligence in failing to repair the light when earlier entities who had leased the truck had reported the problem. General Casualty Insurance was named in the tort action because of its subrogation rights for worker's compensation benefits paid. In the action, Penske Trucking cross-claimed against General Casualty Insurance under the liability policy. Penske Trucking claimed that it was an additional insured under the policy and that thus, General Casualty Insurance owed it a duty to defend. The trial court granted summary judgment to General Casualty Insurance. The Court of Appeals held that General Casualty Insurance owed no duty of defense to Penske Trucking under its liability coverage. As a matter of law, the policy did not insure Penske Trucking in regards to the alleged negligence. The alleged negligence was in the nature of failing to repair the truck following to earlier complaints.

Occupational Exposure

Hooper Corp., et al. v. Labor & Industry Review Commission, 824 N.W.2d 929 (Wis. Ct. App. 2012). The applicant worked for Hooper Corp. for approximately two years. His main duties included cadwelding, digging and locating wires, installing pipes and operating equipment. In addition, he did (on occasion) work in locations outdoors to assist other welders who performed aluminum "wire" welding. When assisting welders outdoors, the applicant normally laid down wire while his co-workers were welding. He also held a tarp so that the wind would not blow in the area that was being welded. While performing this job duty, he stood upwind of the weld. Any smoke or fumes from the welding drifted towards him. He worked both in open air and in enclosed structures. He did not wear respiratory apparatuses. About six months after commencing work for Hooper Corp., the applicant began having unusual symptoms, including insomnia, restlessness, and drooling. These symptoms eventually progressed to include joint pain, choking, and light sensitivity. About two years after he quit working for Hooper Corp., the applicant was diagnosed with manganese poisoning. [This condition is a neurological disorder caused by manganese damaged brain cells.] The only testimony offered by the applicant regarding symptoms of manganese poisoning was from Dr. Nausieda. Dr. Nausieda testified that, after his initial diagnosis, he injected the applicant with an agent that caused manganese to be excreted in urine. Dr. Nausieda opined that the level of manganese excreted from the applicant was high. Thereafter, Dr. Nausieda opined the applicant sustained manganese poisoning. Dr. Nausieda testified that individuals vary in their sensitivity to manganese. Dr. Nausieda testified that the same level of manganese in two individuals might cause one to suffer from poisoning and symptoms, while not the other. Dr. Nausieda admitted that he did not know that the welding materials at the employer's sites contained manganese. He testified he was aware that some welding materials did contain manganese. Nevertheless, Dr. Nausieda opined the welding was the likely cause because Dr. Nausieda could find no other identifiable source of manganese in the applicant's case history. The respondents presented testimony from an independent medical examiner that the applicant did not sustain manganese poisoning. That independent medical examiner did admit it was possible such poisoning could have been caused by welding. The Administrative Law Judge [unnamed] dismissed the applicant's claim in full. The Administrative Law Judge opined that the applicant's pre-existing disorders could, indeed, explain the symptoms. The Administrative Law Judge further opined that the applicant's exposure to manganese would have been very minimal. He concluded the applicant had not met his burden of proof. The Commission reversed. The applicant was awarded 20% disability. This was due to the manganese poisoning that the Commission held was caused by an appreciable period of workplace exposure which was either the sole case or a material contributory causative factor in the onset or progression of the condition. The record clearly showed elevated manganese levels in the applicant's system, he was exposed to welding fumes containing manganese while working for the employer, and the applicant exhibited symptoms of manganese toxicity which affected his ability to work. The Circuit Court upheld the Commission's decision (which awarded the applicant benefits). The Commission's findings were based on credible and substantial evidence. The Court of Appeals likewise affirmed the

Commission's decision. Any finding of fact made by the Commission shall "in the absence of fraud be conclusive." Any finding by the Commission will be upheld "even if they are against the great weight and clear preponderance of the evidence, so long as credible and substantial evidence supports the findings." Substantial evidence means that a finding of the Commission will be upheld only when a reasonable person acting reasonably, and considering all reasonable inferences which could be drawn from the evidence, "could not have reached the decision." While there was no direct evidence that manganese was present in any of the welding fumes the applicant was exposed to, when considering all the evidence in total, the Commission could reasonably conclude that the applicant did have that exposure. This is particularly true when one considers that some of the symptoms, such as drooling, insomnia and tremors, did not appear until after the applicant began working for the employer.

Retraining

Menard, Inc. v. Labor and Industry Review Commission, 2013 WI App 30 (Wis. Ct. App. 2013)(unpublished). The applicant sustained an injury to his right knee. His employment was later terminated. He applied for vocational rehabilitation training. After one year on the waiting list, an individual plan for employment was formulated. The applicant was to obtain a Bachelor's degree in Business Administration, with school attendance from January 2007 to May 2011. An Administrative Law Judge [unnamed] awarded 80 weeks of retraining benefits, which is the minimum award an employee is entitled to under statute. The Administrative Law Judge reserved jurisdiction to determine whether more than the minimum 80 weeks of retraining was appropriate. The record did not contain vocational opinions assessing whether four years of retraining was necessary to restore the applicant's earning capacity. The applicant's individual plan for employment was subsequently amended to change the course of study to an alcohol and other drug abuse counselor. The applicant sought additional weeks of retraining. The Administrative Law Judge determined that it was appropriate to award an additional 80 weeks of retraining benefits. The Commission agreed with additional weeks but modified the award to be an additional 40 weeks instead of an additional 80 weeks. The applicant was awarded a total of 120 weeks of retraining benefits. This reduction was due to the uncertainty of the applicant's future plans to transfer and begin coursework at another location. Jurisdiction was reserved to permit a judge to determine whether extension of additional benefits was warranted later. The Court of Appeals affirmed the Commission's decision. The employer and insurer argued only that the Commission's decision was not supported by substantial and credible evidence. Therefore, no determination regarding whether that was the appropriate standard of review, or whether another standard of review should have been applied. Based upon this standard of review, any credible evidence to support the findings of the Commission would result in affirmance of that decision. The employer and insurer's arguments as to why additional retraining benefits were not appropriate were specifically, and in much detail, categorically rejected, in part due to arguments that were wholly invalid, inaccurate and unsupported by the record. The applicant revised his course of study only one time. This did not add time or cost to the education. He got good grades and was diligent in taking his courses. There was no evidence, as alleged, that the applicant would have a more difficult time obtaining employment in his new course of study (as compared to the initial course of study) because of his past felony convictions. There was no evidence that the course of study would enhance the applicant's earning capacity. This was sufficient to meet the burden of proof the employer and insurer asserted should be applied in this case.

Subrogation

Adams v. Northland Equipment Company, Inc., 2013 Wisc. App. LEXIS 214 (Wis. Ct. App. March 7, 2013). Mr. Adams appealed an order compelling him to accept a settlement of his personal injury claim against Northland Equipment Company at the request of the employer's worker's compensation insurer. The Court of Appeals affirmed the circuit court's order. The circuit court made assessments suggested necessary by *Dalka v. American Family Mutual Ins. Co.* Mr. Adams had some proof problems on issues of liability and causation. The circuit court found the settlement offer was at the upper level of what the case was worth, applied the risk of a no-liability jury verdict, and determined the settlement was fair. The circuit court properly exercised its discretion. ✦

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Decisions of the Wisconsin Labor and Industry Review Commission

Apportionment

Kenneth D. Fuller v. M&H Industrial Service, Claim Nos. 2008-007593; 2010-025552 (LIRC November 13, 2012). The applicant worked as a millwright for 37 years. He worked for various employers during this time frame. He worked for M&H Industrial Service when his knee problems began. When he was released to work after a second surgery, M&H no longer had employment for him. He continued working in the same occupation for another employer. The applicant subsequently worked for Doral Corp. on several occasions (and for other companies in between stints at Doral Corp.). During his last period of employment at Doral Corp., the applicant began to receive some more specialized knee treatment. [He had been receiving some general maintenance treatment in the intervening years.] His treating physician opined his rigorous work activities for Doral Corp. accelerated the degenerative process beyond that which would have occurred through natural progression. The Administrative Law Judge (unnamed) awarded benefits payable by Doral Corp. and its worker's compensation insurer. The Commission adopted the Administrative Law Judge's decision. Repetitive work activities may cause a compensable occupational disease injury. Disability due to occupational disease is not apportionable among the insurers. Work exposure need only be a material factor in the development of progression of the disability disease in order for it to be compensable. The treating physician's opinion regarding causation with respect to job duties at Doral Corp. is credible. Employment at Doral Corp. was, therefore, a material contributing factor to the need for a total knee replacement, and thus, Doral Corp. is solely responsible for the applicant's condition.

Arising Out Of

Lonnie E. Long v. Marten Transport, Ltd., Claim No. 2010-005249 (LIRC Sept. 27, 2012). The applicant began to work for the employer as an over-the-road driver in April 2005. On February 16, 2010, while making a delivery in Pennsylvania, he alleged he sustained a back injury. The applicant alleged this occurred as a result of having to manually release the fifth wheel on the trailer because the automatic release allegedly failed to work. He alleged he completed the delivery, started a trip to California, and realized two days later that the pain in his back was so bad that he could not continue working. He then drove his truck to his home in Illinois, where the employer picked the truck up. An inspection revealed the fifth wheel automatic release worked properly. The employer alleged that the applicant was not credible because (1) the automatic fifth wheel release was found to, in fact, be working; and (2) He did not report the alleged incident until two days after it occurred. Dr. Monacci performed an independent medical examination at the respondent's request. Dr. Monacci noted the applicant's long history of back injuries in addition to a large period of time immediately prior to the injury where no treatment was performed. Dr. Monacci opined that the applicant sustained a permanent aggravation of his lumbar spinal condition. Dr. Bodeau performed a medical record review also at the respondent's request. Dr. Bodeau concluded that the applicant had simply experienced a manifestation of his pre-existing back condition. Administrative Law Judge Mary Lynn Endter held that the applicant was credible. She held that he sustained a permanent injury. The Commission affirmed. Dr. Monacci's opinions (that a permanent injury was sustained) were adopted over Dr. Bodeau's opinions (that only a temporary injury was sustained).

George Meyers v. Thyssenkrupp Waupaca, Inc., Claim No. 2009-017065 (LIRC Sept. 27, 2012). The applicant worked for the employer for approximately ten years. He passed a pre-employment physical. He did not report any prior back or neck conditions. Some of his job duties required the applicant to grab a part and grind the part so that the part was in a finished condition. There was conflicting evidence regarding the physical demands of his position. The applicant alleged he sustained an occupational disease in the nature of a cervical injury. He alleged this cervical injury caused the need for a C6-C7 fusion. When he initially stopped working for the employer to undergo the fusion procedure in May 2008, the applicant did not report that his job duties for the employer caused his symptoms. Post-surgery, the applicant had ongoing problems. He treated with several additional physicians. The records reflected the applicant then reported his job duties included repetitive heavy lifting of up to 100 pounds at a time. The applicant's physicians opined the applicant sustained an occupational repetitive injury. The applicant then underwent a self-requested independent medical examination. This was performed by Dr. Peter Ihlae. The applicant also underwent an independent medical examination with Dr. Clemmy, at the request of the respondents. After the hearing, at the request of the applicant, the employer provided a detailed list of the various job tasks

the applicant had performed for the employer prior to the alleged work-related injury. Administrative Law Judge Edward Falkner required that this information be communicated to all doctors for additional opinions. After review of this additional information, one of the treating physicians, and Dr. Clemmy, stood by their prior causation opinions. Administrative Law Judge Falkner dismissed the hearing application based upon a lack of proof to establish a work injury. Based upon the evidence submitted, he could not conclude that the applicant had been lifting heavy objects on a repetitive basis as the applicant had reported to his treating physician. The opinion of Dr. Clemmy was the most credible. The Commission reversed. The applicant had passed a pre-employment physical. He did not report back problems prior to beginning to work for the employer. The opinions of the treating physician were, therefore, more credible. Loss of earning capacity benefits were awarded in the amount of 45%, based upon the physical restriction assigned by the treating physician.

Gregory J. Strigin v. Gordon Trucking, Claim No. 2007-039684 (LIRC Sept. 27, 2012). The applicant worked for the employer as a truck driver. He alleged that he slipped, but did not fall, on December 5th. This allegedly occurred when he was located on the wet metal floor of the trailer he was cleaning. He first treated on December 7th. At that first medical appointment, the applicant reported to his family physician that, on December 5th, he was stepping out of his truck and again injured his back. He reported he had experienced back pain off and on nine or ten years prior to the examination. The applicant reported that said pain had been progressively worsening over the two or three weeks prior to the examination. He reported pain and numbness radiating into his legs. On December 20th, he treated with a neurosurgeon, Dr. White. Dr. White's records reflect that the applicant reported he experienced increased pain on December 6th. He also noted the applicant reported he struck something when he fell. Dr. Robbins performed an independent medical examination at the request of the respondents. The applicant described the involved event as one of his mis-stepping, landing on his feet, and jolting his back. Dr. Robbins opined that, at most, the involved incident was a temporary aggravation. Dr. Robbins further concluded that no testing revealed any significant neurological defects or acute structural changes. Dr. Robbins recommended trial of some injections. Dr. Robbins opposed the surgery proposed by Dr. White. In March 2008, Dr. White performed a three-level laminectomy and fusion. The applicant reported no significant improvement. Over the next 18 months, the applicant underwent three additional surgical procedures by Dr. White. The applicant reported the additional surgeries gave "no significant improvement." Dr. Richard Karr performed an independent record review. Dr. Karr concluded (as had Dr. Robbins) that the December 5th incident was, at best, a slip in which the applicant landed on his feet, and at worst, caused the applicant to sustain a jolting sensation. Dr. Karr attributed the applicant's symptoms to a pre-existing condition. Administrative Law Judge William Phillips, Jr. held that the applicant did not sustain an injury arising out of his employment. The application was dismissed. The Commission affirmed, with modification. Administrative Law Judge Phillips, Jr. outlined the various reasons for which he concluded the applicant was not truthful and forthright. He adopted the reports of Dr. Karr and Dr. Robbins and the reasoning set forth therein. Dr. White's opinion of causation was basically the result of Dr. White assuming the history given to him by the applicant (that he had had no previous back problem). This was clearly not true. Dr. White made no effort to go through medical records that would have been available to him for his review. Conversely, Dr. Karr and Dr. Robbins quite obviously had done so. While the Commission affirmed the decision, there was a modification in the rationale for the denial of benefit to reflect the various inconsistencies the Commission viewed as undermining the applicant's claims (instead of the reasons that Administrative Law Judge Phillips, Jr. used as a basis for his decision).

William Christofferson v. United Brick & Tile, Inc., Claim No.: 2009-031145 (LIRC November 29, 2012). The applicant worked as a fireplace installer. He alleged that he climbed a 36-foot ladder to get onto a 40-foot chimney. He alleged that he had to swing his whole body up and straddle the chase like a horse in order to get his legs above his head to then get to the top of the chase. He alleged he also used his arms to pull himself up to straighten himself out. The applicant alleged that his hip popped when he got to the top. He alleged that he injured his left knee while coming down from the chimney a second time. The applicant reported the injury several weeks after the alleged incident. His treating physicians opined he had somewhat of an unusual presentation. Testimony revealed that the applicant was a disgruntled employee and unhappy about being assigned work he believed to be unusual. Testimony also revealed that the applicant asked on a daily basis to be laid off or fired. He was terminated for the inability to perform his work activities as well as for threatening behavior by the applicant toward the employer. A refund was requested by the respondents for benefits paid under mistake of fact. The Administrative Law Judge (unnamed) denied the benefits in full. The Commission adopted the decision in its entirety. The applicant's description of

mounting the chimney chase was incredible, there were inconsistent descriptions of how he hurt himself and there was credible testimony from the employer regarding the applicant's attitude prior to the work injury. Further, the respondent's expert's opinions were credible. The applicant's description of events could not be rationally visualized. He was calculating, argumentative and threatening.

Michael J. Hammen v. Kraft Foods Global, Inc., Claim No. 2011-014179 (LIRC January 30, 2013). The applicant alleged he sustained a back injury and subsequently developed deep vein thrombosis. He treated approximately one week post-injury. The applicant reported he was quite sedentary due to back spasms. His treating physician, Dr. Keil, opined the applicant had several risk factors to develop a blood clot. However, Dr. Keil also noted the applicant had no problems until he sustained a back injury and became sedentary. Dr. Keil opined one of the main risk factors for developing deep vein thrombosis is immobilization. Dr. Goodman performed a record review at the request of the respondents. Dr. Goodman opined the applicant was not placed on strict bed rest during recovery. He further opined it was unlikely that the applicant maintained strict bed rest. Dr. Goodman noted the applicant was a smoker and had a strong family history of peripheral vascular disease and atherosclerosis. Dr. Goodman later performed an independent medical examination and issued a subsequent report. The applicant reported to Dr. Goodman that he performed average everyday activities, with a lot of relaxing, in the nature of lying around in bed, watching TV, icing, walking around and stretching. Administrative Law Judge John S. Minix held the applicant did sustain a back injury. However, Administrative Law Judge Minix determined that the applicant did not sustain deep vein thrombosis as a result of being sedentary while off work for the back injury. The Commission adopted the decision in its entirety. Deep vein thrombosis may spontaneously develop in individuals without regard to physical activities. [The author of the Commission's decision noted his/her father developed deep vein thrombosis while climbing stairs to visit the Statute of Liberty.] The applicant had numerous idiopathic risk factors to develop this condition. Wisconsin follows an 'as is' rule under which employers take the employees as they are, including any predisposition to injury from a preexisting condition. Further injury or disability sustained as a consequence of treatment for a work injury is compensable. When an employee is treated for a work-related injury and incurs an additional injury during the course of treatment, the second injury is determined to be one growing out of, and incidental to, employment. The employer, by virtue of the Act, becomes liable for the additional injury. However, Dr. Keil referred to "immobilization" as the level of activity leading to the development of deep vein thrombosis. The applicant's testimony regarding his activity level did not indicate he was immobilized. Therefore, Dr. Keil's opinions regarding compensability were not adopted.

Burden of Proof

Robert Torrez v. Ashley Furniture Industries, Inc., Claim No.: 2010-028245 (LIRC November 29, 2012). The applicant alleged a work-related right shoulder overuse injury as a result of his work activities for the employer. Liability was initially admitted. However, subsequent to receipt of two independent medical examination reports, liability was denied. The Administrative Law Judge (unnamed in the decision) denied all benefits sought by the applicant. It was crucial to determine the extent to which, if at all, the applicant was involved in material above the shoulder or overhead work activities. Testimony revealed that he performed a fair to moderate amount of repetitive work at chest level, and relatively minimal duties above the shoulder and essentially no overhead work. Photographs were helpful to demonstrate the height of various work activities. The Commission adopted the decision in its entirety. The treating physician initially diagnosed the applicant with right shoulder pain, likely secondary to overuse. However, the treating physician opined that he later began to suspect a rotator cuff pathology. The same treating physician's medical records subsequently indicated less certainty about the work relatedness of the injury. The applicant was referred to occupational physicians for this evaluation. The box marked "work related" was checked. However, there was little analysis about how the work activities caused the applicant's injury. These medical records reflect little to no information indicating that the occupational physicians had a reasonably sufficient understanding of the applicant's job duties. Under *Pucci v. Rausch*, an expert opinion expressed in terms of possibility or conjecture is sufficient. "Might," "could" and "perhaps" are not sufficient. Therefore, the adoption of the opinions of the independent medical examiner (Dr. Kulwicki), that the applicant did not sustain a work-related injury, was reasonable.

Causal Connection

Gary John Calaway v. Belgioioso Cheese, Inc., Claim No. 1998-066126; 2009-012925; 2008-020544; 2000-030709 (LIRC Sept. 13, 2012). The applicant's claim was pursued on two different bases. First, he alleged that he sustained a specific accidental injury on February 28, 2000. In addition, he alleged an occupational injury culminating on his last day of work (March 15, 2000). The applicant had previously sustained an injury on June 20, 1999 and another injury on April 20, 1998. Liberty Mutual was the insurer on

the risk for the 2000 injuries. Other insurers were on the risk for the 1998 and 1999 injuries. The applicant was not clear exactly on what he was claiming. The applicant had inconsistent reasons of the injury. On March 23, 2000, the applicant reported to his treating physician that he was subjected to "very strenuous activities." The applicant reported he and two other workers carried tubes of cheese, weighing between 200-270 pounds, up basement stairs. He reported that 5-10 tubes were carried every other day, or about three times a week, and that, in addition, he had to carry 90 pieces of 100-pound cheese. The claim for the 2000 injuries was basically that the applicant had to lift significant weights of cheese, which caused him to have shoulder problems. The evidence revealed that the amount of carrying and lifting performed by the applicant at his job was significantly overstated. The original treating physician opined that the applicant was capable of full-time work, with no permanent restrictions anticipated and end of healing expected shortly. The applicant was then referred to another treating physician (Dr. Barnes). Dr. Barnes opined that the applicant should not reach above shoulder level. There were no other assigned restrictions, although the applicant testified that he was wheelchair-bound. Administrative Law Judge Edward Falkner awarded minimal medical expenses and medical mileage. The Commission adopted the decision in its entirety. The applicant was a "relatively poor historian and also prone to exaggeration." The applicant appeared at the hearing in a "substantially debilitated state. ... he presented as an individual unable to walk, wheelchair-bound, and stiff and clumsy of physical movement." To the extent the applicant's testimony was contradicted by other testimony at the proceeding or other records, it was more likely that the other records or testimony would be more accurate than the applicant's claims. A substantial amount of medical records and medical opinions were submitted. The totality of the evidence demonstrated that the injury in 1998 had substantially healed without problem. The applicant had been released to work after his treating physician opined that his "contusion had resolved." Any problems after 1998 were clearly not related to the 1998 injury. There was likely some injury in 1999. However, the treating physician opined that the problem had resolved and the applicant had 0% disability. Therefore, no benefits were awarded for the 1999 injury because it had resolved in full. There was no medical report to support an occupational disease claim. The applicant did sustain a shoulder strain. However, there was no clear diagnosis as to what exactly was wrong with the applicant. The evidence revealed the applicant had recovered from the strain by March 15, 2000. On this date he had been released without restrictions and fully released to return to work. There was much evidence of drug seeking behavior and compensation motivated behavior.

Gerald Worzella v. Georgia Pacific, LLC, Claim No. 1999-006125 (September 13, 2012). On January 18, 1999, the applicant was moving conduit at work. While doing so, his wrench gave way. As a result, the applicant's body twisted rather suddenly and significantly. He reported intense pain in the left arm. He reported a snapping and popping sound in one arm. The applicant reported he jumped up and told his co-worker something was wrong. His physicians determined that he sustained a fracture of the humerus in his left arm. Treatment for that fracture was complicated because a non-industrial cancer was discovered at the site of the fracture. Repetitive surgeries and treatment were required over several years. These included surgery to repair and tighten loosened screws and hardware. The medical records were, at best, unclear as to whether or not an actual bony union was ever obtained in the fracture site. In 2009, further problems developed in the area of the fracture. An additional surgery was then performed. The operating orthopedic surgeon concluded that there had been a non-union. Surgery in 2009 repaired broken hardware so the solid hardware could function to some extent as a type of union. Administrative Law Judge Joseph Schaeve held there was never a complete healing of the fracture in the time frame around 2002. He concluded that the original injury caused the need for the 2009 surgery. Permanent disability and medical expense were awarded. The Commission affirmed.

Jesus M. Marti v. City of Kenosha, Claim No. 2010-018051 (LIRC October 31, 2012). The applicant alleged that he injured his right knee while stepping off of a bus. Dr. Lemon performed an independent medical examination at the request of the respondents. Dr. Lemon opined that the applicant fabricated the story. The respondents denied the claim based upon Dr. Lemon's opinions. Administrative Law Judge Neil Krueger denied the applicant's claim. Several reasons were noted in support of the denial: 1) The applicant claimed that he injured his right knee when stepping two feet down off the step of the bus. The evidence showed that the bus step was much lower than what the applicant claimed; 2) The applicant did not report his injury on the date of injury. He alleged that there were no supervisors on duty but the court reasoned that the applicant could have reported the injury to dispatch or left a written report of the injury; 3) The applicant continued to work after the date of injury and he did not indicate to supervisors or coworkers that he sustained an injury or had any problems; 4) The applicant saw his family physician 13 days after the alleged injury. His treating doctor reported that the applicant had been having right knee pain for a month and there was no history of trauma; 5) It was not until an MRI examination

after which he knew that he needed surgery, that the applicant changed his story and reported his right knee condition was work related; 6) The court did not find the applicant's testimony credible with respect to not understanding what his doctor meant when he asked him about "trauma." The applicant had testified at the hearing that when his doctor had asked him whether he sustained a trauma to his knee, and he had responded "no," (as noted in the medical record) he did not understand what he meant by trauma. The Commission affirmed Administrative Law Judge's Krueger's decision. The Commission held that Administrative Law Judge Krueger made some errors in his decision. However, the treating physician's office notes were persuasive in supporting a determination that the applicant did not sustain an injury. The treating physician noted the applicant reported pain for a month before the injury (instead of two weeks). Further, even if the applicant did not understand what the physician meant by trauma, a reasonable person would have explained to the physician that he was injured at work. Finally, the treating doctor made comments in the office notes that implied that the treating physician was suspicious about whether the applicant sustained a work injury when the applicant later reported the injury as work related.

Sally J. Poeschl v. Miles Kimball Co., Claim No. 2011-004595 (LIRC October 31, 2012). The applicant sustained a work-related injury to her neck. She subsequently made a claim for an alleged shoulder injury. The respondents admitted the neck injury as a temporary injury, but denied the alleged shoulder injury. The actual date of injury was not clear, but it occurred sometime between January 12, 2011 and January 21, 2011. The applicant first treated for her neck on January 24, 2011. Her chief complaint at that time was neck stiffness. She followed up on January 27, 2011. She again described neck stiffness. She had no radiating symptoms into her arms. She was diagnosed with posterior neck strain. The applicant was taken off of work and referred to physical therapy. An MRI performed on February 11, 2011 of her left shoulder showed a bursal surface tear accompanying rotator cuff tendinopathy. Administrative Law Judge Edward Falkner denied the shoulder claim. When reviewing the medical records and other evidence, it was unclear what changed between January 2011 (when the applicant was taken off of work) and when she had the MRI of her shoulder on February 11, 2011. The applicant was a poor historian. Although she complained that her left shoulder problems started right away when she stopped working for the employer in January, based upon the medical records, that was not true. Before the applicant stopped working for the employer, she only had neck complaints. It was not until after she stopped working for the employer that her shoulder complaints started. He also thought that the treating doctor did not provide a definitive opinion on the cause of the shoulder condition. Although there was sympathy with the applicant's claim, he could not get beyond the fact that the worker's claim respecting her shoulder was simply not proven beyond a legitimate doubt. He explained, as referenced above, that when the applicant stopped working, she was complaining of neck symptoms and not complaining of symptoms in her left shoulder. There was no reason for that if the applicant's left shoulder condition was caused by the original injury. The Commission affirmed. There was legitimate doubt with respect to the applicant's shoulder claim. The applicant did not complain of shoulder symptoms until after she stopped working. No doctors explained the delay in the onset of shoulder symptoms.

Theresa A. Omernick v. Iowa Glass Depot, Inc., Claim No. 2009-013593 (LIRC January 30, 2013). The applicant sustained a left knee injury when she fell in the employer's parking lot on December 30, 2008. The applicant alleged she sustained a thoracic spine injury on October 6, 2009, while participating in a functional capacity evaluation following the left knee injury. The medical records reflected that, during day two of this evaluation, the applicant reported thoracic back pain. The records reflected she self-limited in various activities during the evaluation because of reported back pain. The records reflected the applicant reported to the therapist performing this evaluation that she had a "bad disc" for which she had treated with a chiropractor three to four years prior to the functional capacity evaluation. The applicant asserted a claim for permanent total disability benefits as a result of the alleged thoracic spine injury. The treating physician, Dr. Kirkhorn, opined the thoracic injury sustained during the functional capacity evaluation was temporary. Dr. William Klemme performed an independent medical examination at the request of the respondents. Dr. Klemme similarly opined that a thoracic spine injury occurred during the functional capacity evaluation, but was temporary in nature. Another treating physician (Dr. Messerly) opined she sustained a permanent injury, and provided restrictions. Both vocational experts opined the restrictions assigned by Dr. Messerly would have led the applicant to be permanently and totally disabled on a vocational basis. Administrative Law Judge Falkner denied all benefits sought by the applicant. The Commission adopted the decision in its entirety. The applicant testified to significant and substantial disability, even beyond what one would expect from reading the medical records. She told an untruth with respect to the independent medical examination. This was consistent with compensation seeking behavior. She was advocating for being taken off work even though Dr. Messerly opined she should be working. She used a cane despite a lack of prescription for a cane by a treating

physician. The applicant was able to fully weight bear on her left leg/knee with use of the cane, despite her claim that any activity on that leg caused her problems. The applicant was determined to be symptom magnifying and not reliable.

John M. Amell v. Wal-Mart Assoc. Inc., Claim No. 2008-021884 (LIRC January 31, 2013). The applicant sustained a compensable low back injury on or about June 28, 2008. The injury occurred when the applicant pulled and lifted an empty 70-75 pound pallet out of a slot and placed it in a pallet return bin. The nature and extent of the disability was subsequently disputed, including approximately 18 months of temporary disability, 35% of permanent partial disability and unpaid medical expenses. The applicant underwent extensive medical treatment and two independent medical examinations. Several treating physicians had the same opinions as the independent medical examiner, Dr. Monacci. The applicant testified that he experienced ongoing low back pain and numbness. He reported pain levels between 5/10 and 7-8/10. He testified that bending, lifting, twisting and sitting for long periods of time, along with standing in one spot for a long period of time, increased his symptoms. He also testified that climbing stairs increased his symptoms and that he had difficulty bending down to pick things up off the floor. He testified that he could only perform some duties around the house, including no activities involving those items above that increased his symptoms. Videotape was introduced into evidence that demonstrate the applicant welding, gardening, painting and looking normal. The video demonstrated the applicant loading and unloading items from his truck, including a 5-gallon bucket of paint, climbing with ease up and down ladders, reaching overhead, bending, squatting, kneeling and crouching. Administrative Law Judge Hamdy A. Ezalarab denied all benefits sought by the applicant. The Commission adopted his decision in its entirety. The applicant looked very strong and athletic at the hearing and on the videotape. The applicant was calculating, but neither credible nor believable in his continuing reports of pain. The applicant's insistence of being unemployable was difficult to comprehend considering his young age, physical appearance, seemingly pleasant personality and demonstrated technical skills. The surveillance video was presented to the Commission. Although Administrative Law Judge Ezalarab did not directly address the holding in *Spencer*, the Commission determined it was evident that Administrative Law Judge Ezalarab did not believe the applicant was undergoing treatment in good faith.

Duty Disability Benefits

Jimmy V. Hecht v. Town of Waterford, Claim No. 2009-000678 (LIRC November 12, 2012). The applicant worked as a police officer. He slipped and fell on a patch of ice while getting out of his vehicle to help a disabled vehicle on the side of the road. He reported low back and shoulder symptoms. Low back and left shoulder surgeries were performed. The applicant's treating physicians subsequently opined the applicant sustained permanent disability as a result of the surgeries performed post injury. Dr. Xenos performed an independent medical examination at the request of the respondents. Dr. Xenos opined the lumbar surgery was performed as a result of the applicant's pre-existing degenerative disc disease. He provided similar opinions with respect to the left shoulder condition. The Administrative Law Judge (unnamed) awarded benefits sought by the applicant. The Commission reversed and denied all benefits sought by the applicant. Wis. Stat. §40.65 addresses disability and death benefits for protective occupation participants. Under this statute, in order to receive a duty disability benefit, a protective occupational participant must sustain a duty-related injury or disease leading to a disability that is likely to be permanent. That injury or disease must cause the participant to either retire or sustain other specified adverse employment consequences. Dr. Xenos' opinions better reconcile the medical records regarding the applicant's claimed disability. The medical records demonstrate a significant pre-existing condition. The records do not support that the work-related injury precipitated, aggravated and accelerated the applicant's pre-existing degenerative condition beyond its normal progression.

Issue Preclusion

Patrick A. Bain v. Department of Transportation, Claim No. 2007-011654 (LIRC January 10, 2013). The applicant sustained an injury as a result of a motor vehicle accident. The employer was named as a defendant in the third-party lawsuit brought by the applicant in circuit court. However, a claim for worker's compensation benefits was not raised in circuit court. The employer was not afforded the opportunity to defend against the applicant's claim for such benefits. Administrative Law Judge Cathy A. Lake determined the respondents were not precluded from re-litigating the cause, nature, extent and permanency of the applicant's injury under the doctrine of issue preclusion. The Commission affirmed. The sole liability of the respondents to the applicant is liability under the Worker's Compensation Act. This is solely statutory. The jury verdict does not preclude re-litigation of the issues of cause, nature, extent and permanency of the applicant's injuries in this worker's compensation case.

Job Offer

John B. Sims v. Time Warner Cable, Claim No. 2011-010016 (LIRC November 29, 2012). The applicant sustained an admitted knee-related work injury. The applicant lived on the northwest side of Milwaukee. Prior to the injury, he worked at a location five minutes from his home. He worked Sunday through Wednesday because he had custody of his infant son from Thursday through Saturday. The employer offered the applicant work on the southeast side of Milwaukee. The applicant accepted this position, and used a provided company truck to work at the southeast Milwaukee location. However, the company truck was taken back shortly after this position began, because the applicant was no longer performing installation work. The applicant had no vehicle of his own. The bus ride would have been one and a half hours each way. Additionally, the position offered was Monday through Friday, which would have required the applicant to also get his infant son to daycare. The Administrative Law Judge (unnamed) determined the applicant had reasonable cause to refuse the employment offered by the employer. The Commission adopted the decision in its entirety. The long bus ride would have required a transfer and over 100 stops. A change of daily commuting time from ten minutes to three hours is unreasonable on its face.

Medical Issue

Dustin K. Maciejewski v. Titletown Brewing Co., Claim No. 2008-025598 (LIRC November 29, 2012). The applicant sustained an admitted knee injury. His treating physician recommended an IT band lengthening or release procedure. Dr. Kohn performed an independent medical examination at the respondent's request. Dr. Kohn opined the condition requiring surgery would be work related if the band thickening was demonstrated via a particular MRI. Dr. Kohn opined this would need to be determined by an appropriate radiologist. Dr. Kohn later reviewed the MRI himself and determined the band thickening was not present. The respondents did not present any evidence from a radiologist. The applicant presented a report from a radiologist opining there was thickening on the MRI. The Administrative Law Judge (unnamed) awarded benefits. The Commission adopted the decision in its entirety. The applicant's clinical history supports the radiologist's reading of the MRI scan.

Occupational Exposure

Brian C. Turner v. Martins Bulk Milk Services, Inc., Claim No. 2010-024267 (LIRC January 10, 2013). The applicant routinely drove a propane powered forklift in the warehouse. After one month, he began experiencing sharp headaches, fatigue and vision problems. He was terminated three months later for errors in shipping items. Two months later, he learned a co-worker had been hospitalized for carbon monoxide exposure stemming from use of a propane powered forklift at the employer. The applicant then sought medical attention. His treating physician opined that, although his testing was essentially normal, his symptoms could be consistent with chronic exposure to carbon monoxide. A specialist subsequently opined his symptoms could be delayed neurological effect from a prior carbon monoxide exposure. He subsequently developed significant cognitive disorders and was determined to be permanently and totally disabled by a number of providers. Dr. Novom performed an independent medical examination at the request of the respondents. Dr. Novom opined the hospitalization a few weeks after the applicant stopped working for the employer probably established that the applicant was exposed to carbon monoxide poisoning. Dr. Novom agreed with the treating physicians that a delayed reaction to carbon monoxide poisoning is at least possible. Administrative Law Judge Roy L. Sass awarded per anent and total disability benefits. The Commission adopted the decision in its entirety. While there was no direct evidence of the precise level of carbon monoxide to which the applicant was exposed, there was substantial circumstantial evidence that he was exposed to harmful levels. A lack of contemporary complaints from the applicant and lack of hard data of the amount of carbon monoxide in a largely unventilated cold storage room allows a reasonable conclusion that the applicant was exposed to toxic levels of carbon monoxide during employment. The respondents are not legally required to establish another source for the applicant's current disabling symptoms when the Commission is left with legitimate doubt on causation, per *Molinaro v. Industrial Commission.* Here, there is no other credible explanation for the applicant's disability.

Occupational / Repetitive

Christopher C. Livingston v. Veolia ES Solid Waste Midwest LLC, Claim No. 2010-028516 (LIRC November 21, 2012). The applicant underwent a pre-employment physical examination before he began to work for the employer. The applicant sustained a lumbar strain in March 2007. He was released to regular duty toward the end of March 2007. Dr. Monacci performed an independent medical examination at the request of the respondents. He opined the end of healing was reached as of April 6, 2007. The applicant then returned to work for the employer. Over the next few years, he worked a significant number of hours. In spring 2008, he switched to working a less strenuous job. A driver health history in June 2008 indicated the applicant had no chronic back problems. He was laid off in February 2009. He did not treat for back symptoms until

June 2010. When he treated in June 2010, he reported that he woke up with severe pain on a particular date in June 2010. The applicant asserted that he sustained a back injury as a result of his ongoing job duties for the employer and that this lead to his disabling condition. He testified that his back continued to hurt over the years. The applicant asserted he did not receive medical treatment because of financial reasons. The Administrative Law Judge (unnamed) denied the applicant's entire claim on the basis that the applicant could not demonstrate his work was either the sole cause or a material contributory causative factor in the onset or progression of his low back problems. The Commission affirmed. While the respondents are required to take an applicant "as is," an applicant with a pre-existing back problem that becomes symptomatic or worsens during employment, or after employment ends, must demonstrate that the back problems are related to the applicant's work duties. A sudden onset of symptoms, over one year after employment ended, is less likely to be the result of daily work activities. The treating physician could not medically justify an opinion that the sudden onset of symptoms should be seen as a continuation of his prior back condition. The applicant's testimony regarding his ongoing symptoms, given his lack of medical treatment during the same period of time and answers on a health history form during the same period of time, is not credible.

Permanent Total Disability

Jeremiah J. Vanremmen v. Central Processing Corp., Claim No. 2006-022071 (LIRC January 22, 2013). The applicant sustained a left foot injury. This occurred when a 50 pound concrete block was dropped from a height of six feet. Following an initial hearing in this matter, the applicant was determined to have sustained an unscheduled injury, in the nature of complex regional pain syndrome as a result of the work injury. Temporary disability benefits were awarded. The applicant sought 35% permanent partial disability to the body as a whole at the time of the first hearing. The initial administrative law judge held the request was premature because of an order for prospective medical treatment in the nature of a spinal cord stimulator. Following this hearing, the applicant underwent spinal cord implant surgery and attempted vocational rehabilitation training. The treating physician opined disability and permanent restrictions were to be "body as a whole" because the complex regional pain syndrome diagnosis involved the leg, buttock and low back. Further, the spinal cord stimulator was implanted into the spine itself, and not an extremity. The medical records connected the applicant's foot injury and unscheduled back injury, particularly in the nature of the use of the cane, asymmetric abnormal gait, abnormal stride length, abnormal heel strike, abnormal stance, abnormal toe off and painful gait and deformity of the left leg. The medical records demonstrated the symptoms had progressed and involved the left side of the lumbar spine from T12-S1. A second hearing was held. Administrative Law Judge William Phillips, Jr. determined that the applicant was permanently and totally disabled. The respondents asserted there was no permanent disability due to the unscheduled portion of the injury, and so permanent total disability should not be awarded. There was also an average weekly wage dispute that was appealed. The Commission affirmed on all issues, with slight modification of the decision. Under *Mireles*, in order for an applicant to receive permanent and total disability benefits, an ascertainable portion of the disability must be attributable to an unscheduled injury. Based upon the applicant's testimony and treating physician's opinions, it could be determined that an ascertainable portion of the disability was attributable to the unscheduled back injury, a substantial portion of the sedentary work restrictions and hourly limitations were related to the complex regional pain syndrome and the abnormality/symptomatology in the lumbar segments including T12, L1-L5 and S1. The severe permanent restrictions assigned by the treating physician, in light of the capacity, education and training factors in *Balczewski* (addressing *odd lot* vocational permanent total disability), resulted in a presumption of permanent total disability. The respondents failed to rebut the *odd lot* presumption by showing actual jobs the applicant could perform. Surveillance of the applicant traveling three hours away from home to attend a Green Bay Packers' football game does not demonstrate the applicant is not permanently and totally disabled. Administrative Law Judge Phillips, Jr. held that going to a Green Bay Packers' football game is not merely attending a sporting event, but is participating in a cultural ritual of the first order. One could argue that he did not just go to a football game, but instead went to pay homage at the House of Lombardi.

Psychological Injury

David L. Cook v. Dept. of Corrections, Claim No. 2011-016867 (LIRC October 31, 2012). The applicant sustained work-related tuberculosis while working as a correctional officer at the Department of Corrections. He subsequently alleged a consequential psychological disorder as a result of complications from the tuberculosis, as well as from side effects from his tuberculosis medication. The applicant also alleged that he was permanently totally disabled as a result of the consequential psychological condition. The employer and insurer disputed that the applicant sustained a consequential psychological condition and was permanently disabled as a result. Administrative Law Judge Edward Falkner held that the applicant's consequential psychological condition was work-related and that the applicant was permanently and totally disabled as a result. The Commission affirmed in

part, modified in part, and reversed in part. The applicant's physician, Dr. Ahmed, opined the applicant's diagnosis of tuberculosis and treatment for that condition substantially contributed to the applicant's psychiatric condition, in the nature of post-traumatic stress disorder and depression. Dr. Ahmed opined that the applicant was permanently and totally disabled as a result of his condition. The applicant was evaluated on behalf of the respondent by Dr. Timothy Lynch. Dr. Lynch opined that although the applicant had some anxiety and apprehension due to his positive TB test, and that these symptoms may have been exacerbated by his medication side effects, at the time of Dr. Lynch's examination, the applicant was able to work within normal limits without symptoms of anxiety, depression or other psychological conditions. Dr. Lynch opined that the diagnostic testing disclosed extreme exaggeration of symptoms. Dr. Lynch diagnosed the applicant with malingering. Dr. Lynch opined that the applicant's performance on the diagnostic testing was so deficient that a person could only do that poorly by deliberately deciding not to perform or try to perform badly. The level of the applicant's performance was not seen in either normal controls or severely brain damaged people just guessing. Litigation or other issues of primary or secondary gain were motivating factors. Although the Supreme Court has recognized traumatic neurosis or hysteria caused by a work-related injury as compensable under worker's compensation statutes, the Supreme Court warned that such claims should be examined with caution because of the danger inherent in such cases of malingering. The applicant had the burden of proving beyond a legitimate doubt all the facts essential to recovery of compensation. It is an administrative law judge's duty to deny benefits if a legitimate doubt exists regarding the facts necessary to establish a claim. If a medical report offered by the respondent raises a credible legitimate doubt as to whether work caused the disability, it is not necessary for the respondent to go further and prove that the disability is instead caused by an off-duty accident or exposure. Medical records introduced at the hearing indicated that the applicant had a psychological condition, but that the exact cause was not clear. The applicant's claim for permanent total disability benefits based upon the tuberculosis was also denied. Although the applicant also made a claim for tuberculosis, none of the doctors thought that he was totally disabled as a result of that condition.

Rejection of Medical Treatment

Terry Bol v. Albrightson Excavating, Inc., Claim No. 2004-046810 (LIRC January 22, 2013). The applicant sustained an admitted low back injury. He asserted that he was permanently and totally disabled. The records reflect the applicant became addicted to narcotics that were prescribed as a result of the work-related injury. The insurer offered repeatedly to pay for drug rehabilitation. Administrative Law Judge Mary Lynn Endter held that the applicant was permanently and totally disabled. The respondents asserted the applicant refused to undertake or abandon the attempt to overcome his addiction. The respondents asserted that, pursuant to Wis. Stat. §102.42(6), the applicant rejected treatment and, therefore, no compensation was payable for the applicant's disability. The Commission adopted the decision in its entirety. The applicant ultimately did attend the rehabilitation treatment. He had not relapsed from his drug addiction as of the date of the hearing. It is far from clear that the disability was aggravated, caused or continued by an unreasonable refusal to submit to or follow reasonable medical treatment under these circumstances. ✦

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