June 2023

Volume XXIV

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Wisconsin Worker's Compensation Update

In This Issue

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Decisions of the Wisconsin Labor and Industry Review Commission

Arising Out Of

Alonso v. Star Valley Flowers Inc., Claim No. 2020-008895 (LIRC June 30, 2022). The applicant alleged he sustained an injury to his foot, on October 26, 2019, while he was cleaning out his shoe, lost balance, and stepped down on a cut stem that punctured his foot. The applicant indicated that he believed it was a minor injury. He did not report it until October 28, when he informed the employer he could not work because of his foot pain. The owner of the employer drove the applicant to a clinic and directed him to stay in the vehicle. The evidence indicates the owner went into the clinic and described what happened to clinic staff. (The owner did not testify at the hearing.) The initial clinic note indicates, "[the applicant] does not recall any injury." Latter medical records contain conflicting accounts regarding the mechanism of injury (whether the applicant stepped on a sharp metal bar at work or on a piece of wood at work). Several months later, the applicant's leg was amputated below the knee because of an ongoing infection. An independent medical examiner opined the amputation was the result of a diabetic infection, and opined there was insufficient evidence to support that a work-related incident led to said infection because of the inconsistencies in the medical records regarding the same. The treating physician opined that, absent the work injury, there was no reason to believe

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About Our Attorneys

Our group of worker's compensation 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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the applicant's diabetes would have caused an amputation to be performed. An unnamed administrative law judge held the applicant sustained a compensable work-related injury, leading to an infection and ultimately an amputation. The Labor and Industry Review Commission affirmed. Inconsistent descriptions regarding the occurrence of, and mechanism of, the work incident existed. However, the Commission inferred that these inconsistencies were largely the result of translation issues involving a Spanish-speaking applicant. Further, the indication that the applicant did not recall a work injury was attributed to the owner's description to the clinic and not that of the applicant. The independent medical examiner's opinion was an evaluation of the applicant's credibility and not an actual medical opinion. The applicant's description of the work incident and the treating physician's opinion regarding causation, were credible and supported a finding that a compensable work-related injury was sustained.

Hernandez v. DJS Construction, LLC, Claim No. 2018-007524 (LIRC December 28, 2022). The applicant sustained an admitted right wrist fracture when she fell. She alleged that she also sustained a low back injury. The applicant did not have legal permission to work in the United States and did not speak English. She initially treated in the emergency department. She reported wrist symptoms. She testified that she also had back pain but that she did not report it because she did not have any money to pay. The medical records reflect that the applicant had a hospital interpreter at the time of the emergency visit. The medical records specifically reflect the applicant denied having sustained any other injuries. Medical records from approximately seven months later reflect she reported a *new* symptom of tailbone pain. The medical records subsequently indicate that ongoing symptoms of low back pain were reported by the applicant. Dr. Kulwicki performed an independent medical examination and opined the applicant did not sustain a work-related injury. The applicant sought payment of permanent total disability benefits. An unnamed administrative law judge denied the claim. The Labor and Industry Review Commission affirmed. There is legitimate doubt that any low back injury was sustained. The applicant did not report this on the date of injury, or to the emergency room personnel, or her treating physician for several months. The reasons the applicant provided for not doing so, are not credible. The medical records all reflect the applicant was provided interpreters during her medical treatment. She was treated without insurance in the Emergency Department, at which time she specifically denied any other injuries (apart from the wrist injury) and there would have been no reason to do so if she had actually sustained a back injury.

Cianciaruso v. Novocure, Inc., Claim No. 2019-000925 (LIRC January 25, 2023). The applicant worked in medical sales. She made an on-site presentation at a medical facility. While returning to her vehicle, she slipped and fell on ice in a parking lot. She reported that she fell on her left wrist, felt something happen to her right shoulder, and dropped her heavy sales tote onto her left ankle and foot. The applicant did not seek medical treatment at the medical facility she was visiting in Madison. She returned home to Milwaukee. She treated with her chiropractor several days after the alleged injury. The applicant had already been treating with the same chiropractor for a prior, personal, fall injury that had occurred the year prior to the alleged injury. This prior fall had primarily affected her left hip and sacroiliac joint, but also temporarily aggravated her left ankle. The applicant did not report the incident to her supervisor. She testified that this was because she thought the symptoms would go away. She also testified that she was afraid of losing her job because it was a tense situation at work. The applicant testified that, after she told her boss

about the work-related injury, she was put on a performance improvement plan. She also testified that she was discharged by the employer on the date she took paperwork to apply for disability benefits. The applicant initially sought short-term disability benefits and then long-term disability benefits. Long-term benefits were denied when it was reported that the applicant's disability was the result of an incident at work. The applicant filed a hearing application in January 2019. She alleged that she sustained injuries to her left wrist. She then filed an amended hearing application in October 2020, alleging that she sustained injuries to her left wrist, left ankle, and right shoulder. Dr. Viehe performed an independent medical examination. He opined that the work-related incident was not causative in her ankle or foot conditions because the medical records reflected pre-existing conditions, which were the sole cause of her symptoms. Similarly, he opined the work incident was not causative of her shoulder condition because the MRI revealed only degenerative changes and not an acute traumatic injury. An administrative law judge held the applicant had sustained three injuries and was entitled to various benefits. The Labor and Industry Review Commission affirmed. The applicant's descriptions of her injuries was credible and unrebutted. The lack of treatment at the medical facility where she fell, lack of report to the supervisor, and initial application for short-term disability benefits was reasonable. Further, the applicant's testimony that things were "tense" at work, and her testimony regarding the performance improvement plan and termination, provides credibility to the applicant's testimony regarding why she did not report the injury immediately. The initial application of short-term disability benefits does not demonstrate that she did not sustain an injury because her employer gave her the paperwork after she reported the injury, and she was not aware that she was not eligible for short-term disability benefits until she was denied long-term disability benefits.

Steger v. Visiting Nurse Ass'n of Wisconsin, Inc., Claim No. 2020-010613 (LIRC February 28, 2023). The applicant worked as a certified nursing assistant. She provided at-home care for patients for about 15 years. She alleged a specific lower back injury occurred on August 1, 2017, when a patient grabbed her, after she lifted the patient from the floor. The applicant specifically testified that she experienced the pain when the patient grabbed her and not when she lifted the patient. The evidence reflected that the applicant had initially reported the incident to the employer, but indicated she did not know if she was injured. The medical records reflected the applicant had treated for similar symptoms for approximately 1.5 years, leading up to the alleged incident. She also had a history of other pre-existing spine conditions. The objective imaging did not reveal an acute injury. In April 2018, an independent medical examiner determined the applicant did not sustain a work-related injury. An unnamed administrative law judge denied the applicant's claims. The Labor and Industry Review Commission affirmed. The employee's described mechanism of injury was dubious, because she reported the pain when the patient grabbed her and not when she lifted the patient. Further, the prior history of similar symptoms, and treatment for similar symptoms leading up to the incident, supported the existence of legitimate doubt as to whether any injury was actually sustained.

Mestan v. Kathi Pappa, Inc., Claim No. 2019-009389 (LIRC April 12, 2023). The applicant began working for Kathi Pappa, Inc. as a home health care provider in 2010. She alleged that she injured her left hip on March 18, 2019. She alleged that the injury occurred as a result of moving a 265-pound patient using a hoyer lift, and then later the same day, having to quickly get out her chair to respond to a ventilator alarm later. After that incident occurred, she had severe pain and could not move forward. She went to Lakeland Hospital the same day. She called the employer and advised that she had been hurt and likely could not work the next day. [The employer disputed that the applicant mentioned a work injury, and alleged that she simply indicated she was in pain.] The applicant indicated that she had injured herself the week before, while pushing a wheelbarrow at home. The applicant was diagnosed with multiple partial thickness tears in her left hip. The hospital records indicate that she felt severe left groin pain when "standing up from a chair" while at work. There were no references to any injury while using a hoyer lift. The applicant was discharged to bedrest, at home, for the next several days. Three or four days later, the applicant's pain became excruciating. She developed a fever. She returned to the hospital and was diagnosed with sepsis. She was hospitalized for ten days with IV antibiotics. She needed to be transferred to a nursing facility but her private insurance would not cover this treatment. The applicant then notified the employer, for the first time, of the alleged work-related left hip injury. She told the employer that the "wheelbarrow story was made up." She testified that she made up this history because she did not want to create a worker's compensation problem for the employer. The applicant made a good recovery. She returned to regular

work in May of 2019. She did not seek any additional left hip treatment until February 28, 2020. The February 28, 2020 medical record is the first record which includes a report of an injury occurring on March 18, 2019 while using a hoyer lift. The unnamed administrative law judge held the applicant sustained a compensable left hip injury, and awarded benefits. The Labor and Industry Review Commission affirmed. The Commission rejected the employer and insurer's assertions that the applicant was not a credible witness. The Commission also rejected the employer and insurer's assertions that there was legitimate doubt as to whether any work injury occurred because the applicant herself reported that her left hip problems happened at home; there was no report of a work injury until weeks later when her private insurance declined payment; and the initial treatment records made no mention of a work injury. The course of events was reasonable because the applicant did not initially believe the injury was a big deal and did not want to be a worker's compensation problem for the employer. Testimony by the owner of Kathi Pappa, Inc., wherein the owner explained that she had never known the applicant to be a liar, and that she found the applicant truthful in her testimony was persuasive. Additionally, the applicant's testimony that she was under the influence of narcotic pain medications at the hospital as being the reason why the correct mechanism of injury was not provided, was credible.

Mueller v. West Bend School District, Claim No. 2019-026719 (LIRC April 27, 2023). The applicant alleged that she sustained knee injuries and a right wrist injury as a result of a fall on April 27, 2016. She had preexisting bilateral knee and wrist conditions. The applicant was significantly overweight. The fall occurred when her foot caught on the floor, she fell forward, and twisted to avoid hitting a table. She fell to the floor and landed on her hands and knees. She was able to get up and finish her shift. She iced her knees and wrists when she arrived home. About one month later, the applicant reported she was 80-90% improved. She was released without restrictions. Three months later, she was evaluated by a different physician. She reported ongoing bilateral knee pain, elbow pain, wrist pain and hand pain. She reported that she had fallen on her hands and knees about one year earlier (prior to the work injury) but her symptoms resolved with chiropractic treatment. Subsequent injections did not provide relief. A right knee MRI about 16 months post injury revealed a horizontal tear of the medial meniscus and tricompartmental cartilage disease. The applicant underwent a meniscectomy. A few months later, a left knee MRI was performed. A tear was revealed and meniscectomy performed. Her condition continued to deteriorate. About 19 months post initial surgery, a left knee total replacement was performed. The applicant was referred for a right knee replacement. Her treating surgeon opined all of the procedures were causally related to the work-related fall. Dr. Barron performed an independent medical examination. He did not address the knee injuries and only addressed the alleged wrist injury. Dr. Thomas O'Brien performed an independent medical examination. He opined the bilateral knee conditions were personal and entirely unrelated to the injury. He opined the MRI scans were over interpreted as showing tears. He opined this commonly occurs with tricompartmental degenerative arthritis of the knees and in morbidly obese individuals. The unnamed administrative law judge denied the applicants claims for benefits. The appeal was timely filed but only addressed the knee conditions. The Labor and Industry Review Commission reversed and awarded benefits related to the knee conditions and the wrist conditions. The Commission has authority for de novo review. Unless an appeal specifically indicates an issue is not being appealed, then the Commission will review all of the issues related to the alleged injury. The treating surgeon "checking the wrong box" on the WKC-16-B is not sufficient to require a denial of benefits. The Commission looks to the substance of the narrative reports despite the failure to check the appropriate box. The applicant is a large, heavy, woman and, therefore, would have landed with substantial force on her hands and knees. The circumstances of the fall and sequela of symptoms, belie Dr. O'Brien's description as a "minor slip and fall incident." Dr. O'Brien ignored medical reality when he dismissed the meniscal tears that were surgically identified and repaired as being no more than meniscal degeneration, over interpreted as showing tears. The administrative judge's question of the applicant's credibility on cross-examination (denying statements outlined in the medical records which were detrimental to her position) is understandable. However, the applicant's memory or candor is not determinative. Instead, the reversal is based upon the credible opinions of the treating physicians as opposed to the questionable opinions of the independent medical examiners.

Loss of Earning Capacity

Finch v. Wisconsin Public Service Corp., Claim No. 2008-037866 (LIRC November 16, 2022). The applicant worked as a part-time, seasonal meter reader. On December 9, 2008, she sustained an injury when she fell through a deck at a home, where she was verifying vacancy before turning off gas to the home. Her leg fell through the deck, up to her thigh. She caught herself with her right arm on the deck. She alleged a cervical and thoracic injury, which required surgery. She was assigned 5% permanent partial disability for the physical conditions. She secured an expert vocational report that she sustained 35 – 40% loss of earning capacity. The respondent's expert opined the applicant sustained 0% loss of earning capacity. The evidence reflected the applicant was well paid for her job in 2008. However, the job tasks performed were becoming obsolete. The employment was eliminated as part of a recession. The average hourly rate in the area where the applicant resided, at the time of the hearing, was approximately 37 cents below the hourly rate the applicant had earned in the same area, 11 years earlier. Therefore, the experts agreed there was at least some economic reason for the reduced wages. An administrative law judge held the applicant had sustained a traumatic back injury. The applicant was awarded temporary total disability benefits, 20% loss of earning capacity, and medical treatment expenses. The Labor and Industry Review Commission affirmed. The respondent's argument that the administrative law judge merely "split the difference" between the ratings, which was not supported by any specific wage, and, therefore, cannot be adopted, fails. Further, the respondent's argument that the wage loss was due to economic factors and not the work-related injury, and any underemployment was due to personal choice, also fails. Although the evidence supported that the applicant's wage loss was due to economic reasons, in part, the evidence also showed the average hourly wage for work in the applicant's area was still below her hourly wage at the time of the injury, 11 years later. The hourly rate the applicant earned at the time of the hearing is approximately 20% less than the average hourly rate at the time of the hearing in the same area.

Misconduct

Hirschfield v. Viroqua, Hearing No. 22012404MD (LIRC February 28, 2023). The employer's attendance policy provided for termination if there were six occurrences within a calendar year. The applicant was warned three times for attendance in four months. Three weeks after the final warning, she overslept. She texted her supervisor two and a half hours after the start of her shift, that she would be late. The applicant therefore had four occurrences in four months. The Labor and Industry Review Commission determined that the attendance policy was not violated and, therefore, there was no "misconduct" under Wis. Stat. §108.05(5)(e). The employer had a specific definition of standards of behavior for attendance. While the tardiness was not for a valid reason, it did not evidence willful or wanton disregard of the employer's interests for purposes of misconduct to meet the separate, and second, analysis as to whether misconduct occurs under the statutory provisions. However, the actions of the employee were due to substantial fault. The employer had a reasonable requirement that its employees arrive for work on time. The employee violated this reasonable requirement by oversleeping and missing her shift after having received a final warning from her supervisor. The applicant was, therefore, discharged for substantial fault connected with her employment, under Wis. Stat. §108.04(5g).

Occupational Injuries

West v. Cumberland Vet Clinic, Claim Nos. 2017-027526, 2019-007899 (LIRC December 28, 2022). The applicant sustained a traumatic injury to his low back in 2013, when he was thrown around by a cow, while working as a large animal veterinarian. Hartford Insurance was the employer's worker's compensation carrier at the time of that incident. The applicant continued to work for the employer until 2016. However, he modified his work activities to reduce his chances of further injury. The applicant was initially referred for surgery shortly after the 2013 injury. However, he opted to undergo conservative treatment for about three years so that he could continue working. The applicant testified that, after he ran out of conservative treatment options and could no longer do his work, he stopped working in 2016. He underwent a three level fusion. At the time he stopped working for the employer, Middlesex Insurance was the employer's worker's compensation insurer. Hartford Insurance paid additional worker's compensation benefits, including medical expense, wage loss and permanent partial disability benefits associated with that additional medical treatment. Hartford Insurance filed a reverse hearing application, asserting that the applicant sustained an occupational injury as of the last date of employment, and seeing reimbursement from Middlesex Insurance. Middlesex Insurance denied primary liability for an alleged occupational low back injury and all claims for reimbursement. Hartford Insurance Company secured a WKC-16-B from Dr. Hebl (whom he was referred to treat by Dr. Thapar - this evaluation was not done at the request of the Hartford). Dr. Hebl opined the applicant sustained an occupational

work-related injury as a result of his work activities for the employer. Dr. Lyons performed an independent medical examination at the request of Middlesex Insurance Company. He opined the applicant did not sustain an occasional injury as a result of his job duties for the employer. He noted that Dr. Hebl's opinions are an outlier and the treating physicians did not support Dr. Hebl's opinions regarding causation. The administrative law judge dismissed the reverse application on the basis that the 2013 traumatic injury was the material contributing causative factor for ongoing disability. The Labor and Industry Review Commission affirmed. Medical records after the 2013 traumatic injury indicated that the applicant's work caused him back pain. However, those did not reflect that his work caused further injury to his low back. Feeling pain is not tantamount to being injured. Further, the objective imaging did not show any further injury, and remained essentially unchanged from 2013 through 2016. His ability to continue working for three years posttraumatic injury does not alone indicate that he sustained a new, occupational, injury at the time he had additional wage loss, on an occupational basis. The applicant's testimony did not support Dr. Hebl's opinion regarding causation. If the applicant had sustained an occupational injury following a traumatic injury, the insurer on the risk for the occupational injury would be liable for the entire claim, including any medical treatment prior to the date of injury. However, the evidence does not reflect that the applicant's work exposure was at least a material contributory causative factor to the onset or progression of his degenerative disc disease, and therefore, no occupational injury was sustained in 2016.

Gardner v. County of Portage, Claim No. 2021-006912 (LIRC April 12, 2023). The applicant worked as a corrections officer from 2002 to 2014. He filed a Hearing Application alleging he sustained occupational injuries to his neck and low back, with the date of injury on the last date of employment of September 25, 2013. The applicant asserted that his work as a corrections officer was at least a medium exertional job, which required wearing 15 pounds of gear, extended time walking, bending, and twisting. He indicated that he commonly lifted 10-20 pounds. The applicant indicated he was also be involved in three inmate altercations per week. He also reported that six specific incidents occurred, resulting in neck and low back pain, while he was employed at Portage County. Dr. Owens checked all three causation boxes on the WKC-16-B. Dr. Owens described that "he has been in fights with inmates while working as a correctional officer at the Portage County Jail. Patient…He notes basically he is on his feet all day, 7 days on and 7 days off." Dr. Owens' WKC-16-B also references low back and neck injuries the applicant sustained outside of work, including car accidents, football injuries, and a fall while on a hunting trip. At the Hearing, the Captain of the Corrections Department testified at the request of the employer. He testified that there was a lot of standing involved in the applicant's position, very infrequent heavy lifting, but some lifting of 10-15 pounds. He testified the applicant spent most of his time in a seated position in the control room. The Captain testified that, although inmate altercations did occur, they did not happen multiple times per week. The applicant testified that he did not recall the circumstances surrounding the six injuries he had reported. He testified he did not seek any type of medical treatment following any of these six alleged incidents. The applicant testified he sustained numerous concussions while playing football, injured his back in a sledding accident in 1989, and again while at home working over a stove. The medical records also reported injuries while hunting in Wyoming and while moving furniture. The applicant testified that, after he stopped working for the date of injury employer, he held numerous heavy labor jobs, which were within the guidelines of his capabilities outlined in a functional capacity evaluation. Dr. Klemme performed an independent medical examination. Dr. Klemme held that the cervical and lumbar conditions were not causally related to employment, but rather to multiple out-of-work injuries, obesity, tobacco use, and depression. Dr. Klemme opined there was not a single medical record that documented any acute injury at work with Portage County. Dr. Klemme opined that the Employee's job duties were primarily sedentary, and of insufficient force, duration, or magnitude to have caused the cervical and lumbar spine conditions. An unnamed administrative law judge denied all of the applicant's claims. The Labor and Industry Review Commission affirmed. There were legitimate doubts as to whether any work injuries were sustained. While the applicant reported that he sustained six injuries during his employment, the lack of any indication of those injuries in the records supported the conclusion that any such incidents were not injurious and not of a magnitude that the applicant felt important to report to a medical provider. The applicant could not even recall the circumstances surrounding most of these alleged injuries. Even considering the applicant's testimony that he may have felt pain during these incidents as credible, experiencing pain does not mean the work or activity caused an injury. The Captain's testimony that, outside of inmate altercations, the Employee's work activities were not very physically demanding, was credible.

Permanent Partial Disability

Rohde v. Appvion, Inc., Claim No. 2019-003331 (LIRC February 28, 2023). The applicant began working for the employer in 1977. He alleged that he developed an occupational right knee injury from his years of service, including daily kneeling, stair climbing, moving pallets, and regular lifting of 30-50 pounds. The applicant was diagnosed with lateral and medial meniscal tears, along with chondromalacia throughout the knee joint. Dr. Meyer performed an independent medical examination at the applicant's request. Dr. Meyer supported causation for a right knee occupational injury, based upon the applicant's 44-year history of work for the employer. Dr. Meyer rated the applicant with 14% permanent partial disability to the right knee based upon limited range of motion, medial and lateral meniscal tears, and ongoing pain and arthritis. Dr. Xenos performed an independent medical examination at the request of the employer and insurer. Dr. Xenos opined that the applicant's right knee conditions were due to the applicant's morbid obesity and his age, as opposed to his work duties. The Administrative Law Judge awarded benefits. The Labor and Industry Review Commission affirmed. A minimum of 10% permanent partial disability was required as the minimum rating because the surgery performed included repairs of lateral and meniscal tears. DWD Rule 80.32(4) provides a minimum 5% for a "meniscectomy." That term "meniscectomy" is singular in the Code. Therefore, 5% per procedure is required even if both occur during the same surgery. The employer and insurer's position that only a 5% minimum rating was appropriate because only one surgery was performed, is not consistent with the rules.

Huebner v. Keith R. Olmsted & Sons, Claim No. 2019-023455 (LIRC March 2, 2023). The applicant worked as a truck driver. On October 14, 2019, he was driving a semi-truck, when another vehicle ran a stop side and collided with his vehicle. When he regained consciousness, he was upside down in the cab of the truck. Diesel fuel was leaking into the cab. He was able to release his seat belt and exit the cab. A passerby helped him to rest in a nearby field, while another used a fire extinguisher to subdue flames from his truck. The driver of the other vehicle had been killed. The applicant filed a Hearing Application seeking benefits for an alleged traumatic brain injury and psychological injury. Dr. Siebert diagnosed the applicant with posttraumatic headaches and post-concussion syndrome. Dr. Principe (a psychologist) diagnosed the applicant with depression and possible underlying bipolar disorder, aggravated by the accident. During his sessions with Dr. Principe, the applicant was prone to angry outbursts, criticized the medical system for its response to COVID and excessive medical charges, and was verbally abusive towards his wife. In October 2020, a functional capacity evaluation determined the applicant was able to engage in all of his job requirements without restriction. After about one month of full-duty driving, the applicant reported he was doing well. Dr. Siebert opined the applicant required no permanent restrictions and reached end of healing as of January 19, 2021. A WKC-16-B to this effect was completed in November 2021, but also with a 5% permanent partial disability rating. In the summer of 2021, the applicant began treating with Dr. Malwitz. The applicant was diagnosed with posttraumatic stress disorder and cognitive dysfunction following a brain injury. The applicant reported he felt fatigued, and experienced head rushes along with frequent headaches. He continued to work full duty. Dr. Malwitz completed WKC-16-Bs assessing 10% permanent partial disability for mood disorders, with no permanent restrictions. Dr. Burgarino performed an independent medical examination. He diagnosed the applicant with a mild traumatic brain injury with concussion. He opined the applicant did not meet the criteria for posttraumatic stress disorder. Dr. Burgarino opined the applicant had pre-existing and undiagnosed bipolar disorder. He opined the applicant's work injuries resolved and he was at baseline within three months. He opined the applicant sustained no permanent disability and required no work limitations. The unnamed administrative law judge held the applicant sustained a permanent brain and mental injury. The applicant was awarded 5% permanent partial disability. Both parties appealed the permanency rating. The employer asserted that the law does not permit any permanent disability to be awarded for the mental injury, under *Walls v. Wisconsin Elec. Power Co.* The applicant alleged that the psychological condition resulted in physical changes in his brain, which would allow for an award of permanent partial disability benefits. The Labor and Industry Review Commission affirmed the award of 5% permanent partial disability. Permanent partial disability cannot be awarded for a mental injury without a compensable loss of earning capacity or a physical component. Permanent partial disability based solely upon mental or psychological conditions, and without a physical component, is not permitted when the applicant has returned to work for the date of injury employer and has not sustained actual wage losses equaling or exceeding 15%, pursuant to Wis. Stat. § 102.44(6), because

loss of earning capacity claims are barred in those situations. However, this limitation does not apply to the physical injury (the traumatic brain injury), because permanent partial disability may be assessed for physical limitations stemming from physical injuries, irrespective of whether the 15% threshold for loss of earning capacity has been met. A claim for permanent partial disability for a mental injury was reserved for the applicant to pursue in the future, if the mental restrictions caused a wage loss which exceeded 15%, or if the applicant was no longer employed by the date of injury employer.

Scott v. Helwig Carbon Products, Inc., Claim No. 2020-014750 (LIRC April 12, 2023). The applicant sustained a compensable right index finger severe laceration on June 7, 2019. This was surgically repaired by Dr. Crimmins. The applicant underwent subsequent physical therapy. On October 9, 2019, Dr. Crimmins noted the applicant had full range of motion with no tenderness. He was released to full duty, with no additional treatment required, and no permanent partial disability. The applicant testified he reported ongoing pain and numbness, and an inability to perform certain tasks. Dr. Crimmins did not include his information. The applicant secured a second opinion form Dr. Schulz. The applicant underwent additional physical therapy. Dr. Schulz assessed 14% permanent partial disability to the right index finger PIP joint due to loss of motion and pain. The employer and insurer denied the claim and relied upon Dr. Crimmins' opinions regarding permanent partial disability. The unnamed administrative law judge denied the applicant's claims for permanent partial disability. The Labor and Industry Review Commission reversed as modified. The Commission awarded 10% permanent partial disability. The Commission inferred that Dr. Crimmins dismissed the applicant's reports of ongoing pain, numbness, and limited capabilities as subjective or transitory. Subsequent treatment records reflect the applicant reported continued symptoms. While the applicant's symptoms improved over time, the symptoms never resolved. A lacerated and surgically repaired PIP joint tendon is unlikely to heal with no permanent partial disability. Wis. Stat. §102.18(1)(d) permits the modification of the permanency rating and permits the reduction of the rating to 10% due to the relatively minimal nature of the applicant's disability.

Denman v. Cardinal Glass Industries, Claim No. 2013-016801 (LIRC May 12, 2023). The applicant alleged a knee injury which resulted in a meniscectomy in 2013 and knee replacement in 2020. The parties compromised a dispute in 2016 with a credit of 8% permanent partial disability. The respondents asserted the 3% assigned in 2016, above and beyond the 5% minimum for the meniscectomy, should reduce the 50% rating for the 2020 knee replacement. The unnamed administrative law judge disagreed. The Commission affirmed. The 2016 compromise resolved claims for temporary disability and permanent disability accruing on or before the date of compromise. That was long before the total knee replacement occurred. The compromise cannot be fairly read to have reserved a credit for permanency that might accrue for a new, subsequent, surgery. The case law allows for stacking of permanent partial disability, and therefore the 50% rating for the 2020 surgery is "stacked" upon the permanency *paid* for the earlier, 2013, surgery.

Permanent Total Disability

Rieder v. Paul V. Farmer, Inc., Claim No. 2019-013711 (LIRC December 28, 2022). The applicant worked as a crane operator. On June 18, 2019, he was loading heavy equipment when he experienced a pop in his low back and had sudden back pain. He had no prior history of back pain or injuries. The records indicated that, pre-injury, the applicant had planned to retire in three years, when he turned 55. The nature and extent of the injury was disputed. The applicant alleged he was permanently and totally disabled. Dr. Yoon opined that the applicant needed to remain off work on a permanent basis. Dr. Yoon opined that, despite the applicant's attempt to work with significant restrictions, he was unsuccessful despite only working a few hours in a sedentary position. One month later, the applicant's wife wrote to Dr. Yoon to request clarification of restrictions. She indicated that he was seeking clarification and that his attorney needed to know as well, regarding what activities he could perform at home. The letter inquired as to his weight restrictions for doing things at home. She inquired if he could fish, using the riding mower or ATV, do light work in the shop such as painting or welding, ice fish with an electric auger, carry three to four pieces of wood at a time, carry groceries to the car or at home, push a shopping cart, etc. Dr. Yoon responded with an indication that he recommended the applicant avoid work. Dr. Yoon opined that he generally does not comment on specific home activities that are safe to perform, but generally advises patients to be cautious with all required activities of daily lifting. Dr. Yoon opined that many of the activities mentioned in the question are not required activities of daily living and should be done cautiously as tolerated. Dr. Yoon opined the applicant should take care in how frequently or prolonged he was

participating in the activities and minimize the weight handled when possible. Finally, he recommended that the applicant utilize the last set of restrictions, based upon the Functional Capacity Evaluation, prior to the complete release from work. The applicant and his wife testified about his symptoms and activities post injury. This included hunting, ice fishing, and summer fishing. He also went to Mexico on vacation. The applicant testified that he did not perform significant physical aspects of these activities. He testified that he performed other activities (including those which Dr. Yoon was asked if the applicant could perform). Dr. Harrison performed an independent medical examination. He opined the applicant's injury was temporary in nature and that the applicant's ongoing condition was personal in nature. Dr. Harrison opined the applicant did not require restrictions. Dr. Noonan also performed an independent medical evaluation. He opined the injury was temporary in nature. The vocational evaluators opined the applicant would be permanently and totally disabled under Dr. Yoon's opinions and not have any permanent vocational disability when considering Dr. Harrison and Dr. Noonan's opinions. The employer and insurer's expert opined that the applicant would have only a 55-65% loss of earning capacity if considering the Functional Capacity Evaluation restrictions. An unnamed administrative law judge denied the applicant's claims on the basis that the applicant's actual activities were beyond his medically assigned work restrictions and, therefore, that he had sustained only a temporary lumbar strain. The Labor and Industry Review Commission reversed. The applicant's leisure activities did not exceed his assigned restrictions. These were not activities that required significant physical demand and he was able to take breaks. There was no witness or surveillance to contradict his testimony. The administrative law judge documented her observations of the applicant during the hearing, including that the applicant was frequently altering positions, that his leg was trembling/shaking, and that he was in general discomfort throughout the proceedings. The applicant's testimony, his wife's testimony, and the administrative law judge's observations during the hearing, as well as the objective medical evidence, supported the treating physician's opinions regarding permanent restrictions as being more credible than the independent medical examiner's opinions.

Wendt v. Aurora Health Care, Inc., Claim Nos. 2010-029935, 2012-025859 (LIRC February 28, 2023). The applicant worked as a registered nurse since 1998. She submitted 15 relevant incident reports with the employer from 1999 to 2012. The applicant alleged that her first back injury occurred in 1999. She sustained two additional injuries in 2000 (these injuries were conceded and benefits were paid, including payment of 1% permanent partial disability). She alleged another injury occurred in 2002 and that four more injuries occurred in 2003. The applicant alleged she sustained another back injury in August 2004. She was referred for a four left discography and a disc replacement at L5-S1. The treating providers opined this additional medical treatment was causally related to the 2000 work-related injury. An independent medical examiner opined that an artificial disc replacement was experimental and not appropriate for a worker's compensation claim. That surgery was denied by the employer and insurer. The applicant continued conservative treatment. She sustained another work-related injury in April 2008. A functional capacity evaluation determined she could work eight hours per day at medium duty. She sustained additional injuries in April 2010 and June 2012. A posterior lumbar interbody fusion revision was performed on November 12, 2013. The applicant continued to experience significant back symptoms. An MRI was recommended in October 2014. However, a needle or wire was found implanted in the applicant's left pelvis by the site of the spinal fusion. A revision surgery was performed on March 11, 2015, to remove the foreign body and clean out the abscess. The applicant continued to have severe pain and radicular symptoms. Her treating doctor opined that the applicant was totally and permanently disabled. She filed a Hearing Application for multiple dates of injury, to seek the permanent and total disability benefits. An administrative law judge denied her claims on the basis that the applicant did not meet her burden of establishing that her low back disability was related to traumatic workplace incidents in 2010 and 2012. The judge did not make a decision regarding the alleged occupational disease injury. The Labor and Industry Review Commission reversed. The numerous work-related injuries the applicant sustained from 1999 to 2012 were at least a material contributory causative factor in the onset or progression of the employee's low back condition and that she therefore sustained an occupational disease injury. She also sustained traumatic injuries in 2010 and 2012. The treating physician's opinions that the applicant was entirely unable to work, resulting in permanent and total disability, were credible.

Temporary Total Disability

Odom v. Strategic Resources, Inc. Claim No. 2020-011524 (LIRC March 2, 2023). The applicant sustained a conceded injury. The independent medical examiner opined the applicant's condition resolved as of July 16, 2020. The applicant was paid temporary total disability benefits through August 19, 2020. The amount paid between July 16, 2020 and August 19, 2020, was $2,580.00. The *pro se* applicant claimed entitlement to additional temporary disability benefits and medical expenses. His position was based upon a WKC-16-B from a Physician's Assistant. The unnamed administrative law judge denied the claim for benefits. The Labor and Industry Review Commission affirmed, and held specifically that the respondent is entitled to recover the overpaid temporary total disability benefits of $2,580.00. The mechanism of injury was fairly minor. The MRI did not reveal anything other than wear and tear degeneration. The independent medical examiner's opinion regarding end of healing was close to the date the applicant stopped treating with the initial treating physician and when that physician opined the applicant could return to work without restrictions. The Commission cannot base an opinion regarding end of healing on the Physician Assistant's opinions. The applicant did not present any substantial credible evidence on which to rely for a determination that a later end of healing date was appropriate.

Unreasonable Refusal to Rehire

Warlow v. Bartlet Custom Automotive Inc., Claim No. 2017-001711 (LIRC January 25, 2023). The applicant sustained a compensable work-related injury. Approximately eight days prior to when the applicant was released to return to work without restrictions, the employer hired a replacement for the applicant's date of injury position (welding). The employer had a brake press operator position open at the time the applicant was released to work without restrictions. This was not offered to the applicant. The employer was aware that, prior to employment for the employer, the applicant worked as a brake press operator. At the time the employer hired the applicant, the applicant indicated he was capable of operating a brake press but preferred welding. The applicant secured employment at a minimal wage loss after his release without restrictions. However, he quit this employment shortly after (he determined it was a temporary position), and then secured employment as a brake press operator elsewhere, at a greater wage loss. The administrative law judge held the employer unreasonably refused to offer the applicant work and awarded benefits. The Labor and Industry Review Commission affirmed. The applicant was only required to show that he was an employee, sustained a compensable work-related injury, and that he applied for rehire. The employer then had the burden of demonstrating reasonable cause for not rehiring the applicant. There is no requirement that an applicant demonstrate that the employer refused to rehire the applicant because of the work-related injury. The applicant's indication, upon hire, that he preferred welding positions, was not sufficient to assume that the applicant would have refused an offer of work as a brake press operator. The applicant had no affirmative responsibility to inquire about the brake press operator position because he was not aware that his position was available when he was released without restrictions. Wis. Stat. §102.35(3) does not obligate an employee to mitigate damages by seeking and retaining other employment. The Commission often interprets the statute to include this duty; however, this is evaluated on a case-by-case basis. The applicant's voluntarily quit from a position he secured shortly after he was released without restrictions was not unreasonable. The latter secured position was utilized to calculate benefits owed.

Galbraith v. TDA, Inc., Claim No. 2020-006111 (LIRC April 27, 2023). The applicant worked as a sewer cleaner for a small family owned business, TDA, Inc. He had worked on and off for TDA since 2016. All of the other members of the TDA workforce were members of the Peterson family. The applicant lived with one of the other sewer cleaners, Corey Peterson. On March 4, 2020, the applicant worked from 8:00 a.m. to 6:15 p.m. His job entailed splitting and digging into concrete, and handling equipment weighing 60-100 pounds. The applicant had been scheduled to stop working at 5:00 p.m.; however, the Operations Manager (Deanna Peterson) advised him at 5:07 p.m. that he needed to complete an additional assignment for an existing customer. The applicant initially responded by text, "[t]hat sucks. I'm done at 5." The Operations Manager then stated, "I'm sorry but this is a business so we have to go back." The applicant again refused, which led the Operations Manager to call him and explain that if he did not do the additional job, he would be fired. The applicant relented and performed the additional job. The applicant testified that, the following day, he could barely move his right arm. He sent a text message to the Operations Manager to this effect at 7:01 a.m. on March 5, 2020. The applicant drove to work, punched in, and went to talk to Corey about his arm. He testified that Corey became angry and told the applicant that he

would be fired if he did not work. The applicant then messaged the Operations Manager and advised he planned to seek medical attention for his arm. The Operations Manager responded that, "Corey told me that you quit." The applicant replied, "I did not quit I am going to the doctor." The applicant went to the Emergency Department at 9:52 a.m. He was diagnosed with a minor deltoid strain. He was provided work restrictions. The applicant sent a photograph of the medical records and restrictions to the Operations Manager. The applicant also sent several messages inquiring if he would be allowed to return to work, or if he was fired. The Operations Manager responded, "[d]o not come in…..You refused work and walked out. Call it what you want…Now please stop harassing me." The applicant then advised he planned to come back on Monday and the Operations Manager stated, "[y]ou are no longer and [sic] employee and I am asking you to stay off the premises." The applicant was released to work without restrictions on June 25, 2020. He filed a Hearing Application alleging unreasonable refusal to rehire, in July of 2020. The applicant secured a similar job at a different company, in August of 2020. The unnamed administrative law judge awarded the full penalty amount of one year's wages to the applicant after a Hearing ($40,560.00). The Labor and Industry Review Commission affirmed. The employer "failed to show that its reason for terminating the [applicant] and for refusing to rehire him was reasonable." The award of one year's wages "is a monetary limit, not a temporal one." Accordingly, the Commission awarded the past wage loss which had accrued ($16,640.00) and reserved jurisdiction in the future to allow for further compensation to be awarded if the applicant could show that future wage loss was attributable to the illegal discharge. ✦

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