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STRONG LEGACY✦STRONGER FUTURE

50 YEARS | ARTHUR CHAPMAN
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ATTORNEYS AT LAW

Wisconsin Worker's Compensation Update

In This Issue

Wisconsin Worker's Compensation Practice Group

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New Faces in the Arthur Chapman Workers Compensation Group

Meet Jennifer Augustin and Selma Demirovic

Getting to Know Jennifer Augustin

Jennifer lives and works in south-central Wisconsin and devotes her practice to worker's compensation claims in both Wisconsin and Minnesota. Since 2011, she has enjoyed working closely with employers, insurance carriers and third party administrators to navigate the many nuances of the claims they face.

Why did you decide to practice worker's compensation law?
My interest in worker's compensation began while taking an elective course on the subject in law school. For some reason, the topic grabbed me in a way that my other law classes did not. Around the same time, by chance, a local worker's compensation firm was looking for a law clerk so I jumped on the opportunity and haven't looked back since. That law clerk position led to an attorney position in the same area upon graduation and now 13 years later I am still enjoying the topic and all the nuances I've learned along the way.

What are you most excited for in your role at ACKSP?
I am excited to join a great team of colleagues at ACKSP. They truly are a team and everyone works together so well to help support each other. It has been one of the warmest welcomes I've received in any position.

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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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New Faces in the Arthur Chapman Workers Compensation Group

Meet Jennifer Augustin and Selma Demirovic *(continued)*

What is an interesting fact about you?
Every spring I help my daughters' Girl Scout troops manage their Girl Scout Cookie programs. Our house becomes a cookie storage warehouse with cases of Thin Mints piled floor to ceiling. So if you ever need a Girl Scout cookie hook-up, I can help!

Getting to Know Selma Demirovic

Selma is a vibrant and passionate attorney with an eagerness to make connections with people, and solve her clients' problems efficiently. She practices law primarily in the arena of workers' compensation, but she also has experience with business litigation, personal injury, and estate planning, among others.

Why did you decide to practice law?
I felt called to practice law because I am a first generation American who was inspired by seeing my parents navigate the complicated path to citizenship. I am also naturally very inquisitive, and I love a good debate. I truly enjoy working with people and I feel that even in times of conflict, there is beauty and humanity in acknowledging differences and working through them with the goal of a mutually agreeable outcome in mind.

What are you most excited for in your role at ACKSP?
I am most excited to gain experience in the courtroom. I love the theatric nature of litigation and I feel grateful to have the opportunity to hone my skills under the guidance of so many seasoned litigators.

What is an interesting fact about you?
Bosnian is my first language so I am bilingual, but the really interesting thing is that I have a Pug named Romeo who is subsequently also bilingual.

March 24, 2024 Amendements to the WCA

Effective March 24, 2024, portions of the Worker's Compensation Act were amended. The important changes include the following:

1. PPD Rate. The maximum weekly PPD rate will increase to $438 for injuries occurring on or after 3/24/2024, and increase to $446 for injuries occurring on or after 1/1/2025. See § 102.11(1).
2. Lump Sum Payment of PPD. Lump sum payments of unaccrued PPD may be voluntarily issued without DWD approval in undisputed claims with no 5% interest credit. See § 102.32(6m)(b).
3. Statute of Limitations. The statute of limitations begins to run on the date that DHA/OWCH issues an order approving a compromise agreement. See § 102.17(4)(a).
4. Case Closure. DHA/OWCH is required to return a case file to DWD/WCD within 30 days after DHA/OWCH issues an order if no appeal is pending. The DWD/WCD has exclusive authority to close a case and to notify the parties when it closes a case. The WCD is required to forward a file of a closed case to DHA/OWCH if a hearing is required because a party filed a subsequent hearing application. See § 102.18(1)(B)(1d), (1h), (1p), and (1t).
5. Dependents. For purposes of death benefits, language regarding marriage was changed to be gender neutral. See § 102.51(1).

Decisions of the Wisconsin Court of Appeals

Exclusive Remedy

Johnson v. Torrez, 2023 WI App 44, 995 N.W.2d 490 (Ct. App. 2023) (unpublished). Katirius Johnson was employed by a temporary help agency, Americold Logistics, and was placed to work at Kroger as an "order selector." On November 12, 2018, Johnson was operating a pallet jack at Kroger when a forklift driven by Jessica Torrez ran into her. Johnson filed a complaint in Circuit Court alleging that Torrez negligently operated the forklift along with violations of Wisconsin's safe place statute. Kroger filed an answer and later a motion for summary judgment which was granted. Johnson appealed the grant of summary judgment, arguing that Kroger failed to raise an exclusive remedy defense, and that Americold Logistics was not a "temporary help agency" under the Worker's Compensation Act. The Court of Appeals (Brash, Donald, and White) affirmed the grant of summary judgment. The Court explained that, "no employee of a temporary help agency…. may make a claim or maintain an action in tort against…any employer that compensates the temporary help agency for the employee's services." Further, a "temporary help agency" is defined as "an employer who places its employees with or leases its employees to another employer who controls the employee's work activities and compensates the first employer for the employee's services…" In this case, the Court found Johnson conceded that Americold placed Johnson with Kroger, and that Kroger compensated Americold for Johnson's services. Johnson only disputed whether Kroger exercised the requisite control over Johnson's activities. However, the Court found that Kroger controlled Johnson's day-to-day work through the use of software which controlled what pallets Johnson would move and where he would move them to. Kroger was also responsible for Johnson's schedule and monitoring his efficiency. Therefore, there is no genuine issue of material fact as to whether Kroger exercised the requisite control. Johnson was an employee of a temporary help agency, Americold, when injured and the exclusive remedy applies to bar the civil suit against Torrez and Kroger.

Toboyek v. Wisconsin Public Service Corporation, 2023 WI App 44, 995 N.W.2d 499 (Ct. App. 2023) (unpublished). Brian Toboyek began working for WPS in 2006 and worked his way up to "control operator." During the COVID-19 pandemic, Toboyek alleged being in "constant fear" at work because some co-workers were not complying with the masking requirement. This led to "physical and emotional" ailments and his primary care provider recommended he take a medical leave in December of 2021. Toboyek also was seen for counseling by WPS's own medical professional, Ms. Graves. Subsequently, Toboyek alleged that the personal health information he shared with Graves was posted on the WPS intranet forum and was accessible by all 8,000 WPS employees. He was "shocked, outraged, and mortified" by the unauthorized disclosure and has been on medical leave for anxiety and high blood pressure ever since. Toboyek filed a civil suit against WPS and Graves for negligence, invasion of privacy, and resultant pain and suffering. WPS filed a motion to dismiss, arguing that the negligence claims are barred by the exclusive remedy provision of the WCA. Wis. Stat. § 102.03(2). The Circuit Court granted the motion to dismiss. The Court of Appeals affirmed. The Court explained that the WCA defines

an "injury" as "mental or physical harm," and that Toboyek's alleged anxiety and high blood pressure fall squarely within this definition. Further, the Court explained that Wisconsin courts have recognized that an employee's negligence claims against co-employees are also precluded by the exclusive remedy provision.

Standard of Review

Wotnoske v. LIRC, 2023 WI App 54, 997 N.W.2d 402 (Ct. App. 2023) (unpublished). Wotnoske was employed as a corrections officer with the Department of Corrections. He alleged that he experienced a number of incidents over the years which caused him to develop explosive personality disorder, PTSD, and bipolar depression. Wotnoske filed an application for hearing alleging he sustained compensable nontraumatic mental injuries. Following two hearings, the ALJ found that the Applicant experienced extraordinary stress and awarded benefits. The DOC filed a petition for review with the LIRC. LIRC reversed the ALJ's decision and found that all of the incidents experienced by Wotnoske were consistent with what all correctional guards could expect to experience in their work. Wotnoske then appealed to the Circuit Court, which reversed. The Court of Appeal (Gundrum, Neubauer, and Grogan) reversed the decision of the Circuit Court and affirmed the decision of the LIRC. Wotnoske argued that LIRC's finding that he had not experienced extraordinary stress was a "conclusion of law" which entitled him to de novo review by the Court of Appeals. The Court of Appeals disagreed, and found that "a determination as to the cause of a disability is a question of fact," not law. The Court then examined the findings made by the LIRC and found that its findings on causation were supported by credible and substantial evidence, and must be affirmed. ✦

Recent Decisions of the Labor and Industry Review Commission

Arising Out Of

Shorter-Amos v. SSM Health Care of Wisconsin, Inc., Claim No. 2018-001349 (LIRC November 30, 2023). The Applicant filed a Hearing Application alleging a left knee injury on January 10, 2018, when she slipped and fell on ice while walking across the employee parking lot. She sought treatment at the emergency department the same day. She underwent an MRI which showed near bone on bone arthritis and severe tricompartmental chondrosis. There was concern for a possible re-tear of the medial meniscus. The Applicant was evaluated by Dr. Ertl on January 29, 2018. Dr. Ertl diagnosed bilateral knee arthritis but believed she was "much too young for a total knee replacement." He recommended injections. The Applicant underwent a right side total knee replacement on August 1, 2018, by Dr. Bernhardt. She received an additional injection to the left knee in October of 2018. She was seen by another orthopedic surgeon, Dr. Wollaeger, in January of 2020 for ongoing left knee pain. Dr. Wollaeger diagnosed end stage left knee arthritis and recommended replacement. The left knee replacement was done on May 22, 2020. Dr. Wollaeger submitted a WKC-16-B on the Applicant's behalf and opined that the slip and fall aggravated the pre-existing condition beyond its normal progression, and precipitated the left knee replacement. The Respondents commissioned an independent medical evaluation with Dr. Summerville. Dr. Summerville found that the January 10, 2018 slip and fall caused a temporary aggravation of her pre-existing left knee arthritis which healed within two weeks, and that the left side total knee replacement was not work related. The Administrative Law Judge denied benefits and dismissed the Hearing Application. The Labor and Industry Review Commission affirmed. The Commission found that the Applicant had a history of at least four prior left knee surgeries. The Commission found that the Applicant was able to return to normal work duties within three weeks of the January 10 accident and was able to ambulate on the left knee with no difficulty while recovering from the right knee replacement. The MRI showed no new trauma. The Commission noted that the left knee replacement was performed more than two years after the accident, and credited Dr. Summerville's opinion that the left side replacement would have taken place even if the January 10 accident had never occurred.

Gillespie v. Froedtert Health Group, Claim No. 2021-005812 (LIRC December 29, 2023). The Applicant alleged that she sustained a right shoulder, lumbar spine and cervical spine injury as a result of a syncopal episode, allegedly after being exposed to gas in a room leading to a fall onto concreate floor. The Employer and Insurer denied that the Applicant's

fainting was for reasons related to exposure to gas. The evidence did not include any medical doctor's opinion that the cause of the fall was due to gas exposure. The Applicant decided that she had fallen because of gas exposure because she googled the symptoms of gas exposure while she was in the emergency room following the fall. The Employer witness testified there was no alarm for detection of higher than appropriate levels in the room where the Applicant worked on the date of injury. The Applicant further asserted that, even if it was not the gas levels, that *something* in the room constituted a zone of special danger and a compensable injury. The unnamed administrative law judge held the Applicant's fainting was for unknown reasons as there was no evidence showing there was a gas leak as claimed, and dismissed the hearing application. The Labor and Industry Review Commission affirmed. The Applicant has the overall burden of proof to establish the accident arose out of the employment. An idiopathic fall, due to a personal condition not caused or aggravated by employment is not compensable. An idiopathic fall is not due to any hazard or danger of employment, but instead due to something personal to the individual. The Applicant has the burden to demonstrate the cause of the fall was *not* solely idiopathic in nature. Further, the Applicant has the burden of showing that a special hazard exists to make an otherwise idiopathic condition, compensable. Here, the Applicant failed to prove that she was exposed to gas or that exposure to gas caused her to fall. There is no evidence supporting this assertion. Specifically, there is no medical opinion that any such exposure to gas (if it occurred) would have led to fainting. There was no explanation of the mechanism of injury at all, and thus there is legitimate doubt that any such injury occurred as a result of her employment.

Hernandez v. Green Bay Dressed Beef, LLC, Claim No. 2021-022680 (LIRC December 29, 2023). The Applicant alleged that he sustained a traumatic left hip injury. He alleged the incident occurred when a supervisor pushed a "300 to 500 pound" cart [forklift] with empty containers into him. He testified the supervisor accelerated after hitting him and left. He testified that he cried out in pain, the supervisor got angry and left. He also asserted the supervisor treated him poorly when he worked there. Yet, the Applicant also testified that his pain started that afternoon. He could not recall the date of injury. He testified that he waited months before going for treatment, and that he believed his doctor was lying to him. The Applicant had previously filed a report of injury for a different alleged condition, but did not file a report for the claimed hip injury. The supervisor testified to a completely different version of events. The supervisor recalled that the Applicant walked forward into the forklift, and the supervisor struck the Applicant on the front left of the Applicant's body with cardboard. The supervisor was driving the forklift at walking speed. The Applicant fell onto some barrels. The supervisor indicated the Applicant thought the incident was funny because he was not paying attention. He testified the Applicant and a co-worker were laughing. The supervisor asked the Applicant if he was okay and the Applicant said "yes." The supervisor sent the Applicant to the nurse; the Applicant returned after one hour and told the supervisor he was fine. The expert medical opinions outlined different mechanisms of injury and came to opposite conclusions regarding causation and nature and extent of a hip injury. Administrative Law Judge Falkner denied the Applicant's claims. He noted the Applicant's attorney filed 1200 pages of documents by email and did not bring anything to hearing, despite being instructed to do so. The attorney failed to file the paperwork within 14 days after the hearing as instructed. The exhibits were filed approximately five weeks post hearing. While the Employer and Insurer objected to the timeliness, the judge accepted the exhibits because he wanted to reference the treating physician's WKC-16B in his order denying the claim. Judge Falkner found there were numerous contradictions about how the incident occurred, whether it was reported, when the Applicant first felt pain, if he was fired or retired, and why he did not tell his providers initially about a hip injury. Judge Falkner noted that the Applicant had difficulty telling his story, and while some of it could be due to a language barrier and 6th grade education (as claimed by the Applicant), that most of it "was probably Applicant simply not keeping his story straight." He held the Applicant frequently testified in a nonresponsive fashion which did not help his overall credibility. Further, Judge Falkner found that the Applicant's failure to timely report symptoms in his medical treatment proves the incident was benign and the Applicant's reasons for failing to report an injury at the time of the incident was because no such injury occurred. The Labor and Industry Review Commission agreed that the Applicant was not credible and that any incident was minor and did not result in any actual injury. The Applicant is not being "thrown on the industrial scrapheap" because he did not perfect his worker's compensation claim 'as if he was a college educated native English speaker," as asserted by the Applicant.

Average Weekly Wage

Marohn v. Menard, Inc., Claim No. 2018-023539 (LIRC December 29, 2023). The Applicant was hired as a part-time employee. He worked as such during the months leading up to his injury in July 2018. The Applicant

testified that he hoped to graduate into full-time employment when an employment opening became available at a location nearer to his residence. He testified that he normally worked full time. The wages for an employee working at part-time employment when injured are expanded to full-time wages (40 hours per week) unless it is demonstrated that the employee is restricting his availability in the labor market to part time under Wis. Stat. §102.11(a) and (f). The administrative law judge determined that it was not demonstrated that the Applicant restricted his availability in the labor market to part time, and awarded benefits based upon an expanded average weekly wage. The Labor and Industry Review Commission agreed. However, the basis for the same was modified. Wis. Admin. Code §80.02(2)(d) does not dictate a mandatory expansion of an employee's weekly wage if there is no submission of a signed statement from the employee, indicating the employee is restricting his availability to part-time employment. The provision includes the limiting phrase "if applicable." This means the employee and employer are jointly tasked with submission of such a written statement. However, if there is a dispute, there cannot be expected to be a written statement by the employee cannot be expected. The employer has a due process right to rebut the presumption of expansion to full time by "reasonable clear and complete documentation". [This represents a change from how the Commission previously considered this issue. This has historically been "form over substance" based upon prior decisions. While this is only applicable for dates of injuries prior to April 10, 2022, this is still important for addressing this issue in those claims.]

Compromise Agreement

Denman v. Cardinal Glass Industries, Inc., WC Claim No. 2013-016801 (LIRC July 19, 2023). The Applicant sustained a left knee injury on May 2, 2013 and underwent a meniscectomy with Dr. Kruse in June of 2013. The parties reached a limited compromise in September of 2016 which stated:

> "This compromise is limited to claims accruing on or before July 12, 2016, and permanent partial disability up to 8% at the level of the left knee. The parties agree that the Employer and Insurance Carrier shall receive a credit on any and all additional claims as if PPD of 8% at the level of the knee had actually been paid."

The Applicant went on to develop arthritis in the left knee and underwent a total knee replacement by Dr. Lamson in November of 2020. Dr. Lamson subsequently opined that the May 2, 2013 injury necessitated the total knee replacement and assessed an additional 50% PPD to the left knee. The Applicant filed a Hearing Application alleging entitlement to the additional PPD. The Respondents denied the claim, in part, arguing that the prior limited compromise entitled them to a credit of 8% against the 50% rating by Dr. Lamson. The Administrative Law Judge (ALJ) awarded benefits. The Labor and Industry Review Commission affirmed. The Commission explained that the law in Wisconsin requires permanent disability for successive surgeries to be 'stacked' upon one another if the surgeries result from one work injury. The Commission further found that the limited compromise applied only to claims which had accrued as of July 12, 2016, and had no effect upon the claim for the total knee replacement which did not accrue until years later. Therefore, the Commission refused to apply the 8% credit and awarded the 50% PPD in full.

Meisenheimer v. Tetra Tech Rac Craft, LLC, Claim No. 2018-000678 (LIRC Sept. 20, 2023). In September 2018, the parties entered into a limited compromise that closed all claims except past and future medical expenses. This compromise was approved by Order dated October 1, 2018. In September 2019, the Employee filed an application requesting that the compromise be reopened. The Employee argued that he was cognitively impaired at the time he entered into the compromise, that he did not understand that it would foreclose any future claims he might have, and that his attorney failed to adequately explain the terms of the compromise and put improper pressure on him to agree to it. He attempted to present evidence that the treatment for his allegedly work-related melanoma caused "chemo-brain." However, the evidence showed that he did not receive chemotherapy. Instead, in 2017 he received three doses of immunotherapy drugs which were halted in July 2017 due to side effects, a full year before he entered into the compromise agreement at issue. The Respondents presented a report from Dr. David Blake that dismissed the Employee's claim that his immunotherapy treatment caused any cognitive impairment that would have affected his ability to understand the settlement. At the hearing on the application for reopening, the Employee's former attorney and her legal assistant presented evidence of numerous phone calls and a letter to the Employee detailing the terms of the compromise, and the legal assistant testified that the Employee signed the compromise when neither she nor the attorney were present so they could not have put any improper pressure on him at the time he signed. The ALJ denied the request to reopen. The Employee appealed this denial to the Commission. The Commission agreed

with the ALJ that the Employee's allegations were not supported by credible evidence. The Commission noted that the Employee was "no doubt under significant stress when he signed the compromise, but this is typical in a compromise situation."

Freund v. GGNSC Superior LLC, Claim Nos. 2014-001266; 2020-012743 (LIRC December 29, 2023). The Applicant's attorney reached an agreement with the attorney for the Employer and Insurer on the Friday afternoon prior to a scheduled Tuesday hearing. The draft compromise agreement was provided to the Applicant's attorney the following business day. The day after, Tuesday, the Applicant requested a change to the compromise. The change was made and the revised compromise provided to the Applicant's attorney on Thursday (February 24). The Applicant was provided a copy of this draft. The Applicant's attorney has a signature page with the notation "dated this 27 day of February, 2022" This was sent to the Applicant's attorney on February 28, signed, and sent to the attorney for the Employer and Insurer on the 28th. Later the same day, the Applicant's divorced husband contacted the Applicant's attorney and advised the Applicant had died on February 26, 2022. The issue became whether the Applicant actually signed the compromise before she died and listed the wrong date or if someone forged her signature; and whether the agreement ostensibly reached, was enforceable. The attorney for the estate filed an Amended Hearing Application, asserting a valid compromise agreement had been reached, and requested enforcement of that agreement. The administrative law judge declined to review the asserted compromise agreement. The Labor and Industry Review Commission agreed and determined there was no valid compromise. The Commission further impled the Work Injury Supplemental Benefit Fund to the litigation. The requirements for a valid compromise under Wis. Stat. §102.16(1) and Wis. Admin Code §80.03 were not met. These requirements include that the compromise must be in writing or entered into the record orally by the parties at hearing. Further, the compromise must be reviewed and approved by the Department. This did not occur here as the attorney for the Employer and Insurer never executed the compromise. Further, the Department did not approve the agreement. The death of the Applicant changed the nature of the claims and those issues needed to be addressed before any compromise could be approved.

Loss of Earning Capacity

Campion v. Wis Pak, Inc., Claim No. 2016-011432 (LIRC October 31, 2023). The Applicant alleged an injury to her cervical spine on April 23, 2016. She was working as a part-time merchandiser at the time of alleged injury. The Applicant claimed she was pulling hard on the handle of a pallet jack when she "heard a pop and felt pain in the ball of her neck." The Applicant treated with Dr. Walter and a chiropractor, Dr. Quandt, following the alleged injury. Both Dr. Walter and Dr. Quandt opined that the Applicant was capable of working without restriction in late summer of 2016. After being released to full duty, the Applicant returned to work for Wis-Pak. In October of 2016, the Applicant resigned her employment, stating: "I am giving my 2 week notice as of today….My last day will be November 2nd, 2016….Thank you guys for everything." Subsequently, the Applicant began working a full-time job at Aldi's, and then went on to work numerous other part-time jobs. The Applicant did not seek any additional neck treatment until 2018. In 2020, the Applicant began treating with Dr. Dow, who assessed her with 5% permanent partial disability and adopted the results of a Functional Capacity Evaluation (FCE) which limited her to 20 pounds lifting and no more than six hours of work per day. The Applicant obtained a vocational evaluation with Francis Maslowski, who relied on Dr. Dow's opinions and the FCE report to assess 50-55% loss of earning capacity. The Respondents commissioned an Independent Medical Evaluation by Dr. Harrison, who found that the April 23, 2016 incident caused a soft tissue strain which resolved by June 22, 2016 with no permanent disability or need for work restrictions. The Respondents obtained an independent vocational evaluation with Barb Lemke, who opined that there was no loss of earning capacity based upon Dr. Harrison's findings, and there was 20-30% based upon Dr. Dow's opinions and the FCE results. At Hearing, the Applicant testified that she resigned her employment at Wis-Pak "because she could not lift anything." She testified that she had spoken with her supervisor to see if there was alternative office work, but there was none. She also testified that she subsequently left her job at Aldi's because "the pain was so bad" and she had difficulties with lifting and using pallet jacks in that position as well. The Respondents countered that the Applicant had no restrictions at the time she resigned and worked several jobs without restrictions following her resignation. The Respondents argued that the Applicant's claim for loss of earning capacity was barred by Wis. Stat. § 102.44(6)(a), because the Applicant returned to her job at Wis-Pak at more than 85% of her pre-injury wages, and subsequently chose to voluntarily resign for the purpose of taking the full-time job at Aldi's. The administrative law judge denied the claim for loss of earning capacity. The Labor and Industry Review Commission affirmed. The Commission found that the Applicant's written resignation "made no mention of her work injury or difficulty doing the job. Indeed, she appears to have been leaving to do similar work, but on a full-time basis, at Aldi's."

Misconduct/Substantial Fault

Garrett v. Anodyne LLC, Hearing No. 23003968MD (LIRC September 15, 2023). The Employer instituted a new absenteeism policy that provided for discharge after nine absences. This was signed by the Employee a few days prior to March 1 and noted to be effective as of March 1. The Employee had an absence during the period between when he signed the agreement and March 1. That did not "count" toward the nine absences. The Employee had only eight absences during the period in question. Therefore, his termination was not statutory misconduct because it was not done pursuant to the policy. However, the Employer did have a reasonable requirement that the Employee be at work when scheduled, and it was within the Employee's control to abide by that requirement. It was not credible the Employee had to miss as many days for the claimed reason. This was not a minor rule violation or inadvertent error. Therefore, his discharge was for substantial fault within the meaning of Wis. Stat. §108.04(5g).

Pasha v. Elite Personnel, Inc., Hearing No. 23002901MD (LIRC July 31, 2023). The Employee was a no-call/no-show for work on December 15, 2022 due to a domestic violence situation at home. On January 10, 2023, she received a final warning for this absence that indicated a failure to improve would result in immediate suspension. The Employee received and signed this final warning. On February 21, 2023, the Employee's car would not start. She called and attempted to speak to her third-shift supervisor, but that supervisor was not yet onsite, so the second-shift supervisor took down the Employee's information and indicated she would let the third-shift supervisor know the Employee would not arrive for her scheduled shift. When the Employee arrived to work the next day after her shift was over, she was discharged. The Employer had a written attendance policy which was provided to and signed by the Employee. This attendance policy did not provide a specific number of times a worker may be absent prior to being discharged. The Commission determined that the Employee was not discharged for misconduct because her absences did not meet the criteria in the statutory definition of misconduct. The statute provides that more than two absences within a 120-day period constitutes misconduct in the absence of notice and one or more valid reasons. But an employer can opt out of the default provision and apply its own policy, provided it meets with the other requirements of the statute. In this case, the Employer had an attendance policy as part of its employment manual. However, it did not specify how many days an employee may be absent before being discharged. The Commission found this was insufficient to opt out of the default standard. Therefore, the Employer's policy was not applicable in determining whether the Employee's absenteeism met the definition of misconduct. Therefore, because the Employee was not absent on more than two occasions in the last 120 days, her discharge was not for misconduct under the statute.

Nature and Extent of Injury

Mayorga v. Menzel Enterprises, Claim No. 2020-020841 (LIRC Dec. 29, 2023). The Employee, driving a tow truck, had come to a stop at the end of a freeway exit ramp with a semi-truck stopped in the lane to his right. The semi-truck proceeded to turn right and the back of the semi hit the front passenger side of the tow truck. Video footage of the accident from various angles showed the tow truck rocking slightly after it was struck, and showed the Employee walking outside while talking on the phone shortly afterwards. Dash camera footage showed the Employee's right arm was pulled "sharply" by the steering wheel to the left at the moment of impact (the Employee later described that his arm was "violently" ripped across his body). The Employee then turned his neck left and right to check the road around him, leaned out the window to look around, and then pulled his phone out of his pocket to make a phone call as he exited the cab, presumably showing no signs of significant injury. He testified he felt some pain immediately, but did not have any significant pain until later that day. Records from his same-day emergency room visit indicate he complained of neck and back pain, with some numbness down the left arm but his right arm was not affected. He was assessed with neck pain and acute bilateral back pain. When he presented to Dr. Rosler ten days later his complaints included headaches, neck pain, right shoulder pain, thoracic pain, and lower back pain radiating into the right buttock. Thereafter, he attempted physical therapy and received multiple injections with only some reported relief. The ALJ found the Applicant sustained a thoracic muscle strain, but she had legitimate doubts that he sustained any injury to his neck or shoulder. The Commission, however, credited the treating doctors in full and awarded benefits for injuries to the cervical spine, right upper trapezius, thoracic spine, right shoulder, lumbosacral spine, and cervicogenic headaches. The Commission further awarded a 1% PPD rating for the cervical spine consistent with the treating doctor's opinions. The Commission noted that the fact that the Employee sustained multiple sprains would account for his diffuse and widespread pain complaints, and also surmised that a language barrier potentially created an inaccurate or incomplete record of complaints during the initial post-injury visit.

Occupational/Repetitive Injuries

Klitzke v. Strasau Laboratory, Claim No. 2020-009406 (LIRC December 29, 2023). The Applicant alleged a repetitive upper extremity injury as a result of her work activities for the Employer. She worked for the Employer for 14 years. She alleged lateral epicondylitis as a result of assembling plates She essentially placed various plates or discs together, and filled 24 small holes with explosive powder by holding the plate and turning it with her fingers, and then placing the plate in a press to compress the powder. When assembled, the item weighed 6.375 pounds. She handled approximately 292 plates in a nine-hour shift. She calculated that she lifted each plate three times, and, therefore, lifted 5,578 pounds in a day. The various experts (each party submitted three expert opinions) had conflicting opinions regarding whether the activities were causative of her symptoms. Job duty videos and photographs were considered by the various experts. The unnamed administrative law judge denied the Applicant's claims on the basis that the Applicant's work duties were not of sufficient magnitude to cause or progress her symptoms. The Labor and Industry Review Commission affirmed. Just because someone feels pain while doing work or other activities, does not mean that the work or activity is causing an injury. Correlation does not prove causation. The Applicant may have experienced pain when she performed some of her work, but still did not prove that the work activities were a material contributory causative factor in the onset or progression of her condition.

Psychological Injury

Hoff v. American Girl Brands, Inc., Claim No. 2020-011089 (LIRC August 31, 2023). The *pro se* Applicant filed numerous hearing applications asserting that he had sustained depression due to long term exposure to sexual and disability harassment; mental injuries due to extraordinary stress and a hate crime against a protected class; post traumatic stress disorder, depression, psychogenic pain disorder, severe sleep apnea and insomnia; and various physical injuries (scheduled and unscheduled). The Applicant alleged that he was falsely accused of a criminal offenses by coworkers and management. He also alleged that he was bullied. All of the medical experts agreed the Applicant had mental health issues. The Employer and Insurer denied the Applicant was accused of sexual harassment. Multiple hearings were held, initially before Administrative Law Judge Kinney, and later before Administrative Law Judge Falkner. The Applicant's claims for mental stress were all denied. Administrative Law Judge Falkner issued a *74 page* detailed decision outlining his determination that the Applicant was not credible and had failed to meet his burden of proof. The Labor and Industry Review Commission affirmed. The denial of the Applicant's request to have multiple administrative law judges who he had dealt with in the course of his claim, testify at a hearing, was appropriate. The Applicant's reliance upon the opinions of various individuals, who reportedly relied upon objective sleep study evidence, was not appropriate as those individuals refused to testify in response to valid subpoenas and the relevance of any sleep study is unclear. The Applicant raised no coherent substantive issues. The Applicant was not credible and had a propensity for embellishment. The Employer and Insurer's expert opinion that the Applicant's symptoms were not related to employment but to the potential presence of hypomanic/manic symptoms, likely biologically driven, and found individuals who struggle with bipolar manic complaints, have delusional thinking or have notable paranoid personality traits, was credible.

Fisher v. Cities & Villages Mutual Ins. Co., Claim No. 2019-016101 (LIRC September 20, 2023). The Applicant alleges that being threatened with a gun caused him to develop post-traumatic stress disorder. He testified that there was one encounter of this occurring. The version of events changed on multiple occasions. He reported that the other individual threatened to go get a gun; that he was threatened on multiple occasions with a gun; and that the individual threatened him with a gun on one particular date. There was credible evidence of a delay in reporting a gun was involved in the incident itself. The unnamed administrative law judge denied the claims on the basis that there was insufficient evidence to support any of the various mechanisms of injury alleged were the cause of a diagnosed post-traumatic stress disorder or mental injury. The Labor and Industry Review Commission affirmed. There was no requirement to apply the extraordinary stress test in *School District No. 1* as claimed by the Applicant, because the Applicant failed to provide credible evidence that the incident occurred as he related it, and failed to demonstrate that his current condition is in any way related to the alleged incident. The lack of a threshold injury/incident is alone sufficient to support a denial of the claim. The Applicant's argument that a delay of reporting was coping a mechanism of PTSD is a psychological conclusion not supported by expert medical opinion. Further, while uncorroborated hearsay evidence alone does not constitute substantial evidence, here, the hearsay

evidence in the police report was corroborated by other evidence in the record (including witness testimony and medical records) for the judge and Commission to support the denial.

Retraining

Crary v. Mainstream, Inc., WC Claim No. 2019-025315 (LIRC July 19, 2023). The Applicant was hired by Mainstream, Inc. as a millwright, earning $26.00 per hour plus overtime for any work over eight hours per day. The Applicant worked seven days a week with substantial overtime. He earned over $100,000.00 annually and primarily worked on a UPS account, where he was responsible for maintaining a variety of heavy equipment. There was a lot of heavy lifting involved. The Applicant was working at a UPS facility in North Dakota when he fell off of a ladder and injured his left shoulder on October 28, 2018. His treating physician, Dr. Studt, eventually imposed permanent restrictions which limited him to carrying of up to five pounds, only occasional torquing, repetitive grasping, or use of vibratory tools, and no lifting over shoulder level or climbing ladders. The Respondents commissioned an independent medical evaluation with Dr. Summerville, who did not impose any permanent restrictions. The Applicant provided Mainstream, Inc. with the restrictions by Dr. Studt, but they were unable to accommodate. The Applicant applied for new employment on Monster, Indeed, LinkedIn, and ZipRecruiter. The Applicant also applied for DVR services in May of 2021, and was determined eligible for services in June of 2021. The Applicant's goal was to find a job that paid over $100,000.00. The DVR referred the Applicant for a vocational evaluation with Jesse Ogren, who opined that the Applicant was limited to sedentary work and would need additional schooling to restore his earning capacity. He believed that a "mechanical design" program would align with the Applicant's interests and mechanical aptitude. The Applicant's DVR case worker, Renae Stewart, initially assisted the Applicant with job search, but he was not successful in getting any offers. The Applicant eventually was hired at Dadson's to work five hours per week, working on small parts, with the understanding that they would be interested in hiring him full time if he completed a mechanical design program. Stewart revised the Individualized Plan to include a retraining program for mechanical design in December of 2021. The Applicant began the mechanical design program at Chippewa Valley Technical College in 2022 and did well with the exception of his math courses. Due to concerns about his math skills, the Applicant and Stewart discussed possibly changing from mechanical design to operations management or manufacturing engineering technology. The Applicant's vocational expert, John Woest, evaluated the Applicant and opined that the mechanical design program may pose too great a challenge due to the math and science requirements, and recommended a degree in project management. The Respondents commissioned several vocational evaluations with Sidney Bauer. Bauer opined that the Applicant had possessed a commercial driver's license in the past, and identified several truck driving jobs for which he was qualified. Bauer researched the mechanical design field and found that graduates only earned an average of $43,988.00, whereas work as a truck driver could easily restore his earning capacity. The Applicant then filed a Hearing Application seeking benefits for vocational retraining. The Administrative Law Judge (ALJ) denied the Applicant's claim for vocational retraining. The Applicant appealed and argued that the ALJ applied the wrong standard of review. The Applicant argued that the DVR counselor's recommendation could only be rejected if there was misrepresentation or abuse of discretion under the *Massachusetts Bonding* case. The Applicant argued that Bauer's opinions were "totally irrelevant" on the issue of whether the DVR's recommended program was appropriate. Further, the fact that the mechanical design program would not immediately restore his earning capacity was not a barrier to approving the plan, as his earnings would likely increase over time and he had extensive prior experience in the industry, as compared to a new graduate with no experience. The Respondents argued that the Applicant had misrepresented highly material facts to the DVR, by failing to notify the DVR counselor that his back pain, neck pain, bipolar disorder, and ADHD were not related to his work injury. Further, the Applicant is unlikely to succeed in the mechanical design program due to his admittedly poor math skills, his admitted habitual use of marijuana, and his learning disability and self-professed disinterest in schooling. The Respondents argued that there was no retraining program that would be capable of restoring his earning capacity, contrary to Wis. Admin. Code § 80.49(10)(a)1. The Respondents also argued that the Applicant did not cooperate with job search efforts and sabotaged his job prospects. The Labor and Industry Review Commission reversed the decision of the ALJ and awarded retraining benefits. The Commission found the Applicant had made reasonable efforts to obtain suitable employment, and noted the Applicant had contacted 138 potential employers after confirming Mainstream, Inc. could not accommodate

his restrictions. The Commission further found that, even though the DVR did take non-work related conditions into account in recommending the program, the program was nonetheless premised upon the restrictions for the work-related shoulder injury, citing Stewart's testimony that she believed the program was appropriate based on the left shoulder conditions alone. Finally, the Commission held that it cannot credit Bauer's opinions over that of the DVR counselor's unless there was misrepresentation or abuse of discretion—which was not proven here.

Bridges v. C&D Technologies, Inc., Claim Nos. 2018-008524; 2020-002378 (LIRC January 31, 2024). The Applicant alleged he sustained two traumatic left shoulder injuries and sought payment of temporary disability, permanent disability, medical expenses, and retraining benefits. The claims were denied and the medical experts did not agree that traumatic left shoulder injuries were sustained. The Applicant's vocational assessment determined the Applicant had a 4th grade reading level, 5th grade spelling level, 7th grade vocabulary level, and 4th grade mathematical level. The parties' vocational experts provided opinions regarding appropriate retraining programs. Each opinion was based upon the assumption the applicant was already a high school graduate. However, the Applicant had not graduated high school nor obtained his GED. A neuropsychological expert opined she had never seen anyone with these low of scores earn a Bachelor's degree, even with accommodations. She opined that trade school or a turnkey business with an apprenticeship program may be better. However, she also opined he has every right to pursue his dreams and should be allowed to try if he so chooses. By the time of the hearing, the Applicant had begun the process of obtaining his GED but had not yet completed the same. The Employer and Insurer's vocational expert opined the Applicant may be able to complete a two year Associate's degree or an eight week truck driving program to restore his earning capacity but would need to increase his skills first, based upon his test levels – including just to pass the entrance examination. The unnamed administrative law judge denied the Applicant's claims on the basis that he had not proven that he sustained traumatic injuries as claimed. The Labor and Industry Review Commission reversed and awarded all benefits including up to 80 weeks of retraining benefits. The Commission determined the Applicant's expert was more credible, and his opinions regarding causation should be adopted. Further, the Commission determined that there was no indication that the Applicant misrepresented highly material facts to the DVR or that DVR abused its administrative power in approving the retraining plan. The Commission determined that it, therefore, must order payment of rehabilitation benefits for the first 80 weeks. [The Commission appears to come to the conclusion that the vocational experts' opinions that the Applicant had a high school diploma was not material because the Applicant would obtain a GED prior to entering another program.] The Commission also spent considerable time noting that the Applicant filed the appeal *pro se* and that he alleged his attorney did not come to the hearing prepared to argue the case and instead attempted to get the Applicant to settle. The Applicant outlined additional actions his attorney took, with which he disagreed. As part of the Commission's review, the Applicant made an offer of proof that showed he sustained an occupational injury and not a traumatic injury. The Applicant alleged his dyslexia was why he was unaware of the nature of claim asserted by his attorney. He asserted his case should not rest on the lack of preparation and negligence of the attorney and that he deserves to be heard. The Applicant also presented arguments and evidence of an occupational disease/repetitive injury versus the traumatic injury theories. Finally, the Applicant alleged that denying him retraining benefits would be discriminating against a person with learning and physical disabilities. He argued his delay in seeking retraining benefits should be forgiven because it was during the pandemic and he lived with his elderly immune compromised mother at the time, so it was not safe for him to begin. He also indicated that DVR never told him there were limited time frames during which he needed to act. The Commission considered all of this in determining that all of the benefits sought by the Applicant should be awarded.

Safety Violation

Burdick v. Woodmans Food Market, Inc., Claim No. 2018-007347 (LIRC October 31, 2023). The Applicant was injured on March 21, 2018 while operating a stand-up forklift. The Applicant was attempting to back the forklift into the racking area to deposit a pallet of paper products when his left leg became wedged between the forklift and the racking assembly. The Applicant sustained significant injuries that ultimately required amputation of his lower left leg. The Respondents conceded liability for the underlying injuries but a dispute arose when the Applicant filed a Hearing Application alleging increased compensation for a safety violation under Wis. Stat. § 102.57. The Applicant argued that the Employer violated the safe place statute by allowing employees to operate a stand-up forklift which was more "jumpy and accelerated more quickly

than it should have." The Applicant also argued that the Employer failed to provide safety devices which would have prevented the injury, including a "rear operator guard," a "backbone rear post," or a harness for the driver. Finally, the Applicant argued that the Employer failed to properly train him on the use of the forklift. The Respondents argued that the claim must be denied because OSHA investigated the accident and found no violations. Moreover, the video of the accident proves the Applicant was not looking in the direction of travel when the accident occurred, was going too fast for conditions, and was operating the machine with his left foot outside the operator's box. The Respondent argued that the Applicant was to blame for the accident, and produced an "industrial safety consultant" who testified that the there were no safety violations that contributed to the accident, that the Employer's training program exceeded OSHA requirements, and that the Applicant was adequately trained on "like equipment," which was all the law required. With regard to the video evidence, the safety consultant testified that the Applicant was not operating the equipment in the proper stance, was not looking in the right direction, and was raising the load while moving. She further testified that guards and harnesses were not recommended because it can be essential for operators to be able to dismount the machine quickly in the event of a flip over. Finally, the consultant testified that the Employer's inspection and service program for the forklift in question went "above and beyond" the OSHA requirements. The Administrative Law Judge denied the claim and dismissed the Hearing Application. The Labor and Industry Review Commission affirmed. The Commission explained that in order to succeed on his claim, the Applicant was required to prove (1) a violation of a safety rule, (2) prior actual or constructive notice of the violation in question, and (3) that the violation was a substantial factor in causing the injury. The Commission found that the Applicant failed to prove any violation of a safety rule. OSHA did not find any violation. The safety expert testified that the training and maintenance program went "above and beyond" the legal requirements, there were legitimate safety reasons for why guards and harnesses were not appropriate on this specific forklift, and there was no evidence tending prove the forklift was "jumpy" or accelerating defectively prior to the accident.

Standard of Review

Abrahamson v. Capstone Logistics, LLC, Claim No. 2021-026930 (LIRC January 31, 2024) The Applicant was employed as a grocery selector for Capstone Logistics. This required working in a warehouse and filling orders for grocery stores by palletizing products to be shipped to various stores. The Applicant alleged an acute injury to his neck and right shoulder on October 30, 2021, when he picked up a pallet, went to throw it, and felt searing pain in his shoulder and right side of his neck. The Applicant underwent treatment and was provided with light-duty work restrictions throughout. His light-duty restrictions were modified in March of 2022 and he submitted them to Capstone and asked if they had work available. According to the Applicant, Capstone advised they had work available but would not provide him with the details. Moreover, the Applicant claimed that he was penalized for not showing up for work during this same period of time, and was given a written warning advising that his employment was suspended for two days, due to the accumulation of four attendance points. The Applicant was terminated on April 4 by the human resource generalist, Ms. Benitz. The Applicant had clocked in that morning, then left to attend a physical therapy appointment without notifying anyone, and upon his return needed help from Ms. Benitz to enter the building and access his computer. He felt he was going to be fired. While assisting the Applicant to log in to his computer, the Applicant claimed Ms. Benitz told him he was being rude and negative, and that he was terminated. He was then escorted off the premises. Capstone did not present any witnesses to testify on their behalf. Instead, they submitted emails which tended to indicate that the applicant was terminated for repeated absences and insubordination. Captsone did not submit any attendance policies into evidence, however. The ALJ found that the Applicant sustained a shoulder injury and was entitled to temporary disability benefits, but also that no neck injury was sustained. The Applicant filed a petition for review with the Labor and Industry Review Commission, arguing the ALJ erred by failing to find that a neck injury had occurred. The Respondents did not file a cross-petition and, for the first time in the case, argued in their brief to the Commission that the Applicant's claims for temporary disability should have been denied because he unreasonable refused a suitable offer of employment, and because he was discharged for misconduct. The Commission affirmed the decision of the ALJ in its entirety. The Commission further held that, even though the Respondent did not file a cross petition for review, there is no law or policy which prevents that party from arguing any issue in the case in its responsive brief. However, "the [C]ommission's policy is to accord lesser weight to arguments raised in a responsive brief, as opposed to those raised in a timely petition or cross-petition…." The Commission proceeded to address both the refusal of job offer and discharge for misconduct theories

on the merits, but found that neither defense applied in this case, citing specifically the lack of any first hand testimony from Capstone on either issue.

Subrogation

Higley v. Pehler & Sons, Inc., Claim No. 2019-026143 (LIRC October 31, 2023). The Applicant sustained a work-related injury as a result of a motor vehicle accident that occurred in Minnesota. The Applicant brought a personal injury lawsuit against the at fault party in Minnesota. A settlement was reached in that case. The distribution of settlement did not follow the formula in Wis. Stat. §102.29(1). Specifically, a specific dollar amount was paid to the workers' compensation insurer as "complete satisfaction" for its subrogation interest. This payment was made with the stipulation that no additional amount needed to be set aside as a cushion. As part of settlement negotiations, the Insurer waived establishment of any cushion. At the time that settlement was finalized, the Applicant filed a worker's compensation claim in Wisconsin for payment of disputed permanent partial disability. The Applicant was awarded permanent partial disability at a hearing, after the administrative law judge held Dr. Hebl's opinions regarding permanency were the most credible. The Employer and Insurer asserted that there should be a cushion, despite the settlement terms, because the Minnesota settlement was not approved by a court as required by Wis. Stat. §102.29(1)(d) and no "new money" was payable. The judge held that, while the Applicant was entitled to the claimed permanency, no new money benefits were ordered payable because the court had questions about the application of the third party settlement. The Applicant filed a motion with the Minnesota court and asked for court approval of the terms of the personal injury settlement. This Order was provided. In the meantime, the Labor and Industry Review Commission was reviewing the merits of the permanent partial disability claim. The Commission affirmed the decision regarding permanency. The Employer and Insurer did not oppose the submission of the Minnesota Order that verified no cushion exists for offset of the permanency award for the Commission's consideration. The Commission accepted the same into the record. The Employer and Insurer's brief to the Commission made no mention of the third party settlement or the cushion issue. Therefore, that issue was waived. In light of the Order and no claim for a cushion by the Employer and Insurer before the Commission, the entirety of the permanent partial disability was determined to be "new money" owed to the Applicant and his attorney.

Unreasonable Refusal to Rehire

Porter v. United States Fire Protection, Inc., Claim No. 2016-022147 (LIRC Nov. 30, 2023). The Employee worked for nine years as a fabricator for the Employer. He sustained an injury when his right hand was sucked into a machine. He was released to light-duty work approximately three months after the injury, and full-duty work approximately four months after the injury. He reported difficulty performing his job due to reduced mobility and strength in his right hand. He further testified that he was treated differently upon his return to work. He was not invited to social events, he was assigned jobs he had never done before (ex., picking weeds outside the shop), he was timed when he went to the bathroom, and a video of him nodding off at work (allegedly caused by his injury-related pain medication) was circulated throughout the company for which he felt harassed and embarrassed. The Employer presented a poor performance review allegedly conducted the same month the Employee returned to full-duty work, but the Employee testified he had never seen this performance review until the date of the hearing, it was not included in the materials he received in response to a request for his personnel file, and he had not received any prior warnings about any of the concerns addressed in the performance review through the date of the hearing. About five weeks after he had returned to full-duty work, he was terminated. He was offered a check for $5,000.00 for a "severance package." When he asked if he could review it with his attorney, the Employer admitted his request was declined, and further admitted he was not allowed to take the agreement home to think over it. The supervisor testified that he had talked to the Employee about his performance issues, but he never put anything in writing. The Employee was ultimately terminated because he was not doing his job, he was disappearing for long periods of time on bathroom and smoke breaks, and he was taking bids and running his side business in construction while at work. The ALJ denied the unreasonable refusal to rehire penalty, but the Commission reversed and awarded a portion of the maximum penalty commensurate to the amount of time the Employee was unemployed following his termination. The Commission noted that the purpose of the "Unreasonable Refusal to Rehire" statute is to protect injured workers, and that the statute "must be liberally construed to afford the aggrieved worker additional compensation." The practical effect is to modify the employment-at-will doctrine in Wisconsin. The standard set out by prior case law is that, after an employee shows that he/she has been injured in the course of employment and subsequently is denied rehire, it becomes the burden of the employer to show reasonable cause for not rehiring the employee. In the present

case, there was no dispute that the Employee met his initial burden. The issue was whether the Employer had proven reasonable cause for the Employee's discharge and the Commission found that it did not. The Commission noted that many of the complaints the Employer presented about the Employee's work could be directly tied to his work injury, noting that it takes longer to go to the bathroom or perform your work duties when your fingers are sewn together. The Commission further noted that the Employer's testimony was dubious given the lack of evidence to support its claims. ✦

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