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Wisconsin Worker’s Compensation Update

Mark Your Calendar!

2014 Workers Compensation Seminars

Thursday, June 12, 2014
McNamara Alumni Center, University of Minnesota
Minneapolis, Minnesota

Thursday, June 19, 2014
Crowne Plaza, Wauwatosa, Wisconsin

More information will be available soon!

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Case Law Update

Decisions of the Wisconsin Court of Appeals

Evidence

*Cefalu v. Labor and Industry Review Commission, 352 Wis. 2d 574 (Wis. Ct. App. 2013)* (unpublished). The applicant alleged that Medrol, a medicine he had been prescribed for a brief period of time following a work-related back injury, had caused a perforated duodenal ulcer and required a number of surgeries. Administrative Law Judge (unnamed) refused to accept an insert for the prescription drug which provided various warnings about the drug. This was based upon the argument that the insert was hearsay, there were concerns of authenticity, and the date listed on the insert was eight years after the applicant took the medication. The judge considered various expert medical opinions, determined the medication was not the cause of the perforated ulcer, and denied all benefits sought by the applicant on the basis that his condition, disability, etc. was not work related. The Commission, Circuit Court and Court of Appeals agreed and the decision of the Commission was affirmed. The request to include the insert of the medication was correctly denied. Any persuasive force of the document was rebutted by medical evidence in the record. The Commission did consider the precautions contained in the package insert and discredited the evidentiary effect of the insert in light of the expert medical opinions. Admitting the insert into evidence would not have altered the Commission’s final decision.

Decisions of the Wisconsin Labor and Industry Review Commission

Arisign Out Of

*Specht v. City of Kenosha, Claim No. 2012006469 (LIRC November 4, 2013).* The applicant sustained a work-related cervical and lumbar injury. He was referred for an MRI to address his lumbar and cervical symptoms. The applicant alleged he sustained a shoulder injury, requiring surgery, while undergoing this MRI. He testified two technicians were pushing on the MRI table to get it to move and, as they did, he experienced a snapping sensation and pain in his shoulder. He testified that he immediately demanded the technicians remove him from the machine. One of the technicians who performed the MRI denied that the incident occurred. The applicant had not filed a claim against the facility where the MRI was performed. The applicant did contact the hospital and reported the incident. He was sent a general letter of apology. The MRI technician testified he was asked about the incident by the person who sent the apology letter, and that he denied any such incident occurred. The initial medical record reflecting reports of shoulder symptoms does not contain any mention of the injury having occurred during an MRI. The records reflect the applicant was diagnosed with a recurrent tear after a failed rotator cuff repair. Administrative Law Judge (unnamed) held that the applicant did not sustain a consequential injury as a result of medical treatment undertaken for the work-related injury. The Commission affirmed. The MRI technician was more believable than the applicant in light of the evidence and testimony presented. [Editor’s note: This case demonstrates the importance of detailed investigation into allegations and claims. Locating the MRI technicians and the non-existence of a claim filed against the hospital for the alleged mishandling were both factors considered by the courts in determining that an injury did not occur as alleged.]

*Reeves v. Pereles Bros. Inc., Claim No. 2011-019133 (LIRC November 29, 2013).* The applicant’s job duties involved preparing a machine, hitting buttons to operate a machine, trimming plastic parts and placing them for delivery. She worked with an average of 100 parts per hour. She was required
to trim and cut plastic from some parts. Those parts were frequently warm and soft when cut or trimmed. Dr. Borkowski performed an independent medical examination. He opined the applicant’s work duties were insufficiently repetitive and not forceful, and thus did not cause her upper extremity conditions. Administrative Law Judge Sass held the bilateral carpal tunnel syndrome and trigger finger conditions were unrelated to her work activities. The Commission affirmed. Dr. Borkowski was familiar with the kind of work that the applicant performed. The witness testified the applicant generally changed machines daily, in part to avoid repetition. Dr. Borkowski considered certain risk factors (including personal health attributes of post-menopausal status, age and elevated body mass index).

Sura v. Packaging Corp. of America, Claim No. 2012-000454 (LIRC December 17, 2013). The applicant’s treating physician “checked the box” regarding precipitation, aggravation and acceleration of a pre-existing condition. This is a causation standard used for specific, traumatic, injuries. The parties all submitted evidence regarding the applicant’s job duties and clearly considered the claim to be that of an occupational injury. Administrative Law Judge Arnold held there was proper support for an award of benefits to the applicant despite the treating physician having checked the wrong box. The Commission affirmed. The medical records made it clear that the treating physician’s rationale for finding causation was on a repetitive occupational injury basis. The primary purpose of the boxes is to identify the legal theory of causation and physicians are trained to provide medical, not legal, opinions. The Commission has routinely rejected arguments based solely upon the fact that the wrong box was checked. This is particularly true when choosing between the “precipitated, aggravated and accelerated” and the “occupational disease” causation theories because in some cases there is often no useful distinction between the two theories.

Key v. Supportive Homecare Options, Inc., Claim No. 2011-022487 (LIRC January 9, 2014). The applicant’s mother was unable to live independently due to dementia and other issues. The applicant moved her mother into her own home and began to care for her mother on a full-time basis. She provided personal cares. Her mother required constant care and the applicant described this as a 24-hour job. The applicant learned she could get paid for some of her time as a caregiver and began working for the employer as a home health care provider. Her mother was her only client. The employer assigned the applicant a schedule of hours during which she would be paid for her services, based upon an assessment of the mother’s needs. During the hours she was not scheduled, the applicant continued to care for her mother as a family member. The applicant alleged she sustained a shoulder injury while assisting her mother. The accident occurred while the applicant was not scheduled to be caring for her mother by the employer. Administrative Law Judge Smiley held that the applicant was performing services growing out of or incidental to her employment only during her scheduled and paid work hours. She was not in the course of her employment at the time of her injury and her application was dismissed. The Commission affirmed. The applicant was acting as a good daughter at the time she was injured and was not in the course of her employment. The services she performed as a daughter were the same services she performed as an employee of the employer. However, Town of Russell Volunteer Fire Dep’t v. LIRC, 223 Wis. 2d 723, 589 N.W. 2d 445 (Ct. App. 1998) is not on point in this case. The applicant was not an on-call employee and did not act in the dual capacity of employee and daughter on only one occasion as in Town of Russell. Further, in Town of Russell, as an on-call firefighter, the employee would have presumably been called to the fire in his own home, and thus an injury sustained during fighting that fire was compensable, whereas here, the applicant was providing care to her mother at all times (sometimes as an employee and sometimes as a daughter).

Causal Connection

Frye v. Sheehy Mail Contractors, Claim No. 2012-001322 (LIRC November 29, 2013). The applicant sustained a work-related knee injury during a motor vehicle accident. He had a pre-existing degenerative condition in his knee. The applicant advised his treating physician that he had not experienced left knee symptoms for the 10 to 15 years prior to the work-related injury. The records contradict this history, and reflect treatment for knee buckling approximately 18 months prior to the injury. The treating physician opined the applicant most likely sustained a permanent work-related knee injury. Dr. Timothy O’Brien performed an independent medical examination and held the applicant’s knee problems were not causally related to the work injury. He opined the applicant did not even sustain a work-related injury. Administrative Law Judge Schneider opined the applicant was entitled to a total knee replacement as a result of the work-related injury. The Commission
Jeffords v. Navistar, Inc., Claim No. 2006-022255 (LIRC November 29, 2013). The applicant sustained a work-related injury to his cervical spine in 2006. He was released to work without restrictions in April 2007. He sought no treatment until October 2011. Shortly after re-initiating medical treatment, the applicant underwent a C4-7 anterior cervical discectomy and fusion. The applicant’s treating neurosurgeon, Dr. Ahuja, had originally (in his reports to the private health insurer) opined that the cervical fusion surgery was not work related. Sometime thereafter, the applicant started contacting the doctor on various occasions, indicating that he believed the cervical fusion was related to his work-related injury. The surgeon referred the applicant to a chiropractor for a causation opinion. [Compensation Judge Schneiders opined that, in her experience, a neurosurgeon referring a patient to a chiropractor for an opinion as to the cause for the neurosurgical procedure is “absolutely unprecedented.”] The chiropractor performed a causation evaluation, acknowledged he did not have some significant medical records, and yet opined the surgery was causally related to the work injury. The neurosurgeon then adopted the chiropractor’s opinion, and opined the surgery was, indeed, work related. Administrative Law Judge Schneiders held the confusion, vacillating and often incomplete nature of the treating neurosurgeon’s opinions were not reliable and must be disregarded. She adopted the opinions of the independent medical examination, Dr. Karr, who opined the surgery was not causally related to the work injury. The Commission affirmed. The neurosurgeon’s ultimate opinion regarding causation is inconsistent with his earlier opinion. The applicant did not meet his burden of proof in demonstrating a causal connection between the work injury and subsequent surgery.

Lotze v. City of River Falls, Claim No. 2000-007396 (LIRC December 26, 2013). The applicant sustained a work-related injury involving L3-4. Imaging performed shortly after the admitted, 2000, work-related injury revealed no significant pathology at the L5-S1 level. The applicant continued to have low back symptoms. He underwent a CT scan in 2009, after failed conservative treatment. The applicant was diagnosed with significant pathology and pain at L5-S1 and he was referred for a disc replacement at that level. Another physician joined in his recommendation in 2010. Dr. Monacci performed an independent medical examination. After several examinations and review of ongoing medical treatment, Dr. Monacci ultimately agreed that the procedure would be appropriate. The Department appointed a neutral examiner, Dr. Garvey, to evaluate whether the proposed procedure would be appropriate. He opined the procedure was reasonable and necessary to treat the L5-S1 symptoms. Administrative Law Judge Roberta Arnold awarded the applicant the proposed procedure. The Commission reversed. The Commission underwent a rather thorough review of medical records and the medical reports. Dr. Garvey merely opined that the disc replacement surgery was appropriate treatment for the L5-S1 condition, and did not specifically opine that this condition was causally related to the 2000 work-related injury. Dr. Monacci opined there was no evidence the L5-S1 disc was injured at the time of the 2000 injury. The treating physician’s records do not explain why or even if the L5-S1 disc was injured in the work injury. There is no evidence the applicant sustained a work-related injury to L5-S1 at the time of the work-related injury, and the actual imaging from prior to 2000 suggests otherwise. Spencer does not apply under City of Wauwatosa because there is a question as to whether the L5-S1 disc condition was causally related to the work-related injury.

Pauer v. Alpha Plastics Solutions, Inc., Claim No. 2011-015890 (LIRC January 22, 2014). The applicant sustained an admitted work-related injury in April 2011. A June 2011 MRI demonstrated disc bulges at L4-S1, and L5-S1. However, there was no herniation observed. The applicant was released to work full duty, without restrictions, on July 26, 2011. Her treating physicians opined she reached the end of healing on that date. She worked that date, and then was off work until August 16, 2011 because of an unrelated surgery. She did not treat for her back during that period of time. The applicant reported a significant increase in pain after she cleaned up dog vomit from the floor on September 9, 2011.
This activity was not related to her work injury. A subsequent MRI scan demonstrated the existence of an L4-5 disc herniation. Dr. Robbins, the independent medical examiner, opined this herniation was the result of normal everyday activities. He opined the symptoms were not a continuation of the work-related injury, which had resolved as of July 26, 2011. Dr. Robbins opined the herniation was not causally related to the work injury in April 2011, because there was no identifiable herniation on the MRI scan from June 2011. Administrative Law Judge Martin awarded the applicant’s claims for benefits on the basis that at least some disc protrusion and bulging was present prior to the release without restrictions. The Commission reversed. The applicant’s condition had improved to the point that she had been taken off restrictions in July 2011. Her significant increase of pain occurred when she bent over to clean dog vomit, when she was not at work.

**Consequential Injury**

*Specht v. City of Kenosha*, Claim No. 2012006469 (LIRC November 4, 2013). The applicant sustained a work-related cervical and lumbar injury. He was referred for an MRI to address his lumbar and cervical symptoms. The applicant alleged he sustained a shoulder injury, requiring surgery, while undergoing this MRI. He testified two technicians were pushing on the MRI table to get it to move and, as they did, he experienced a snapping sensation and pain in his shoulder. He testified that he immediately demanded the technicians remove him from the machine. One of the technicians who performed the MRI denied that the incident occurred. The applicant had not filed a claim against the facility where the MRI was performed. The applicant did contact the hospital and reported the incident. He was sent a general letter of apology. The MRI technician testified he was asked about the incident by the person who sent the apology letter, and that he denied any such incident occurred. The initial medical record reflecting reports of shoulder symptoms does not contain any mention of the injury having occurred during an MRI. The records reflect the applicant was diagnosed with a recurrent tear after a failed rotator cuff repair. Administrative Law Judge Phillips, Jr. held that the applicant did not sustain a consequential injury as a result of medical treatment undertaken for the work-related injury. The Commission affirmed. The MRI technician was more believable than the applicant in light of the evidence and testimony presented. [Editor’s note: This case demonstrates the importance of detailed investigation into allegations and claims. Locating the MRI technicians and the non-existence of a claim filed against the hospital for the alleged mishandling were both factors considered by the courts in determining that an injury did not occur as alleged.]

**DEATH BENEFITS**

*Ruck v. City of Green Bay*, Claim No. 2012-013395 (LIRC February 18, 2014). The applicant alleged he had sustained numerous injuries to various body parts, but mainly to his back and neck. The parties stipulated the applicant was a protective occupation participant. Two treating physicians opined the applicant sustained work-related injuries as a result of his repetitive duties as a firefighter and paramedic. Dr. Karr performed an independent medical examination. Dr. Karr opined the neck and back conditions were unrelated to the applicant’s employment as a firefighter and paramedic. Administrative Law Judge Landowski held the applicant did not meet his burden because there was legitimate doubt as to whether his neck and low back conditions were work related. His benefits were entirely denied under Wis. Stat. §40.65. His application, seeking review of the Department of Employee Trust Fund’s denial of his claim, was dismissed with prejudice. The
Commission affirmed. Wis. Stat. §40.65(4) requires an applicant prove four items to be eligible for duty disability benefits: (1) he was a protective occupation participant at the time of injury; (2) he sustained an injury while performing his duties or contracted a disease due to his occupation; (3) the disability caused by the injury or disease was likely to be permanent; and (4) he was permanently assigned to light duty as a result of the disability. Wis. Stat. §40.65(2) (b)(2) requires an applicant for these benefits submit two items: (i) written certification from two physicians that the applicant meets criteria under Wis. Stat. §40.65(4); and (2) a statement from the applicant’s employer that the applicant’s disability is duty related. By rule, the Department of Employee Trust Funds must deny the application for duty disability benefits if the employer fails to submit the required statement or certification. The Department of Employee Trust Funds can only determine the applicant is eligible for duty disability if the employer agrees the disability is duty related. The agency does not resolve disputes on that issue. Wis. Stat. §40.65 does not limit an Administrative Law Judge’s statutory authority to follow procedures in Wis. Stat. 102.16 to 102.26, including the provisions regarding the submission and evidentiary weight of expert medical opinions, in deciding cases under Wis. Stat. §40.65. To hold otherwise would suggest an employer could only challenge the duty relatedness of a disability on a medical basis if there was a disagreement between the doctors whose reports were submitted by the applicant. There is no basis for such a limitation. The judge was permitted to consider Dr. Karr’s expert medical opinion regarding causation in determining whether the applicant had met his burden of proof.

**Employment Relationship**

*Noyce v. Aggressive Metals, Inc.*, Claim No. 2011-004383 (LIRC February 6, 2014). The applicant approached the owners of Aggressive Metals looking for a job on or about December 27, 2010. Neil Holland started this company as a sole proprietorship in February 2010. His brother, Nick, worked with him from almost the beginning. However, he did not gain ownership in the company until December 30, 2010. Neither of the brothers received wages in the first three quarters of 2010. Beginning in October 2010 Neil began receiving wages and beginning in December 2010, Nick began receiving wages. The total paid was $22,346.86 in the fourth quarter of 2010. The Hollands offered the applicant one week’s work helping them install insulation in the building where the company was located. They told him they had no work available in the business itself (which was metal fabrication, welding and related small jobs). The applicant was offered $590.00 for one week of work. He was told he was hired as an independent contractor. He was paid the full $590.00 in wages on December 30, 2010. He performed the insulation work. He also performed work directly related to the business on two occasions. There was more than a sufficient connection between Aggressive Metals’ business and the services that the applicant performed, such that the applicant was an employee under Wis. Stat. §102.07(8)(b) were met. Under Wis. Stat. §102.07(4)(a), an employer does not include any person whose employment is not in the course of a trade, business, profession or occupation of the employer. The insulation work, while not in the course of its business, was performed to directly benefit the business housed in the building area being insulated. Additionally, the applicant performed duties directly related to the business on two occasions. There was more than a sufficient connection between Aggressive Metals’ business and the services that the applicant performed, such that the applicant was an employee under Wis. Stat. §102.07(4). However, Aggressive Metals was not a subject employer under Wis. Stats. §§102.04(1)(b) and 102.05(1). The relevant part of these statutes state: “every person who usually employs three or more employees for services performed in this state, whether in one or more trades, businesses, professions or occupations, and whether in one or more locations”; “every person who usually employs less than three employees, provided the person has paid wages of $500.00 or more in any calendar quarter for services performed in this state. Such employer shall become subject on the 10th day of the month next succeeding
such quarter”; “an employer who has not usually employed three employees and who has not paid wages of at least $500.00 for employment in this state in every calendar quarter in a calendar year may file a withdrawal notice with the department, which withdrawal shall take effect 30 days after the date of such filing or at such later date as is specified in the notice.” Historically, the legislature and courts have protected small business employers who might unwittingly become subject to the Act due to a casual hiring of a few employees. The language in the statute of “usually employs,” together with the court decisions, clearly reflects the intent to keep very casual employers from being subject to the Act. However, there is a separate test of payment of wages of more than $500.00 in any calendar quarter for other employers. Aggressive Metals had not become subject to the Act pursuant to the test of wages of $500.00 or more in any calendar quarter at the time of the injury, such that the company would have become a subject employer by January 4, 2011. As of the date of injury, Aggressive Metals had not “usually” employed three or more employees. Therefore, Aggressive Metals is not liable to the applicant for any compensation under the Act, and is not required to reimburse the uninsured employer fund for payments it may have made.

**Insurance Coverage**

Gilardon (Dec’d) c/o Jacqueline Lopez v. Native Built Homes, Claim No. 2010-023994 (LIRC November 29, 2013). The applicant was hired by Native Built Homes to work on an apartment building on the Lac Du Flambeau Reservation. On September 7, 2010, at 9:00 a.m., the applicant fell from a ladder and struck his head. One week later he died as a result of the injuries. The week prior to the date of injury, the owner of the employer, Mr. Elm, had contacted a local insurance agent. Mr. Elm advised the agent he needed liability and worker’s compensation coverage. Mr. Elm testified that the agent told him during that phone conversation that he had authority to bind coverage and was doing so at the time of the conversation. The agent testified at the Hearing that he did, in fact, have authority to bind worker’s compensation coverage for Society Insurance. The agent, however, testified that he would never have issued a verbal insurance binder over the telephone to an individual, such as Mr. Elm, with whom he had previously experienced difficulty in collecting premiums. Mr. Elm acknowledged that the agent did advise him, during that telephone conversation, that Mr. Elm would have to come into the agency to sign the insurance application and to make a premium payment. Mr. Elm was scheduled to come into the office on September 3rd, but had car trouble. The appointment was rescheduled to September 7, 2010 at 10:00 a.m. The paperwork was completed at that time. Mr. Elm was aware that the applicant had sustained an injury approximately one hour prior to this appointment. Mr. Elm did not advise the agent of the injury. Mr. Elm made payment for the policy. The one-year insurance binder issued by the agent was retroactive to one minute after midnight on September 7, 2010, which is the standard procedure. Mr. Elm contacted the agent later the same day and asked what time the coverage was effective. He advised the agent of the applicant’s injury during that discussion. For further information on this case, please refer to the Death Benefits category. Society Insurance denied that it was bound to cover the applicant’s injury in light of these circumstances. Therefore, the Wisconsin Worker’s Compensation Uninsured Employer Fund was also a party to this case. Administrative Law Judge Endter determined that Society was bound to cover for the applicant’s injury. She held the coverage was effective and bound as of the time of Mr. Elm’s initial telephone conversation with the insurance agent. The Commission reversed. The agent’s testimony was more credible than Mr. Elm’s testimony. Coverage was bound on September 7, 2010, at a time when the insured, Native Built Homes, knew of a pre-existing injury. Therefore, the applicant’s injury was considered a “known loss.” Under the “known loss doctrine,” no policy of insurance can be deemed retroactive to cover a loss prior to the time the binder was issued. Therefore, Society Insurance was held to not provide coverage for the applicant’s work-related injury.

Klockzien v. Hot-Shot Express, Inc., Claim No. 2010-006191 (LIRC November 29, 2013). In October 2009, Hot-Shot Express, Inc. (“Hot-Shot”) entered into an outsourcing agreement with Allegiant regarding Hot-Shot’s drivers. This relationship was categorized as a professional employer organization and client. Allegiant was responsible for payroll, providing worker’s compensation coverage, paying taxes, etc. Allegiant would then bill Hot-Shot for reimbursement. Hot-Shot maintained a worker’s compensation policy for office personnel who were not part of the outsourcing agreement. The day-to-day operations also continued as they had before, with Hot-Shot continuing to supervise the drivers and make decisions regarding hiring and firing the drivers. Wis. Stat. 102.315 provides for a procedure by which a “client” under such an outsourcing relationship can have a divided workforce, in which some of its employees are leased employees provided by a professional employer organization.
while other employees remain employees of the client. The statute specifically indicates that any client intending to divide its workforce in such a manner must provide notification under Wis. Stat. 102.315(6). A specific form must be completed. Also, Wis. Stat. 102.31(1)(a) holds that every contract for insurance of compensation provided under this chapter or against liability therefore is subject to this chapter and provisions inconsistent with this chapter are void. (i)(b) provides that, except as provided under (c) [which do not apply here], a contract under (a) shall be construed to grant full coverage of all liability of the assured under this Chapter unless the department specifically consents by written order to the issuance of a contract providing divided insurance or partial insurance. Neither Hot-Shot nor Allegiant had notified the Department of the intent to divide Hot-Shot’s employees, nor had the department issued an order permitting divided or partial insurance, prior to the work-related injury. Administrative Law Judge Falkner held that Hot-Shot remained the applicant’s employer under worker’s compensation even after entering into the outsourcing agreement. Hot-Shot did not appeal this finding. Instead, Hot-Shot requested that it be permitted to retroactively complete a “divided coverage form” application under Wis. Stat. 102.31(1)(b) to give effect to the outsourcing agreement. The Commission declined to allow notice of this agreement to be provided retroactively. In Epic Staff Management, the Court of Appeals held that, because Wis. Stat. 102.03(1) provides that liability under Chapter 102 is determined by circumstances existing at the time of the injury, the rights and responsibilities under the Worker’s Compensation Act should be conclusively established at the time of injury. Allowing parties to retroactively alter employment relationships that existed on the date of injury would conflict with goals of promptness, certainty and efficiency in compensated injured workers.

MENTAL INJURIES

Manvilla v. First Student Management, Inc., Claim No. 2010-014985 (LIRC November 4, 2013). The applicant was a school bus driver. An oncoming vehicle, traveling at high rates of speed, struck the front of the school bus. The bus was forced off the road. Some of the children on the bus were injured. The applicant had physical injuries to her neck, low back, left arm and face. She was diagnosed with post-traumatic stress disorder, in addition to several orthopedic strains to her back, as a result of the work-related injury. The applicant did not have a licensed psychologist perform an evaluation prior to the Hearing. Dr. Langmade performed a psychological evaluation at the request of the employer and insurer prior to the Hearing. Administrative Law Judge Phillips, Jr. allowed the applicant to undergo a post-Hearing examination at his request with, and obtain a report from, a licensed psychologist (Dr. Rusch). Dr. Langmade also performed a supplemental post-Hearing evaluation of the applicant. Dr. Rusch and the applicant’s primary physician opined the applicant sustained post-traumatic stress disorder as a result of the work injury. Dr. Langmade disagreed. Administrative Law Judge Philips, Jr. held the applicant sustained a compensable psychological injury and awarded benefits to the applicant. The Commission affirmed. Dr. Rusch specifically applied psychological measures for PTSD and credibly related the symptoms to the effect of the work injury. Dr. Langmade’s report had no detailed analysis of the symptoms of PTSD as they might or might not relate to the applicant’s symptoms and only addressed PTSD by saying the applicant did not have that condition. The Commission determined the record was entirely void of any indication as to what benefits the applicant was seeking. While the Commission held an injury in the nature of post-traumatic stress disorder was sustained as a result of the work-related injury, no actual benefits were awarded. The applicant was advised that another Hearing would need to be held with respect to claims for any particular benefits.

Penalty

Love v. Milwaukee Symphony Orchestra, Inc., Claim No. 2011-024986 (LIRC November 4, 2013). The applicant properly reported a work-related injury to her employer. She missed approximately 10 days of work as a result of the work-related injury. The applicant used sick time during her absences. She was laid off for several months, beginning approximately one month post-injury. She reported ongoing symptoms to her employer when she returned to work. The employer first notified its insurer of the existence of the work-related injury at that time. The Department wrote to the employer, asking for an explanation for the delay in reporting the injury. The employer was given 30 days to respond, and advised a default order could be issued without a Hearing if there was no response or if the explanation was inadequate as a matter of law. The penalty amount was indicated in the letter. There was no response by the employer. The Department issued a default Order for a mandatory 10% increase
in compensation inexcusably delayed due to the late reporting (See DWD 80. 02(1)), as required by Wis. Stat §§ 102.22(1). The commission affirmed, with a modification as to the amount of the penalty. The employer had primary liability and the insurer had secondary liability for this penalty under Wis. Stat 102.22(1) and 102.62

**Permanent Partial Disability**

*Gentry v. Gateway Technical College*, Claim No. 2012-011884 (LIRC November 4, 2013). The applicant sustained an admitted, temporary, work-related back strain. Approximately six weeks post-injury, the applicant reported he had minimal symptoms and believed he could return to performing normal job duties. The applicant was released to work without restrictions. He was advised to treat as needed. The applicant returned to treat approximately six months after the release without restrictions. He reported some thigh pain. An MRI demonstrated degenerative changes in the lumbar spine. The applicant was provided restrictions, underwent a surgical evaluation and was referred for physical therapy and injections. Approximately nine months post-injury, in January 2011, the applicant reported a 95% improvement in his relief of symptoms post-injection. On December 2011, the applicant treated with his neurosurgeon. He reported he was performing his work activities without restrictions. The applicant reported persistent right leg pain and occasional low back pain. He reported his symptoms did not interfere with his day-to-day activities. No work restrictions were provided. At a final visit, in May 2012, the applicant reported some increased back symptoms if he lifted more than 50 pounds. He reported his symptoms were otherwise well controlled. He was provided a 50-pound lifting restriction. The applicant was also assigned a 5% permanent partial disability rating as a result of the work-related injury. In assigning this rating, the neurosurgeon opined the work-related injury transiently aggravated the applicant's lumbar spondylosis causing worsening and lumbar radiculopathy. An independent medical examiner and separate medical record review physicians opined the applicant had not sustained a permanent disability and required no restrictions as a result of the work-related injury. Administrative Law Judge Smiley held no permanent partial disability was sustained. The Commission affirmed. The neurosurgeon merely opined the work injury transiently aggravated the applicant's spondylosis and caused a worsening of the lumbar radiculopathy, with no explanation as to why this would cause a permanent disability. The applicant reported an excellent recovery, did not require surgery and took medication on an infrequent basis. The independent medical examiner credibly opined a 5% rating was too high for an individual in this situation.

*Good v. City of Sun Prairie*, Claim Nos. 2003-045389, 2006-038969 (LIRC January 9, 2014). The applicant filed a Hearing Application on February 12, 2009, asserting injuries arising out of and in the course of the applicant’s employment with the employer. The application was for medical expenses, transportation expenses, temporary total disability, permanent partial disability at 18% to the knee, retraining and prospective relief. The parties entered into a Limited Compromise Agreement, which was accepted and an Order issued. In the Limited Compromise, the respondents denied the injuries and any entitlement to benefits. The parties stipulated that the compromise was a settlement for the temporary total disability claims of any nature and for claims up to 20% permanent partial disability to the left knee. The respondents were credited in the future for payment of 20% permanent partial disability to the left knee. All defenses and claims were otherwise reserved. The applicant subsequently filed another Hearing Application, listing the same injury dates, seeking 30% permanent partial disability to the left knee, medical expenses and a bad faith penalty for not paying permanent partial disability. This Hearing Application was dismissed without prejudice. Shortly thereafter, another Hearing Application was filed, seeking the same benefits. The employer and insurer asserted the applicant had already been paid 38% permanent partial disability (18% prior to the Compromise Agreement and another 20% under the Compromise Agreement) and was, therefore, not entitled to additional claims. The parties determined the issue was the language under the compromise relating to the permanency close out. A formal hearing was not held. Briefs were submitted. Administrative Law Judge Roberts held the applicant was entitled to payment of an additional 10% permanent partial disability because a credit was provided up to 20% and the applicant had medical support for 30% permanency. The Commission agreed the terms of the Compromise Agreement did not prevent the applicant from seeking permanent partial disability above and beyond 20% to the left knee. The matter was remanded for a full hearing on entitlement to additional permanency.

**Permanent Total Disability**

began to work for the employer, she had undergone multiple lumbar surgeries following a personal injury. She was provided permanent restrictions following those surgeries. She continued to work full time for a number of other companies, albeit not for long periods of time. She sustained another injury to her low back, and was provided full-time, light duty, work restrictions while working for one of these companies. These restrictions included no lifting over 20 pounds. The applicant subsequently began to work for the employer. Her job duties required her to lift up to 25 pounds. The applicant testified that she believed she could perform these job duties. She performed work outside of these restrictions during her employment, including at the time she sustained the admitted cervical injury. Administrative Law Judge Smiley held the applicant was odd lot permanently and totally disabled. The Commission affirmed. The applicant was not already odd lot when she began to work for this employer. The applicant worked various full-time jobs after permanent work restrictions were assigned, but prior to her employment for this employer. The length of her employment in any particular job is not dispositive in determining odd lot status. Further, her performance of job duties outside of these permanent restrictions, and failure to advise the employer of the same when she was hired, does not preclude her claims for benefits. Worker’s compensation is a no-fault system. Her return to work in violation of her restrictions might be viewed as negligent but does not bar her claim. There is no direct statutory basis for reducing or denying compensation when an individual engages in work that exceeds his or her doctor imposed work restrictions. Poor judgment or negligence on the part of the applicant does not bar a claim for worker’s compensation benefits. Even injuries caused by intentional conduct [such as working outside of one’s prior restrictions] may qualify as an accident under the Act and be compensable.

**Procedural Issues**

*Cvijakic v. Lippmann Milwaukee, Inc.*, Claim No. 2010-028662 (LIRC January 22, 2014). The applicant sustained an admitted head injury while working at the employer. He alleged he was odd lot permanently and totally disabled. The applicant required an interpreter at the Hearing because he did not speak English. There were some instances where the interpreter needed to obtain clarification of a question. On another occasion she indicated that she did not understand the applicant. Administrative Law Judge Schneiders denied the applicant’s claims for additional benefits on the basis that he did not require any permanent restrictions as a result of the work-related injury, and that he had not sustained any permanency. The Commission affirmed. The applicant alleged that his interpreter did not provide accurate translations. He alleged that he, therefore, did not receive a fair hearing. However, the decision by the Administrative Law Judge was based primarily upon the weight of the medical evidence. Any real or perceived shortcomings of the interpreter could not have affected the applicant’s medical records. While the interpreter did have some trouble with a few words, the record includes all significant factual assertions made by the applicant in his testimony. The applicant received a fair hearing.

**Refusal to Rehire**

*Scotty Pippin v. Staff On Site, Inc.*, Claim No. 2012-008455 (LIRC November 29, 2013). The applicant sustained a work-related hernia injury. He contacted the employer after he was released to return to work without restrictions, and requested to return to the assignment he held at the time of injury. [The employer was a temporary agency.] The employer could not place the applicant in that position because the assignment company had downsized. The employer requires its workers to contact the employer about their availability for work two or three times per week. This provides an availability window so the employer has viable candidates for job matches. If the worker fails to update his availability every two to three days, the worker is placed in the inactivity roster until he or she calls in again. This requirement is documented in the manual of employee procedures. The employer searched for assignments for its workers using an auto match process that matched skills and availability. The employer then calls the employees who match, and continues until the vacancies are filled. The employer followed this process after the work injury. The applicant testified he was aware of this policy. However, he contacted the employer once per month for the two months after he was released to work, and three times the following month. The employer attempted to reach the applicant about a position but could not reach him. The applicant contacted the employer on a few occasions but each time the employer did not have work available or the applicant did not return the call before the position was filled. The employer made 100 to 150 placements in the time between the injury and the Hearing. The applicant was not qualified for all of the placements. The applicant was qualified for more than what he was offered but the positions were offered to other workers in accordance with the standard procedure. Administrative Law Judge Ezalarab awarded benefits to the
applicant for wrongful refusal to rehire. The Commission reversed. The employer met its burden to show that it had a reasonable cause for not contacting the applicant about more than the two positions it had contacted him about following his release to work. The employer is under no duty to keep a job open for an injured worker indefinitely. The employer does not need to continue temporary accommodations indefinitely or create work for an employee who is returning from a work injury. There is no accommodation requirement in the statute and the statute does not guarantee reemployment in every case. The reasonable cause language is contained in the statute. The employer had reasonable cause in this case by applying its procedure for obtaining a job match for the applicant, in consideration of other qualified workers, in a fair and nondiscriminatory manner. The failure of the employer to find assignments for the applicant can be explained, in large part, by the applicant's failure to update his availability every two to three days as required by all workers seeking placement.

**Joshua E. Baker v. Menard, Inc.,** Claim No. 2012-005778 (LIRC December 17, 2013). The applicant was the lead man in a pallet repair crew. On November 1, 2011 he sustained an injury when he accidentally drove a nail through his thumb. His nail was removed, but he was released back to work without restrictions. Two weeks later, on three separate days, his crew was reported by other supervisors to be in the break room about 15 minutes after they were to have started work. The applicant was terminated a few days later by the general manager. The general manager did not know the applicant had sustained a work injury at the time the applicant was discharged. The applicant submitted provisions in the employer's policy book which basically called for written reprimands for this kind of conduct by an employee, up through the fifth offense. Administrative Law Judge O'Connor awarded the applicant one year's salary on the basis that the applicant was wrongfully discharged and there was no reasonable cause for that discharge. The Commission reversed and dismissed the application. The Commission noted that it has uniformly taken the position that the applicant, in order to establish prima facia case, merely has to establish that he had sustained a work injury and that he was then terminated or not rehired. The applicant does not have the burden to establish that determination or refusal to rehire was related to the work injury. The employer has the burden of demonstrating that the refusal to rehire or the termination was "for a cause, or reason that is fair, just or fit..." In this case, the employer did show such a basis. The policy provisions were intended to apply to individual employees, or to persons not in management positions. The applicant could justifiably be terminated, not because he was in the break room when he should have been working, but because he allowed the employees he was supervising to be in the break room when they should have been working.

**Roberts v. School District of Florence,** Claim No. 2009-008662 (LIRC February 6, 2014). The applicant sustained an admitted injury. She was released without restrictions a few days after the 2009-2010 school year ended. The employer considered the applicant to have voluntarily resigned. The applicant advised the employer that she had not quit, and intended to return to work for the 2010-2011 school year. The employer did not permit her to so return. A grievance was raised. A Hearing was held in March 2011. The arbitrator held the applicant did not voluntarily terminate her employment and that the employer had no just cause to discharge the applicant. The employer was ordered to make the applicant whole. The employer was paid the amount of $52,711.00 (gross) by check dated August 15, 2012, in accordance with payment on the arbitrator's award. The check indicated it was for lost wages for school years 2009-2010 and 2010-2011. The point of the arbitration was to decide whether the applicant quit in May 2010 or was discharged without good cause after being released to work in June 2010. The employer also brought this claim for worker's compensation benefits on the basis that she was unreasonably refused rehire. Administrative Law Judge Sass held the applicant was unreasonably refused rehire. He ordered payment of one year's worth of wages without any offset for the amount paid under the arbitrator's decision. The Commission affirmed with modifications. The employer did wrongfully refuse to rehire the applicant. However, the amount the employer is liable to pay an employee under Wis. Stat. §102.35(3) [refusal to rehire] can be offset by a back pay award issued by an arbitrator. The liability under this statute is based upon lost wages due to the unreasonable refusal to rehire. Here, the amount paid to the applicant under the arbitrator's award was one year's back pay. The employer was not liable for back pay prior to June 2010 and could not have been liable for payment for this purpose for school year 2009-2010. The check issued was for back pay for the 2010-2011 school year, despite the notation on the check that it also covered the 2009-2010 school year. The employer could not have wrongfully refused the applicant work until the start of the 2010-2011 school year. The employer's liability for wrongful refusal coincides with the period for which the back pay was
paid pursuant to the arbitration. Because the back pay fully compensated the applicant for her lost wages during that period, no amount is due to the applicant under Wis. Stat. §102.35(3).

**Statute of Limitations**

*Hendricks v. Milwaukee Board of School Directors*, Claim No. 2011-020899 (LIRC February 6, 2014). The applicant alleged she sustained an injury to her right buttock, cheek and hip when she slipped on snow covered icy rock on March 15, 2005. She did not miss any work. She did not treat for her hip until September 2005. The medical records reflect she reported pain in her groin and the back part of her leg in approximately August. The work incident was not mentioned. The applicant testified that she did not mention this because she had not yet made the mental connection between the incident and her hip problem. An MRI in October 2005 revealed avascular necrosis of the right femoral head, right hip joint effusion, synovial hyperplasia and labral degeneration. A right total hip replacement was performed in November 2005. The applicant did not report her work incident to her physician prior to surgery. She returned to work in January 2006. In March 2009, the applicant submitted a letter to the employer that described the work incident. She attributed her right hip symptoms and surgery to that incident. In October 2010, during a follow-up visit for her hip replacement, the applicant first mentioned the work incident to her treating physician. Her surgeon subsequently opined the fall was a factor in the need for surgery and caused an exacerbation of her pre-existing condition and led to an earlier hip replacement than otherwise would have been expected. Dr. Rolnick performed an independent medical examination.

He opined the fall did not cause the hip injury. He opined the long delay in reporting the incident, and delay before seeking medical attention, demonstrated the condition was not work related. He opined the hip condition was a manifestation of her pre-existing degenerative hip condition. Administrative Law Judge Phillips, Jr. held the applicant sustained a compensable injury and awarded benefits. The Commission reversed. If the applicant made the mental connection between the work incident and the hip problem prior to the expiration of the two-year statute of limitation, a case could be made for dismissing the claim under Wis. Stat. §102.12. This statute disallows any claim filed more than two years from the date of the injury, or from the date the employee knew or ought to have known the nature of the disability and its relation to the employment. The claim is not barred if the employer knew or should have known, within the two-year period, that the employee had sustained the injury. The employer likely could not have known about any injury during this two-year period. This would require a difficult and subjective determination of the applicant’s thought process. This was not required because the case was dismissed on other grounds. The applicant did not make a claim for well over three years post-surgery. Additionally, she did not mention the injury to her treating physician prior to surgery, and had a degenerative, pre-existing hip condition. Further, she experienced degenerative osteoarthritis in other areas of her body, and required an opposite site hip replacement.

**Unreasonable Refusal to Rehire**

*Nelson v. Masterclean Services*, Claim No. 2008-016609 (LIRC October 29, 2013). The applicant testified that his supervisor, Mr. Carley, told him he was discharged for attendance reasons three months after he returned to work from the injury. The applicant testified Mr. Carley knew the applicant’s attendance problems were related to the work injury. The employer offered no testimony from Mr. Carley to contradict the applicant’s position. Instead, the employer offered the testimony of the owner. The owner testified he did not know the reason why the applicant was discharged, but implied it was for economic reasons or because the employer changed the manner in which it hired unskilled labor. He testified that he did not personally recall anything about the applicant. He relied upon general knowledge of how the applicant’s supervisor did things. The owner testified that there was an economic downturn and downsizing; however, this occurred seven months after the applicant was terminated. The owner also testified that it began to use temporary workers and subcontractors. [The court held this supported there was actual sufficient business, and that the work was just accomplished differently.] The Commission affirmed. The testimony of the owner of the employer failed to show reasonable cause for discharging the applicant. The applicant’s testimony about his discussions with his supervisor was excluded from the definition of hearsay. Even without the applicant’s testimony regarding the discussion he had with his supervisor, the testimony of the owner of the employer would have been insufficient to carry the employer’s burden of proof.
The employer had the burden of proving reasonable cause for the discharge under Wis. Stat. 102.35(3) and failed to meet that burden. Reasonable cause for the discharge or failure to rehire has been required to include an absence of motivation related to the fact that the applicant sustained a work injury. Business decisions may provide reasonable cause, if the asserted business reason is not a pretext. Economic factors, such as a seasonal slowdown, have been sufficient for a valid defense. The prohibition against unreasonable refusal to rehire has been applied even where an individual is hired only in part because of the work injury. Finally, here, the employer did not present any testimony from the applicant’s supervisor or any explanation for the absence of such testimony. The supervisor’s lack of testimony had been discussed in detail by the courts in prior proceedings on this matter which included liability for the underlying work-related injury, bad faith claims and unreasonable refusal to rehire. The court held this lack of testimony was particularly important in combination with the employer’s failure to present any documentation regarding alleged economic reasons for the applicant’s termination, which would have presumably been available to the employer as part of normal business records. These factors all raised at least the inference that the testimony or other evidence from the applicant’s supervisor and the employer was not provided for strategic reasons or because it would not have been favorable to the employer.

*Martini v. CNH America LLC*, Claim No. 2011-007146 (LIRC November 4, 2013). The applicant was hired by the employer on November 29, 2010. He was subjected to a 90-day probationary period. The applicant sustained three injuries between December 7, 2010 and January 18, 2011. He was counseled by his supervisor on each occasion about being more careful and observant of his surroundings and understanding the potential risk of job duties. He signed a root cause analysis agreement which is required by the employer after all safety injuries and near misses. The employer performed an evaluation of the applicant on the date of the last injury, prior to the occurrence of the incident. The evaluation indicated the applicant did not meet expectations and needed improvement in the areas of safe work practices and guarding against work hazards. The employer’s determination that the applicant presented an unacceptable danger to himself and others through lack of attention to detail, lack of awareness of the dangers of the job and lack of respect for equipment was a reasonable basis for discharge.
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