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ARTHUR CHAPMAN

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Wisconsin Worker's Compensation Update

In This Issue

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Three New Faces in the Arthur Chapman Workers Compensation Group

Meet Beth A. Butler, Ken J. Kucinski, and Hannah J. Mohs

Beth's practice focuses on workers' compensation law. She's been practicing in workers' compensation, employment law, and personal injury since 2017. Clients appreciate the energy and passion Beth brings and her focus to exceed client goals in all stages of litigation. Her strong communication skills and strategic thinking allow her to effectively resolve disputes. You can reach Beth at BAButler@arthurchapman.com or (612) 375-5987.

Ken's practice focuses on workers' compensation claims. He has spent the last eight years in this area and is licensed in both Minnesota and Wisconsin. He is a board member for the St. Croix Valley Bar Association and a member of the Wisconsin Association of Worker's Compensation Attorneys. You can reach Ken at KJKucinski@arthurchapman.com or (612) 375-5993.

Hannah's practice focuses on Workers' Compensation Claims. She has experience working in employer and insurer defense matters including initiation of litigation through appellate work. Her clients appreciate her strong communication skills and attention to details. You can reach Hannah at HJMohs@arthurchapman.com or (612) 375-5908.

ABOUT OUR ATTORNEYS

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

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Decisions of the Wisconsin Supreme Court

Exclusive Remedy

***Graef v. Continental Indemnity Company*, 959 N.W.2d 628 (Wis. 2021).** The applicant sustained a compensable work-related injury in November 2012, which caused physical and psychological injuries. He was prescribed antidepressant medication. In May 2015, the applicant went to refill the prescription. This was initially rejected, and then approved after the pharmacy contacted the insurer. In June 2015, the insurer again denied the pharmacy's initial request for payment. The applicant left without the medication because he could not afford to purchase the medication on his own. Less than two months later, he attempted suicide with a firearm and sustained a gunshot injury. Two years later, the applicant filed a tort action in circuit court against his employer's worker's compensation insurer, alleging that his self-inflicted gunshot wound was the result of the insurer's negligence. Specifically, the applicant alleged the insurer was negligent in failing to approve payment for a refill of his antidepressant medication in June 2015. The applicant alleged that, as a result of that negligence, the applicant attempted suicide. The insurer moved for summary judgement on the basis that the Worker's Compensation Act provides the exclusive remedy for the applicant's injuries. The Circuit Court concluded that the exclusive remedy provision did not bar the claim because the insurer would not concede that the applicant's claim would prevail if it was filed as a worker's compensation claim. The Court of Appeals reversed. The Supreme Court affirmed the Court of Appeals determination that the Worker's Compensation Act provides the exclusive remedy for the alleged injuries. The case was remanded with directions to the Circuit Court to grant summary judgment. The allegations in the applicant's complaint, if proven, would satisfy the conditions of worker's compensation liability under Wis. Stat. 102.03(1). Therefore, his claim must be filed under the Act in the proper forum. The insurer is entitled to argue to the Circuit Court that the applicant is in the wrong forum, and that, even if he was in the right forum, his claim would fail. The Circuit Court improperly imposed a prerequisite to the exclusive remedy provision by conditioning is application on the insurer's concession that the applicant would prevail in a different forum under the Worker's Compensation Act. The insurer simply reserved its right to litigation in the proper forum and to dispute the underlying factual allegations, which it is entitled to do. ✦

Decisions of the Wisconsin Court of Appeals

Evidence

***Bartlet Custom Automotive Inc. v. Labor and Industry Review Commission*, 2021 WI App 41 (Ct. App. 2021)(unpublished).** The applicant was hired in September 2016 as a welder. He had been offered a press brake operator position initially, but was not interested in that position. He sustained a compensable work-related injury in January 2017. He was out of work for at least seven weeks. The employer hired a laborer to help with various tasks in the interim. When the applicant returned to work, the employer's president told the applicant that work was slow and the applicant was laid off. He was not offered a press brake operator position that was available at that time. The applicant filed a claim in October 2017, asserting the employer unreasonable refused to rehire the applicant when he returned to work. The employer asserted that there was no welding work available when the applicant returned. He did acknowledge that a press brake operator position was open at that time. The employer recalled the applicant was adamant about not wanting that position when the applicant was hired in September 2016 because the applicant was scared of the machine. Administrative Law Judge Phillips held the employer did not unreasonably refuse to rehire the applicant. He held the employer did not behave in an unreasonable fashion that would rise to liability. He determined the employer had only work available for which the applicant was not qualified. The Labor

and Industry Review Commission reversed and held that the employer failed to provide the applicant with suitable employment following a work-related injury because there was an obligation to offer the press brake operator position at the time the applicant was available to return to work after the work-related injury. The Circuit Court affirmed. The Court of Appeals reversed and remanded with directions. The Labor and Industry Review Commission made a witness credibility determination without the benefit of the administrative law judge's personal impression of the witnesses (the judge passed away before the Commission issued its decision). The Commission indicated its decision was not based on witness credibility, but rather on the uncontested fact that the employer had employment available when the applicant was able to return to work. The case was remanded to the Commission for a new hearing. The Commission's findings were speculative and relied upon credibility determination despite its indication to the contrary. The determinations by the Commission and the administrative law judge made implicit findings even though neither explicitly addressed witness credibility.

***Harris v. Department of Workforce Development*, 2009AP2098 (Ct. App. 2021)(unpublished).** The applicant alleged that he sustained a work-related injury in June 2015. He submitted and opinion from Dr. Perlewitz in support of his claim. Dr. Monacci performed an independent medical examination. He initially agreed that the applicant had sustained a work-related injury, but noted he had not reviewed the applicant's prior medical records. After Dr. Monacci reviewed prior medical records, which demonstrated an extensive history of prior work-related injuries and treatment, including three months prior to the injury, Dr. Monacci held the applicant did not sustain a work-related injury as a result of the 2015 incident. The unnamed administrative law judge held that Dr. Monacci's opinion was more credible and persuasive, and denied benefits. The Labor and Industry Review Commission agreed and denied the applicant's claim. The Circuit Court and Court of Appeals affirmed. The applicant attempted to frame his argument on appeal as one based upon due process and questions of law. However, all of the arguments are based on the premise that the Commission erroneously credited Dr. Monacci's opinions, and instead should have credited the applicant's testimony and treating physician's opinion. The dispositive question is whether the Commission's findings of fact and credibility determinations are supported by substantial and credible evidence. The Commission is the sole judge of the weight and credibility of the witnesses offering medical testimony. The Commission has the role to reconcile conflicts or inconsistencies.

***McRoberts v. Labor and Industry Review Comm.*, 948 N.W.2d 493 (Ct. App. 2020).** The applicant sustained an admitted back injury in April 2013. She was diagnosed with a soft tissue contusion injury. Dr. Barron performed an independent medical examination. He concluded that the work accident caused merely a temporary aggravation of the applicant's pre-existing back condition. The administrative law judge did not find the applicant credible. He held the applicant's condition was the result of her longstanding pre-existing back problems." The applicant asserted that the administrative law judge erred because Dr. Barron's opinions was predicated on a non-existent "phantom" MRI report and that his medical opinion could not be considered credible. The Labor and Industry Review Commission affirmed. There was no MRI scan taken of the employee's low back after her fall and prior to the preparation of Dr. Barron's report. The most reasonable interpretation was that Dr. Barron intended to say "subsequent x-rays." The Commission held that any reference by Dr. Barron to a 2014 post-injury MRI was a typo and that he was not relying upon a phantom report when he reached his conclusions. The Court of Appeals found that the "typo" was a proper inference to be drawn from the evidence as a whole. The Commission reasonable concluded that the applicant sustained a soft tissue injury that fully resolved by July 17, 2013, as opined by Dr. Barron in his first report. ✦

Decisions of the Wisconsin Labor and Industry Review Commission

Apportionment

Berger v. Megtech Systems, Inc., Claim Nos. 2006-012561 & 2018-003405 (LIRC November 13, 2020). The applicant worked as a welder for the employer for about 35 years in total. The applicant sustained an accidental neck injury as a result of working in a cramped confined space on March 16, 2006. That claim was conceded by the insurer on the risk at that time, Illinois National Insurance Company (Illinois National). 20% permanent partial disability was paid to the applicant. The applicant subsequently returned to work full time as a welder. In December 2016, the applicant had recurring neck and left arm symptoms. He again sought treatment. He underwent surgery on January 20, 2017. The insurer on the risk in 2016, Ace Fire Underwriters Insurance Company (Ace), secured an opinion from Dr. Meincke. Dr. Meincke opined that the work event of March 16, 2006 was not the sole cause of the need for the surgery in 2017. Dr. Meincke opined that the applicant's work from 2006 to 2017 was a material contributory factor in the progression of the cervical spine condition and the need for surgery in January of 2017. Illinois National secured an opinion from Dr. Barron. Dr. Barron opined that medical treatment after March 19, 2007 was not reasonable, necessary and causally related to the 2006 work-related injury. Dr. Barron opined that the additional medical treatment was caused by non work-related injuries. The administrative law judge found that a compensable neck injury had occurred and found Ace liable for 100% of the benefits owed. The Labor and Industry Review Commission affirmed. Ace argued that even if the applicant had developed an occupational disease as a result of his work activities from 2006 through 2017, that liability for the disability associated with the January 2017 surgery should be apportioned between the occupational disease and the earlier injury in March of 2006. The Commission rejected this argument. Apportionment of liability is not an appropriate consideration in an occupational disease claim. In claims involving occupational disease, where the disability results from a progressive disease that ripens into a barrier to further work, there is a conclusive presumption that the date of disability is when the employee first suffers a wage loss due to that condition. The statutes do not allow apportionment of liability in these types of occupational disease claims.

Arising Out Of

Carpenter v. Consultants Laboratory of Wis., Claim No. 2018-021951 (LIRC May 8, 2020). The applicant was employed as a phlebotomist at the employer for eighteen (18) years. She alleged an injury to her back on March 8, 2018 when moving a bedside table to make a blood draw. The bedside table weighed ten to fifteen pounds and was on wheels. The applicant did not recall anything out of the ordinary when moving the table on March 8. The applicant did not report the alleged injury until late March. The applicant sought medical treatment on March 8, 2018 with a chiropractor, Dr. Deer. The medical record from March 8 indicates that the applicant "comes in today stating that she has been dealing with neck and back pain for the last couple days. She states that she is not sure what caused the pain to start and denies any recent injury." The applicant then began treating with NP Pieper. NP Pieper explained that the applicant began having more intense pain on March 8, 2018, but that there was no specific incident where the pain started. The onset was gradual. The applicant went to see Dr. Judkins on April 9, 2018. She complained of back pain starting on March 8, 2018, which she felt was related to constantly moving bedside tables and furniture at work. The applicant also explained that she no longer had any back pain. The record noted that NP Pieper believed her back strain had resolved. X-rays of the applicant's back were done on June 5, 2018 and showed no acute findings. There were degenerative changes. The applicant then began treating with Dr. Choi, who recommended an MRI and continued chiropractic care. Following the MRI, the applicant was seen by Dr. Breunig for a second opinion. Dr. Breunig noted that the back pain began on March 8, 2018. Additionally, Dr. Breunig noted that the applicant had a prior back injury in 2012 when she was bending over and felt a pop. Dr. Breunig believed that most of her pain was muscular. The applicant did not continue to treat with Dr. Breunig after this visit. The applicant's back complaints continued to wax and wane into the Spring of 2019. She was seen by Dr. Bensen on March 29, 2019. Dr. Bensen explained the applicant had been on a "circuitous" course of

treatment. She had previously been diagnosed with a lumbar strain. The applicant had come in wanting to obtain a permanent disability rating. Dr. Benson rated "approximately 4% to 5%" to the low back. The applicant eventually obtained WKC-16-B reports from Dr. Judkins, Dr. Choi, and Dr. Bensen. Dr. Judkins checked all three causation boxes, but indicated that there was no permanent disability. Dr. Choi said the March 8, 2018 incident "could be" responsible for her back complaints. Dr. Bensen indicated that the activity of "moving [a] beside table" had directly caused a low back injury and resultant 5% permanent disability. The respondents secured an independent medical examination from Dr. Friedel. Dr. Friedel indicated that the applicant's back pain dated back to 2009 and that her back pain had been waxing and waning ever since. He believed that there was no injury on March 8, 2018. Rather, he opined that her symptoms that day were a manifestation of longstanding and pre-existing chronic low back pain with radiation. The administrative law judge denied the applicant's claim for benefits. The Labor and Industry Review Commission affirmed. The Commission did not find the applicant credible. Most significantly, the applicant failed to credibly explain why she did not mention the alleged injury to Dr. Deer when she treated with him, for back pain, on the date of injury--March 8, 2018. The applicant testified that she did not mention anything to Dr. Deer because "she normally does not tell them anything and just goes in for adjustments." The applicant also testified at Hearing that she did not recall a variety of prior injuries involving her low back, including falling while ice skating in December of 2017 and falling in her garage in September of 2017. Nor did she recall treating with Dr. Deer in January of 2018 for bilateral low back pain, just a couple months before the alleged injury. The Commission adopted the opinions of Dr. Friedel and found that the applicant had not sustained any injury arising out of her employment in March of 2018.

Grumann v. Aurora Health Care, Inc., Claim No. 2014-023613 (LIRC August 7, 2020). The applicant was employed as a housekeeper, performing cleaning services at the hospital. She had been working for about five months before she allegedly tore a ligament in her right wrist while cleaning a bedrail on July 20, 2014. She did not seek any medical treatment until the next day, after discussing the incident with her supervisor. She was seen by Dr. Phillips and described a "fire" type pain during a forceful upward motion while cleaning a bedrail. The applicant denied any prior injuries to her right wrist or hand. She was diagnosed with a wrist strain and referred her to a hand specialist. She was seen by the specialist, Dr. Sodhi, on July 32, 2014. She described pain while "cleaning a bedside rail and twist[ing] the wrong way." Dr. Sodhi recommended prednisone and splinting. The applicant provided a recorded statement to the insurance carrier on July 29, 2014 and denied any previous problems with her right wrist, with the exception of a wrist fracture in the third grade. An MRI was done on August 19, 2014. Dr. Sodhi reviewed the MRI and recommended surgery to repair a torn ligament and carpal tunnel syndrome. The respondents referred the case to Dr. Bax for an independent medical examination. Dr. Bax opined that the force of wiping down a hand rail would not be sufficient to cause

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a ligament tear. The applicant began treating with Dr. Mikolyzk for complex regional pain syndrome in January of 2015. Dr. Mikolyzk described the injury as involving the applicant's hand becoming caught between the bed and the handrail, with the applicant having to forcefully pull her hand free. The applicant was seen by Dr. Scarlett in April of 2015 and Dr. Scarlett also reported a history of injuring her right hand when it became wedged between a mattress and a bed rail. The applicant eventually submitted WKC-16-B reports from Dr. Sodhi, Dr. Mikolyzk, and Dr. Scarlett. The respondents then obtained another independent medical examination with Dr. Ketchum. Dr. Ketchum opined that there was no injury. He explained there was clear documentation of right wrist pain prior to the alleged injury, and agreed with Dr. Bax that the force of the event was not sufficient to cause a ligament tear. The administrative law judge denied the claim for benefits. The Labor and Industry Review Commission affirmed. The Commission found that the applicant was not a credible witness. The Commission noted that, prior to July 20, 2014, the applicant had been diagnosed with carpal tunnel syndrome. The applicant had been seeking medical treatment for pain and numbness in her right hand and wrist for months before the alleged injury. Likewise, the Commission also explained that the applicant's version of events had changed on numerous occasions, further undercutting her credibility. The Commission found that there was a legitimate doubt with respect to whether any work injury had occurred, and that the applicant had failed to meet her burden of proof.

Cromheecke v. Menard, Inc., Claim No. 2018-023473 (LIRC August 17, 2020). The applicant was employed as a part-time stocker. The applicant alleged an injury to his right knee on October 18, 2018 as a result of having to climb a ladder repeatedly and having to pull a pallet full of heavy materials with a pallet jack. However, the applicant gave a recorded statement to the insurance carrier. He indicated that he did not experience any discomfort in his knee while climbing the ladder or while using the pallet jack. The applicant did not develop any right knee discomfort until three or four hours after his shift had ended. He did not seek any medical treatment for his knee until October 22, 2018. On that date, he treated with PA-C Lopez, who diagnosed him with a sprain of the medial ligament. During a follow-up visit on November 12, 2018 PA-C Lopez explained her belief that "his injury was caused by overuse at his place of employment…" The respondents referred the case to Dr. Pals for a Medical Records Review. Dr. Pals opined that the knee symptoms were a manifestation of a pre-existing condition. Dr. Pals noted that there were no symptoms at work, and that there was no specific injury or unusual event. The applicant obtained a WKC-16-B report from PA-C Lopez, dated November 29, 2018, which was then co-signed by Dr. Nelson on December 12, 2018. All three causation boxes were checked. PA-C Lopez initially assessed 5% permanent partial disability to the right knee, but later changed this rating to 0%. The administrative law judge denied the claim. The Labor and Industry Review Commission affirmed. The Commission concluded that the applicant had failed to produce evidence "to support a legal conclusion of a medical causal connection for the knee problems." The Commission found that he experienced no symptoms while climbing the ladders or using the pallet jack, and that his treating physicians failed to explain how this type of work activity could have caused an injury considering the delay in symptoms. The Commission held that "it would clearly be impermissible speculation to attribute the applicant's knee pain to the work exposure."

Martinez, Maria T. v. Dufeck Mfg Co., Claim No. 2017-012336 (LIRC August 17, 2020). The applicant was employed at an assembly plant. On May 20, 2019, the applicant and another co-worker, Alta Sanchez, got into a physical altercation. The applicant broke her right wrist. The day before, on May 19, 2019, the applicant had complained to her supervisor that Sanchez had taken some of her work supplies. On the date of injury, the applicant was walking by Sanchez's workstation when Sanchez grabbed the applicant by the hair and pulled her to the floor. As she was falling over, the applicant tried to brace her fall with her right arm. Once on the ground, Sanchez got on top of the applicant and began to slap her and yell at her until another coworker was able to break up the fight. Sanchez was discharged immediately. The applicant was discharged on June 8, 2017. The respondents asserted that the applicant was the "aggressor" in the fight, and that benefits should be denied. The administrative law judge determined that the applicant's wrist injury was compensable and awarded benefits. The Labor and Industry Review Commission affirmed. The respondents argued that the testimony of a coworker witness, Arcos, should be adopted as credible. Arcos testified that on May 20, 2019, the applicant was making fun of Sanchez, before the two began to argue and fight. The Commission rejected Arcos' testimony. The Commission explained that Arcos

had a "longstanding animosity towards the applicant," having previously completed a statement where she had characterized the applicant as a "sardonic and disrespectful person" who "thinks that she is superior to other people." The Commission concluded that Sanchez initiated the attack as retaliation for the applicant reporting her to the supervisor the day before, and that the respondents had failed to prove that the "aggressor defense" applied to the applicant's injury.

Namchek v. Lifenet LLC, Claim No. 2016-018199 (LIRC August 17, 2020). The applicant was employed as a supportive care worker. She alleged that she injured her right hip and back on July 25, 2012 when one of her clients backed into her with an electric wheelchair. The applicant was seen by NP Hague the following day. She was diagnosed with muscle strains. She continued to treat with NP Hague throughout the months of August and September but her right hip pain persisted. The applicant then began treating with Dr. Stark. Dr. Stark explained that she may have sustained a contusion and possible bursitis to the right hip but opined that as of November 21, 2012, those conditions had resolved and ongoing treatment was no longer attributable to the work injury on July 25. Many months later, in July of 2014, the applicant consulted with Dr. Decker for pain in her right thigh extending down her right leg. The applicant related these symptoms to the July 25, 2012 incident, but Dr. Decker believed that it was "not clear" that there was a cause-and-effect relationship. Dr. Decker did not believe that any further testing would add anything of value and the applicant agreed. The applicant then sought out treatment with Dr. Fitzgerald, who she saw for the first time on October 16, 2014. Dr. Fitzgerald diagnosed right leg pain and explained that the "etiology is somewhat unclear at this time." On March 4, 2015, Dr. Fitzgerald rated 3% permanent partial disability to the body as a whole for sacroiliac joint dysfunction, which he believed was a direct result of the July 25 injury. Dr. Fitzgerald increased his rating to 5% (without explanation) in a WKC-16-B report. The respondents referred the case to Dr. Monacci for a Medical Records Review. Dr. Monacci explained that the applicant had a long pre-existing history of chronic pain affecting several areas of her body. He described her conditions as degenerative and part of the normal aging process. Dr. Monacci found that the July 25, 2012 accident did not cause any injury to the cervical or lumbar spine. He explained that the accident, as described, would not be expected to cause a significant injury. The administrative law judge found that the applicant sustained a right hip contusion, consistent with Dr. Stark's November 21, 2012 treatment note, and that no benefits were due beyond that date. The Labor and Industry Review Commission affirmed. The Commission agreed that Dr. Stark's opinion was the most credible. Dr. Fitzgerald did not begin treating the applicant until over two years post-alleged injury and he did not analyze how the applicant's complaints had changed after the July 25, 2012 incident.

Bunkelman v. McFarland Cascade Holdings, Inc., Claim No. 2018-007955 (LIRC Nov. 30, 2020). The applicant worked as a "treating engineer." His job involved monitoring the process of treating utility poles with preservative. The applicant would often work in an enclosed control room, alone, for his entire shift. He worked twelve (12) hour shifts on rotating nights. On March 24, 2018, while working alone in the control room, the applicant accidentally shot himself in the left thigh area with a handgun he had brought to work. At the time of the accident, he was talking to his wife on the phone with the gun in his hand. He testified that he had the slide of the gun locked back, and then "shoved the clip in it, and that slide slammed forward. The next thing you know, I had a bullet in my leg." The applicant called 911. He was found on the floor and taken to Lakeview Medical Center. He advised the physicians that he was talking to his girlfriend on the phone, while cleaning his gun, when it accidentally discharged. The employer had a policy against possessing firearms on company property. Violations could result in discipline up to and including termination. The employer also had a policy against workplace violence and bullying, which prohibited conduct involving the use of weapons or carrying weapons on to company property. The administrative law judge denied the claim for benefits. The Labor and Industry Review Commission affirmed. The Commission compared the facts of this case to similar cases in other states, and explained that the focus is on "whether at the time of the injury the employee was acting in furtherance of the employer's interests; or put another way, when injured was the employee performing services arising out of his employment?" The Commission found that the applicant did not inform the employer that he was routinely bringing a firearm to work because he knew or was concerned that this was not allowed. The Commission rejected the applicant's claim that he brought the gun with him for protection of himself and company property. His job description did not involve security, he often worked in a locked

and secured building, and the building itself was "not subject to unauthorized intrusion." The Commission held that "[s]ecretly bringing a gun to work was not an act arising out of employment with the employer."

Gabron v. Gleason Roll Off & Recycling, Claim No. 2017-019052 (LIRC Jan. 12, 2021). The applicant was employed as a garbage truck driver. On June 15, 2017, he was working from inside of the truck's dumpster to pull a tarp across the top of the dumpster. While walking backwards through the refuse, one of his feet fell through a soft spot in the refuse and this allegedly resulted in a back injury. The applicant testified that he informed the employer of the incident the day it occurred. The employer had no recollection of a conversation to this effect. The applicant continued to work full time following the alleged injury. He did not seek any medical treatment until June 27, 2017 when he was seen by Dr. Rizzo. Dr. Rizzo explained that the applicant "comes in with lower back pain bilateral for the last month or so. He doesn't remember injuring himself." The applicant later testified that Dr. Rizzo was not making eye contact with him during this visit and did not appear interested in what he was saying, so he chose to see another doctor. The applicant then began treating with Dr. Zehr in August of 2017. The applicant filled out a questionnaire before seeing Dr. Zehr wherein he mistakenly listed July 13, 2017 as the date of his alleged injury. This was in contrast with the First Report of Injury which listed June 15, 2017 as the date of injury. Dr. Zehr explained that during the examination, he "attempted to clarify the obvious inconsistencies…but [the applicant] was evasive and defensive, and no progress was made. It remains unclear to me if there ever was a workplace injury incident, and if so when." The applicant was subsequently referred to an orthopedic surgeon, Dr. Didinsky. Dr. Didinsky diagnosed the applicant with "severe persistent low back pain for many years, failed conservative care." Dr. Didinsky recommended an L4-5 fusion procedure which took place on February 13, 2019. The respondents referred the case to Dr. Noonan for an Independent Medical Examination. Dr. Noonan opined that the applicant may have sustained a minor lumbar strain which fully healed within three (3) to six (6) weeks. Dr. Noonan explained that the applicant had exaggerated pain during his examination which was "out of proportion to any objective findings." The administrative law judge found that the applicant sustained a compensable low back injury and adopted the opinions of Dr. Didinsky. The Labor and Industry Review Commission affirmed in part and reversed in part. The respondents argued that there was legitimate doubt as to whether any injury had ever occurred given the inconsistencies in the medical records and the testimony of the employer. The Commission rejected this argument. The Commission accepted the applicant's testimony about the occurrence of his work injury as being credible. The Commission believed that "the applicant is a poor historian, that his memory of the details surrounding past events is spotty, and that when confronted with questions concerning what he said or did in the past he has a tendency to become confused or reflexively combative." The Commission explained that the delay in seeking treatment was understandable given that the applicant had tried to ice his back for a time to see if it would improve on its own. The Commission accepted the applicant's claim that he had accurately reported the injury to Dr. Rizzo and that Dr. Rizzo was simply not paying attention. However, the Commission also went on to adopt the opinions of Dr. Noonan and found that the applicant sustained a temporary low back strain which fully healed as of March 1, 2018.

Tierney v. ABC Seamless Janesville, Inc., Claim No. 2018-018778 (LIRC April 29, 2021). The applicant began working for the employer in May of 2018. His job duties involved installing windows, doors, siding, fascia and soffits. On August 1, 2018, the applicant fell from a scaffolding platform onto the ground six (6) feet below. The applicant did not seek any medical treatment that day. His foreman placed him on light duty beginning the day after the injury. The applicant sought medical treatment for the first time on August 14, 2018. He complained of numbness and tingling in his hands following the fall on August 1. An MRI was done on August 30, 2018. This revealed advanced multilevel cervical spondylosis, which had progressed since a prior MRI done in June of 2016. Treatment records from June through September of 2016 contained evidence that the applicant had experienced bilateral and radiating symptoms during that time, and received multiple injections. The applicant was referred to Dr. Rust for a neurosurgical consultation on September 25, 2018. Dr. Rust believed that a three (3) or four (4) level fusion would be required, but did not want to perform this procedure. The applicant was then referred to Dr. Soliman, who recommended a five (5) level cervical fusion. The applicant underwent this procedure on December 4, 2018. A second surgery was necessary to fix loosened screws. A third surgery was contemplated on account of "lucencies" at multiple levels, and additional loose screws. However, Dr. Soliman did not want to perform this

procedure until after the applicant stopped his use of alcohol and tobacco. Dr. Soliman completed a WKC-16-B. He opined that the August 1, 2018 fall caused a permanent aggravation of the applicant's pre-existing cervical spondylosis which required multiple surgeries to remedy. The respondents had the case reviewed by Dr. Monacci, who opined that there was no cause and effect relationship between the August 1, 2018 fall and the need for surgery. Dr. Monacci explained that the diagnostic testing showed no evidence of acute injury and attributed the applicant's symptoms and need for surgery to his pre-existing degenerative condition. Dr. Monacci believed that the applicant would have sought treatment sooner than two weeks post injury if the fall had caused a serious injury to his neck. The administrative law judge adopted the opinions of Dr. Soliman. The Labor and Industry Review Commission affirmed. The respondents argued that the applicant's symptoms in 2016 were the same as those complained of following the fall in 2018. The Commission rejected this argument. The Commission found that the applicant had never missed work for any neck problem before August of 2018 and noted that the applicant had not treated for any ongoing cervical spine problems between September 2016 and the fall in August of 2018. The Commission explained that "the applicant had a fragile, degenerative cervical spine when he fell. The fall plainly changed the course of this degenerative condition, causing it to become symptomatic when for a period of nearly two years it had not been."

Fox v. A. W. Oakes & Son, Claim No. 2017-023569 (LIRC July 13, 2021). The applicant was employed as an equipment operator. On January 17, 2017, the applicant was found lying outside of his vehicle on the pavement at a McDonald's restaurant. EMTs responded to the scene and transported the applicant to the hospital. During the transport, the applicant initially denied any injury. He then stated he had a minor incident at work while driving a skid steer. Once at the hospital, the attending physician wrote that there was a question of whether the applicant had suffered some trauma to his left lateral chest while operating construction equipment. The applicant passed away while in the hospital. The Sheriff's Department and OSHA conducted an investigation, but neither uncovered any evidence on any injury at work. Likewise, the applicant's colleagues did not witness any accident or injury on the day in question. The applicant's foreman recalled a conversation with the applicant that afternoon, but did not observe the applicant to be in any pain. A co-worker had a conversation with the applicant just before the applicant left the worksite for the day, but did not observe the applicant to be injured or in pain. The applicant's skid steer was inspected and found to be undamaged. The applicant's wife filed a claim for death benefits, relying in part upon a Medical Record Review by Dr. Wojciehoski, wherein he concluded that the applicant sustained fatal injuries while operating his skid steer. The claim was denied by the administrative law judge. The Commission affirmed the denial. The Commission explained that "the idea that [the applicant] was crushed by his skid steer is completely inconsistent with the absence of any reported or witnessed injury, the absence of any indication that the skid steer had been damaged…..and the incredible scenario of [the applicant] somehow being crushed by his skid steer but continuing his workday as if nothing had happened." The Commission held that the evidence presented in the case established only and unexplained injury, and it is well settled law that a truly unexplained injury is not compensable.

Hoffman v. Kohl's Department Stores, Inc., Claim No. 2018-007298 (LIRC July 13, 2021). The applicant was employed as a sales associate working part time. She alleged an injury to her right shoulder on June 29, 2017. The applicant had previously undergone right shoulder surgery in November of 2016. No rotator cuff tear was found during the 2016 procedure. On June 29, 2017, the applicant claimed she reached up above her shoulders to hang a necklace onto a hook and felt sharp and shooting pains in her neck and right shoulder. The applicant did not report the injury. Instead, the applicant departed on a trip to Michigan and then the East Coast to visit her relatives. She left on July 1 and did not return until August 14. When she returned from vacation, she went to see her doctor (Dr. Gordon). She described the work injury as causing very sharp pain in the shoulder and arm. The applicant then reported the injury to her employer. An MRI of the right shoulder was done on November 20, 2017 which showed a full thickness tear of the rotator cuff. The applicant underwent additional right shoulder surgery on December 21, 2017. The respondents arranged for an independent medical examination with Dr. Friedel. Dr. Friedel opined that the mechanism of injury was inconsistent with causing a rotator cuff tear. Dr. Friedel indicated that the applicant failed to seek treatment for the alleged injury for almost two months. He opined that the right shoulder condition

was a result of an underlying chronic condition. Dr. Gordon completed a WKC-16-B wherein he opined that the June 29, 2017 incident caused an aggravation of her pre-existing condition and resulted in the rotator cuff tear shown on MRI. Dr. Gordon reasoned that the tear occurred at work because no tear was observed during the surgery he performed in November of 2016. The administrative law judge awarded benefits. He found the applicant credible when it came to the occurrence of the work incident and her reports of immediate and persistent pain, despite the delay in reporting and seeking treatment. The applicant testified that she delayed "because she had vacation time coming up and hoped the shoulder would heal by itself." The Labor and Industry Review Commission affirmed the decision.

Bad Faith

Vanden Heuvel v. Calmes & Sons, Claim No. 2018-000284 (LIRC February 18, 2021). The applicant worked as a project manager in construction for the employer. He was injured when he fell off a 10-foot ladder while attempting to use a nail gun. The applicant sustained multiple fractures which required surgery. The employer asserted that the applicant self-inflicted his injuries, and therefore, denied primary liability. A hearing was held on the issue of primary liability. The decision was appealed to the Labor and Industry Review Commission. In July 2019, the Commission held that applicant sustained a work injury when he fell from the ladder. The Commission held this was not a self-inflicted injury. The issue of bad faith for the denial was then addressed at another hearing. This was also appealed to the Commission. Here, the Commission held that a reasonable insurer would not deny a claim for someone who fell off a ladder at work. The Commission affirmed an award of the maximum bad faith penalty. However, the Commission held that there was not a separate, additional, act of bad faith, to justify another separate award of bad faith penalties, just because the initial case was appealed to the Commission. This was an issue of first impression for the Commission. Previously, the Commission had not expressly determined whether a petition to the commission could be considered an independent act of bad faith under Wis. Stat. § 102.18(1)(bp). Here, the Commission held that, because the review is de novo, due process and fundamental fairness are required in the case review process. While multiple bad faith claims may be filed in certain circumstances, this occurs in rare cases. The respondent did not act in bad faith merely by requesting the due process right to have the case reviewed and the issues decided by the Commission in the ongoing case of the respondent's denial of the applicant's claim.

Burden of Proof

Stauner v. Lindus Construction, Inc., Claim Nos. 2015-018140 & 2018-022382 (LIRC March 31, 2021). The applicant was employed as a construction worker. On July 21, 2015, the applicant was working to set up a section of scaffolding and allegedly injured his left shoulder. The applicant continued to work the rest of the day but did report the incident to human resources. The applicant sought medical treatment the following day and was diagnosed with a left shoulder injury. He explained that "he was putting up scaffolding and while pushing it started having pain in his left shoulder." He was then referred to Dr. Romzek who reviewed an MRI and diagnosed him with a left shoulder labral tear. Dr. Romzek explained that the applicant had injured his shoulder while "lifting a 24-foot plank." The applicant underwent surgical repair with Dr. Romzek on August 19, 2015. The applicant then decided to seek a second opinion from Dr. Drawbert. Dr. Drawbert explained that the applicant injured his left shoulder when he attempted to catch a falling ladder "by abducting and externally rotating his left arm." Dr. Drawbert recommended against any additional surgery. The applicant then sought a third opinion with Dr. Holm. Dr. Holm recommended arthroscopic surgery and possible glenoid labrum repair. Dr. Holm explained that the applicant injured his left shoulder when "lifting and climbing on scaffolding in July of 2015 and fell." The respondents referred the case to Dr. Meletiou for an Independent Medical Examination. During the examination, the applicant explained that on July 21, 2015, a 120 pound piece of scaffolding fell approximately five (5) feet and that he tried to catch it with his left arm with immediate pain and popping sensation in his left shoulder. Dr. Meletiou diagnosed the applicant with a pan-labral tear but explained that the mechanism of injury documented in the medical records was not consistent with causing a pan-labral tear. Dr. Meletiou explained that it is unlikely that an individual could have kept working following a pan-labral tear. Dr. Meletiou believed that the applicant had a chronic pan-labral injury and that the incident on July 21, 2015 was simply a manifestation of symptoms of that pre-existing problem. The administrative law judge denied the applicant's claim. The Labor and Industry Review Commission reversed the decision of the administrative law judge, after first remanding the case back to the Office of Worker's

Compensation to allow the treating physician to offer a new opinion based upon the applicant's testimony at hearing. The respondents argued that the administrative law judge correctly dismissed the claim because the applicant had "changed his story regarding what happened several times." The respondents asserted that Dr. Holm had misunderstood the mechanism of injury and was under the impression that the applicant had fallen from the scaffolding. The applicant testified that he did not fall from the scaffolding. The respondents argued that, therefore, Dr. Holm's opinions must be disregarded. However, Dr. Holm issued a revised opinion following the remand and concluded that "it is still my opinion that the left shoulder…was significantly injured at work when the scaffolding collapsed, and he caught a portion of it with his left arm." The Commission adopted the opinions of Dr. Holm and found the applicant's testimony credible, where the administrative law judge had not. The Commission explained that while "it is true that the medical records are not consistent in describing the work incident….the Commission has frequently noted that busy medical providers, who are primarily concerned with medical diagnosis and treatment, may record inexact or inaccurate descriptions of exactly how or when a work injury occurred." The Commission then rejected the opinions of Dr. Meletiou because there was no evidence that the applicant had any prior left shoulder problems.

Lemberger v. A & A Haulers, Claim No. 2014-013418 (LIRC April 29, 2021). The applicant was employed as a truck driver. On May 12, 2014, the applicant fell from his truck and was hospitalized for six (6) days with a collapsed lung and a head injury. There were no recorded complaints of neck pain or neck symptoms while in the hospital. The applicant was then released to return to work, with no restrictions, in July of 2014. Thereafter, the applicant continued to work as a truck driver and passed multiple physical examinations for the maintenance of his Commercial Driver's License. The applicant began seeking medical treatment for numbness and tingling in his arms in October of 2015, and eventually brought a claim seeking worker's compensation benefits for myelomalacia of the cervical spine. The physician supporting his claim for neck injury, Dr. Cragg, did not begin treating the applicant for this condition until December of 2017. When first seen by Dr. Cragg, the applicant reported that he had "developed increasing numbness and tingling in his hands" over the past three (3) years, following the work injury. He reported that his symptoms would worsen when he twisted his neck. Dr. Cragg opined that the May 12, 2014 incident caused a traumatic spinal cord injury with "progressively developing cervical cord myelomalacia." The respondents submitted an opinion by Dr. Harrison who opined that the May 12, 2014 incident did not cause any cervical spine injury. Dr. Harrison explained that there were no neck complaints in the hospital records and that the first complaints of neck pain did not surface until June of 2014. Administrative Law Judge Shampo found the opinion of Dr. Cragg to be more persuasive and held the respondents liable for permanent and total disability, among other benefits. The Labor and Industry Review Commission affirmed. The respondents argued that Dr. Cragg's opinions were based upon an inaccurate medical history and should have been disregarded. They asserted that the medical records surrounding the May 12, 2014 injury did not document any increasing neck or arms symptoms, and that the applicant did not begin treating for any neck or arm symptoms until October of 2015. The Commission rejected the respondents' arguments, explaining that Dr. Cragg's causation opinion did not assume that the neck or arm symptoms began right away, but rather that those symptoms developed progressively over time.

Causal Connection

Veloz v. Maglio & Company, Claim No. 2018-011644 (LIRC March 1, 2021). The applicant was employed as a general laborer. On September 14, 2013, she was lifting a twenty five (25) pound when she felt low back pain and had to leave work. She was seen at the emergency room and diagnosed with a low back strain and pain radiating into her leg. An MRI of her lumbar spine showed mild facet arthropathy but no canal or foraminal stenosis. The applicant underwent physical therapy without improvement. She was referred to Dr. Maciolek who reviewed her MRI and x-rays, and determined that surgery was not necessary. The applicant was then referred to pain management. A nurse practitioner noted "signs of symptoms exaggeration during physical examination." The applicant received a series of steroid injections which provided no lasting effect. The applicant then chose to begin treating with Dr. Chunduri who diagnosed her with facet mediated pain and left sacroiliac dysfunction. Dr. Chunduri performed more injections to the lumbar spine and sacroiliac joint, again without lasting benefit. Dr. Chunduri then referred the applicant to Dr. Reichert for a surgical consultation. Dr. Reichert ordered facet ablations at L4-5 and L5-S1. These procedures did

not provide any lasting benefit either. Another round of physical therapy was ordered but was not efficacious. Dr. Chunduri then referred the applicant for a functional capacity evaluation (FCE). The evaluators found that the applicant "could have performed at markedly higher levels than willing during musculoskeletal and functional testing. Behavioral factors are affecting evaluation results to such a degree the evaluator cannot identify the [applicant's] true musculoskeletal status, project full time work tasks and/or true impairment." The applicant's attorney referred her to a chiropractor, Raymond Janusz, for an independent medical examination. Dr. Janusz assessed 10% permanent partial disability for an L4-5 protrusion and an additional 10% permanent partial disability for accelerated lumbar spondylosis at L4-S1. He restricted the applicant to fifteen (15) pounds lifting and no repetitive motions involving the middle and lower back. The respondents referred the applicant for an Independent Medical Examination (IME) with Dr Aschliman. Dr. Aschliman found evidence of inconsistent effort and exaggerated tenderness on examination. He opined that the applicant's pain complaints were not associated with any objective abnormality. He found no permanent disability and opined that the work incident did not result in the need for any permanent restrictions. The respondents referred the applicant for another IME with Dr. Zoran Maric. During his examination, Dr. Maric noted breakaway weakness, extremely poor strength effort, and diminished "glove and stocking" like sensations in both lower extremities. Dr. Maric opined that the accident caused, at most, a sprain which fully healed without permanent disability or the need for any permanent work restrictions. The administrative law judge awarded compensation. The Labor and Industry Review Commission affirmed in part and reversed in part. The Commission awarded temporary disability from the date of injury to November 30, 2016 (when Dr. Chunduri opined that the applicant had reached end-of-healing.) The Commission awarded 3% permanent partial disability to the body as a whole. The Commission explained that it "could not discount the evidence of symptom magnification and inconsistency of response in the applicant's medical records." The Commission noted that Dr. Aschliman, Dr. Maric, NP Bendre, and the functional capacity evaluator had all found clear evidence of symptom magnification which "undermine her claim for a more extensive degree of temporary or permanent disability…"

Choice of Practitioner

Alcaraz v. Cooper Power Systems, LLC, Claim No. 2019-008880 (LIRC Jan. 12, 2021). The applicant was employed as a coil rewinder. On March 8, 2017, he was working from a bent over position and pulling on a wrench when he felt pain in his upper back and lower neck. He reported the injury to the employer who sent him to its designated health provider, U.S. Health Works Medical Group. He was seen by PA-C Bowling and diagnosed with a rhomboid strain and placed on work restrictions. The applicant subsequently chose to consult with Dr. Jon Englund at Orthopaedic Associates of Wisconsin. He was seen by Dr. Englund for the first time on April 12, 2017 and was diagnosed with upper thoracic back pain which was likely myofascial in nature. While treating with PA-C Bowler and Dr. Englund, the applicant attended a course of Physical Therapy with minimal benefit. In July of 2017, the applicant told Dr. Englund that he would like to try chiropractic treatment, and that he had a specific chiropractor in mind, Dr. Nowak. An Athletic Trainer from Dr. Englund's office wrote a note in August of 2017 indicating that Dr. Englund had "agreed in his previous office visit…that [the applicant] could try a 'handful of visits' with the chiropractor.'" The applicant received chiropractic treatment from Dr. Nowak on August 22, 2017, but did not follow up thereafter. The applicant then chose to seek treatment from Dr. Prpa. He saw Dr. Prpa for the first time on October 11, 2017 and further treatment in the form of epidural steroid injections and cervical fusion was discussed. Dr. Prpa then referred the applicant to Dr. Piryani for a series of epidural steroid injections, none of which provided any relief. The administrative law judge found that the applicant sustained compensable injures to his thoracic and cervical spine. The Labor and Industry Review Commission affirmed in part and reversed in part. The respondents argued that treatment with Dr. Prpa and Dr. Piryani was not compensable because the applicant had exceeded his two choices of medical providers. The respondents asserted that the applicant's first choice was Dr. Englund, his second choice was Dr. Nowak, and his third (non-compensable choice) was Dr. Prpa. The respondents argued that Dr. Englund had not referred the applicant for chiropractic treatment with Dr. Nowak. Rather, the applicant raised this issue on his own and Dr. Englund "merely acquiesced" to the applicant's plan. The Commission rejected the respondents' arguments. The Commission held that "Dr. Englund plainly approved of the applicant's desire to seek chiropractic treatment, and his approval constituted a referral to Dr. Nowak."

Course of Employment

Bentley v. Meridian Industries, Inc., Claim No. 2017-016945 (LIRC Nov. 30, 2020). The applicant was employed as a purchaser. On July 6, 2017, the applicant fell while traversing the employer's property and heading from the employee parking lot toward a building entrance. There was a designated walkway for employees to use to reach the building entrance. However, on July 6, 2017, the applicant "chose at one point to leave the walkway and step over a curb onto a grassy area that provided a more direct route to the entry door." While traversing over this grassy area, the applicant tripped and fell over a tree root. She alleged an injury to her left knee and right thumb. The applicant testified that she frequently took this shortcut route, that the employer never advised against taking this specific route, and that other employees routinely took this route as well. The employer had a policy which explained that "all pedestrians must use designated walkways and/or be mindful of activity around them when traveling through production areas." The human resource manager testified that employees were expected to use the designated walkway and were not supposed to walk across the grassy area where the applicant fell. She explained she had disciplined 10 employees for not using designated walkways. The use of designated walkways was covered in new employee orientation and periodically thereafter during monthly safety training sessions. The human resource manager testified that she had observed employees taking the route the applicant had taken, and that "in each instance she verbally admonished those employees, telling them that they needed to use the walkway." The administrative law judge awarded compensation. The Labor and Industry Review Commission affirmed. The respondents argued that the applicant was not going between the parking lot and the work premises in the "ordinary and usual way" when injured. The Commission rejected this argument. The Commission found that there was "no more than sporadic enforcement" of the employer's policy against using shortcuts and that "a reasonable employer…would have ordered a warning sign to be placed at that spot, or would have promulgated a direct order to all employees not to cut across that grassy area."

Death Benefits

Sanders (Dec'd) v. American Foods Green Bay Dress, Claim No. 2016-007644 (LIRC July 30, 2020). In March 2016, the deceased applicant was attacked at a plant by a coworker. The applicant was stabbed twice in his body and slashed on his cheek. He underwent emergency surgery. He reported "seeing things" on his fourth day of hospitalization. He attributed this to his medication. The respondents asserted this was delirium tremens from alcohol withdrawal. Medical records reflect the deceased applicant reported his wife was worried about him becoming depressed and turning to alcohol. There is some evidence the applicant's drinking at least temporarily increased after the work-related injury. The applicant recovered from his physical wounds. He underwent counseling for PTSD, anxiety and other psychological effects of the incident. In September 2015, he was found in his car in what appeared to be a seizure like state after drinking heavily the night before. He admitted to drinking two shots of liquor every night. [The records reflect he had a 2006 conviction for possession of a controlled substance. He also pled guilty to manufacturing/delivery of heroin in 2008.] The applicant returned to work full time by January 2017. The evidence revealed this appeared to go well. He was separated from his wife around the same time and also stopped taking prescribed medication. Dr. Grunert performed an independent medical examination in May 2017. He agreed with a PTSD diagnosis as a result of the work injury. In July 2017, the applicant was driving a car with friends when he began to drive erratically and his right arm twitched. His friends had him pull over the car. The applicant slumped to the side and became unresponsive. His friends took him to the hospital. The applicant was pronounced dead. The cause of death was acute intoxication caused by the combined effects of alcohol and Fentanyl. The wife of the deceased applicant filed a hearing application to assert that her husband's death was causally related to a conceded work-related injury. She sought additional death benefits pursuant to Wis. Stat. 102.46. The respondents disputed that death benefits were owed. The deceased applicant's wife secured an opinion that patients with PTSD struggle with alcohol and other drug use. However, this expert was unaware of the applicant's prior history of drug use involving heroin. Dr. Grunert opined the PTSD had been well managed, that the alcohol use and Fentanyl use were recreational and related to the applicant's personal difficulties (marital problems, financial stressors, personal health concerns and the murder of his stepson in February 2017). An unnamed administrative law judge held that the death was causally related to the work-related injury and awarded benefits. The Labor and Industry Review Commission reversed the decision and dismissed

the application. Dr. Grunert's opinion that the effects of the work-related injury were not a proximate cause of his overdose death was credible. The applicant's expert's opinion was based upon incorrect evidence that included an asserted lack of prior history of drug use. The parties disagreed over the appropriate standard of causation. The applicant asserted the standard of causation should be addressed via the "substantial factor" rule in *Lange v. LIRC* from 1997. [This case held that a work-related injury which plays any part in a second, nonwork-related injury is properly considered a substantial factor in the re-injury.] The applicant asserted that the effects of PTSD constituted a substantial causative factor in the fatal overdose incident. The Commission held that, regardless of whether the applicant's ingestion of Fentanyl could be construed to have constituted a new or second injury, it was the result of an intentional and illegal act. The parties also presented arguments regarding whether there was a chain of causation leading from the work incident to the overdose. This had been the evaluation adopted in determining whether the effects of a work-related mental illness led to an individual's suicide. Additionally, the respondents asserted the proper standard is under Wis. Stat. 102.46, which provides, in part, that "where death proximately results from the injury" and the Supreme Court's definition of proximate cause in 1906 ["proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause".] The Commission applied this final statutory proximate cause standard to this case. The Commission also held the decision would be the same under any of the asserted standards.

Employment Relationship

SK Management, LLC v. Donald King et al., Claim No. 2016-017261 (LIRC June 29, 2020). Donald King alleged that he was injured while working for SK Management, LLC on May 13, 2016. SK Management asserted that King was not their employee at the time of injury, and that King was, in fact, an employee of another business (Mr. Phixitall) when injured. Mr. Phixitall was a sole proprietorship operated by Brian Schweinert. There was a corresponding dispute as to whether Mr. Schweinert was an independent contractor or whether he, too, was an employee of SK Management. Neither SK Management nor Mr. Phixitall had a worker's compensation policy in effect for the time period in question. The Uninsured Employers Fund (UEF) made payments to King for his injuries. The administrative law judge found that SK Management was the liable employer and ordered that company to reimburse the UEF. The Labor and Industry Review Commission affirmed. The Commission found that Mr. Phixitall was not King's employer on the date of injury. The Commission found that SK Management exercised the "primary right to control" over King's activities. SK Management would secure the work to be done and would provide instructions on how the work was to be carried out. SK Management paid cash wages to King and provided him with equipment and tools. SK Management also retained ultimate control over the hiring and firing decisions. The Commission further found that Schweinert (d/b/a Mr. Phixitall) was not an independent contractor as that term is defined in Wis. § 102.07(8)(b). Mr. Schweinert satisfied only two of the nine statutory criteria.

Antonio Garcia v. Kaster Rehab & Maintenance LLC et al., Claim No. 2014-025749 (LIRC February 18, 2021). The applicant performed maintenance, repairs, and minor construction work. The applicant alleged he was injured on September 2, 2014 while employed by Citywide Rentals Property Management, LLC (Citywide). Subsequently, Kaster Rehab & Maintenance, LLC (Kaster) and the Uninsured Employers Fund (UEF) were impleaded into the case. The dispute centered around whether Citywide or Kaster was the applicant's employer at the time of injury. The Kaster company was formed in January of 2013 to provide maintenance services for only one customer, the Jason Scott Realty & Management Company (JSRM). Alex Kaster ran the Kaster company and was originally its only employee. Kaster then hired a man named Virgilio Miranda to assist, and Kaster delegated him the ability to hire other individuals to assist with the work. Meanwhile, Citywide was formed by Alex Kaster and his wife in July of 2013. Citywide was formed to purchase the property management portion of JSRM's business and this purchase was carried out in May of 2014. However, despite Citywide's purchase of JSRM's property management work, the Kaster company continued to exist and perform maintenance work. The Kaster company continued to perform work and pay its employees out of its own bank account. Mr. Miranda continued to supervise Kaster's employees in the same manner as before. The applicant, for his part, was drawn to a job posting by Miranda in July of 2014. Miranda hired him and directed the applicant's

day-to-day activities thereafter, and provided the applicant with tools and equipment. The applicant was paid from Kaster's bank account. On September 2, 2014, the applicant fell from a ladder and suffered severe injuries with resultant paraplegia. The administrative law judge found that Citywide was the employer and ordered reimbursement to the UEF. Citywide appealed and the Labor and Industry Review Commission reversed and found that Kaster was the employer. The Commission explained that the seminal case on employment relationship is *Kress Packaging Co. v. Kottwitz*, 61 Wis. 2d 175 (1978). The primary consideration is on who has the right to control the details of the work and secondary considerations include method of compensation, furnishing of tools and equipment, and the right to hire and fire. The Commission found that while Alex Kaster may have intended to ultimately transfer all of Kaster's business to the newly formed Citywide, that this had not been accomplished by the time of the applicant's injury. Kaster Company had continued to exist just as it had since its inception. The only difference was that Kaster Company was now paid by Citywide for its work, instead of JSRM. The Commission concluded that Kaster Company was plainly the applicant's employer at the time of injury. Kaster hired, directed and controlled, furnished equipment to, and paid the applicant. Because Kaster was admittedly uninsured at the time of the injury, the UEF was ordered to make payments to the applicant, with Kaster then becoming liable for reimbursement of the same.

Evidence

Tessmer v. Menzies Aviation, Claim No. 2018-026321 (LIRC October 19, 2020). The applicant alleged that he sustained a low back injury as a result of one or two separate incidents when he slipped on ice. The applicant alleged that, on November 27, 2018, he slipped, regained his balance and did not fall. He alleged that the following day, he again slipped, and fell flat on his back. The applicant was not allowed to work for the following two days because he had reported work-related injuries. He was not scheduled to work on a Saturday three days later. He stayed at home and participated in a video game tournament. The applicant testified at the hearing that, on that Saturday, he felt fine and nothing was too out of the ordinary. He testified that he had increased swelling that night. The applicant went to the emergency department the following day. The applicant underwent an emergency two level lumbar surgery. The medical records reflect the applicant had a substantial history of prior low back and radicular symptoms. The applicant did not submit any WKC-16B forms from his treating physicians or any other physician in support of his claim. He did file a certified medical report in which Dr. Fuiks indicated the applicant had sustained a 'workmen's Comp injury process' while working for the employer. Similar comments were included in some additional certified medical records. The respondents submitted an independent medical examination report from Dr. Reineck. His report included an extensive and thorough outline of the applicant's prior medical history related to similar symptoms. He opined the applicant had a significant preexisting condition, and that this was the reason for surgery and not the alleged work-related injury. The unnamed administrative law judge awarded the benefits sought by the applicant. The Labor and Industry Review Commission reversed the decision, and dismissed the application. [Commissioner Gillick did not participate in this decision.] The independent medical examiner's opinion was more credible. Dr. Fuiks' opinion, as outlined in the medical records, was without explanation as how he believed the work-related incident caused a change in the applicant's preexisting condition. There was no WKC-16B or equivalent document submitted by Dr. Fuiks. Further, there was no indication that Dr. Fuiks was ever made aware of the applicant's significant preexisting history. The applicant also did not file any WKC-16B or causative opinions from the physician who had a long history of treating the applicant for his preexisting condition, regarding the effects of the alleged work-related injury. The Commission held that the administrative law judge essentially created his own medical opinion by finding that, subsequent to the work injury, there was a significant change in the applicant's condition and he underwent emergency surgery, and that the applicant's normal work duties were contributing factors to the development of the applicant's back condition, even disregarding the effect of the work-related incidents. The Commission determined that there was no credible medical support in the record for the administrative law judge's findings.

Issue Preclusion

Zelaya-Alvarez v. PPC Industries, Inc., Claim No. 2007-022224 (LIRC July 30, 2020). In November 2010, an administrative law judge held that the applicant sustained a 2007 work-related lumbar injury. 25% permanent partial disability was awarded. The respondents were also prospectively liable for a spinal cord stimulator. The issue was interlocutory for additional disability and medical expenses. The decision

was not appealed. The applicant had a spinal cord stimulator implanted. He had complications and this was removed. The doctors recommended against another permanent spinal cord stimulator. The applicant subsequently was advised to undergo a spinal cord stimulator implant at a different level, which would not cause the complications that existed previously. The respondents secured an opinion which disagreed with the reasonableness and necessity of the additional spinal cord stimulator. The respondents had video surveillance of the applicant walking without a cane, posing for pictures, entering and exiting a vehicle and dragging leaves across his yard. The applicant also went home to Honduras for an unspecified period of time. He alleged that he treated for his symptoms in Honduras but did not provide any medical records. In 2018, a hearing was held to address the applicant's request for payment of additional medical expenses, including another permanent spinal cord stimulator. An unnamed administrative law judge held the respondents were liable for the cost of a new permanent spinal cord stimulator and medical expenses. The decision was interlocutory for future medical expenses. The Labor and Industry Review Commission affirmed the determination. There is no evidence of any significant change in the applicant's medical condition as compared to before or after his trip to Honduras. The applicant's treating physician opinion regarding the reasonableness and necessity of additional treatment, and causation for the same, is credible. The surveillance demonstrated the applicant had some gait issues as outlined by the treating physician. Further, the current claim for a prospective spinal cord stimulator is medically indistinguishable from the claim adjudicated in 2010. Therefore, the doctrine of issue preclusion applies.

Loss of Earning Capacity

Floriana v. Menard Inc., Claim No. 2017-011865 (LIRC October 8, 2020). The applicant was employed as a forklift driver. On June 8, 2016, the applicant fell onto his right side on concrete. He felt immediate pain in his low back, right shoulder, and right elbow. He reported the injury and was instructed to see a chiropractor and placed on light duty. Following an initial visit to the chiropractor, he was referred to an occupational medicine specialist, Dr. Studt. By November 8, 2016, Dr. Studt noted that the shoulder and hip complaints had improved, whereas the elbow and back had not. An MRI of the lumbar spine was done which showed mild degenerative disc disease. Dr. Studt then referred the applicant to Dr. Carlson in pain management. Dr. Carlson believed that the fall had probably aggravated his facet arthrosis and recommended an MRI of his right hip. Dr. Carlson also noted that he had some "exaggerated pain responses" and it was difficult to determine how much of the complaints were due to "pain behaviors." Dr. Carlson performed medial branch blocks at multiple levels, which were unhelpful. Dr. Carlson did not believe she had much else to offer and referred him back to Dr. Studt. On June 1, 2017, Dr. Studt rated 2% permanent partial disability and imposed permanent work restrictions, to include no lifting of over 40 pounds and the ability to alternate between sitting, standing and walking. The applicant could work full time, including overtime. The respondents referred the case to Dr. Harrison for an independent medical examination. Dr. Harrison believed the June 8, 2016 fall caused a right hip sprain and right elbow bursitis. The fall also caused a temporary aggravation of his lumbar facet sclerosis and rotator cuff impingement. Regardless of cause, there was no need for permanent work restrictions. The applicant then referred the case to a vocational consultant, Jeanne Krizan. Ms. Krizan believed that post-injury the applicant was limited to only 40 hours per week, and could expect to earn no more than $12.50 per hour. She assessed the applicant with a 45-55% loss of earning capacity. The respondents referred the case to a vocational consultant of their own, Frances Maslowski. Mr. Maslowski opined that, under Dr. Studt's restrictions, the applicant had sustained a 5-20% loss in earning potential. The administrative law judge found that there was legitimate doubt as to the injury and denied the claim for benefits. The Labor and Industry Review Commission (Commissioners Falstad and Maxwell) reversed. The Commission held that the applicant had sustained an 18.3% loss in earning capacity, based upon Dr. Studt's permanent work restrictions. The Commission criticized Ms. Krizan's report for exaggerating the number of hours the applicant worked pre-injury, and for minimizing the wages he could earn post-injury. The Commission noted that the applicant had in fact found employment, post-injury, which paid more than Ms. Krizan believed was possible. Moreover, the Commission found that the applicant had been "self-limiting" his work schedule post-injury. Dr. Studt had not placed any restrictions on the hours he could work. The applicant was choosing to work only 29 hours per week. Commissioner Gillick dissented. Commissioner Gillick believed the correct way to measure lost earning capacity was to try and estimate "what the injured worker would probably have earned had the injury not occurred." The majority responded to the dissent and

explained that Commissioner Gillick's perspective was already encompassed within the framework for evaluating loss of earning capacity as set forth in Wis. Admin. Code § DWD 80.34(1).

Topp v. Frank Bros., Claim No. 2016-019066 (LIRC February 18, 2021). The applicant was employed as an equipment operator. He alleged an injury on August 5, 2016 when he was attempting to load a cement roller onto a trailer. The loader began to lose traction and the applicant was thrown from the machine and onto the ground. The loader then fell off the trailer as well and ran over the applicant while he was lying on the ground. The applicant was seen in the Emergency Room and eventually diagnosed with a left acetabular fracture and pelvic ring injury. The applicant was treated for left shoulder and low back pain as well. The applicant underwent a Functional Capacity Evaluation (FCE) on July 11, 2017 which determined he was capable of medium duty work. On August 10, 2017, his treating physician (Dr. Goodspeed) determined the applicant had reached end-of-healing. Dr. Goodspeed completed a WKC-16-B report on October 20, 2017 rating 10% permanent partial disability to the hip and adopting the restrictions as set forth in the FCE. The applicant then sought a second opinion with a pain management physician, Dr. Poliak-Tunis. Dr. Poliak-Tunis recommended facet injections and indicated that she was in agreement with the permanent restrictions set forth by Dr. Goodspeed and the FCE. On July 18, 2018 Dr. Poliak- Tunis wrote a letter assessing 30% permanent partial disability to the left hip, 25% to the left shoulder, and 5% to the low back. On July 19, 2018, the applicant called the clinic and complained that his restrictions "are not good enough" and that he was "still doing a lot of work that he feels he shouldn't be doing anymore." He wondered if Dr. Poliak-Tunis could update his restrictions or arrange for another FCE. Dr. Poliak-Tunis referred the applicant to PT Riley for an evaluation on September 11, 2018. PT Riley issued updated work restrictions on September 18, limiting the applicant to light-sedentary work. On October 22, 2018, the employer advised that they could not accommodate the restrictions imposed by PT Riley and his employment was terminated. The respondents referred the case to Dr. Karr for an IME. Dr. Karr did not believe that any back or left shoulder injury had occurred. Dr. Karr found that injuries to the left sacroiliac joint and the left hip occurred, and rated 10% permanent partial disability to the left hip. Dr. Karr imposed permanent restrictions of 50 pounds maximum lifting, and repetitive lifting of up to 25 pounds. The applicant submitted a Vocational Evaluation by Ronald Nemiroff. Based upon the restrictions set by Dr. Poliak-Tunis, Mr. Nemiroff opined that the applicant was permanently and totally disabled. Mr. Nemiroff also opined that the applicant was not a candidate for retraining, given he was 52 years of age and had not obtained a high school degree or equivalent. The respondents submitted a Vocational Evaluation by John Meltzer. Mr. Meltzer opined that the applicant was capable of being retrained. He may require some skill "remediation" to obtain his GED, but this was possible, as was a technical school program to restore his earning ability. Mr. Meltzer pointed out that the applicant was able to return to his pre-injury job for two years, earning similar wages as he had previously. He explained that the applicant had not made a diligent attempt to obtain other employment since being terminated. Mr. Meltzer assessed a 50-60% loss of earning capacity assuming Dr. Poliak-Tunis' restrictions, and opined that there was no loss of earning capacity under the opinions of Dr. Goodspeed and Dr. Karr. The administrative law judge found the claim compensable and awarded permanent and total disability benefits. The Labor and Industry Review Commission reversed. The Commission found that the issue of loss of earning capacity was "premature" without information bearing upon the applicant's eligibility for services from the Division of Vocational Rehabilitation (DVR). The Commission remanded the matter and instructed the applicant to apply with the DVR and determine if services are available and, if so, to follow through on those recommendations.

Misconduct / Substantial Fault

Gonzalez v. Woodmans Food Market, Inc., Hearing No. 20607601MW (LIRC March 1, 2021). The applicant worked for the employer for five years before her employment was terminated. Prior to the termination, the applicant utilized her Facebook account to post messages about her employer, stating their customers were "fucking PIGS" and "heartless inconsiderate assholes." The administrative law judge denied the applicant's claim for unemployment insurance benefits. The applicant appealed, arguing her claim was wrongly denied because her posts did not specifically identify the employer or its customers by name. The Labor and Industry Review Commission affirmed. The Commission found that the applicant's comments were made on a public Facebook page, where they could be viewed by anyone, and noted that one customer had complained of the posts. The Commission explained that the posts were "clearly insulting and inappropriate and could potentially influence a customer's decision to shop at the employer's store." The

Commission held that the applicant's actions "were so egregious as to amount to misconduct even without a prior warning [from the employer]."

Kress v. Wal-Mart Associates, Inc., Hearing No. 20010657MD (LIRC June 30, 2021). The applicant was employed as a "cart-pushing associate." This job consisted of operating a mechanical "cart mule" to move shopping carts from the parking area to the store. On April 7, 2020 the applicant ran the cart mule into a parked car. He received a written warning for this incident on April 9, 2020. He was advised that any further events of this type could result in termination. He was also reminded of how to operate the cart mule properly. On April 10, 2020, the applicant ran the cart mule into another parked car. His employment was terminated as a result. The administrative law judge denied the applicant's claim for unemployment benefits. The Labor and Industry Review Commission reversed and awarded benefits. The Commissioners (Gillick and Townsend) opined that the facts did not constitute misconduct because the employer's property was not substantially damaged, nor was the applicant's behavior "so grossly negligent as to demonstrate an intentional and substantial disregard of the employer's interests." The Commission also concluded that these circumstances did not constitute substantial fault, either, because the applicant "did not intend to hit a parked car with the cart mule" and because his actions "were at most, 'unintentional' or 'heedless' and best characterized as an 'inadvertent error.'" Commissioner Maxwell dissented. Maxwell opined that the applicant was warned that he needed to pay more attention to his surroundings after the first incident and then, the very next day, ran into another parked car while admittedly "looking down" and not paying attention to his surroundings. Maxwell believed these circumstances constituted a finding of substantial fault and a denial of benefits.

McCann v. Toro Mfg, LLC, Hearing No. 20010819MD (LIRC June 30, 2021). The applicant worked for the employer for eleven (11) months as an assembler before her employment was terminated for violation of the attendance policy. The attendance policy assessed penalties, using a points system, with the accumulation of eight (8) points resulting in termination. The applicant was cited for multiple attendance violations and was warned about her attendance problems in June and October of 2019. The applicant was then cited for additional violations in January, February, and April of 2020. On Friday, April 17, 2020 the applicant "overslept and did not call in or report to work." The applicant attempted to report to work the following Monday and was advised that her employment was terminated due to the accumulation of nine (9) attendance points. The administrative law judge denied the applicant's claim for unemployment insurance benefits. The applicant appealed, arguing that two of the absences counted against her were invalid, and were in fact authorized by her supervisor. The Labor and Industry Review Commission (Commissioners Gillick and Townsend) reversed the decision of the administrative law judge and awarded benefits. The Commission credited the applicant's testimony that two of the absences had been authorized and explained that the employer had "failed to present credible evidence to establish that she was not approved to leave early on those [two] days." The Commission held that the applicant, therefore, had not violated the employer's attendance policy, and that the applicant's actions "did not evince a willful and substantial disregard of the employer's interests and did not violate a reasonable employer requirement." Commissioner Maxwell dissented. She opined that the applicant's conduct in oversleeping and failing to call in on April 17, 2020, in light of the past violations and warnings regarding her poor attendance, was "inconsistent with the continuation of the employment relationship…" Commissioner Maxwell concluded that the applicant's conduct constituted a constructive quit.

Occupational Exposure

Clark v. PPG Industries, Claim No. 2016-010868 (LIRC August 7, 2020). The applicant worked for his employer, a paint manufacturer, for 31 years. He was exposed to paints, chemicals and resins. The applicant was a nonsmoker and active. He had no significant medical problems prior to a diagnosis of bladder cancer. He testified that, throughout his employment, other workers at other mixers may have been adding chemicals at the next tank, when he would not have the protective equipment on. The applicant also testified that he trained as a mill operator and would grind solid ceramic material to a very fine level. He testified that sometimes solvent would escape and he would not wear a respirator. The applicant testified that, in 2001, he transferred to work in a shipping area as a forklift truck operator. He testified that he had to use a respirator three or four times a month. He testified that he then went to the resin department for a year. The applicant indicated that he then returned to working as a forklift truck driver. The applicant testified that, on

June 6, 2014, he saw blood red urine. He testified that he was thereafter diagnosed with bladder cancer and underwent medical treatment. This treatment included removal of his bladder and right kidney (the cancer had spread). The applicant retired after his kidney removal surgery. On April 12, 2016, Dr. Leonovicz wrote to the applicant's attorney. He outlined the applicant's treatment and opined that the applicant's occupation involved significant chemical exposure. He opined that this exposure was the cause of the applicant's bladder cancer and associated treatment. Dr. Johnson (the treating kidney physician) also provided an opinion that the applicant's job duties caused his condition. The respondents referred the case to an industrial hygienist, Dr. Lawrence Keller, and a toxicologist, Dr. David Pyatt, for opinions on the issue of causation. According to Dr. Keller, the employer maintained a comprehensive toxicology and industrial hygiene program for more than 50 years. He reviewed the applicant's exposure monitoring from 1986 to 2010 and found that the monitoring of the applicant did not show any sample tests that were over the acceptable standards. Dr. Keller concluded that the evidence did not support a conclusion of occupational causation based upon the NIOSH criteria. Dr. Pyatt prepared a report evaluating the exposures that the applicant would have been exposed to while working for the employer. In his opinion, the applicant was not exposed to chemicals that could cause bladder cancer. Dr. Pyatt opined that it was his professional opinion that the applicant's bladder cancer was idiopathic and was not related to titanium dioxide or other exposures he may have experienced from his work at PPG. The administrative law judge held that the evidence was sufficient to raise a legitimate doubt as to whether the applicant's bladder cancer was work related. The administrative law judge held the applicant failed to meet his burden of proof and his claim was dismissed. The Labor and Industry Review Commission reversed. The Commission found that the applicant's assertion that his condition was caused by work because he is a non-smoker, and the analysis of his particular cancer and employment circumstance required the conclusion that the employment was a material contributory causative factor in the applicant's cancer diagnosis and associated treatment. The commission held that it is sufficient to show that work exposure was a material factor in the development or progress of the disabling disease. The results of monitoring do not preclude a finding of compensable work related exposure. The Commission found the applicant's experts credible and persuasive.

Mendola v. City of Oak Creek, Claim No. 2019-006039 (LIRC August 7, 2020). The applicant began employment as a police officer for the employer in January 1996. In 2003, a memorandum sent to the employer about the concern over the lead exposure at the shooting range. In 2008, the applicant became a member of the employer's SWAT team. This required him to engage in more than twice as much firearm practice as a regular officer. Also in 2008, the employer began regularly testing SWAT team members for lead exposure. Beginning in 2016, masks were provided. The applicant wore the masks. In 2017, testing was done. Three out of the five lanes tested high in air lead level exposure. Therefore, the range was shut down for two to three weeks for remedial measures. On March 16, 2017, the applicant began treating with Dr. Brown for what was considered to be the effects of lead toxicity. Dr. Brown completed a WKC-16-B report on April 3, 2018 in which she found work causation for precordial chest pain and palpitations, impaired hemoglobin synthesis, and declining renal function, all attributable to lead exposure. The respondents referred the case to Dr. Tovar for an independent medical examination. He opined the applicant's blood lead levels were consistently normal. These levels were normal between 2009 and 2015. Dr. Tovar opined that the applicant's medical records revealed no evidence of lead toxicity. The administrative law judge denied the applicant's claim. The Labor and Industry Review Commission affirmed. The Commission found that Dr. Tovar's opinion was credible. The objective measurements of the applicant's blood lead level was consistent with Dr. Tovar's opinion. The objective results did not support Dr. Brown's diagnosis of lead toxicity. Furthermore, Dr. Brown's opinions that the conditions were causally related to the applicant's work exposure with the employer were speculative and incredible. Therefore, the applicant did not meet his burden of establishing an injury.

Occuptional / Repetitive Injuries

Gunderson v. Morgan Truck Body, LLC, Claim No. 2019-008053 (LIRC August 31, 2020). The applicant alleged he sustained work-related injury as a result of his repetitive work activities. The applicant worked on a manufacturing line for the employer for approximately 20 years. He then worked as a maintenance mechanic for the employer for another 20+ years. The applicant worked 45-60 hours per week. As a mechanic, he was responsible for six buildings. He operated various vehicles. He was responsible for now removal or plowing, as well as lawn mowing. He also maintained various items of heavy equipment. The applicant and a coworker described the work as fast paced and physically demanding. The only employer representative was a senior human resource manager who

had never performed the applicant's job duties. Dr. Kurpad opined the applicant sustained a work-related injury as a result of his regular job duties. He opined the activities involved repetitive bending, twisting, turning, reaching, carrying and otherwise back intensive stressful activities. Dr. Karr performed an independent medical examination. He opined the applicant did not sustain a work-related injury. He opined there is insufficient scientific evidence of an association between low back pain and episodically performing physically demanding tasks. The administrative law judge held the applicant sustained a compensable work-related injury and awarded temporary total disability benefits. The judge did not order the applicant to repay the short term disability benefits. The Commission modified and affirmed the decision. The determination regarding compensability was affirmed. Dr. Kurpad and Dr. Karr's understanding of the applicant's work duties were accurate. An employer takes an employee "as is" and this includes susceptibility to injury. Dr. Karr's opinion overreaches to say there is essentially no activity that would ever cause a low back injury, which is not credible. The main article relied upon by Dr. Karr does not make this extreme conclusion. [Commissioner Falstad dissented. He opined the applicant failed to prove that his work activities were repetitive and stressful. The applicant described a variety of activities. His work duties were quite diverse. He did not prove that he repetitively engaged in one activity for any length of time that would put stress on his back. The applicant did not describe his work duties as repetitive. Dr. Kurpad's description of the applicant's work as repetitive was clearly erroneous. A medical opinion that is based on an inaccurate history of events cannot credibly carry the applicant's evidentiary burden.]

Permanent Total Disability

Fisher v. REM Wisconsin II, Inc., Claim No. 2008-022049; 2015-014979; 2016-018345 (LIRC June 10, 2021). The applicant alleged that she sustained numerous work-related injuries at multiple employers. She alleged that she was permanently and totally disabled. The vocational experts for the applicant and the independent vocational expert for one insurer opined that, based upon the treating physician opinions, the applicant would be *odd lot* permanently and totally disabled. The vocational expert for the other insurer opined that the applicant could work at various positions within the treating physician's permanent restrictions, and assessed a loss of earning capacity at 5% to 15%. He also opined the applicant would be a viable candidate for retraining benefits. However, this expert did not provide any specific evaluation of the positions available at the time of the evaluation. The administrative law judge held the applicant's treating physician was more credible than the independent medical examiners, and including with respect to permanent restrictions. The judge held the applicant was entitled to permanent total disability benefits. The Labor and Industry Review Commission affirmed and remanded the determination for updated calculations regarding the compensation owed. The Commission is bound by the Wisconsin Supreme Court's 2004 holding in *Beecher vs. LIRC*. This case held that, if an applicant made a *prima facie* case for *odd lot* benefits, the employer has the responsibility to demonstrate that there exists suitable employment for the applicant. The employer does this with evidence of actual job availability, making it more probable than not that the applicant is able to earn a living. The applicants can then respond with evidence of an actual futile job search or rely upon his expert evidence to defeat the employer's attempted rebuttal. Here, the applicant clearly established a *prima facie* case for permanent total disability based upon the evidence. The only rebuttal evidence was one insurer's vocational report. However, this report did not include any evidence of a labor market survey or identification of actual jobs available to the applicant. The cursory supposition outlined in the report, regarding the jobs available for the applicant, falls short of meeting the burden of persuasion established by the *Beecher* case.

Psychological Injury

Wotnoske v. Wis. Dept. of Corrections, Claim, No. 2016-013369, (LIRC June 29, 2020). The applicant worked for the employer for five years. He alleged that he sustained a nontraumatic mental injury culminating on December 12, 2015, due to a series of events at work over time. The applicant complained of an incident on November 11, 2004, where some inmates had begun rioting. The prison was placed on lockdown. The applicant and his coworkers entered the housing unit they were assigned to. The prisoners entered the unit and came rushing out at them. The applicant's medical records reflect he subsequently had recurring dreams and flashbacks. The applicant also complained of an incident that occurred in 2008 or 2009. This incident occurred when a storm caused a complete power outage at the facility. The applicant and co-workers were uneasy that there was total darkness and the inmates were out of their rooms. The applicant went to where the inmates where located. The inmates yelled and swore at the

applicant and threw toilet paper. There was no physical assault. The power came on in an hour. The employee transferred to a different facility in 2009. He did not get along with his supervisor, Meicher. He believed Meicher "hated" him and would "rile up" inmates by treating them unfairly so guards would have to deal with them. In 2012, Meicher was transferred. The applicant needed to call in sick. His coworkers complained about him and sent a group email in response to them. The applicant alleged that, in 2013, he was sexually harassed by Sergeant Derek Eufinger, with sexual comments. The applicant indicated he "blew up." A two month investigation occurred. Eufinger was transferred. In 2014, the facility had a power outage. The applicant and a female coworker were the only guards to control 110 inmates. The applicant was unable to get help for 45 minutes. He described this as a "scary" incident. on December 10, 2015, the applicant was reprimanded for an incident that involved an inmate and inmate's visitor taking a picture in a prohibited area. Soon after, the applicant accidentally took pepper spray home. He was asked to bring it back immediately. He brought it back the next day instead. The applicant testified that he was going to kill his coworkers, but instead sought mental help at a hospital. He testified that, while he was inpatient, he received a phone call that he was under investigation. This led him to sustain a mental breakdown. He did not return to work. The applicant alleged that he sustained permanent and total disability as a result of the alleged mental injury. In March 2016, he began treatment with Dr. Weston, a psychologist. Dr. Weston opined that the applicant was unable to work in a stressful environment such as corrections. The respondents secured an independent medical examination with Dr. Lynch. Dr. Lynch diagnosed the employee with explosive and personality disorder, PTSD and bipolar depression. Dr. Lynch opined that the employee's pattern of behavior was caused by his underlying mental health condition, and not his employment. The administrative law judge found the case compensable and awarded benefits. The respondents appealed and the Labor and Industry Review Commission reversed. All of the incidents the applicant experienced while employed as a correctional guard for the employer were not of greater dimension than the day-to-day emotional strains and tensions that all correctional guards can be expected to experience. These situations were not so out of the ordinary, unexpected, or unforeseeable for all similarly situated correctional guard as to meet *School District I* and *Probst* standards.

Jose Lopez Alfaro v. Bagels Forever, Inc., Claim No. 2016-010043 (LIRC July 23, 2020). The applicant worked for the employer for 18 years, primarily as a night general foreman. He alleged that he sustained several injuries at work, and that the stress from the injuries contributed to his mental health injury. The employee asserted that Donahoe, a coworker and supervisor, started to create a toxic work environment in 2010 with other employees. He also alleged that he was constantly harassed from 2010 to 2013. He alleged he reported this to the owner, Berman. The applicant alleged that, in 2013, the harassment increased because Berman verbally abused him in front of other workers, including Donahoe. In 2014, a coworker lost four fingers in an accident. The applicant went to recover the fingers. The applicant asserted that he was traumatized by this incident and that it could have been prevented if the drug and alcohol policy had been enforced. In October 28, 2015, the applicant claimed that he could not feel his legs and became barely able to walk. He stated that his mental and physical health has gotten worse and worse since then and has not been able to recover since that date. He indicated that he attended psychological treatment when it was clear he could not work anymore. An unnamed administrative law judge denied his claim for benefits. The Labor and Industry Review Commission affirmed. The standard of causation set out by the Supreme Court, in *Sch. Dist. No. 1 of Brown Deer v. DILHR*, 62 Wis. 2d 370, (1974) is the appropriate standard. *Sch. Dist. No. 1* holds that, for nontraumatic mental injuries to be compensable, the symptoms must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tensions which all employees must experience. It is not an "injury" no matter how disabling, unless it arises from unusual occupational stresses. This test is objective and looks at whether an individual of ordinary sensibility would be emotionally injured or mentally distressed in the absence of unusual circumstances. Here, the applicant did prove that his work caused him a traumatic mental health injury. However, he failed his burden under *Sch. Dist. No. 1* and did not demonstrate that that the stress he was exposed to was out of the ordinary to similarly situated employees.

Easley v. YMCA Metro Milwaukee, Claim No. (LIRC November 13, 2020). The applicant worked initially as a senior secretary, and then became an Administrative Director at a different location. She determined that the Executive Director, Hayden, at a different branch, used cash deposits for personal expenses. The applicant noted discrepancies with

other financial issues. Hayden resigned. Johnson then became the applicant's supervisor. Johnson and the applicant kept clashing. The applicant wrote a formal complaint on November 27, 2005. On November 29, 2006, the employer determined that the applicant's complaints did not rise to the level of harassment. Subsequently, Johnson changed the applicant's work times, gave the applicant more work and demanded the applicant get it done quickly. The applicant stated that she felt threatened by him. She went to her doctor and psychotherapist for treatment. On June 15, 2006, the applicant was diagnosed with depression. She did not return to work for the employer. Ten years later, the applicant underwent a complete physical examination by Dr. Momper. The applicant indicated she wanted to discuss her psychiatric issue. Dr. Momper opined that the work incident precipitated, aggravated and accelerated a preexisting condition, and also that the applicant had from a condition caused by an appreciable period of workplace exposure that was at least a material contributory causative factor in the condition's onset or progression. The applicant filed a hearing application and alleged that she sustained a mental health injury due to harassment by her supervisor. She sought payment of 30% permanent partial disability and asserted that she was unreasonably refused rehire. The administrative law judge held that an injury was sustained. However, the applicant was not awarded any permanent partial disability. Further, the administrative law judge held the applicant did not unreasonably refuse to rehire the applicant. The Labor and Industry Review Commission affirmed. The applicant failed to meet her burden to prove that she sustained 30 percent permanent partial disability as a result of the work injury. The applicant did not have any permanent work restrictions. She did not take her medication after April of 2007. She did not seek any medical treatment for the work-related mental health injury for over ten years. She was employed after 2007. There was no evidence she lost any earnings. The applicant's position was eliminated for organizational restructuring. The employer eliminated a similar position at another branch. A business decision to reduce costs can by itself, establish the reasonableness of the decision.

Statute of Limitations

Hoffman v. Wis. Electric Power Company, Claim No 1995-036059 (LIRC May 8, 2020). The applicant submitted a claim to his former employer for occupational hearing loss. He alleged a date of injury on October 1, 1994. The parties entered into a limited compromise agreement whereby the employee accepted $4,108.00 for resolution of all issues relative to his claim with the sole exception of future medical expenses. This Agreement was approved on July 10, 1995. On July 3, 2018, the applicant filed another application for hearing. He alleged that his employer was liable for his new hearing aid expense. The administrative law judge dismissed the application against the employer on the basis that it was time-barred. The Labor and Industry Review Commission affirmed. The applicant argued that because the respondents did not expressly reserve a statute of limitations defense in the Limited Compromise Agreement, that the defense was, therefore, waived. The Commission rejected this argument. Wis. Stat. § 102.17(4) establishes a time limit that remains in effect until and unless it is specifically waived or extended by the payment of additional compensation, other than medical treatment or burial expenses. Here, neither a waiver nor extension occurred, so the claim against the respondents was time-barred.

Sitron v. Grand Geneva Spa & Resort, Claim No. 2001-041348 (LIRC July 30, 2020). The applicant sustained a compensable left shoulder in a specific incident in 2001. The applicant filed a hearing application in April 2008, and alleged neck and back injuries, as well as foot injuries, as a result of the same incident. The applicant submitted various WKC-16B forms in September 2008. These supported some of the causation arguments. The submitted medical reports did not identify specific dates of temporary disability or permanent disability. In October 2008, an administrative law judge wrote to the applicant and indicated that additional support to identify specific dates of temporary and/or permanent disability would be needed to proceed. The applicant failed to submit the documentation. Another judge issued an order and dismissed her claim without prejudice. In February 2014, the applicant sustained another hearing application. No medical support was included. The application was filed within the period of statute of limitations. A prehearing conference was held in August 2014. The applicant was provided specific time limits in which to provide more details of her claims and medical support. She failed to comply with the time limits. In December 2014, an order was issued to dismiss her claim with prejudice. The applicant filed for commission review. In May 2015, the applicant issued a

decision which affirmed the dismissal; however, it indicated this was without prejudice. In July 2018, the applicant again filed a hearing application. No medical support was included. In October 2018, this was dismissed without prejudice. The applicant filed another hearing application in October 2019. This included a WKC-16B which supported causation. In April 2020, an order was issued to dismiss the claim with prejudice. The judge held that the statute of limitations had expired prior to the filing of the most recent hearing application. The Labor and Industry Review Commission affirmed the denial and dismissed the application. The prior Commission decision, which changed the dismissal from "with prejudice" to "without prejudice" did not impact the statute of limitations. This change had been made because the commission did not have clear evidence regarding whether the 12 year period for filing had expired. This phraseology and a dismissal "without prejudice" cannot change the date on which the 12 year filing period expired.

Veith v. Highsmith Co. Inc., Claim No. 1993-0177579 (LIRC January 20, 2021). The applicant sustained a conceded back injury on March 5, 1990. The respondents conceded 75% permanent partial disability to the body as a whole. Subsequently, the parties entered into a limited compromise. This provided for a lump sum payment of $85,000.00, except medical expenses incurred after January 26, 1995. The applicant filed a hearing application to seek payment of medical expenses on March 16, 2009. The respondents asserted that the lump sum payment in 1995 was the last payment of compensation and that triggered the beginning of the 12-year statute of limitations. The administrative law judge held that the Statute of Limitations had not expired on the applicant's claim. The Labor and Industry Review Commission affirmed. The limited compromise settled both permanent disability claims, and incorporated an advancement of conceded compensation for unaccrued permanent partial disability. The payouts were to otherwise have been made in $800.00 monthly increments, which would have lasted until sometime in early 2003. This would have extended the 12-year statute of limitations past the filing date of 2009. Even with consideration of various payout scenarios, the 12-year period for filing an application would not have begun until 2001 at the earliest.

Temporary Total Disability

Mosley v. Hormel Geo A & Co., Claim No. 2019-002444 (LIRC July 30, 2020). The applicant alleged that she sustained an occupational neck injury as a result of her repetitive work activities. Primary liability was denied. She received short term disability benefits during a period of time she sought temporary disability benefits. The respondents asserted the employer paid $9,043.05 to the applicant for these short term disability benefits. The record was left open, following the hearing, in order for the parties to provide the necessary information to determine if an offset was appropriate. The respondents submitted an exhibit which purported to show a list of payments made to the applicant, with a description listed as "disability." The administrative law judge held the applicant sustained a work-related injury. The judge did not offset the temporary disability awarded by the amount of disability benefits on the basis that there was a lack of evidence of consent or improper payment. The Labor and Industry Review Commission remanded the case for a hearing to address the propriety of offsetting the worker's compensation benefits or disability benefits and to then order final payment to the appropriate parties. The administrative law judge tried to reasonably hold the record open for 30 days to get further proof on the issue of payments but this did not occur. The short term disability policy was not submitted into evidence. There was no testimony regarding the exhibit to support the basis for the disability benefits. The applicant agreed that, if payment was made pursuant to a policy, then the carrier which made the payments should be reimbursed. However, the applicant asserted there was no way to tell from the submitted exhibit which company made the payments, or what the payments were made for. The applicant alleged she paid taxes on the payments and should not have had to do so if they were work-related indemnity payments. The respondents assert that Wis. Stat. 102.30(5) does not require that such support be submitted in order for the benefits to be asserted, that the applicant is not entitled to a windfall at the employer's expense, and that the applicant's willful ignorance about the payments is an attempt to secure double payment. An unpublished court of appeals decision included a determination that the policy must be in evidence at a hearing as proof required for reimbursement of short term disability benefits under Wis. Stat. 102.30(7) absent a stipulation from the parties.

Unreasonable Refusal to Rehire

Wetterling v. Custom Fabricating & Repair, Claim No. 2017-005766 (LIRC June 11, 2020). On August 7, 2018, the applicant filed a hearing application alleging that the employer unreasonably refused to rehire him following a February 20, 2017 work-related injury. The respondents' independent medical examiner had opined that the applicant did not sustain any work injury and was able to return to work without restrictions. The notice of discharge had indicated the applicant was discharged for three no-call no-shows on March 28, 29, and 30, 2017. The applicant's physician did not release the applicant to work until April 11, 2017. At that time, the applicant was provided restrictions of requiring respiratory protection. The applicant complied with the written policy to submit his medical reports to the employer. The applicant spoke with the employer about his release with restrictions. He was told by the employer that there were no respirators available to him. The administrative law judge held that the employer had unreasonably refused to rehire the applicant. The Labor and Industry Review Commission affirmed. The Commission held that the employer discharged the applicant with on inaccurate and understanding of his actions. It is not reasonable for an employer to discharge an injured worker who remains off work in accordance with his physician's directions, even though the employer may have gotten a contrary medical opinion. The employer asserted that the applicant failed to report to work. However, there is first-hand testimony to the contrary. The applicant was discharged on a mistaken assumption and the misunderstanding was on the employer's part. An employer must take a reasonable effort to learn all the relevant facts before discharging an injured worker, especially during the worker's healing period. The employer acted unreasonable and unfairly by summarily discharging the applicant before conducting an adequate investigation of what had occurred. The employer has the burden of the employer to show reasonable cause for not rehiring the employee, and that was not met.

Massop v. Market & Johnson, Claim No. 2015-025620 (LIRC June 29, 2020). The applicant worked as a carpenter for the employer. The applicant was hired to work on certain projects. On September 28, 2015, the applicant sustained a conceded bicep tendon tear injury. He underwent surgery in late October to repair the torn bicep tendon. When the project ended on March 11, 2016, he was laid off. He was brought back for more work later. The applicant was laid off again in May 6, 2016. The supervisor told him to stay in touch with Hemauer until another spot was found. Each time the applicant called Hemauer, the applicant got voice mail. In November 2015, the employer hired Thompson for placing employees. The applicant conceded that, when he called Hemauer, the voicemail told him to phone Thompson to look for work. The applicant testified that he did not call Thompson. He remained unemployed until July 5, 2016, at which time he took a job with another company. The unnamed administrative law judge denied applicant's claim that he was unreasonably refused rehire. The Labor and Industry Review Commission affirmed. The applicant acted unreasonably by not taking the simple step of contacting Thompson, as he conceded Hemauer's voicemail message told him to do. The applicant further also did not register with a system that matches carpenters with contractors. The employer gave no reason to suspect that it did not want the applicant back as an employee.

Easley v. YMCA Metro Milwaukee, Claim No. (LIRC November 13, 2020). The applicant worked initially as a senior secretary, and then became an Administrative Director at a different location. She determined that the Executive Director, Hayden, at a different branch, used cash deposits for personal expenses. The applicant noted discrepancies with other financial issues. Hayden resigned. Johnson then became the applicant's supervisor. Johnson and the applicant kept clashing. The applicant wrote a formal complaint on November 27, 2005. On November 29, 2006, the employer determined that the applicant's complaints did not rise to the level of harassment. Subsequently, Johnson changed the applicant's work times, gave the applicant more work and demanded the applicant get it done quickly. The applicant stated that she felt threatened by him. She went to her doctor and psychotherapist for treatment. On June 15, 2006, the applicant was diagnosed with depression. She did not return to work for the employer. Ten years later, the applicant underwent a complete physical examination by Dr. Momper. The applicant indicated she wanted to discuss her psychiatric issue. Dr. Momper opined that the work incident precipitated, aggravated and accelerated a preexisting condition, and also that the applicant had from a condition caused by an appreciable period of

workplace exposure that was at least a material contributory causative factor in the condition's onset or progression. The applicant filed a hearing application and alleged that she sustained a mental health injury due to harassment by her supervisor. She sought payment of 30% permanent partial disability and asserted that she was unreasonably refused rehire. The administrative law judge held that an injury was sustained. However, the applicant was not awarded any permanent partial disability. Further, the administrative law judge held the applicant did not unreasonably refuse to rehire the applicant. The Labor and Industry Review Commission affirmed. The applicant failed to meet her burden to prove that she sustained 30 percent permanent partial disability as a result of the work injury. The applicant did not have any permanent work restrictions. She did not take her medication after April of 2007. She did not seek any medical treatment for the work-related mental health injury for over ten years. She was employed after 2007. There was no evidence she lost any earnings. The employer terminated the applicant because her position was eliminated to an organization restructuring. The employer eliminated a similar position at another branch. A business decision to reduce costs can by itself, establish the reasonableness of the decision. ✦

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