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ARTHUR CHAPMAN

KETTERING SMETAK & PIKALA, P.A.

ATTORNEYS AT LAW

Wisconsin Worker's Compensation Update

In This Issue

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Judson (Jud) Ballentine focuses his practice on consulting on and defending workers compensation claims. He handles workers compensation matters for employers, insurers, and TPAs. He has a background in handling personal injury and immigration cases. Jud is fully proficient in Spanish. He lived in Guatemala for four years working for a non-profit, and assisted in resolving disputes between employees, volunteers, and program participants.

Jud's hobbies include traveling with his wife, cheering the Minnesota Gopher football and basketball teams, playing basketball, and cycling.

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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

There were no decisions for this reporting period.

Decisions of the Wisconsin Court of Appeals

Arising Out Of

Welter v. Labor and Industry Review Commission*, 944 N.W.2d 351 (Wis. Ct. App. 2020) *(unpublished). The applicant underwent a knee replacement in 2003. She began working for the employer in 2009. In 2013, she began to have symptoms in her knee. Objective evidence revealed loosening of the components. A second knee replacement was recommended. The applicant elected to wait to have the procedure. Several weeks later, she fell at work. She reported increased pain. Shortly afterward, she had a knee replacement. Dr. Lemon opined she sustained only a knee contusion at the time of the fall and did not require a second knee replacement as a result of the fall. Dr. Bodeau opined the fall precipitated, aggravated and accelerated the pre-existing condition and she required a second knee replacement earlier than she otherwise would have had it performed. The unnamed administrative law judge held Dr. Lemon's opinions were more credible, and denied benefits. The Labor and Industry Review Commission and the Court of Appeals affirmed. The applicant challenged only the Commission's factual findings. In the absence of fraud, the Commission's findings of fact are conclusive, as long as they are supported by credible and substantial evidence. This is evidence which is relevant, credible and probative evidence upon which reasonable persons could rely to reach a conclusion. Substantial evidence is less of a burden than a preponderance of the evidence in that any reasonable view of the evidence is sufficient. Where two conflicting views of the evidence may be sustained by substantial evidence, it is for the Commission to determine which view of the evidence it wishes to accept. When determining whether credible and substantial evidence supports the Commission's factual findings, a court may not substitute its judgement for that of the Commission as to the weight or credibility of the evidence. The Commission is the sole judge of the weight and credibility of medical witness.

Deviation

Brown v. Muskego Norway School District Group Health Plan*, 389 Wis. 2d 377 (Wis. Ct. App. 2019)*(unpublished). Applicant had a salaried job which required him to travel between a Juneau plant location and a West Bend plant location. He worked at the Juneau plant until approximately 2:00 p.m. Applicant asserted that he was injured while on a lunch break and enjoying a motorcycle ride on a beautiful day in November after having worked eight hours. Applicant was injured in a motorcycle accident just before 3:00 p.m. on the highway that was the most direct route from the Juneau plant to the West Bend facility. He testified that he was not sure if he was intending to go to the West Bend location that day. His employer investigated the case, determined he sustained a compensable work-related injury and submitted the claim to the state and its insurer. Worker's compensation benefits were initiated. Applicant refused the checks. He instructed the employer and worker's compensation insurer to withdraw the claim, arguing that he was not working at the time of the accident. His health insurer sent a standard questionnaire to applicant, which included an inquiry as to whether the treatment was required as a result of a work-related injury. Applicant's attorney completed the form and indicated "no" to that question. His private health insurer paid over $482,000.00. Applicant filed a civil claim against the driver and insurer of the vehicle that hit him. The health insurer was named as a subrogated party. The health insurer counterclaimed to seek a determination that the health insurer was not obligated to pay any benefits because applicant was covered by worker's compensation benefits. The language in the plan provided for reimbursement by the member for amounts paid or owed by worker's compensation, and applied for any injury arising out of and in the course of employment if benefits

were available under the worker's compensation act, whether or not the member claimed the benefits or compensation. A judgement was entered against applicant in favor of the plan for approximately $515,000.00 (interest and costs were included). The Court of Appeals affirmed. Wis. Stat. §102.03(1)(f) creates a presumption of worker's compensation coverage for traveling employees. Specifically, the statute provides that "every employee whose employment requires the employee to travel shall be deemed to be performing service growing out of and incidental to the employee's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employee's employment." A deviation for a personal purpose that is reasonably necessary for living or incidental thereto is known as the personal comfort doctrine. Deviations under the personal comfort doctrine are compensable. The burden of proving a personal deviation is on the party asserting the deviation. The presumption of employment under the statute is strong. Applicant's assertion that he was on a personal excursion is not sufficient because he also needed to show the deviation was for a personal purpose not reasonably necessary for living or incidental thereto. Applicant was required to travel between the plants during the workday. The incident occurred on the most direct route between the locations. There was no evidence that the employer was not expecting him back in the office on the day of the accident. Further, the employer believed applicant had a valid worker's compensation claim.

Retirement

***Mueller v. Labor and Industry Review Commission*, 388 Wis. 2d 602 (Wis. Ct. App. 2019)**. The applicant sustained an admitted work-related injury on October 17, 2013. She retired on March 14, 2014. Three months later, in June 2014, she underwent surgery for her work-related injury. In January 2015, the applicant secured a part-time job elsewhere. The applicant sought temporary total disability benefits and temporary partial disability benefit for the period of time after her retirement. The unnamed administrative law judge held the applicant did not retire because of the work-related injury and denied the claims for benefits. The Labor and Industry Review Commission affirmed. The circuit court remanded the issue to the Commission to determine whether the applicant re-entered the work force following her retirement, and whether the return to work entitled her to benefits. The Commission determined that the applicant could work full-time if she desired. The Commission held that her part-time work was not sufficient to establish actual wage loss due to her injury. The Circuit Court affirmed. The Court of Appeals affirmed. The applicant's attempt to re-enter the job market was not impaired by her work injury. She did not have any actual wage loss attributed to her work injury.

Subrogation

***Sinkler v. American Family Mutual Insurance Company and James R. Thomas, Defendants, EMCASCO Insurance Company, Defendant-Appellant*, 936.N.W.2d 186 (Wis. Ct. App. 2019)**. The applicant sustained a work-related injury as a result of a motor vehicle accident during the course of his employment. The applicant filed a third party claim against the driver of the other vehicle. The worker's compensation insurer hired an attorney, on a contingent-fee basis, to represent its subrogation interest. The case settled at mediation. The worker's compensation insurer asserted that its attorney should receive his fee by taking a portion of the applicant's attorney's fee, rather than from their portion of the insurer's subrogation recovery. The insurer asserted that its attorney was entitled to do so because he participated in the prosecution of the claim, which benefited the applicant and his wife. The Circuit Court did not agree. The Court of Appeals affirmed the Circuit Court's decision. The applicant's attorney did the bulk of the work. The insurer's attorney's participation in the claim was limited to the mediation. Given the totality of the circumstances, while the Circuit Court determining that the reasonable value of the insurer's attorney's work was zero dollars is not typical, the Circuit Court had the discretion to do so, as long as it provides an explanation for its decision.

Kasal v. Stryker Corporation*, 391 Wis. 2d 649 (Wis. Ct. App.) *(unpublished). The applicant sustained a compensable work-related injury while working for Aurora. Sentry paid worker's compensation benefits as a result of that injury. The applicant retained an attorney to assist in an action against Stryker, which owned the relevant defective equipment. The worker's compensation employer and insurer agreed to assist the applicant, but were not entirely cooperative. Therefore, various claims and cross claims were asserted and dropped throughout the litigation. Sentry retained an attorney to represent it in the claim for worker's compensation benefits paid to the applicant as well as to defend and assert the various

claims. Sentry incurred some costs for discovery conducted after the applicant believed the case was ready for mediation, which the applicant asserted did not yield new information. Sentry opposed the applicant's proposed distribution of the settlement reached with Stryker because the proposal did not include reimbursement of Sentry's attorney's fees and costs. The applicant opposed inclusion of Sentry's attorney's fees and costs. The applicant argued that Sentry's worker's compensation policy provided for reimbursement for its payments made to an employee who recovers from a third party, but was silent as to recovery of attorney's fees and costs incurred during that process. That policy also did not reference recovery pursuant to Wis. Stat. §102.29. Sentry contended that the statute provisions regarding recovery of attorney's fees and costs superseded the policy with respect to third party liability cases. The circuit court declined to apportion, from settlement proceeds, the attorney's fees and costs incurred by Sentry. The Court of Appeals affirmed. Wis. Stat. §102.29 provides a right for an employee, employer or insurer, to pursue a tort action against a third party who is liable for the employee's actions. The statute allows for the apportionment of attorney's fees and costs for all parties involved in the claim unless otherwise agreed upon. Sentry's worker's compensation policy provided: "G. Recovery from Others: We have your rights and the rights of persons entitled to the benefits of this insurance, to recovery our payments from anyone liable for this injury. You will do everything necessary to protect those rights for us and to help enforce them." This policy provision was what was contemplated in the "unless otherwise agreed upon" language in Wis. Stat. §102.29. Sentry's policy allowed for Sentry to recovery only payments that it made under the worker's compensation policy. The policy provision was silent on Sentry's right to recovery attorney's fees and costs that were incurred during related proceedings. Other provisions of the policy accounted for recovery of payments as well as its "expenses of recovery." Therefore, it is reasonable to conclude that, if Sentry had intended to mandate the recovery of attorney's fees and costs in worker's compensation cases, it would have included similar language in that provision as well. ✦

Decisions of the Wisconsin Labor and Industry Review Commission

Arising Out Of

Gronostajksa v. Eitsert Family Cares Inc., Claim No. 2017-021592 (LIRC May 31, 2019). The applicant alleged she sustained a work injury on July 14, 2017 when she was moving a patient from bed to a chair, and a subsequent injury on August 1, 2017. The medical records reflect inconsistent reports of when the symptoms began and the date(s) of injury. The difference in reported dates was approximately 1-2 weeks. Further, some of the medical records did not initially contain any alleged date of injury. Other records did not note the second alleged date of injury. The applicant did not initially specify the date of injury when she reported the injury. The unnamed administrative law judge dismissed the application based upon the inconsistencies. The Labor and Industry Review Commission reversed. The applicant was not a native English speaker. She may have had difficulty expressing specific dates and details of her injuries to her medical providers. The applicant was not the type of person who, when in pain and seeking early treatment with her medical providers, would be particularly concerned with the accurate reporting of details such as exact dates of work incidents. She experienced greater than average difficulty recalling details of past events. Communication issues and the applicant's poor memory were reflected in several medical records. The applicant was a credible individual with a less than stellar memory.

Bauman v. Aurora Health Care, Inc., Claim. No. 2015-030391 (LIRC June 28, 2019). The applicant alleged he sustained a low back injury on November 8, 2015, as a result of transferring a patient from one bed to another. On November 13, 2015, the applicant treated with his primary care physician, Dr. Moyer. The medical records noted that the applicant thought he had pulled a hamstring and there was "no known acute trauma." Dr. Moyer referred the applicant for a lumbar MRI. The MRI was performed one week later and revealed moderate disc protrusions at several levels. Later that same day, the applicant treated at Aurora Medical Center. He reported severe low back pain and urinary incontinence. The record noted the applicant indicated he hurt his back while picking up laundry. No work injury was noted. Later that evening, Dr. King scheduled the applicant for emergency low-back surgery. Dr. King noted that the injury occurred while applicant was working as a CNA lifting and transferring a patient between beds. Dr. King opined that the work incident precipitated, aggravated, and accelerated applicant's preexisting spinal condition beyond normal progression. The applicant testified that he told Dr. Moyer about the work injury during the first visit. The applicant's co-worker testified that she did not recall the applicant saying anything about injuring himself before, during, or after the incident. Dr. Monacci performed an independent medical examination. He opined that the applicant's condition was simply a manifestation of his common degenerative condition and was not a work-related injury. The unnamed administrative law judge awarded benefits. The Labor and Industry Review Commission reversed. Dr. Monacci's opinion was credible. The applicant's testimony that he told Dr. Moyer about the work incident was not credible because it was not recorded in medical notes. Instead, Dr. Moyer wrote that there was no known acute trauma. [Chairperson Gillick dissented in this decision. He noted that clinical medical records are "notoriously inaccurate." He believed that it was not credible that a 25 year old with no prior history of low back pain would have the degenerative condition described by Dr. Monacci. He considered the inconsistencies in the medical records fully explained. Chairperson Gillick also noted that a fundamental principle of Wisconsin worker's compensation law is that it is to be liberally interpreted to effectuate its purpose of protecting injured workers.]

Borchardt v. Precision Plastics, Inc., Claim No. 2017-018987 (LIRC June 28, 2019). The applicant alleged that she sustained a work-related injury to her back while helping to carry a 200 pound motor down stairs. She treated with a chiropractor, Dr. Anderson, three days later. She reported lumbar pain with symptoms radiating into her right leg. The clinic notes do not mention any report of a work injury. Dr. Anderson's records from later the same month indicate the applicant reported she sustained an injury while moving a dresser and cleaning. Ten months later, the applicant treated in the emergency department. She

reported back pain. The applicant reported she had sustained a worker's compensation injury. This is the first reference in the medical records to a work-related injury. She continued to treat for low back pain, with multiple doctors, over the next two years. The applicant did report her symptoms as related to a work-related injury. Dr. Studt opined that the work injury directly caused, precipitated, aggravated and accelerated applicant's preexisting degenerative condition. Dr. Thomas O'Brien performed an independent medical examination. He noted that contemporaneous medical records did not mention the work incident. Dr. O'Brien noted the records, instead, described an insidious onset of symptoms. He opined that her condition was an age related degenerative condition. The unnamed administrative law judge awarded benefits. The Labor and Industry Review Commission reversed. Legitimate doubt must arise from contradictions and inconsistencies in the evidence, and not simply from intuition. The inconsistencies in the medical records and applicant's testimony were sufficient to raise legitimate doubt that the applicant sustained a work injury as asserted.

Collins v. Wheaton Franciscan Services Inc., Claim No. 2014-014399 (LIRC July 26, 2019). The applicant alleged she sustained a back injury on April 24, 2014 while lifting a linen bag weighing approximately 50 pounds. The written incident report identified "left upper chest pain" as the body part affected. There was no mention of back symptoms or a back injury. The applicant treated with Dr. Baltrusaitis. The initial record did not reference a report of back pain related to the work incident. Dr. Bultrusaitis did write: "She admitted to me that she had some chest pain and back pain last year but that was in an unrelated area of the back." Dr. Baltrusaitis noted that the applicant's back range of motion was normal. The next clinic note also did not include anything concerning back pain. Dr. Baltrusaitis later released the applicant to full duty. Subsequently, the employer terminated the applicant for absenteeism and/or tardiness. The applicant began treating with Dr. Stein approximately nine months after she last treated with Dr. Baltrusaitis. She reported 10/10 pain in her low back. Dr. Stein's clinic note from that date recounted that the applicant had a history of lower back and neck pain since 2013. She also stated that the pain began after picking up a heavy linen bag. The unknown administrative law judge held the applicant was permanently and totally disabled as a result of a compensable L3-S1 injury. The Labor and Industry Review Commission reversed. The applicant sustained only a temporary chest wall strain injury. Dr. Stein's notes failed to credibly explain the dramatic change in the applicant's alleged symptoms. There was a significant lapse between treatment with Dr. Baltrusaitis and Dr. Stein. Further, Dr. Stein did not attempt to explain why he believed that the April 24, 2014 work incident caused a debilitating low back injury when the applicant treated for two months specifically and exclusively for chest wall symptoms.

Boritzke v. Robb Brinkmann Constr., Inc., Claim No 2012-013180 (LIRC September 19, 2019). See the Category of Judicial Estoppel for the facts of the case. The Commission held that the applicant was not injured while performing services growing out of and incidental to his employment. The applicant was no longer working when he was injured. Even though he was on the employer's premises at the time of the incident, that alone was not sufficient alone to bring the applicant's activity within the course of his employment. The people were still on the premises to try out the employer's new "toy." None of the other individuals claimed to be working or claimed pay for the time spent. Adding oil to the engine and gathering wood were not work activities. Further, even if they were, those were done prior to when the tire ran over the applicant's foot. See also the Categories of Judicial Estoppel, *Res Judicata*, and Collateral Estoppel.

Hanson v. Milwaukee Board of School Directors, Claim No. 2015-010634 (LIRC December 13, 2019). The applicant worked as a school nurse. She responded to a 12 year old, 120 pound student who was having a seizure on a school playground. She sat down alongside the student and logrolled the student onto her body. She remained in that position for 15-20 minutes until paramedics arrived. She required the assistance of another teacher to stand up. She reported a little bit of soreness in her low back, right hip and right leg. She believed this would resolve on its own and finished her workday. She worked a normal day the following day (a Friday). The applicant treated with Dr. Clemence the following Monday. The record noted a history of low back pain and degenerative disc disease that had been stable for the past several years. She reported severe right hip, thigh and leg pain had begun the prior Thursday without any specific inciting injury. Dr. Clemence noted an incident occurred at home without an injury mechanism. The applicant filed an injury report with the employer the day after she treated with Dr. Clemence. The applicant then treated with Dr. Clemence a few weeks later. The record again noted an incident occurred at home and

that there was no injury mechanism. The applicant ultimately underwent a two level fusion procedure. The medical records reflect the applicant had previously undergone several prior low back surgeries, beginning 25 years prior to the alleged work-related injury. The applicant treated for back symptoms periodically over the course of the time between those procedures and the alleged work-related injury. The surgeon opined the work incident precipitated, aggravated and accelerated the preexisting low back condition beyond normal progression without any explanation as to how that occurred. Dr. Noonan and Dr. Marie performed independent medical examinations. Both doctors opined the applicant's condition was personal in nature and not impacted by the work-related injury. Administrative Law Judge Minix denied the applicant's claim that she sustained a compensable work-related injury. The Labor and Industry Review Commission affirmed. The applicant had a significant history of prior low back symptoms. The medical records reflect she received periodic treatment for associated symptoms for at least 18 years prior to the alleged work-related injury. The applicant initially though she just had transitory soreness after the incident occurred. Her initial statements to Dr. Clemence support the denial further. While the applicant alleged that she fully described the work-related incident when she first treated with Dr. Clemence, the medical records do not support the assertion. Dr. Clemence did not provide any clarifying statement. Further, the alleged incident was rather benign and there is no medical explanation as to how her preexisting condition was aggravated beyond normal progression by said incident.

Scholler v. Ascension All Saints Hospital, Inc., Claim No. 2015-010085 (LIRC February 20, 2020). The medical records documented several different cause of the applicant's injury. These included sleeping with her head on her arm, lifting surgical trays, picking up a surgical cart, a sudden pulling sensation, moving a patient and more. Administrative Law Judge Mitchell awarded benefits. The Labor and Review Commission affirmed. Many of the discrepancies in the medical record were minor. These errors in the record were likely due to busy medical professionals more concerned with treating the patient than creating a legal record. Further, the applicant may have not understood the intent of a question or misspoke about exact details. Busy medical providers, who are primarily concerned with medical diagnoses and treatment, often write inaccurate descriptions of exactly how a work injury is alleged to have occurred. The Commission must carefully examine the entire record to determine the weight to be given to a particular note. Typically a great deal of weight is given to the first medical records. Here, the discrepancies with testimony and other evidence reflect the record is most likely a confused combination of several statements given by the applicant.

Bougie v. Appleton Coated, LLC, Claim No. 2018-023173 (LIRC April 16, 2020). The applicant filed an injury report alleging she sustained a right knee injury. She described the incident as "getting off a chair, turned to walk out the door. I took one step towards the door, felt a lot of pain in my right knee, I thought I was going to fall down." The same description was given to multiple medical providers. There were no witnesses. The floor was regular linoleum tile that was dry, clean and level. The applicant had on safety shoes with good soles. The applicant did not turn the chair in any fashion before she stood up. She did not recall which foot she stepped up with. She was walking in a straight line when she stepped. She was not twisting from side to side. She did not slip and her foot did not get caught on the floor. The medical records reflect the applicant had extensive advanced chondromalacia. The unnamed administrative law judge determined the applicant sustained a right knee injury. The Labor and Industry Review Commission reversed. The applicant's testimony did not support her twisting her knee. She did not report that she twisted her knee in any report of injury or recorded statement. The applicant did not feel or hear a pop in her knee. There was no swelling or bruising. Her treating physician did not specifically opine that the incident directly caused the injury. There was no "breakage" to result in a compensable injury under Llewellyn category 1. Given the facts that the applicant was walking in good shoes, on a clean, dry, level linoleum tile surface, took a step, only felt generalized pain, and returned to work without restrictions with a resolution of pain in that area (and then had further problems in other parts of her knee) there are legitimate doubts that the work incident aggravated her preexisting arthritis beyond its normal progression or that it was anything more than a manifestation of her preexisting degenerative arthritic condition

Rowe v. Milwaukee Transport Services Inc., Claim No. 2015-029225 (LIRC April 16, 2020). The applicant worked as a bus driver. He parked his bus at a layover area at the transit center in downtown Milwaukee. On his way back to his bus, he encountered an unidentified male. The applicant heard the individual say something to him. The applicant

stopped, turned toward the man, and waited for the man to approach him. The man continued talking but did not make any sense. When the man was approximately three to four feet away, the applicant turned to walk back toward his bus. He next recalled lying on the ground and another bus driver waking him up. The applicant had a head wound. The applicant could not recall what happened. He developed a subdural hematoma which required surgery. The applicant was diagnosed with a syncope episode. However, there was no medical evidence as to the basis for the syncope episode or a history of prior such episodes. There was some indication the applicant had untreated diabetes and hypertension. Administrative Law Judge Phillips held the applicant sustained a work-related injury as a result of an assault by the unnamed man. The Labor and Industry Review Commission affirmed. The evidence calls for the fact finder to accept one of two possible factual inferences. Either the applicant was physically assaulted by the unnamed man or he lost consciousness and fell on the street due to an idiopathic cause. The applicant's wallet was not stolen and there was no specific indication as to a potential motive the unnamed man would have had to assault the applicant. However, the assumption that the individual did not attack the applicant is inconsistent with the applicant being found alone and bleeding. The reaction of a normal person (such as the nearby man) to seeing the applicant fall to the street and open a wound on his head would be to offer assistance. The positional risk doctrine is useful when the facts surrounding the cause of injury are not readily determinable, but the conditions of the employment environment place the worker in circumstances that constitute a special zone of danger. When considering the circumstances in conjunction with the positional risk doctrine, the credible inference was that the applicant's injury arose out of his employment, through the agency of the third party attacker.

Sueflohn v. Hooper Corp., Claim No. 2013-003297 (LIRC May 8, 2020). The applicant sustained an admitted shoulder injury in December 2012. He underwent surgery in January 2013. In June 2013, the applicant reported that he had neck and arm pain. He was thereafter referred for a treatment related to his spine. The treating physician opined the applicant sustained a cervical injury at the time of the December 2012 incident. This injury was denied. The applicant was released from care in August 2013. He reported some ongoing catching in his shoulder with some pain. He treated once in January 2016 for these symptoms. In December 2017, the applicant returned to his treating physician from the original injury. He reported that he had recovered well. He reported that he had sharp pain and a pop in his shoulder while working out at a gym approximately one month before the visit. He reported increased pain and range of motion difficulties subsequent to that incident. The applicant also reported numbness extending into his hand when he turned his neck. The treating physician opined the applicant had a gradual progression of post-traumatic osteoarthritis in his shoulder. The applicant also had another evaluation for cervical symptoms because of ongoing upper extremity symptoms which were concerned to be mimicking problems from the shoulder. He was referred for a cervical fusion. Dr. Barron and Dr. Bartlett opined the applicant's cervical symptoms were personal in nature and unrelated to the December 2012 work-related injury. Dr. Bartlett opined the applicant's shoulder symptoms were related to his training activities. The unnamed administrative law judge awarded the requested shoulder and cervical surgeries. The Labor and Industry Review Commission affirmed. All of the Commissioners determined that the applicant's activities at the gym did not cause his injury or condition that required additional treatment. Instead, the activities merely caused him to experience pain in certain areas. [Commissioner Falstad dissented in part. He opined the applicant did not sustain a cervical injury. The applicant did not report neck pain until six months after his initial injury to the right shoulder. At that time, he already had significant preexisting degenerative symptoms. He then did not treat for any additional cervical symptoms over four years, until December 2017 when he began to have numbness when he turned his neck after the incident while he was working out. When the applicant treated in 2016, he did not report any cervical symptoms. Given his preexisting degenerative condition, the lengthy timeline before he sought treatment for his neck, and that he injured himself in the workout, Commissioner Falstad had legitimate doubts that the cervical spine surgery was related to the December 2012 injury.

Bad Faith

Vanden Heuvel v. James Calmes & Sons, Claim No. 2018-00284 (LIRC July 26, 2019). The applicant was a project manager. He testified the date of injury occurred on a frustrating afternoon because the owners of the job site did not want to sign change orders. The employer wanted to play hardball. The applicant and the employer's owner had a phone conversation wherein

the applicant asked if he was going to be fired. Later, the applicant fell from a 10-foot ladder. He sustained broken ribs, cracked vertebrae, a broken left elbow, and other bumps and bruises. The owner of the site told the employer owner that he felt that the applicant had jumped off the ladder and that the injury was self-inflicted. He did not say that he was 100% certain but indicated that it was his interpretation, based on the fact that the applicant was physically upset about the prior phone conversation. Administrative Law Judge Sass awarded the maximum bad faith benefits. The Labor and Industry Review Commission affirmed. Even if the applicant was upset and even if he may have suspected that his job was in jeopardy (which he denied), it would be speculation to find that he fell off the ladder to hurt himself. There was no non-speculative, substantial, and credible evidence to support a finding of self-infliction. The applicant had to show that the insurer had no reasonable basis for denying benefits and that the insurer knew or recklessly disregarded that there was no reasonable basis for denying benefits. The job site owner's speculation could not form a reasonable basis to conclude that the applicant's injuries were self-inflicted. A reasonable insurer would not deny a claim for someone falling off a ladder at work based solely on a hunch. The insurer relied on the job site owner's speculation, even though the owner was not near the fall and could not recall exactly what the applicant said prior to the fall. There were no mitigating factors.

George v. Creation Technologies Int'l., Claim No. 2017-019041 (LIRC February 28, 2020). A dispute regarding the nature and extent of the applicant's work-related injury, and required payment of medical expenses, was resolved via a compromise agreement. The compromise agreement provided that the insurer would pay medical expenses incurred before the date of the Order. The Order did not specify the bills that were to be paid. The insurer initially did not realize there were medical bills that were required to be paid because the Order did not outline the same. The applicant filed a hearing application, alleging bad faith in issuing payment, and seeking the maximum $30,000.00 in penalties, approximately six weeks after the Order was approved. Upon notification that the medical bills needed to be paid, the insurer began to review the billing statements and process payments. Some of the bills were paid within a few days and others within a few months (because of coding issues). The insurer attempted to determine whether all of the bills were paid but did not receive any response from the applicant's attorney. Several months later, another bill was forwarded to the insurer. This bill was for emergency medicine specialists for a date of service around the date of injury. This was received by the insurer two weeks prior to the hearing, which was approximately two years after the injury. Administrative Law Judge Minix held there was bad faith in non-payment of the emergency medicine specialist bill because the insurer paid other bills associated with that date of service and should have realized that there were separate facility charges and professional charges from an emergency department visit. The other bills were promptly paid and no bad faith was found. The Labor and Industry Review Commission affirmed the determination that the other bills were appropriately paid and no bad faith occurred. There was no timeframe for issuing the payment. The insurer was allowed to evaluate the bills and ensure proper coding before issuing payment. The Commission remanded the case for a determination regarding the timing of the payment for the emergency medicine specialist bills. The insurer was not required to 'connect the dots' and the bad faith evaluation is to be focused solely on the timing of payment upon notification to the insurer that the bill remained outstanding.

Causal Connection

Cook v. Legacy Flexo Corp., Claim No. 2018-003271 (LIRC October 23, 2019). The applicant alleged he sustained a work injury to his left knee and low back from a specific incident while climbing up a metal ladder. A temporary left knee injury was admitted. His left knee treatment included an evaluation with Dr. Enright. The applicant was diagnosed with left knee joint effusion, joint line tenderness and a positive McMurray's test. Dr. Lemon performed an independent medical examination. His examination revealed diffuse tenderness. Dr. Lemon opined the injury resulted in a minor knee sprain that should have healed uneventfully within one month. He acknowledged Dr. Enright's interpretation of an MRI including a low grade partial tear of the ACL as well as an increased proton density signal which Dr. Enright believed could represent a capsular junction injury. Dr. Lemon acknowledged a partial tear of the ACL could be due to acute trauma; however, he opined the effect of the tear was limited to a minor left knee sprain. Dr. Lemon did not address Dr.

Enright's description of a possible capsular junction tear. Surveillance video showed the applicant walking to work at Lambeau Field. He helped people get seated into tubes for sliding down a snow covered ramp. The applicant gave the individuals a push to get them going down the ramp. He walked with a slight limp that favored his left leg. He moved freely at the top of the tube run. He squatted repeatedly and did not exhibit any noticeable difficulty getting up from his squats. Administrative Law Judge Falkner opined the applicant did not sustain a back injury. He opined the applicant sustained a knee injury which resolved in full (this was consistent with the opinion of one of the treating physicians). The Labor and Industry Review Commission affirmed with respect to the low back condition. However, the Commission reserved jurisdiction for one year to allow the pro se applicant the ability to secure competent medical evidence supporting that he sustained more than just a temporary left knee strain. If the applicant did not obtain and submit to the Wisconsin Worker's Compensation Division such medical evidence, the decision would be become final in essentially all respects. The Commission indicated it took the unusual discretionary step of leaving the decision interlocutory for one year because Dr. Lemon failed to completely and consistently address Dr. Enright's interpretation of the left knee MRI.

Paez v. Mayville Eng'g Co., Claim No. 2017-019553 (LIRC January 22, 2020). The applicant sustained an admitted low back injury. He had treated on several prior occasions for same/similar symptoms. The treating physician was unaware of that prior treatment. The applicant denied the treatment and prior symptoms despite being reminded of the associated medical records during his course of treatment. The independent medical examiner was aware of the prior symptoms and treatment. He opined the applicant sustained a temporary injury which resolved in full, and that the applicant's ongoing symptoms were causally related to the personal/prior condition. The unnamed administrative law judge awarded all benefits sought. The Labor and Industry Review Commission reversed in part. Commissioners Falstad and Maxwell held the treating physician's opinion was based on the inaccurate history provided by the applicant (specifically regarding the discrepancies of prior treatment/ symptoms). Therefore, his opinion could not be considered credible, and could not be relied upon to award benefits. The independent medical examiner was aware of the applicant's accurate medical history and opined the injury was temporary in nature. Benefits are owed only in accordance with that opinion. [Commissioner Gillick dissented. He held the applicant was credible. Commissioner Gillick noted that manual laborers tax their bodies for a living. He opined that it was not surprising that the applicant did not remember his prior back injuries. Further, Commissioner Gillick specifically opined that the treating physician's opinion was not lessened by the fact that he was not aware of these prior injuries.]

Death Benefits

Marsalek v. Work Inj. Sup. Ben Fund, 2019 WL7046898 (LIRC December 13, 2019). The applicant died in a car accident after he rear-ended a school bus. The applicant made no attempt to stop or slow his vehicle before the accident occurred. A toxicology report showed the presence of cannabinoids, cocaine metabolite and ethanol in the applicant's system. The employer had a policy that prohibited the use of drugs by an employee in any company vehicle. The applicant signed a document indicating his awareness of the policy. Dr. Tovar opined the levels and quantity of drugs were sufficient to have made the applicant in violation of the employer's drug free workplace policy and were causally related to the motor vehicle accident and death. The applicant was not married, had no children, and had no dependents. Administrative Law Judge Shampo held that the employer and insurer owed the entire available death benefit to the state. The Labor and Industry Review Commission affirmed. Recently amended Wis. Stat. §102.58 provides that "if an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee's injury, no compensation or death benefits shall be payable to the injured employee or a dependent of the injured employee." However, the state is not an injured employee or a dependent. Wis. Stat. §102.49(a) requires payment of $20,000 to the state for each injury resulting in death. Wis. Stat. §102.49(b) provides "in addition to the payment required under par. (a), in each case of injury resulting in death leaving no person dependent for support, the employer or insurer shall pay into the state treasury the amount of the death benefit otherwise payable, minus any payment made under Wis. Stat. §102.48(1), in 5 equal annual installments with the first installment due as of the date of death." The language "otherwise payable" could potentially make the state's claim to death benefits derivative of the claim a dependent would have, and result in payment not being owed to the state for those benefits. However, Wis.

Stat. §102.49(5)(e) provides that the adjustments in liability provided in [several statutes, including Wis. Stat. §102.58] do not apply to payments under that section. Therefore, there is no bar to death benefit payments being owed to the state.

Due Process

Oja v. M.A.D. Enterprises, Claim No. 2010-024657 (LIRC September 19, 2019). Administrative Law Judge Shimabuku held a hearing in March 2018 on the extent of left shoulder disability.. The record was left open for the submission of an independent medical examination. Administrative Law Judge Shimabuku left the Division in November 2018. The independent medical examination was submitted in December 2018. The case was transferred to Administrative Law Judge Roberts to write the decision. He determined that the applicant's testimony contracted his medical records. All permanency claimed was denied. The Labor and Industry Review Commission vacated the decision. Where there is conflicting testimony and the judge made findings based upon the credibility of the witnesses, the Commission must have the benefit of the judge's personal impressions of the material witnesses. Administrative Law Judge Roberts based his decision, at least in part, on what he thought of the applicant's credibility. He did this without the benefit of the demeanor impressions of the ALJ who heard the witnesses. This was a denial of due process. Administrative Law Judge Shimabuku was contacted regarding her demeanor impressions from the hearing. However, this occurred 17 months after the hearing and she did not recall any specific demeanor impressions. The Commission remanded the case for an entirely new hearing and decision.

Employment Relationship

Van Remortel v. Big Mike's Home & Barn, LLC, Claim No. 2015-013560 (LIRC May 31, 2019). The applicant alleged he worked for the employer on three days at a residential job site. He earned $10.00 per hour. He was paid with three checks (one each day) made out to the applicant's company's name. The applicant provided his own tools. He was paid $300.00 total. The applicant and owner of the employer were the only people on the job site. The applicant had never done the particular type of work before and was directed by the employer. The applicant fell off a ladder owned by the employer. The applicant did not know the homeowner and did not have any profits or losses from the job. The applicant alleged he was an employee of the employer, whereas the employer alleged he was an independent contractor. The employer also argued that his business was not subject to the worker's compensation act. Administrative Law Judge Martin held the applicant was an actual "employee" of the employer, and that the employer was covered under the Worker's Compensation Act. The Labor and Industry Review Commission affirmed the determination that the applicant was an "employee" and remanded the case for an evidentiary hearing on the issue of whether the employer was a covered entity under the Act. Some of the evidence supported the assertion that the applicant was an independent contractor. However, the applicant did not meet the entire nine-part test set forth in Wis. Stat. S. 102.07(4)(a). The applicant's business did work other than what he was doing for the employer on the date of injury. The tools were different. The applicant did not control the means of performing the work, incurring expenses for the work or that he received compensation on a per job basis, had business expense or may have realized a profit or loss. There is a rebuttable presumption that the employer/employee relationship exists when a person is rendering a service for an "employer." Further, the evidence was not sufficient to determine whether the employer usually employed three or more employees or had paid wages of $500.00 or more in any calendar quarter, in order for the employer to be a covered entity under Wis. Stat. §102.04(1)(b). A negative inference will not be taken by the lack of information and/or testimony provided by the employer at the initial hearing.

Lee v. UW-System Administration UW-Stout, Claim No. 2017-027447 (LIRC February 28, 2020). The applicant was a student at UW-Stout. As part of her studies, she was required to provide mental health services at a practicum site to gain clinical experience. On January 25, 2016, she was participating in the program at a practicum site when she sustained an injury to her knee. The applicant received no payment from UW-Stout or the practicum site location for performing the services. Further, no funds were exchanged between UW-Stout and the site location for performance of her duties. She alleged that she was an employee of UW-Stout. Administrative Law Judge Shampo held that the applicant was not an "employee" at the time of her alleged injury, and therefore dismissed her application. The Labor and Industry Review Commission affirmed. Wis. Stat. §102.07(12m)(b) essentially provides that an institution of higher education must elect "employee status" for an unpaid student performing services to be considered an employee under the Act. UW-Stout did not make

such an election. The applicant is not entitled to be considered an "employee" under Wis. Stat. §102.07(1). An individual must have an appointment, or contract of hire, express or employed, with a putative employer in order to meet the statutory definition of an "employee" under that statute. Wages or compensation (consideration) of some kind is a requirement for a legal contract of hire. That fundamental requirement cannot be ignored. The applicant did not receive any wages or anything else of value for the services she provided. She provided the services as a step in obtaining for herself a thing of value (her degree). This was the same as any student who performs out of classroom coursework exclusive of a contract of hire.

Evidence

Simonich v. SMJB, Inc., Claim No. 2016-011807 (LIRC February 7, 2020). The applicant alleged he sustained a specific injury. He alleged that he worked for another 20-25 minutes after the injury. He indicated that he discussed the injury with his coworkers' right after it occurred and that he favored his right arm. The applicant and the employer watched approximately four minutes of video covering the alleged incident, a few days afterward. The employer's operation manager testified that he watched the remaining 20 minutes or so as well, until the applicant stopped working. He testified this did not support any type of injury, or reflect the applicant exhibiting any pain symptoms. Only a portion of the four minute video, grainy, and capturing only some frames, was still available at the time of the hearing. The remaining portion of the video, including the approximately 20 minutes after the alleged incident occurred, was destroyed sometime after the operations manager reviewed the video. Administrative Law Judge Landowski awarded benefits. The Labor and Industry Review Commission affirmed. The employer failed to discharge its duty to notify the applicant before destroying video evidence. An appropriate sanction is to draw the negative inference that the rest of the video showed what the applicant alleged.

Rolon v. Generac Power Systems, Inc., Claim No. 2017-028695 (LIRC April 29, 2020). The applicant alleged he sustained a work-related injury in November 2017. He was released with permanent restrictions and working on July 13, 2017. His wife called the clinic to report he had significant pain and headaches. The applicant was released from work for one month. The same day, video surveillance showed the applicant sitting at a bar drinking beer for three hours, and standing outside the bar and conversing with other individuals. The next day, he was videotaped loading items into the back of a capped pickup truck with his wife. He subsequently drove to an antique mall where they sold the items. He lifted a cooler, medium sized bag and plastic tub with unidentified items. Further, an anonymous email was submitted to the Department of Workforce Development from June 2017. This indicated the applicant was bragging about making thousands of dollars a month, buying and selling antiques, performing heavy lifting and had admitted to undergoing unnecessary surgery to receive a better financial payout. Administrative Law Judge Colleen Bero-Lehmann did not allow the email to be admitted into evidence. She awarded all of the benefits sought. The Labor and Industry Review Commission affirmed. The applicant was credible despite the video surveillance and alleged anonymous email. There was no clear evidence that anything the applicant lifted in the video exceeded his permanent fifteen pound lifting restrictions. Further, the information in the anonymous hearsay email was completely incredible.

Fraud

Bein-Aime v. Speedy Metals, Inc., Claim No. 2015-00535 (LIRC June 28, 2019). The applicant alleged he sustained work-related back injury. A co-worker testified the applicant previously reported having personal back issues. The same co-worker testified the applicant went to the co-worker's house four times after the applicant no longer worked for the employer. The applicant asked the co-worker to testify on his behalf and to state that he saw the applicant get injured at work. He indicated the applicant reported the applicant had financial difficulties and the applicant faced a possible eviction. The applicant indicated he needed the co-worker to remember the applicant getting hurt at work so the applicant could win his case. The applicant told the coworker that, if there was any money left over from the claim, the applicant would help out the co-worker. The co-worker completed two affidavits regarding contact with the applicant. The unnamed administrative law judge awarded benefits. The administrative law judge advised the Labor and Industry Review Commission the applicant testified candidly, in detail and without hesitation, even about things not favorable to his case. The judge indicated the same was not true with the respondent's witnesses. He indicated the problems with the respondent's witnesses were so noticeable that he referenced it in his decision. He also found various factual discrepancies. The

judge indicated he, therefore, found the applicant more credible. The Labor and Industry Review Commission reversed. The Commission held the co-worker (noted above) was the most credible. The individual was no longer employed by the employer at the time of the hearing. He had been a work friend of the applicant. He had no reason to lie. Further, the applicant testified that he worked light duty post alleged injury whereas the personnel records reflect the applicant performed regular work duties.

Issue Preclusion

Boritzke v. Robb Brinkmann Constr., Inc., Claim No 2012-013180 (LIRC September 19, 2019). See the Category of Judicial Estoppel for the facts of the case. The Commission held that the applicant's claim was not barred by the doctrine of issue preclusion/collateral estoppel. Issue preclusion prevents the re-litigation of issues that have actually been litigated in a prior proceeding. This is narrower than claim preclusion and does not require identity of parties. The court must analyze two things. First, it must determine whether the issue of fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment. If so, the court must then determine whether applying issue preclusion comports with issues of fundamental fairness. There are five factors to consider when determining the issue of fundamental fairness. However, those are not applicable if the first element is not met. Here, the primary issue of whether the applicant was injured while performing services growing out of and incidental to his employment was not actually litigated in the circuit court. Assertions were made by the applicant's attorney that the applicant was not in the course of his employment. However, there was no actual determination by the jury that the applicant was not in the course of his employment. Therefore, the claim was not barred under the doctrine of collateral estoppel. *See also* the Categories of Judicial Estoppel, *Res Judicata*, and Arising Out Of.

Judicial Estoppel

Boritzke v. Robb Brinkmann Constr., Inc., Claim No 2012-013180 (LIRC September 19, 2019). See the Category of Judicial Estoppel for the facts of the case. The Commission held that the applicant's claim was not barred by the doctrine of issue preclusion/collateral estoppel. Issue preclusion prevents the re-litigation of issues that have actually been litigated in a prior proceeding. This is narrower than claim preclusion and does not require identity of parties. The court must analyze two things. First, it must determine whether the issue of fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment. If so, the court must then determine whether applying issue preclusion comports with issues of fundamental fairness. There are five factors to consider when determining the issue of fundamental fairness. However, those are not applicable if the first element is not met. Here, the primary issue of whether the applicant was injured while performing services growing out of and incidental to his employment was not actually litigated in the circuit court. Assertions were made by the applicant's attorney that the applicant was not in the course of his employment. However, there was no actual determination by the jury that the applicant was not in the course of his employment. Therefore, the claim was not barred under the doctrine of collateral estoppel. See also the Categories of Judicial Estoppel, *Res Judicata*, and Arising Out of.

Mental Injury

Purdy v. Appleton Coated LLC, 2019 WL 5546805 (LIRC October 23, 2019). The applicant worked for the employer as a crane operator. The cables snapped while lifting a 20,000 pound roll of paper. The roll of paper was hanging lopsided from the crane books. The assistance of a third party contractor was needed to remedy the mishap. The applicant sat in the crane to coordinate efforts with that third party contractor. While they were attempting to fix the issue, one of the chains from the crane broke loose and struck the safety glass in the crane. There was a center base bar along with the safety glass. The glass shattered and the safety bar wrapped itself around the applicant. The applicant sustained no physical injury. He was shaken up mentally. He testified the situation did not hit him until he was driving home. The applicant subsequently asserted an ongoing fear of working with the crane. The employer had the applicant perform other jobs until the plant ultimately closed. Dr. Gerald Bannasch and Licensed Clinical Social Worker Krista Jensen both opined that the applicant had developed post-traumatic stress disorder as a result of the work-related injury. Dr. Brad Grunert performed an independent medical examination. He held that the applicant did not experience any life threatening condition and that the work incident did not constitute an "extreme or unusual stressor" for a crane operator. The applicant's co-workers and supervisor testified

about the nature of work of a crane operator. They testified that crane operators do occasionally see accidents such as the one that occurred in this situation. Administrative Law Judge Falkner held the applicant did not sustain a compensable mental injury. The Labor and Industry Review Commission affirmed. The applicant did not meet the School District No. 1 standard. The applicant did not demonstrate that he sustained a mental injury as a result of a situation of greater dimensions than the day-to-day emotional strain and tension which all employees in his profession experience.

Misconduct / Substantial Fault

Silgman, v. Potawatomi Bingo Casino, Hearing No. 19002563MD (LIRC October 31, 2019). The applicant worked part-time. The employer had a detailed no fault attendance policy. The applicant acknowledged receipt of the attendance policy with his signature. The policy assigned .5 occurrences for an instance of tardiness of eight minutes or more, one occurrence for an absence with notice, and three occurrences for an absence without notice. Consecutive days of an absence were assessed a .5 occurrence. Occurrences were doubled on "blackout days." For part-time workers, the accrual of seven occurrences during a rolling 12-month period resulted in discharge. The applicant was discharged for accruing more than seven occurrences under the policy within a rolling 12-month period. There was no evidence that the applicant was discharged for any other reason besides attendance, despite the applicant's assertions in this respect. The Labor and Industry Review Commission affirmed a decision that the applicant was discharged for substantial fault. In analyzing discharges, the Commission follows a three-step approach. First it determines whether the employee was discharged for misconduct by engaging in any of the actions enumerated in Wis. Stat. § 108.04(5)(a)-(g). If those provisions do not apply, the commission determines whether the employee's actions constitute general misconduct as defined in Wis. Stat. § 108.04(5)(intro.). Finally, if misconduct is not found, the commission determines whether the discharge was for substantial fault by the employee connected with the employee's work, as set forth in Wis. Stat. § 108.04(5g). When discharge is based on attendance, the Commission first looks to see if Wis. Stat. § 108.04(5)(e) applies. This provision governs misconduct due to absenteeism on more than 2 occasions within the 120-day period before the date of the employee's termination, unless otherwise specified by his or her employer in an employment manual of which the employee has acknowledged receipt with his or her signature, or excessive tardiness by an employee in violation of a policy of the employer that has been communicated to the employee, if the employee does not provide to his or her employer both notice and one or more valid reasons for the absenteeism or tardiness. The Commission determined that, here, the statute did not apply because it considered absenteeism separately from tardiness. The employer's attendance policy assessed points for different types of attendance infractions, kept a running total of all points assessed, and mandated discharge when a certain point total is reached, thereby combining absenteeism and tardiness. The Commission evaluated Wis. Stat. § 108.04(5)(intro.), which defines misconduct generally as "one or more actions evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which an employer has a right to expect of his or her employees, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design of equal severity to such disregard, or to show an intentional and substantial disregard of an employee's interests, or of an employee's duties and obligations to his or her employer." The applicant provided notice to his employer of his absences and instances of tardiness. Although not all of the absences and instances of tardiness were for valid reasons, the last two infractions leading to the discharge were for valid reasons (car trouble during the winter). Therefore, the infractions did not evince the requisite intentional and substantial disregard necessary to support a finding of misconduct under the general definition. The final inquiry was whether the acts or omissions at issue amounted to substantial fault connected with the employee's work, within the meaning of Wis. Stat. § 108.04(5g). This includes "those acts or omissions of an employee over which the employee exercised reasonable control and that violate reasonable requirements of the employer. It does not include minor infractions or rules unless an infraction is repeated after warning, inadvertent errors, or any failure of the employee to perform work because of insufficient skill, ability, or equipment." The employer's requirement that the applicant report to work when scheduled was reasonable and something over which the applicant generally exercised reasonable control. He had received a written warning for five attendance infractions. While his last two infractions were for valid reasons,

he would not have been discharged had he not previously been tardy on multiple occasions. Therefore, the discharge was for substantial fault connected with his work. [Commission Maxwell concurred separately to write that she would have found misconduct pursuant to Wis. Stat. § 108.04(5)(e) and the Court's holding in Beres that allowed an employer to opt out of the statutory definition of "misconduct" by absenteeism and set its own absenteeism policy, the violation of which would constitute statutory "misconduct."] [*See also Gehrke v. Advanced Disposal Services*, Hearing No. 19001693MD (LIRC October 31, 2019) for another Labor and Industry Review Commission evaluation of a similar attendance policy. The Commission came to the same ultimate determination that the applicant was discharged for substantial fault when the discharge occurred as a result of the accrual of too many occurrences under the attendance policy.]

Occupational / Repetitive Injury

Albright v. Deckert WL, Co., Inc., Claim No.: 2017-013593 (LIRC June 28, 2019). The applicant performed a variety of duties for employer, including office work, maintenance work, a production role and a machine shop role. He filled in on the production floor as needed. This work involved lifting items up to 120 pounds and feeding 60 foot belts into a machine. He also ran a milling machine, which required him to bend down to operate it. The applicant testified that his back was often sore after work but considered it part of his job. He testified that, beginning in 2014, he would often take a pain pill in the morning and a Vicodin in the evening. On March 8, 2014, the applicant began treating with Dr. Milosavljevic. He reported lumbar pain and radiculopathy. His treatment included six epidural steroid injections in 2014 and refills on medication. The applicant reported 90 to 100 percent pain relief from the injections. On March 20, 2015, he went to his attorney's office to sign documents. He read the documents and upon leaning forward to sign he stated that "liquid hot fire" erupted in his leg and he went "flying out of the chair" and rolled on the floor in severe pain. He treated in the emergency room the next day. He reported burning, hot, and numbness in his upper right leg. He stated that this pain was different than his previous pain. The applicant continued treatment, eventually undergoing medial branch block and radiofrequency ablations to his lumbar spine. Dr. Karr performed an independent medical examination. Dr. Karr opined that the applicant's work exposure was not a material contributory causative factor in the development of his condition. The unnamed administrative law judge awarded benefits. The Labor and Industry Review Commission affirmed a determination that the applicant sustained a repetitive occupational injury. The applicant leaning over to sign a document at his attorney's office alone would not have caused spinal damage but for the previous work injury to his back. Further Dr. Karr's opinion was not credible because he did not have an understanding of the applicant's job duties. Dr. Karr also treated the applicant's injury as a traumatic injury and not a progressive occupational injury as asserted by the applicant and supported by the treating physician.

Bell v. Tradesman Int'l, Inc., Case No. 2015-002513 (LIRC June 28, 2019). The applicant worked as a welder for Tradesmen International. He alleged a 2012 cervical injury as a result of his job duties for this company. The applicant underwent surgery. He had improved in his upper arm symptoms, but still some ongoing neck pain post-surgery. He was advised a two level fusion was a possibility but not ideal. Subsequently, in 2014, the applicant returned to work at various locations, through the union hall. He worked for 15-16 employers before he was ultimately provided permanent restrictions in 2016 by Dr. Chen. He did not work again for Tradesmen International. Dr. Burton opined the applicant's cervical condition was personal in nature and not the result of his job duties for Tradesmen International. Tradesmen International and its insurer wrote to Dr. Chen and explained that the applicant had worked for 15-16 employers after his full time full duty work release in 2014 and the assessment of permanent restrictions in 2016. Dr. Chen affirmatively responded to an inquiry as to whether the applicant's additional work exposure for those other employers made his cervical condition worse, necessitating the need for the permanent restrictions. Dr. Chen specifically indicated "likely his condition is related to initial injury. However, additional employers work environment, exposure may hav[e] aggravated his pain as well." Vocational experts opined the applicant sustained approximately 50% loss of earning capacity as a result of the permanent restrictions in 2016. The unnamed administrative law judge determined that the applicant sustained a work-related injury in 2012 and awarded the claimed loss of earning capacity. The Labor and Industry Review Commission affirmed with respect to the existence of a work-related injury in 2012. However,

the case was remanded for a new hearing, with instructions to implead the employer where the applicant last worked prior to the assignment of permanent restrictions. While the applicant alleged there was no medical testimony to establish any other employer being responsible for the injury, except Tradesmen, Dr. Chen's opinions (in response to Tradesmen International and its insurer's inquiry) is medical evidence within a degree of medical certainty or probability that the subsequent work activities could have caused a new work injury and additional disability. The date of injury for occupational disease includes the last date of work for the last employer whose employment caused disability. Full liability for the occupational disease rests with the employer for whom the employee was working on the date of disability, or when disability arises after the cessation of all employment that contributed to the disability, the last employer whose employment was causative of the occupational disease. The last employer is liable. The Commission cannot apportion disability on an occupational disease basis between employers. Courts have stated there is no injustice to any individual carrier or employer because the law of averages will equalize burdens imposed by this act among the employers and insurers in the state. To determine if there was an occupational condition that ripened into a disabling condition, courts look at actual physical incapacity to work rather than a medical or pathological disability which results in no wage loss. Where there is one date of injury, if an applicant plateaus at a tolerable level of symptoms and is able to work without restrictions, but later becomes worse to the point of increased disability with additional work exposure, the date of disability is as of the point of increased disability with additional work exposure. When there are cases of multiple dates of injury with discrete periods of exposure, causing permanent disability, then recovery and subsequent disability with subsequent exposure, the insurer on the risk at the time of the earlier date of injury is liable only for the actual disability as it exists at the earlier date of injury and not for some percent of later arising disability occurring after the subsequent date of injury which may be attributed to the occupational exposure before the earlier date of injury. Recovery does not mean complete relief from symptoms or reaching a permanent level from which an individual does not decline. An applicant's ability to return to work can be considered in whether a recovery has occurred.

Roberts v. Wal-Mart Assoc., Inc., Claim No. 2018-010378 (LIRC August 30, 2019). The applicant sustained a work-related hip injury while working for the employer in Illinois on August 26, 2010. He underwent surgery. He settled that claim in Illinois on a full and final basis. The applicant subsequently began working for the employer in Wisconsin. He filed a hearing application, alleging that he sustained a repetitive occupational injury and specifically an aggravation of an underlying right hip condition in the nature of development of osteoarthritis and avascular necrosis. The unnamed administrative law judge awarded benefits. The Labor and Industry Review Commission reversed. The treating physician did not record any discussion of the applicant's work duties or state how the applicant's work duties might have affected the applicant's underlying condition. The treating physician opined that the work activities were at least a material contributory causative factor in the onset or progression of the applicant's symptoms. This statement was conclusory and did not explain the mechanism of injury or how the work duties would advance the applicant's condition or need for surgery. The treating physician checked all three causation boxes on the WKC-16B which suggested that his causation opinion was not entirely clear. In contrast, the independent medical examiner, Dr. Summerville, clearly opined that the closed-out 2010 injury was the direct cause of the hip condition and need for surgery. He reviewed the work duties description. He opined that the workplace exposure would not be in any way causative of avascular necrosis. He also cited medical literature to support generally repetitive activity is not causative of avascular necrosis. The independent medical examiner focused on whether the work activities affected the applicant's medical condition of avascular necrosis, rather than whether the work duties may have caused pain or symptoms.

Punzel v. Dave Jones, Inc., Claim No. 2018-004634 (LIRC September 5, 2019). The applicant worked as journeyman crew leader in the plumbing field. His work was conceded as being physically demanding. The applicant worked in the residential and new construction department from approximately 2013 to 2015. He then began to work in the service and remodel department. This department was more physically demanding than where he initially was employed. The applicant testified he had no right knee problems or symptoms when he started working for the employer in 2013. In October 2013, he alleged a specific injury while walking down a stairwell to install plumbing underground. The stair broke, he dropped to the ground, and ended up in a heap on the basement. He began to treat approximately two months later. He did not miss any work. He was not referred for any treatment other than

physical therapy and use of a brace. In February 2014, he reached end of healing and was released full duty. He did not treat again for approximately three and a half years. He reported that his right knee symptoms had changed. The applicant reported increased pain throughout the day and more instability. He described the symptoms as a progressive change over time. His treating physical referred back to the 2013 incident and the applicant's ongoing job duties. He submitted a WKC-16B that supported an occupational injury and specific aggravation injury. Dr. Kulwicki performed an independent medical examination. He opined that the applicant did not sustain a compensable injury in 2013. Dr. Kulwicki also indicated that an occupational injury was "not at play in this case." The insurer for the 2017 injury asserted the claim for an alleged repetitive injury was only asserted after the insurer for the 2013 specific injury denied the claim. The 2017 insurer requested that the insurer for the 2013 be impled to the case. Administrative Law Judge Mallon held the applicant sustained an occupational right knee injury, culminating in August 2017. The Labor and Industry Review Commission affirmed. The applicant had no problems with his right knee when he started working for the employer. He worked in a very physical demanding job. The employer witnesses agreed with the applicant's description of his job duties. Dr. Kulwicki did not discuss the applicant's job duties with him. Dr. Kulwicki's opinion was inconsistent in that he opined the applicant's body weight affected his knee condition but determined that the frequent carrying of an additional 100 pounds of weight on an uneven ground would not cause or aggravate a knee condition. Dr. Kulwicki's statement that a workplace exposure was "not at play in this case" was not correct. Finally, the insurer with the policy in place at the time of the culmination of the occupational injury has the entire liability for that occupational injury. Liability for an occupational injury cannot be apportioned. If there is one date of injury, but an applicant plateaus at a tolerable level of symptoms and can work without restrictions, and later becomes worse to the point of increased disability with additional work exposure, the date of disability is as of the point of increased disability with additional work exposure.

Hemphill v. Mathy Construction Co., Claim No. 2018-010372 (LIRC January 22, 2020). The applicant worked as a heavy equipment operator. On July 15, 2017, he began to experience severe low back pain, including radicular symptoms in his legs, after watering his garden at home. He presented to a chiropractor for treatment. He filled out a form indicating the injury arose while watering his garden at home. After beginning treatment, a chiropractor discussed with the applicant that his condition could be affected over time by heavy equipment work such as what he did for the employer. The chiropractor told the applicant that he chiropractor believed the applicant's low back problem was work related. The applicant subsequently reported that his symptoms had started at work as an equipment operator. The records then began to reflect the symptoms were work related. The applicant subsequently failed to report the symptoms began when he was watering his garden at home. His chiropractor opined that the low back injury resulted from low back stressors that the applicant encountered at his job. The applicant was released from work for a period of time. During that time, the employer observed the applicant operating the same heavy equipment, for another company, that he alleged caused his symptoms. Dr. Monacci performed a medical record review. He opined that the applicant's job duties were not a causative factor to his condition. Administrative Law Judge O'Connor held the applicant sustained a work-related injury and awarded benefits. The Labor and Industry Review Commission affirmed with a slight reduction in the amount of permanency assessed. Dr. Monacci opined the symptoms were not caused by the work activities. However, he did not specifically attribute the condition to the applicant's gardening activities or any other cause. The applicant credibly testified regarding his job duties. The applicant acted inappropriately and exhibited poor judgement when he chose to violate his own medical release and perform work duties he claimed were causative of his symptoms. However, the job duties provide support for causation despite a lack of good judgement. [Commissioner Falstad dissented. He noted the applicant did not dispute that his symptoms began while he was at home. Additionally, Commissioner Falstad noted the applicant's story changed dramatically after the applicant began treatment with a chiropractor. He also noted the applicant deliberately failed to mention the home incident in subsequent medical record and instead alleged the onset occurred while he was working. He was then caught performing the same job duties for another company. Commissioner Falstad opined that the applicant had a complete lack of credibility.]

Orsted v. City of Green Bay, Claim No. 2018-003180 (LIRC March 12, 2020). The applicant worked for the City of Green Bay in several roles, including in the sanitation department (garbage collector), street department (laborer), and sewer department (truck driver). She alleged her job duties

caused an occupational left thumb injury. The medical records reflect that the applicant's job duties were inconsistently outlined in the medical records. The unnamed administrative law judge held the applicant did not sustain a compensable injury and denied the claims. The judge based this on the inconsistencies in the medical records and determined there were further inconsistencies between the applicant's testimony and the medical records. The Labor and Industry Review Commission reversed. The decision specifically noted "The [C]ommission is very familiar with the fact that busy medical professionals frequently fail to accurately record all of the details of the relevant work exposure. The applicant was not as careful as she should have been when reporting and documenting details of her work-related injury. However, the inference was that her failure to bring up her work duties to her doctor proves nothing more than that filing a work injury claim was not foremost in her mind when she saw that particular physician. The applicant is not a physician or a lawyer. When she saw the doctor, she could not have been expected to have known with any certainty that she had a worker's compensation claim. She was also obviously not thinking of the fact that it would assist her in the prosecution of the claim to inform the doctor of any suspicious that her condition was work related. The facts are consistent with an individual who was not the most careful or conscientious of historians but who honestly sought treatment for her medical condition and at some point realized she had a worker's compensation claim related to that condition.

Permanent Partial Disability

Roberts v. Marten Transport, Ltd., Claim No. 2017-007810 (LIRC June 28, 2019). The applicant alleged a right shoulder injury. His treating physician assessed 12% permanent partial disability to the right shoulder, based upon the applicant's physical examination and range of motion. Six months later, during an independent medical examination, Dr. O'Brien's physical examination reflected a significant improvement of the applicant's range of motion. He rated the applicant with 0% permanent partial disability. The unnamed administrative law judge held the applicant sustained a work-related injury and awarded 12% permanent partial disability. The Labor and Industry Review Commission affirmed with respect to causation and modified the permanency award to 6%. Based upon the applicant's testimony regarding the extent of his physical condition at the time of the hearing, and differences in physical examinations between the treating physician and independent medical examiner, an award of 6% permanent partial disability is more appropriate. [In the last year, The Commission issued several other similar decisions, with reductions of permanency by approximately one half of the amount awarded by the administrative law judge.]

De Avila v. National Bedding Co LLC, Claim No. 2011-024251 (LIRC February 20, 2020). The applicant alleged that she sustained an occupational repetitive injury. The independent medical examiner, Dr. Bax, somewhat agreed that the job duties outlined could be causative of an upper extremity condition. However, he disagreed with the treating physician regarding the extent of the permanent partial disability. Dr. Bax opined the applicant sustained 8% permanent partial disability to the right wrist. The treating physician opined the applicant sustained 50% permanent partial disability to the right wrist. Both doctors agreed that the applicant sustained 10% permanent partial disability to the left wrist. The medical records and testimony supported that the applicant's right wrist symptoms were more severe than the left wrist. The Labor and Industry Review Commission adjusted the permanency awarded by the unnamed administrative law judge (in an unknown way). Wis. Admin. Code §DWD 80.32(10) provides a 65-75% rating for total median sensory loss to the hand and a 40-50% rating for median nerve related thenar paralysis with sensory loss. The applicant had significant residuals of pain and sensory loss. However, the applicant's testimony, including the administrative law judge's credibility determination of the applicant's report of symptoms, the medical records, and the Rules reflect that she sustained 25% permanent partial disability to her right wrist.

Cutter v. City of Kenosha, Claim No. 2017-026745 (LIRC April 16, 2020). The applicant alleged he sustained a compensable work-related back injury as a result of a work-related injury on November 7, 2017. The records reflect the applicant had a prior history of low back pain with lower extremity symptoms, which had resulted in low back surgery approximately three and a half years prior to the work injury. The applicant did require another low back surgery in 2018. His treating physician ultimately assigned him with seven percent permanent partial disability to the body as a whole, with five percent for the low back surgery and two percent for ongoing back and leg pain. The physician opined the applicant had sustained an injury as a

result of precipitation, aggravation and acceleration of a pre-existing progressive deteriorating degenerative condition beyond its normal progression. The physician also opined the applicant had a prior permanent disability. However, there was no additional information in this respect provided. The unnamed administrative law judge held the applicant sustained a work-related injury in November 2017. The Labor and Industry Review Commission affirmed. The Commission remanded the case for a new hearing to address the extent of any permanent partial disability. Each of the surgeries performed would typically result in assessment of a 5% disability rating. However, the minimum ratings in the rules assume there was no prior disability. Wis. Stat §102.175(3)(b) requires that a WKC-16B assessing disability include an opinion on the percentage of permanent disability caused by the work injury and the percentage attributable to other factors. The statute does not allow for assumptions to be made regarding the doctor's intentions regarding reductions for permanent partial disability due to preexisting conditions or disabilities. The WKC-16B submitted by the applicant did not address any permanent partial injury attributable to the applicant's prior injuries. Therefore, the record is not sufficient for the Commission to make a decision on that issue. The doctors must be given an opportunity to clarify their opinions and the administrative law judge to make a new decision on the assessment of applicable permanent disability.

Res Judicata

Boritzke v. Robb Brinkmann Constr., Inc., Claim No 2012-013180 (LIRC September 19, 2019). See the Category of Judicial Estoppel for the facts of the case. The Commission held the applicant's claim was barred by the doctrines of res judicata/claim preclusion and judicial estoppel. The doctrine of claim preclusion (or res judicata) has three elements: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits. Although the defendants were not identical (in the circuit court action the employer was named in his personal capacity while, in the worker's compensation matter, his construction company was the respondent), they were privies. The Circuit Court issued a final order after a jury verdict. Therefore, there was a final order on the merits from a court with jurisdiction. Wisconsin utilizes a "transactional approach" to determine whether there is identity of claims between two lawsuits. A valid and final judgement in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Both actions involved the same injury, cause of injury, witnesses, and medical treatment. In both actions the applicant sought recovery for wage loss and past and future medical bills. Both cases involve a common nucleus of operative facts. The third element was satisfied. *See also* the Categories of Judicial Estoppel, Collateral Estoppel, and Arising Out of.

Retirement

Svehlek v. Wisconsin Insulation Services Inc., Claim No. 2016-002495 (LIRC February 20, 2020). The applicant alleged he sustained a right shoulder occupational repetitive injury, culminating on his last date of employment. Approximately nine months later, the applicant formally retired and began collecting his pension. He was approximately 54 years old at the time be retired. On several occasions, the medical records reflect that the applicant was not given work restrictions after his retirement date. The records do indicate that, if the applicant had been working, he would have required restrictions. Those restrictions were enumerated by the treating physician throughout the records. The applicant testified that he would have continued working for another six to eight years if he had physically been able to do so. Administrative Law Judge Michelstetter held the applicant was entitled to payment of temporary disability benefits after the date of retirement. The Labor and Industry Review Commission affirmed. The applicant only chose to claim his pension because he needed income. He was physically unable to perform his job duties or find other suitable employment. The wage loss he experienced after retiring was directly related to the effects of his work injury. The medical records reflect that the applicant would have required restrictions on his activities if he had been working. Therefore, he was entitled to temporary disability benefits.

Retraining

Rapala v. Vick Trucking LLC, Claim No. 2010-007142 (LIRC February 7, 2020). The applicant began a DVR approved program to become a real estate agent. The applicant enrolled in nine credits instead of twelve for one semester. He testified that only nine credits were available in the course work he required for his program. He was paid 75% of

the indemnity benefits during that period of time. The applicant took a licensing examination in June 2015. He had three courses left. He did not enroll in any classes in fall 2015. He enrolled in one course in spring 2016 and two in fall 2016. The applicant elected to undertake additional courses to become a real estate appraiser. The appraiser program was not approved by DVR. The applicant did not apply for any exception to potentially secure DVR approval for the appraiser program. The administrative law judge awarded the applicant temporary disability benefits at 100% for the semester when he took nine credits and the two semesters in 2016. The Labor and Industry Review Commission reversed in part. A full time schedule is not necessarily a prerequisite to receiving full disability benefits. Given the remedial purpose of vocational retraining the Commission is disposed to order full time retraining benefits unless there is a deliberately unreasonable reason or reasons for not pursuing the training on a full time basis. When the reason for partial pursuance is beyond the applicant's control, payment of full time retraining benefits is most likely to be ordered. The availably of only nine credits for the program, instead of twelve, was not in the applicant's control. Therefore, he was entitled to full disability benefits for that semester. However, the applicant's failure to take any courses in fall 2015 took him out of the regular cycle of academic completion of his DVR program. He failed to demonstrate that the required three remaining courses were not available to him during that semester. He unnecessarily interrupted completion of this program. Therefore, it is not reasonable to require the payment of any retraining benefits for the 2016 semesters. The inference is that the prospect of receiving retraining benefits for the minimal completion of this course work in 2016 while the applicant pursued his new goal of becoming a real estate appraiser (not a DVR approved program) influenced his decision to resume the approved program in 2016.

Statute of Limitations

Boyd v. Labor Ready Midwest, Inc., Claim No. 2000-010175 (LIRC July 26, 2019). The applicant alleged he sustained an injury on August 18, 1999. The applicant did not file an application until December 2018. Administrative Law Judge Schneiders dismissed the applicant's claim. The Labor and Industry Review Commission affirmed. For this date of injury, the claim is time-barred after 12 years from the date of injury or from the date compensation was last paid, whichever is later. No compensation was ever paid. The applicant asserted that he neither the employer nor the Worker's Compensation Division ever notified him of a statute of limitations. Ignorance is not a defense to filing the claim within the statutory prescribed period. There is no authority to entertain the application or determine whether the applicant is eligible for compensation after that statutory time has passed.

Supplemental Benefits

Kriescher v. Classic Modular Systems, Claim No. 1988-023831 (LIRC July 26, 2019) The applicant sustained a compensable injury which resulted in entitlement to permanent total disability benefits. The applicant began receiving social security disability benefits, which reduced the permanent total disability amount he was entitled to receive, pursuant to Wis. Stat. §102.44(5). The applicant became eligible for supplemental benefits effective April 1, 2008. The supplemental benefit amount was a few dollars more than the reduction for social security disability benefits. WISBF asserted that it should receive the entire credit for the social security disability benefit reduction and reimburse the insurer only the small difference. The insurer asserted it should receive the benefit of the offset and be reimbursed the entire amount from WISBF. The unnamed administrative law judge found WISBF was entitled to the offset. The Labor and Industry Review Commission reversed. The insurer was entitled to the offset for receipt of social security disability benefits. Wis. Stat. § 102.44(5)(e) allows offset credit for SSDI benefits for temporary total, temporary partial, permanent partial, and permanent total disability benefits. Supplemental benefit payments are not included in this enumeration. Additionally, the WISBF is funded in part by an annual assessment placed on carriers and employers and the interest generated from late assessment payments due. Therefore, allowing WISBF to have the benefit of the reduction could effectively result in double charging the carrier for payment of supplemental benefits.

Temporary Partial Disability

Moreno v. Zang Pies LLC, Claim No. 2018-003973 (LIRC December 13, 2019). The applicant was injured after working in his position for two weeks. He earned $114.34 one week and $222.29. This averaged $168.32. The applicant was a part time worker who self-restricted his employment. His average weekly wage was calculated based upon his hourly regular rate and his hourly tip rate, multiplied by 40 hours. His average weekly wage was $500.87 with a compensation rate of $333.87. This compensation rate was utilized by the

Department to calculate the amount owed for temporary total and temporary partial disability benefits. The result was that the applicant was paid more in temporary partial disability benefits than the average of his actual pre injury earnings. The employer and insurer asserted that a cap of the average of his actual earnings over the two weeks of employment should apply to any temporary partial disability benefits owed. An unnamed administrative law judge affirmed the Department's calculations. The Commission reversed. Wis. Stat. 102.11(1)(f)(2) provides that the weekly temporary disability benefits for a part-time employee who restricts his or her availability in the labor market to part-time work and is not employed elsewhere may not exceed the average weekly wages of the part-time employment. Therefore, the applicant's post injury temporary partial disability benefit rate was capped at $168.32 in this case. The benefit amount is calculated by determining the percentage of wage loss (actual post injury earnings divided by the date of injury determined average weekly wage), and multiplying that figure by the date of injury temporary total disability benefit rate. If that calculation would result in an amount that is excess of the average of the actual pre injury earnings, the amount payable is reduced to the cap equivalent to actual pre injury earnings. [Here, that cap would be $168.32.] If the formula would result in an amount that is less than the average of the actual pre injury earnings, the actual lower amount is payable.

Unreasonable Refusal to Rehire

Dryden v. G4S Solutions, Claim No. 2017-014529 (LIRC May 31, 2019). The applicant sustained an admitted work-related injury. He was employed as a prison transport officer. Security was an important aspect of the applicant's job. The nature of the job made it imperative the transport officer's trust each other and have confidence they will have each other's back if something goes wrong. The employees are armed. The employer, therefore, has a zero tolerance policy regarding workplace violence and threats of violence. The policy is in the handbook and enforced by the employer. Subsequent to the injury, the applicant worked for approximately six weeks while he had restrictions and was in the healing period. Pursuant to the employer's policy, the applicant was unable to continue working until he was released without restrictions. Approximately ten days after he last worked, the employer received a verbal report that, on the applicant's last day of light duty, the applicant confided to a coworker that the applicant sometimes feels like coming to work and shooting them all. The applicant told the coworker that he would only warn the coworker and one other individual. The coworker reported the applicant scares the life out of the coworker. The coworker indicated she has since stayed away from the applicant. The coworker indicated she believed the applicant was unstable. The applicant was called in to the employer's facility and asked about the statements. The applicant initially denied knowing the coworker or having a conversation with her. He ultimately admitted that he knew the coworker, and that he had told the coworker that he had thought about coming in and shooting up the place except for the two individuals. The applicant was terminated for violating the employer's zero tolerance policy regarding workplace violence and threats of violence. Administrative Law Judge Schneiders held the employer had reasonable cause for terminating the applicant. The Labor and Industry Review Commission affirmed. The termination occurred after a thorough investigation. The termination was not motivated or precipitated by the work-related injury.

Dickson v. Lake Shore Burial Vault, Co. Inc., Claim No. 2017-017114 (LIRC July 26, 2019). The applicant sustained a compensable, surgical finger crush injury on April 14, 2017. He began treating with Dr. Crimmins shortly thereafter. The applicant gave copies of his work restrictions to his employer. The documentation noted the next appointment date. The restrictions were accommodated. The owner of the employer acknowledged the work restriction documents were in the personnel file. The applicant had no prior discipline for failing to show up at work, etc. The employer terminated the applicant on May 25, 2017, after he returned to work following an appointment with Dr. Crimmins earlier that same date. The Administrative Law Judge Schneiders awarded the maximum penalty based upon the extent of wages lost prior to the hearing, with the reservation for additional future lost wages, up to the maximum allowed pursuant to the statute for one year worth of wages. The Labor and Industry Review Commission affirmed. The applicant established a prima facie case for unreasonable refusal to rehire by demonstrating that he was an employee, who was injured while employed by the employer, and was refused discharged. The employer had the burden to demonstrate credible evidence which established a reasonable cause for the discharge. The employer's assertion that the applicant routinely failed to provide the employer with advance notice

of his appointments was not sufficient to meet this burden. In order to accommodate those restrictions, the employer would have had to have been aware of what they were, and that documentation had the next appointment dates.

Cortez v. Brian L. Helmrick, D/B/A Helmrick's Landscaping and Handyman Services, LLC, Claim No. 2015-3093 (LIRC January 31, 2020). The applicant worked for the employer for one week before he sustained a compensable injury. His employment was terminated during the healing period. The employer asserted that the employment termination resulted from the applicant having instigated a combative and heated argument between several employees. The employer asserted the termination was necessary to ensure the safety of his staff. Two employer representatives testified that, during a ten minute heated argument, wherein the applicant became combative, the applicant did not discuss his injury, did not report anything about working beyond his restrictions, did not discuss having to miss therapy appointments and did not mention any safety issues. Administrative Law Judge Schneiders held the employer had reasonable grounds for the termination. The Labor and Industry Review Commission affirmed. The applicant met the elements of a prima facie case for an unreasonable refusal to rehire penalty. The burden did shift to the employer. However, the decision to terminate the applicant was reasonable. The employer reasonably determined that the severity of the incident/altercation needed to be neutralized and stopped, as the employer did not want individuals' fist fighting in his office. The decision to terminate the applicant was reasonable under the circumstances. Given the escalating situation, the employer's decision to terminate the applicant was fair, just and fit under the circumstances. ✦

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