December 2022 Volume XXIII

ARTHUR CHAPMAN
KETTERING SMETAK & PIKALA, P.A.
ATTORNEYS AT LAW

Wisconsin Worker's Compensation Update

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A New Face in the Arthur Chapman Workers Compensation Group

Meet John R. Foss

John's practice focuses in worker's compensation matters. He has been practicing in Wisconsin for ten years. For the past seven years, he represented applicants in Social Security disability and Wisconsin worker's compensation claims.

John received his Juris Doctor and Masters in Business Administration from the University of St. Thomas. Prior to attending graduate school, he acquired his Bachelor Degree from the University of St. Thomas, where he majored in Finance and Business Law, with a minor in Economics. John is currently a member of the Wisconsin Bar Association, Wisconsin Association of Worker's Compensation Attorneys, and Hudson Lion's Club. You can reach John at JRFoss@ArthurChapman.com or (612) 375-5948.

WISCONSIN WORKER'S COMPENSATION PRACTICE GROUP

Susan E. Larson
SELarson@ArthurChapman.com

Ken J. Kucinski
KJKucinski@ArthurChapman.com

John R. Foss
JRFoss@ArthurChapman.com

Renae Eckberg, Paralegal
Bao Vang, Paralegal

ABOUT OUR ATTORNEYS

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

811 1st Street
Suite 201
Hudson, WI 54016
Phone 715 386-9000 Fax 715 808-8083

500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402
Phone 612 339-3500 Fax 612 339-7655

ArthurChapman.com

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Save the Date!

2023 Workers Compensation Seminars

Thursday, June 15, 2023
McNamara Alumni Center, University of Minnesota
Minneapolis, Minnesota

Tuesday, June 27, 2023
Brookfield Conference Center
Brookfield, Wisconsin

Contact Marie Kopetzki at 612 225-6768 or email mkkopetzki@arthurchapman.com for more details.

Decisions of the Wisconsin Court of Appeals

Burden of Proof

Murff v. Labor and Industry Review Commission*, 980 N.W.2d 493 (Ct. App. 2022) *(unpublished). The applicant began working for Aurora in June 2008, as a housekeeper. The applicant alleged she sustained a work injury on April 9, 2010, when she was on a ladder in a closet and reaching to get a box from a shelf. The applicant alleged she heard something "pop" in her lower back, when she was lifting the box down from the shelf. Prior to the injury, she had treated with Dr. Sinense. She described her job duties during that treatment. Dr. Sinense did not opine that her symptoms were work related and did not complete a WKC-16B. The applicant was referred to a neurologist, Dr. Razzaq. The applicant treated with Dr. Razzaq about two weeks prior to the alleged work injury incident. An MRI of the Applicant's head, right shoulder, cervical spine, and lumbar spine were ordered. The MRI occurred about two weeks after the alleged work-related injury. Dr. Razzaq opined that the results of the MRI were unremarkable. Dr. Razzaq completed a report opining that he did not consider the applicant's case as qualifying for worker's compensation benefits. The applicant also treated with Dr. Sinense after the alleged April 2010 injury. She was provided work restrictions. Aurora could not accommodate the same. The applicant began collecting short-term disability benefits. She returned to work for Aurora in May 2010. The applicant stopped working for Aurora in January 2012. She alleged that she could no longer work because of her back pain and that Aurora could not accommodate her restrictions. Aurora alleged that the applicant returned without restrictions in May 2010, and never had any restrictions before she stopped showing up for work in January 2012. In 2016, the applicant sought payment of temporary total disability benefits for periods between 2014 and 2016, medical expenses and permanent total disability benefits. She alleged three theories of recovery, including that the April 2010 incident was a direct cause of her symptoms; if not a direct cause, the incident precipitated, aggravated, and accelerated a preexisting degenerative condition beyond its normal progression; or that her job duties for Aurora were a material contributory causative factor of her condition's onset or progression. The applicant secured a WKC-16-B from several of her treating physicians (but not those who treated her prior to the injury), which related her back symptoms to the alleged April 2010 work-related incident. Dr. Krug performed independent medical examinations in November 2016 and

January 2018. He performed an additional medical records review in May of 2019. Dr. Krug opined there were inconsistences between the reported symptoms and the medical records, as well as the timing of the same. He opined all three theories of recovery should be rejected. At a June 2019 hearing, the applicant testified that she never experienced any similar symptoms prior to working for Aurora. She testified that she had to pass an "extensive" pre-employment physical examination. The report from this examination was not in the record. Additionally, medical records were secured that demonstrated she reported left extremity numbness prior to the alleged injury. The applicant also testified she started experiencing back pain about three to four months after her employment with Aurora began, even before the work-injury incident. The unnamed administrative law judge awarded benefits. The judge credited the treating physicians and held the independent medical examiner had diminished credibility because of the time that passed between the alleged injury and independent medical examinations. The Labor and Industry Review Commission reversed. The Circuit Court and Court of Appeals affirmed. Legitimate doubt existed as to whether the applicant's claim was supported by credible and substantial evidence based upon the reasonable inferences drawn from that evidence. The medical evidence demonstrated the applicant was developing the same symptoms prior the work incident that she reported after the incident. Further, there was no objective evidence of an injury to the applicant's back at the time of the incident. The applicant's condition did not become significantly worse until several years after she left employment with Aurora. The treating physician's opinions regarding causation included varying etiologies and levels of disability. The mechanism of injury included in those reports were not consistent with the applicant's testimony and the records reflect the doctors did not have a complete medical history for the applicant. Even though the Commission concluded the independent medical examiner failed to provide the most persuasive opinion, the Commission was not required to provide a countervailing medical expert opinion to support its conclusion that there was legitimate doubt as to the applicant's claim. Further, while the Court of Appeals believed the record could support a benefit award, that is not the standard of review, and the report also supported the Commission's determination as to legitimate doubt.

Exclusive Remedy

***Rood v. Selective Insurance Company of South Carolina*, 404 Wis. 2d 512 (Ct. App. 2022)**. The applicant was injured in the course of his employment with Stockton Stainless, Inc., when his supervisor drove a telescopic forklift ("telehandler") over the Applicant's left foot and leg. Worker's compensation benefits were paid. The applicant later filed a negligence action against his supervisor and the employer's insurer. The applicant asserted that an endorsement to the policy "Fellow Employee Extension" waived the exclusive remedy provision. The applicant also argued that his claim fell within the exception for a co-employee's negligent operation of a motor vehicle under §102.03(2). The Circuit Court dismissed the claim on summary judgment, concluding it was barred by the exclusive remedy provision in Wisconsin's Worker's Compensation Act (*see* Wis. Stat. §102.03(2)). The Court of Appeals affirmed. The worker's compensation act is generally an injured employee's exclusive remedy against an employer, co-employee, and worker's compensation insurance carrier. An insurer can waive statutory immunity when the express terms of the insurance policy demonstrate an intent to do so. The policy language unambiguously stated the insurer will pay only those sums that it becomes legally obligated to pay. The policy also contained a Worker's Compensation exclusion that unambiguously provided that the insurer would not cover any obligations arising under a worker's compensation law. The Fellow Employee Extension broadened the definition of an insured to include an employee in circumstances where worker's compensation law does not apply and where the employee's conduct might fall under an exception to the exclusive remedy provision. However, this did not modify the agreement that the insurer would only pay those sums that the insured became legally obligated to pay nor did it alter or eliminate the worker's compensation exclusion. Therefore, an express waiver of the exclusive remedy provision was required to extend such liability to the insurer; and that did not exist. Further, the alleged motor vehicle exception did not apply because the telehandler does not constitute a "motor vehicle." The term "motor vehicle" in § 102.03(2), must be interpreted narrowly, in a manner consistent with the Wisconsin Supreme Court's interpretation of "motor vehicle" in *Rice v. Gruetzmacher*, 27 Wis. 2d 46, 51 (1965). This definition includes vehicles that are designed primarily for transporting persons or property upon a public roadway, unless the vehicle was being operated upon a public roadway at the time the employee was injured. Here, the telehandler was capable of being driven on a public roadway, but it primary purpose and intended use

were not for transporting persons or property on a public roadway. Further, it was not being operated on a public roadway when the applicant's injuries occurred.

Independent Contractors

SK Management, LLC v. King*, 980 N.W.2d 490 (Ct. App. 2022) *(unpublished). The applicant, Donald King, was working on a construction project at a property managed by SK Management. He fell off a ladder, sustaining injuries to his right wrist, elbow, and shoulder. The applicant filed a worker's compensation claim against SK Management, LLC, which was uninsured. The Wisconsin Workers Compensation Uninsured Employer's Fund (the Fund) paid benefits to the Applicant. The Fund then demanded reimbursement from SK Management. SK Management filed a reverse Hearing Application alleging there was no employer-employee relationship between the applicant and SK Management and that, instead, the applicant was employed by an independent contractor, Brian Schweinert (d/b/a Mr. Phixitall) when he was injured. After two hearings on the matter, the unnamed administrative law judge held that the applicant and Mr. Schweinert were both employees of SK Management, and that Mr. Schweinert was not an independent contractor under the provisions of Wis. Stat. § 102.07(8)(b). The Labor and Industry Review Commission, Circuit Court and Court of Appeals all affirmed. Wis. Stat. § 102.07 provides the exclusive method to determine whether a person is classified as an employee or an independent contractor under the Worker's Compensation Act. Mr. Schweinert satisfied two of the nine requirements for independent contractor status (he had his own business with his own equipment and facilities, and he had his own federal employer identification number). However, SK Management failed to prove that Mr. Schweinert satisfied the remaining seven requirements. SK Management's alternative argument, that the applicant was not an employee of SK Management, regardless of whether Mr. Schweinert was an independent contractor or not, was rejected. The *Kress Packing* test applies to determine whether a person is an employee under the Act. The principal test is whether the alleged employer had the right to control the details of the employee's work. In this case, there was substantial evidence indicating that the manager of SK Management (Tim Olson) had the right to control the details of the applicant's work on the jobsite. Mr. Olson was personally present on the jobsite and gave the applicant directions "at some points." Mr. Olson also determined if the project was completed satisfactorily and was responsible for determining if workers were needed on site or not. Mr. Olson was also responsible for approving hiring decisions, providing materials at jobsites, and approving compensation-related decisions.

Issue Preclusion

Mallett v. Labor and Industry Review Commission*, 2021 AP 1263 (Ct. App. 2022) *(unpublished). The applicant filed a claim for compensation from the Work Injury Supplement Benefits Fund (WISBF), asserting he sustained injuries to his cervical spine while working for Briggs & Stratton Corp. in 1984. The applicant began working for Briggs & Stratton in 1978. In April of 1981, he sustained a thoracic back injury at work. Following a hearing, the applicant was awarded benefits. The Labor and Industry Review Commission affirmed. This was considered a final order (affirmed following the applicant's appeal to the Circuit Court as to the finality). In December of 1983, the Applicant sustained an injury to his right arm. This claim was conceded. He continued to work for the same employer until April 24, 1984. In 1987, the applicant filed a worker's compensation claim for medical expenses, seeking to reopen the final order from the 1981 work-related injury. The applicant listed the 1981 and the 1983 injuries on the Hearing Application. He alleged that his work at Briggs & Stratton, in 1983, had aggravated the effects of the 1981 injury. The claim was rejected by an unnamed administrative law judge. The Commission affirmed. The Circuit Court and Court of Appeals rejected the applicant's appeal as untimely. The decision following the 1987 Hearing Application only dismissed the portion of his claim with regard to the 1981 injury. The applicant then pursued benefits related to the 1983 injury claim. Briggs & Stratton obtained an independent medical examiner's opinion that the alleged work activities performed by the applicant were not causally related to any spinal condition and that the 1983 arm injury had not caused any neurological damage. A hearing was held in 2007. The applicant alleged that the 1983 right arm injury was a material contributory causative factor in the onset or progression of a neck and right arm condition or disability due to cervical myelopathy. The unnamed administrative law judge held the independent medical examiner's opinion was more credible. The applicant's claim was dismissed. The Commission, Circuit Court and Court of Appeals supported the dismissal. The applicant then filed a claim in 2014, alleging his work activities from January to April 1984 had aggravated or contributed to his spinal condition. An unnamed administrative law judge denied the claim on the basis that it had

previously been determined that the applicant did not have a viable claim. The Commission upheld that decision on the basis that the applicant's claim was properly rejected on issue preclusion. The Commission further concluded the medical evidence was insufficient to support a finding of causation. The Circuit Court affirmed in part and reversed in part. The Circuit Court affirmed that issue preclusion barred the Applicant's claim relating to the 1981 and 1983 dates of injury, but remanded for additional findings regarding the sufficiency of the medical evidence relating to the work exposure from January to April 1984 and whether those work duties were a material contributory causative factor in the Applicant's spinal condition. The Court of Appeals affirmed the Circuit Court. On remand, the parties elected to waive a new hearing and stipulated to obtaining a decision from the Commission that would be based on the Commission's review of the evidenced submitted at the previous hearing. The Commission again found the independent medical examiner's opinion more credible than the opinions of the treating physicians. The Commission noted that the treating physicians had not made reference to the Applicant's work exposures from January to April 1984 until the Applicant sent each doctor a pre-typed letter in 2015, which described his work duties during that timeframe as "material contributing factor of his injury," which the doctors then signed. Thus, the Commission again dismissed the claim. The Circuit Court again affirmed. The applicant essentially challenged the Commission's findings of fact that relied on the independent medical examiner's opinion. The Court of Appeals affirmed. The applicant had not met his burden of demonstrating the evidence the Commission relied on was not credible and substantial.

Standard of Review

Gabron v. Labor and Industry Review Commission*, 2021AP2171 (Ct. App. 2022)*(unpublished). The applicant alleged that he sustained a work-related injury. The employer and insurer disputed that such an injury was sustained, as well as the nature and extent of any such injury. At the time of a hearing, the unnamed administrative law judge specifically noted that the issues in dispute were whether the applicant sustained injuries arising out of employment and if so, the nature and extent of any disability and related medical expenses. The administrative law judge also noted that a tentative period of temporary disability was set, with the understanding that the dates may be changed as things develop. The administrative law judge specifically noted that no portion of that period was conceded. A second hearing was held and essentially the same thing was noted, with some difference in dates for temporary disability outlined. The administrative law judge held the applicant sustained a work-related injury and awarded temporary disability benefits and medical expenses. The Labor and Industry Review Commission affirmed on causation, but only on a temporary injury basis, and did not award all of the temporary disability benefits sought. The Circuit Court held that the Commission exceeded its authority in reaching the issue of temporary total disability benefit periods owed on the basis that it believed the parties had reached an agreement as to the dates of temporary disability benefits if causation was established. The Court of Appeals reversed and reinstated the Commission's decision as a summary disposition. The decision regarding the scope of the Commission's power was reviewed *de novo*. Because the nature and extent of disability and related medical expense was on the table at the time of the initial hearing, this was an issue within the Commission's authority when it took the appeal, and was also properly considered by the Circuit Court on appeal. The applicant did not seek to limit the administrative law judge's statement of the issue at the time of the initial hearing and he cannot do so with respect to the Commission. Case law holds that parties to an administrative proceeding must raise known issues and objections and all efforts should be directed toward developing a record that is as complete as possible in order to facility subsequent judicial review of the record. The record clearly indicated the nature and extent of disability was in dispute. Therefore, the Commission's decision was not without or in excess of its powers. ✦

Decisions of the Wisconsin Labor and Industry Review Commission

Appeal

Kellnhauser v. Appleton Papers, Inc., Claim No. 2017-01644 (LIRC August 30, 2022). The applicant sustained a compensable work-related injury. The nature and extent of the injury was in dispute. The applicant prevailed in a decision issued on October 19, 2021. The last date to timely file a petition for commission review was November 9, 2021. The respondents filed its petition on November 16, 2021. The respondents alleged that its attorney did not receive the administrative law judge's Order until November 12. The attorney asserted he first received notice of the Order via an email from the applicant's attorney inquiring as to the status of payment pursuant to the Order because 21 days had expired. The respondents' attorney notified the administrative law judge and opposing counsel immediately that he did not receive the Order. The judge emailed the respondents' attorney a copy of the Order. This was addressed correctly, but neither the attorney nor the law firm had a copy of the Order, despite conducting an exhaustive review of the electronic and paper files. The respondents asserted the late petition was for reasons beyond its control. The Labor and Industry Commission held that the respondents' indication that it did not receive the Order until after the deadline passed to file a timely petition, was credible. If the attorney did not receive the Order, that is a reason beyond the respondents' control for failing to file a timely petition. Therefore, the Commission accepted the late petition for review and addressed the merits of the case.

Arising Out Of

Alonso v. Star Valley Flowers Inc., Claim No. 2020-008895 (LIRC June 30, 2022). The applicant alleged he sustained an injury to his foot, on October 26, 2019, while he was cleaning out his shoe, lost balance, and stepped down on a cut stem that punctured his foot. The applicant indicated that he believed it was a minor injury, so he did not report it until October 28, when he informed the employer he could not work because of his foot pain. The owner of the employer drove the applicant to a clinic and directed him to stay in the vehicle. The evidence indicates the owner went into the clinic and described what happened to clinic staff. (The owner did not testify at the hearing.) The initial clinic note indicates, "[the applicant] does not recall any injury." Subsequent medical records contain conflicting accounts regarding the mechanism of injury (whether the applicant stepped on a sharp metal bar at work or on a piece of wood at work). Several months later, the applicant's leg was amputated below the knee because of an ongoing infection. An independent medical examiner opined the amputation was the result of a diabetic infection, and opined there was insufficient evidence to support that a work-related incident led to said infection because of the inconsistencies in the medical records regarding the same. The treating physician opined that, absent the work injury, there was no reason to believe the Applicant's diabetes would have caused an amputation to be performed. An unnamed administrative law judge held the applicant sustained a compensable work-related injury, leading to an infection and ultimately an amputation. The Labor and Industry Review Commission affirmed. Inconsistent descriptions regarding the occurrence of, and mechanism of, the work incident existed. However, the Commission inferred that these inconsistencies were largely the result of translation issues involving a Spanish-speaking applicant. Further, the indication that the applicant did not recall a work injury was attributed to the owner's description to the clinic and not that of the applicant. The independent medical examiner's opinion was an evaluation of the applicant's credibility and not an actual medical opinion. The applicant's description of the work incident and the treating physician's opinion regarding causation, were credible and supported a finding that a compensable work-related injury was sustained.

Lehman v. Fincantieri Marine Group, Claim No. 2016-024360 (LIRC July 28, 2022). A Hearing Application was filed on September 6, 2016. The applicant alleged that he sustained a traumatic back injury on January 2, 2004, while he was employed by Marinette Marine. The application was later amended to also allege that he sustained an occupational back injury, culminating on August 15, 2012, while the applicant was employed by Fincantieri Group. Marinette Marine was dismissed from that claim, without prejudice because it was not the employer on August 15, 2012. However, hearings were held on May 8, 2018 and December 17, 2018, before another administrative

law judge, with Marinette Marine as the named employer. Those hearings did not include Fincantieri. On March 11, 2019, the administrative law judge held the applicant had sustained an occupational injury to his back, culminating on August 15, 2012. The Labor and Industry Review Commission set aside the decision and remanded the matter for a new hearing with Fincantieri as the respondent. A new hearing was held before another administrative law judge, Colleen Bero-Lehmann. Administrative Law Judge Bero-Lehmann also held that the applicant had sustained an occupational back injury, culminating on August 15, 2012. The Labor and Industry Review Commission affirmed. Fincantieri asserted that the independent medical opinion should have been accepted over the treating physician's opinion because, in part, the applicant's treating physician failed to include a description of the applicant's work duties in his WKC-16-B, allegedly rendering the opinion defective. The applicant provided credible and unrebutted testimony regarding the physically stressful work he performed. The applicant credibly testified that he described his work duties to the physician. The physician plainly referenced the applicant's collective "work duties" as "a materially contributory causative factor" in his WKC-16-B. The combined testimony of the applicant and the written statements of the treating physician provided credible and substantial evidence concerning the causative factor of the applicant's condition.

Causal Connection

Ebben v. Appleton Papers, Inc., Claim No. 2018-019860 (LIRC July 28, 2022). The applicant alleged he sustained a left shoulder injury, including a traumatic, full-thickness rotator cuff tear, on August 31, 2018, after falling down steps. A knee injury was conceded and benefits paid as a result of this incident. In the work incident investigation report given to his supervisor, the applicant reported injuring his right side. He did not report falling on his left side. In his first statement to the insurer, given less than a week later, the applicant indicated he landed on his back. He listed injuries to his right knee, right elbow, left knee, and left wrist. The first notation to left shoulder pain occurred when the applicant reported these symptoms to his physical therapist, a little more than two months after the workplace incident. The applicant did not seek treatment for left shoulder pain with his primary care physician until three and one-half months after the incident. In a second statement to the insurance carrier, given four months after the incident, the applicant then claimed to have landed on his left side. The independent medical examiner, Dr. Moore, opined that, had the applicant torn his rotator cuff in the incident, the applicant would have voiced concerns about his shoulder symptoms sooner. Dr. Moore concluded that the lack of complaints closer to the time of the incident, coupled with the MRI findings, suggested a more chronic, preexisting degenerative rotator cuff tendinopathy/tearing. An unnamed administrative law judge dismissed the applicant's claim. The Labor and Industry Review Commission affirmed. The applicant's testimony was inconsistent and lacking credibility. His story changed over time as to how he landed and what body parts he injured. The opinions of the applicant's physicians were not credible because they were predicated on the applicant's inaccurate recollection of events. Therefore, because of the applicant's inconsistent testimony and the more credible opinion of Dr. Moore, the applicant failed to meet his burden of proof. There were legitimate doubts that he injured his left shoulder in the work incident.

Compromise Agreement

Yates v. Joy Global Surface Mining, Inc., Claim No. 2018-015298 (LIRC August 30, 2022). The applicant filed a Hearing Application seeking payment of permanent partial disability and loss of earning capacity benefits only, as a result of an occupational lumbar spine injury. He did not seek payment of any temporary disability benefits or vocational retraining benefits. A full and final compromise agreement was entered into by the parties and approved by Administrative Law Judge Ezalarab. The applicant received payment consistent with the terms of that agreement. Several months later, the applicant, *pro se*, submitted a request to reopen the compromise agreement on the basis that he was not paid for loss of income. He indicated that he thought the agreement should be reopened because he found out that he could not work and his employer would not let him work when he was on medication. He did not believe it was fair that he had to retire early. He indicated that, when he signed the agreement, he understood that he had a right to appeal it within a year. He indicated that the attorneys made deals on his life and he did not believe

it was fair or right. He did not allege any fraud, duress, or mutual mistake. He alleged that an additional WKC-16B was newly discovered evidence. The unnamed administrative law judge dismissed the applicant's request to reopen the compromise agreement. The Labor and Industry Review Commission affirmed. The terms of the compromise agreement noted there was a bona fide dispute between the parties as to whether the occupational exposure occurred as alleged; whether, at the time of the injury, the applicant was performing services growing out of and incidental to his employment; whether the disease arose out of his employment; the nature and extent of the alleged disability; and the amount and reasonableness of medical treatment. The agreement provided it was a settlement of any and all liability of the respondents under the Wisconsin Worker's Compensation Act for any injury or injuries that allegedly occurred on a specific date; for any claims related to the applicant's back conditions, whether traumatic or occupational, for any date or dates of injury prior to the date of settlement; for all past and future medical expenses, temporary disability, permanent disability without regard to its nature and extent; and for benefits and/or payments. Above the signature lines, in bold and all capital letters, the agreement stated, "By signing this Compromise Agreement, you are representing that you have read and that you understand the Compromise Agreement. If you have any questions about any of the terms of the Compromise Agreement, you should make sure that it has been fully explained to you before you sign the Compromise Agreement. Your signature on this agreement certifies that you have read and understand the agreement and that you are signing it freely and of your own will." The applicant and his attorney signed the compromise agreement. The fact that the applicant made what turns out to be a "bad deal" is not grounds to have the compromise agreement set aside. This is not possible even if an applicant's condition worsens beyond his or her expectations at the time of the compromise, as long as the applicant was aware of the possibility that the condition would worsen as it did. There is a five-part test to decide whether to accept newly discovered evidence. That evidence must have come to a party's knowledge after the hearing or compromise agreement; the party must not have been negligent in failing to discover it; the change must be material; the evidence must not be merely cumulative; and the evidence must be reasonably likely to change the result. The applicant's additional submitted WKC-16B includes no evidence the applicant's medical condition changed, and his permanent restrictions remained the same. Therefore, there is no newly discovered evidence sufficient to justify the reopening of the agreement.

Occupational / Repetitive Injuries

Rodriquez v. Aurora Health Care Metro Inc., Claim No. 2018-021724 (LIRC May 31, 2022). The applicant's general duties for the employer involved setting up trays of food, putting them on a cart and delivering them to patients. These duties required her to adjust or pull up on top of a cart like table that extended over a patient's bed. At times, the tops of the carts would "stick" and more force needed to be used to pull in order to get the top to rise. The applicant alleged she sustained a right shoulder rotator cuff tear as a result of an April 20, 2017 work-related injury. The applicant alleged that, on this date, she pulled on a stuck top of a cart-like table and experienced a numbness or tingling sensation from her hand to her elbow. The applicant reported the injury after making a few more meal deliveries on the same date of the alleged incident. She treated with PA-C Tuscano, under the supervision of Dr. Petro. She reported the mechanism of injury, and indicated the trays are sometimes difficult to lift up. She then began to treat with Dr. Clark. He performed an arthroscopic decompression, rotator cuff repair, and distal clavicle resection of the right shoulder. Dr. Clark completed two WKC-16Bs which noted there was causation by occupational disease, and specifically that the applicant's injury was caused by an appreciable period of workplace exposure. Dr. Friedel performed an independent medical examination. He reviewed a video of the applicant's job duties. He opined the applicant only sustained a strain to her right hand and thumb. He opined she had a chronic underlying degenerative condition at the acromioclavicular joint and a degenerative rotator cuff tear which were pre-existing conditions undergoing their natural progression. The unnamed administrative law judge held the applicant sustained a work-related injury as a result of her job duties for the employer. The Labor and Industry Review Commission affirmed. While Dr. Clark's medical records did not detail the applicant's job duties for the employer, he provided care through the same health system as Dr. Petro. Therefore, Dr. Clark had access to Dr. Petro's medical records, which included a description of the applicant's job duties. Further, the job duties described by the applicant on the date of specific injury, was an activity that she performed on a regular basis and can be regarded as sufficient magnitude, duration, or frequency

to be a material contributory factor as opined by Dr. Clark. Dr. Friedel did not appreciate the effort required for the applicant's job duties or the physical demands of her job. Further, the evidence supporting the prior existence of a degenerative condition in the applicant's shoulder is not supportive of a denial. Employment exposure need not be the sole cause or the main factor in a worker's disabling condition, it is sufficient to show the work exposure was a simply a material factor in the development or progression of the disabling disease.

Breunig v. Intercon Construction Inc, et al., Claim Nos. 2002-002033, 2005-025449, 2019-017147 (LIRC June 30, 2022). On June 7, 2001, the applicant slipped at work and injured his left knee, while employed by Intercon Construction. He was diagnosed with a left medial meniscus tear and an arthroscopic repair surgery was performed by Dr. Rosenthal, on January 10, 2002. The applicant was released to work, without restrictions, on February 7, 2002. The applicant alleged that he sustained a new injury to his left knee when he slipped on a rock, on June 3, 2005, while still employed by Intercon. (This claimed injury does not appear to have been asserted until a Hearing Application was filed in November 2016.) Dr. Rosenthal performed a second surgery on July 8, 2005. The applicant was released to work on September 20, 2005. Dr. Rosenthal assessed a 40% permanent partial disability to the left knee, for the June 2005 injury, and noted that a total knee arthroplasty would likely be needed in the future. The applicant left employment with Intercon and began working for Madison Gas and Electric (MG&E) in 2006. The applicant experienced increasing left knee pain while he was walking to the kitchen in his home. He returned to treat with Dr. Rosenthal in January of 2011. Dr. Rosenthal diagnosed the applicant with advanced left knee degenerative arthritis. He advised the applicant to defer care for as long as possible. The applicant again treated with Dr. Rosenthal, on December 2, 2013, for increasing knee problems. He received an injection for pain relief. The applicant filed a Hearing Application, on November 7, 2016, asserting that the alleged June 3, 2005 left knee injury arose out of his employment with Intercon, and seeking payment of 40% permanent partial disability to the left knee as well as medical expenses. The applicant did not seek additional treatment for his left knee until May 17, 2018. He treated with Dr. Rosenthal and reported increasing pain, especially at the end of the day. Dr. Rosenthal opined that the applicant met the criteria for a total knee replacement. He subsequently amended his formal claims to seek approval of a prospective total knee replacement. The applicant deferred surgery, due to his age. He anticipated undergoing surgery in 2021. A hearing was held on July 30, 2019. At that time, the unnamed administrative law judge impled MG&E. Dr. Lemon performed an independent medical examination of the applicant at Intercon's request. Dr. Lemon opined that the applicant's work for MG&E would not cause or aggravate osteoarthritis. However, Dr. Lemon opined the job duties of standing, in combination with the applicant's obesity, would be a material contributory causative factor in the progression of the left knee osteoarthritis. He apportioned liability to the 2001 injury, 2005 injury, work at MG&E and obesity. Dr. Krug performed a medical records review at the request of MG&E. He opined the applicant's need for medical treatment and his knee condition were attributed to the 2001 and 2005 injuries and the applicant's obesity. He opined there was no causal connection to the employment for MG&E. The treating physician only provided an opinion that the 2005 injury was causative of the need for a total knee replacement. On June 8, 2021, another hearing was held, which addressed the merits of the applicant's claims. The unnamed administrative law judge held Intercon was liable for medical and mileage expense attributable to the June 2005 work injury and for the planned total left knee replacement. The administrative law judge dismissed MG&E from any liability for the prospective surgery. The Labor Industry and Review Commission reversed. The Commission determined that Dr. Lemon's opinions regarding causation were most credible, and held that the applicant had sustained an occupational disease injury to the left knee as a result of his employment for MG&E. The applicant sustained a series of traumatic knee injuries, which, when combined with his many years of physical work exposure, resulted in all physicians of record agreeing that a total left knee replacement was medically advisable. The straightforward and overwhelming medical evidenced demonstrated that the applicant's 12 years of work for MG&E was a material contributory causative factor in the occupational disease process. Well-established case law provides that the last employer whose employment contributed to the occupational disease injury assumes the entire liability for the effects of that occupational disease. The Commission explicitly rejected an argument that the applicant's obesity was a causative factor and that prolonged standing while working at MG&E was not. The Commission concluded that obesity would have no real effect on the knee, unless the applicant was engaged

in some form of standing or walking. Intercon was held liable only for mileage and medical expenses attributable to treatment the Applicant received in 2005. MG&E, as the last employer whose employment contributed to the occupational disease injury, was held prospectively liable for the total left knee replacement surgery and the resulting disability and medical expenses. The Commission remanded the claim for determination of the date of injury for the occupational left knee injury because the existing record failed to provide adequate evidence for determining the date of the occupational disease injury.

Statute of Limitations

Scott v. Aurora Health Care, Inc., Claim No. 2014-015628 (LIRC July 28, 2022). The applicant alleged he sustained a right wrist/arm injury on June 21, 2003. The applicant submitted a Hearing Application, on July 13, 2014, *pro se*. On May 27, 2015, the Hearing Application was dismissed because the Department was unable to conduct a hearing with an individual incarcerated in a maximum-security prison. The applicant could, therefore, not participate in the prosecution of his claim. The application was dismissed without prejudice. The applicant was informed that, if he was no longer incarcerated, he could file a new application before June 21, 2015 (the expiration of the 12-year statute of limitations). The applicant subsequently renewed his request for hearing, after the expiration of the statutory period and while he was still incarcerated. The Department rejected the request on the basis that the application was filed after the statutory expiration on June 21, 2015. The Labor and Industry Review Commission set aside the Department's decision and reopened the applicant's July 13, 2014 Hearing Application. The Commission concluded that the applicant's due process right took precedence over the desire to expediently conclude the matter. The Department's dismissal of the claim and the applicant's tardiness in refiling were the result of circumstances outside of the applicant's control. These circumstances included the Department's knowledge that the applicant's release from incarceration would not occur until August 2054, which made it impossible for him to satisfy the condition set by the Department for a new filing. ✦

ARTHUR CHAPMAN
KETTERING SMETAK & PIKALA, P.A.
ATTORNEYS AT LAW

811 1st Street
Suite 201
Hudson, WI 54016
Phone 715 386-9000
Fax 715 808-8083

500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402
Phone 612 339-3500
Fax 612 339-7655

ArthurChapman.com

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