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Wisconsin Worker's Compensation Update

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Recent Decisions of the Wisconsin Court of Appeals

Exclusive Remedy

Santiago v. Didion Milling, Inc.*, 2024 WI App 74, 15 N.W.3d 514 (Ct. App. 2024) (unpublished)**. Maribel Santiago's husband, Angel Luis Reyes-Sanchez, was employed by a temporary help agency and assigned to work at a plant owned by Didion Milling, Inc. ("Didion"). Reyes-Sanchez was injured in an explosion at Didion's corn milling plant in May 2017, and he died from his injuries a week later. In November 2020, Santiago brought this tort action, alleging that Reyes-Sanchez's injuries and death were caused by Didion's negligence, claiming that Didion violated Wisconsin's safe-place statute and sought punitive damages. At the time of Reyes-Sanchez's injury and death, Wis. Stat. § 102.29(6)(b)1 stated that "[n]o employee of a temporary help agency ***who makes a claim for compensation may make a claim or maintain an action in tort against ... [a]ny employer that compensates the temporary help agency for the employee's services." However, by the time that Santiago filed her tort action against Didion in November 2020, the legislature had amended Wis. Stat. § 102.29(6)(b)1 to provide that an employee of a temporary help agency is prohibited from bringing a tort action against the temporary employer if the employee "***has the right to make a claim*** for [worker's] compensation." The court found the amended version of the statute applied and Santiago's tort action was barred because her claim was filed after March 2, 2018, and because Santiago "had the right to make a claim for worker's compensation." The parties filed cross-

continued on next page . . .

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motions for summary judgment on whether Santiago's tort action was barred by either version of Wis. Stat. § 102.29(6)(b)1. Didion argued that the current version of § 102.29(6)(b)1 applied retroactively to Santiago's tort action because Santiago filed the action after 2017 Wisconsin Act 139's effective date and because she had the right to make a worker's compensation claim. In response, Santiago argued that because her tort claims accrued at the time of her husband's 2017 injury and death, the prior version of the statute applied and that under the prior version, her tort claims could proceed because she had not made a claim for worker's compensation. Although Santiago argued that the current version of § 102.29(6)(b)1 did not apply to bar her tort action, she did not argue that its retroactive application would be unconstitutional at the circuit court. The Court of Appeals affirmed the circuit court's grant of summary judgment. Santiago did not argue that applying Wis. Stat. § 102.29(6)(b)1 retroactively was unconstitutional before the circuit court, and because Santiago provided no authority that supported that proposition, the Court of Appeals found it had no obligation to consider the untimely constitutional challenge.

Loaned Employee Doctrine

***Demars v. Fincantieri Marine Group*, 2024 WI App 56, 14 N.W.3d 102 (Ct. App. 2024) (unpublished)**. Mark Demars was employed by Bosk as a painter. Bosk had contracted with Fincantieri Marine Group ("FMG") to provide paint laborers to work on a combat ship in furtherance of FMG's shipbuilding contract with the federal government. After he sustained a work injury on June 19, 2018, he filed a workers' compensation claim against Bosk. Demars also initiated a tort action against FMG, claiming FMG had violated Wisconsin's Safe Place Statute and was otherwise negligent. On FMG's behalf, Bosk filed a motion for summary judgment, seeking dismissal of Demars' action on the basis of the "loaned employee doctrine." The circuit court determined that Demars was a loaned employee to FMG. As a result, the court concluded that the Demars's claims against FMG were barred by the exclusive remedy provisions of Wis. Stat. § 102.29(7). Demars appealed. The Court of Appeals of Wisconsin rejected Demars's arguments and affirmed the circuit court's decision. The test to determine whether an employee becomes a loaned employee of the borrowing employer was first set forth in *Seaman*. The Supreme Court explained that "[t]he Seaman loaned employee test has two aspects: three elements and four vital questions." *Borneman*, 219 Wis. 2d at 353. The vital questions in controversies of this kind are: (1) Did the employee actually or impliedly consent to work for a special employer? (2) Whose was the work he [or she] was performing at the time of injury? (3) Whose was the right to control the details of the work being performed? (4) For whose benefit primarily was the work being done? *Id.* at 353-54 (quoting *Seaman*, 204 Wis. at 163). The court first determined whether the Employee consented to work for FMG. Under the undisputed facts in this case, the Court of Appeals agreed with the circuit court that Demars consented to work for FMG. First, there was an express agreement between Bosk and FMG, and that agreement provided painters employed by Bosk to FMG at an hourly rate to work on specific projects. Demars was engaging in that contracted work at the time of his injury. Second, while Bosk directed Demars to work for FMG, the record demonstrates that Demars did more than merely obey Bosk's direction. While working at FMG, Demars and the others in Bosk's paint crew would begin their day in "muster meetings" with both Bosk and FMG employees where the FMG foreperson would instruct them what "needed [to be] done that day." Demars' testimony confirmed that the FMG foreperson, not the Bosk foreperson, would "tell [Bosk employees]" what they would be doing that day and assign specific tasks to individual members of Bosk's paint crew. The Bosk foreperson confirmed that she did not "have any input as to where people were going to work." The Court of Appeals concluded that the circuit court properly determined that Demars was performing FMG's work at the time of his injury. According to Bosk's president's affidavit, "the arrangement between Bosk and FMG was a 'time & attendance' contractor, meaning that Bosk ... provided painters to [FMG] to work on [FMG's LCS] project." Demars was assisting FMG in fulfilling its obligations under its contract with the federal government. Next, the Court of Appeals determined that FMG had the right to control the details of the work being performed. FMG contracted with Bosk for the sole purpose of utilizing Bosk's painters to help fulfill its defense contracts. According to the record, Bosk often "contracts with commercial clients on a task completion basis" whereby a client hires Bosk to undertake an entire project, Bosk "controls the tasks and work of its employees and provides all of the workers and equipment necessary for completion of the project," and the client pays Bosk a lump sum upon completion. Bosk's arrangement with FMG as a "time & attendance" contractor was different. FMG compensated Bosk based on an agreed hourly rate for Bosk's workers, Bosk's employees logged their hours in FMG's timekeeping program, and Bosk's workers were prohibited from bringing any material to FMG's facility because FMG provided "all material

and equipment necessary" for Bosk's employees to complete the work for FMG. Further, FMG retained the rights to test Bosk's employees "to verify their qualifications," to require Bosk's workers to take direction from the FMG forepersons, to discipline and/or dismiss Bosk's workers from its facilities, and to require Bosk's workers to follow FMG's workplace rules and procedures. Lastly, the Court of Appeals noted the circuit court had determined "that the work Demars was doing at the time of his injury, i.e., painting the vessel, was clearly being done for [FMG's] benefit." The Court of Appeals agreed with the circuit court's conclusion that the work performed by Demars was *primarily* for FMG's benefit. As the court explained, "[t]he only reason Bosk and [FMG] contracted was because [FMG] had been awarded the defense contract," and, therefore, "every coat of paint Demars applied went towards finishing [FMG's] end of the LCS project."

Standard of Review

***Paul V. Farmer, Inc. v. LIRC*, 2025 WI App 23, 19. N.W.3d 845 (Wis. App. 2025) (unpublished).** The Applicant sustained a traumatic low back injury on June 18, 2019. An administrative law judge held a hearing to address the Applicant's claim on September 13, 2021. The judge concluded that the Applicant had sustained a temporary lumbar strain or sprain with an end of healing without disability or need for further treatment by February 10, 2020, and denied his claim. The Labor and Industry Review Commission reversed. The Commission credited the Applicant's testimony as the medical opinion of Dr. Yoon, a Mayo Clinic occupational medicine physician and one of the Applicant's doctors, in support of its finding that the Applicant was permanently and totally disabled. The Commission indicated the administrative law did not credit the Applicant's testimony because the judge believed the Applicant's engagement in other activities, such as hunting, fishing, and traveling, which exceeded his physical restrictions. The Commission determined that the evidence did not demonstrate that the Applicant exceeded his restrictions with those activities. The Circuit Court affirmed the Commissions decision as did the Court of Appeals. The Respondents asserted the Commission's finding of permanent and total disability was a legal conclusion requiring *de novo* review. In support of this argument, the Respondents asserted that the Commission had found the Applicant permanently and totally disabled based upon application of the *odd lot doctrine*, a legal conclusion which required *de novo* review. The Court of Appeals disagreed. The Court of Appeals determined the Commission had actually not applied the *odd lot doctrine*. Instead, the Applicant was determined to be permanently and totally disabled based upon the opinions of Dr. Yoon and those of the Applicant's vocational expert, John Woest. Dr. Yoon had opined that Rieder was uncapable of working in any capacity, which is a traditional disability determination and is not the same as an *odd lot* evaluation. ✦

Recent Decisions of the Labor and Industry Review Commission

Appeals

Welch v. Paloma Legacy, LLC, WC Claim No. 2021-006391 (LIRC March 31, 2025). The Applicant filed a Petition for Review with the Labor and Industry Review Commission, seeking an increase in the permanent partial disability rating assessed by the unnamed administrative law judge. The Respondents did not file a Petition for Review, or a Cross-Petition for Review following the judge's decision. Rather, the Respondents filed an Answer to the Petition for Review filed by the Applicant, and in that Answer, the Respondents disputed causation of the underlying injury and argued that the Judge's permanent partial disability award should be affirmed. The Applicant argued that because the Respondents' arguments were not raised in a Petition or Cross-Petition, those arguments should be rejected or given little consideration. The Commission explained that pursuant to *Schmidt v. Metro Milwaukee Auto Auction*, its review is *de novo* and its policy is to "accord lesser weight to arguments raised in a responsive brief, as opposed to those raised in a timely petition or cross-petition." However, when arguments made in a responsive brief "are found to have a solid basis in law and/or fact, the Commission will act upon them." The Commission explained that there are a number of considerations which justify giving less consideration to arguments raised in response briefs, including the chilling effect on filing Petitions for Review in the first instance; the reluctance to leave a petitioning party in a worse position than they were before petitioning; the increased burden placed on an "already overloaded administrative process"; and the potential for abuse by raising inappropriate arguments in the responsive brief. *See, e.g., Nelson v. General Motors Corporation*, 332 N.W.2d 514 (1983). Therefore, while the Commission had the discretion to consider the Respondents' causation arguments, it was nonetheless clear that those arguments did not have a solid basis in law or fact and, therefore, those arguments were afforded little weight, and the judge's findings were affirmed with regard to causation.

Apportionment

Meyer v. JFTCO, Inc., WC Claim No. 2017-008693 (LIRC June 28, 2024). The Applicant in this case suffered from problems with his back since the age of 16 when he was involved in a prior injury. This was followed by years of on and off treatment, including a left-sided L4-5 microdiscectomy and L5 foraminotomy in 2014. On March 17, 2017, the Applicant alleged a new injury to his back after slipping and falling on ice while at work for the Employer. In support of his new work injury claim, the Applicant submitted a WKC-16-B from Dr. Floren which indicated the work injury permanently aggravated a pre-existing condition, resulting in a 4% permanent partial disability at the low back. Dr. Floren referred to his notes for the elements of disability. For box 19, which asks, "Prior to this accident or illness, did employee have any permanent disability?" Dr. Floren checked "no." Under "If YES, then explain:" Dr. Floren wrote, "Prior L4-5 surgery; No ratings." Importantly, Dr. Floren's records show that he mistakenly thought the 2014 surgery was on the right side, which was the opposite side affected by the 2017 work injury. Dr. Floren's notes also indicate that his 4% rating was in addition to any other or prior impairment the Applicant may have merited. However, Dr. Floren's notes went on to discount the 2014 surgery because it was performed on the other side of the lumbar spine, a fact that was incorrect. The Labor and Industry Commission took note of the parties' arguments regarding the legal sufficiency of Dr. Floren's WKC-16-B in light of Wis. Stat. s. 102.175(3)(b). The Applicant argued the form was legally sufficient because Dr. Floren specifically addressed the permanent partial disability caused by the Applicant's prior surgery by stating in the records that his disability was in addition to any prior impairment the Applicant may have merited. The Respondents argued that Dr. Floren's opinion in his WKC-16-B was legally insufficient because the form failed to contain his opinions as to the percentage of permanent partial disability caused by the work injury and the percentage caused by other factors. They pointed to Dr. Floren's incorrect foundation, as well as the fact that the Applicant was given time after the hearing to obtain an updated WKC-16-B before the record closed but chose not to do so. Therefore, the Respondents argued that the factfinder was left to speculate as to the proper preinjury permanent partial disability assessment, and that a remand to allow the Applicant to obtain clarification from Dr. Floren was not appropriate because the Applicant already declined to obtain such clarification. The Commission pointed out that this issue has been addressed in previous decisions and that, until the DWD modifies the WKC-16-B form to comply with the requirements of § 102.175(3)(b), the Commission will continue to remand claims to allow providers the opportunity to clarify

their opinions consistent with the statutory requirements. However, in this case, the Commission discredited Dr. Floren's opinions for other reasons; therefore, no remand was necessary. The ALJ's denial of additional benefits was affirmed.

Average Weekly Wage

Gonzalez Gomez v. Vortieq Coil Finishers, LLC, Claim No. 2019-022875 (LIRC September 25, 2024). The Applicant forklift driver filed a hearing application for a disputed occupational lumbar injury. The administrative law judge determined there was a compensable injury and awarded compensation. The Applicant appealed only the determinations related to the average weekly wage and loss of earning capacity awarded. The evidence showed a schedule which varied between 40-60 hours per week. The Applicant requested that his post-injury earnings, when he regularly continued to work at 60 hours per week, be used to determine the benefits. The Labor and Industry Review Commission decision properly rejected the use of post-injury earnings. The Commission reviewed wage to consider when weekly hours varied and contained regular overtime, noting:

1. Wis. Stat. § 102.11 (1)(a)(3)- provides that primary consideration be given to an employee's normal full-time workweek as established by the employer; and
2. Wis. Stat. § 102.11(1)(a)(1)- requires an exclusion of overtime, defined as that time beyond the number of hours usually worked by the employee.

The Commission held that, when reading the two sections in harmony, overtime hours do not enter into the calculation, except when overtime hours are included in the Applicant's normal full-time workweek as established by the Employer. In this case, the Employer was unable to produce all relevant time records due to a transfer in payroll companies. The Applicant had testified to working 40-60 hours per week regularly, while the company's operations manager testified that the Applicant regularly worked "roughly 40-50 hours per week." Evidence of a regular 40-hour work week was established, as was overtime which varied up to 60 hours per week, or more, from the payroll records which were available for review. The administrative law judge had not fully appreciated the statutory requirements above. The Commission recalculated the average weekly wage. The Commission held it appropriate to "average" this Applicant at 50 hours per week (40 hours at his hourly rate, and 10 hours per week paid at the overtime rate). Separately, the Commission noted the Applicant was young (46 years old) and that the record failed to establish whether the Applicant tried to pursue any retraining benefits. The Applicant's own vocational expert recommended retraining. Therefore, any loss of earning capacity award was premature. The matter was remanded to determine whether the Applicant was eligible for retraining. His participation (or election not to participate) should be considered as part of any loss of earning capacity award.

Burden of Proof

Cura, Jr. v. Reinhart Foodservice, LLC, Claim No. 2019-025790, (LIRC December 26, 2024). On November 17, 2019, the Applicant was rear-ended while driving his semi-truck. As a result, he alleged a permanent aggravation of a pre-existing low back condition that required an L5-S1 fusion procedure and implantation of a spinal cord stimulator. The Applicant's claim was supported by Dr. Prpa, who performed the spinal fusion, and Dr. Reyes, who implanted the spinal cord stimulator. The Applicant asserted that his pre-existing low back symptoms had resolved prior to the date of injury, and that, according to Dr. Prpa, he would not have needed surgery based upon the pre-injury MRI findings alone; therefore, the injury was a permanent aggravation of the pre-existing condition. The Respondents, represented by Susan Larson of our firm, conceded a low back strain that resolved within two weeks with no permanent disability pursuant to the independent medical examination opinions of Dr. Hsu. Notably, the Applicant has been treating for chronic back pain and chronic pain syndrome since at least 2014. Between 2014 and the date of injury, his medical history included medication refills, a referral to pain management, a referral to physical therapy, a non-industrial motor vehicle accident with subsequent emergency room visits for 10/10 low back pain radiating to his right foot, chiropractic treatment, medial branch blocks and radiofrequency ablation. The last ablation was performed on March 22, 2019, and was expected to last 3-6 months. The Applicant testified that he was asymptomatic the day before the work incident and generally downplayed the significance of his pre-existing condition and exaggerated the seriousness of the work-related motor vehicle accident. The administrative law judge found that the Applicant failed to meet his burden to prove anything more than a temporary injury that resolved within two weeks and ordered benefits paid accordingly. On review, the Labor and Industry Review Commission affirmed. The Commission noted its concerns about the Applicant's credibility given that his testimony and subjective complaints were belied by the medical

records. The Commission further noted its concerns about the opinions of Drs. Prpa and Reyes, who appeared to have an inaccurate history regarding the Applicant's pre-existing condition as well as the symptoms immediately after the alleged work injury. The Commission concluded that Dr. Hsu reviewed all the Applicant's prior medical records and had a better understanding of the Applicant's medical condition. They ultimately found there was legitimate doubt that the Applicant sustained anything more than a lumbar strain as a result of the work incident.

Fields v. Bridgeman Foods, Claim No. 2018-016778 (LIRC January 31, 2025). The Applicant claimed that he was permanently and totally disabled as a result of a work-related injury. The medical experts disagreed on the nature and extent of the injury and whether permanent restrictions were required. The vocational experts agreed that restrictions assigned by the treating provider would result in the applicant being permanently and totally disabled. They also agreed that the applicant was not permanently and totally disabled if Dr. Lemon's independent medical examination opinions were adopted. Surveillance evidence contained full videos of the Applicant's activities on five days. The Applicant was shown walking normally for a man of his age, getting in and out of his car without a problem, and taking off from his drive on a motorcycle on the first two days. On the third date, he was seen showing up for his examination with Dr. Lemon. The Applicant was walking extremely slowly, at some points as if he could barely move. He used a cane and had a back brace on, neither of which he had during the first two dates. He showed substantial difficulty getting into and out of his car. On the date of the independent vocational evaluation, he again walked extremely slowly with the cane and back brace. On the final day of surveillance, he walked normally at a gas station. He did not use a cane, had no back brace, and demonstrated no difficult entering or exiting his vehicle. The unnamed administrative law judge denied the Applicant's claims for permanent total disability. The Labor and Industry Review Commission affirmed. The Applicant's credibility is severely undercut by video surveillance evidence showing drastic differences in his ability to move, based upon whether he believed he might be observed by someone familiar with his workers' compensation claim.

Course of Employment

Lamm (Deceased) v. Mathy Construction Co., Claim No. 2020-002048 (LIRC October 21, 2024). The Applicant drove water trucks (which sprayed pavement for construction) or heavy equipment at job sites, typically quarries. The company sometimes had him drive the water truck to/from his home. He logged on an Electric Driver Log (EDL) whenever he operated the water truck. He would be on paid status when logged into the EDL. On the day of the fatal accident, the Applicant was told to drive a water truck to his own residence, then use his personal vehicle to go to a second job site. The parties disagreed as to whether the Applicant was typically paid when driving his personal vehicle. The Applicant's evidence led to an inference that reimbursement was typical when he drove his own vehicle. The administrative law judge determined that the Applicant was on paid status when he was killed driving from his home to the second jobsite, and thus held his claim was compensable. The Labor and Industry Review Commission affirmed. The credible evidence supported the compensability determination. The Commission held that the Applicant was not injured on his normal work commute route. The directions to drive his personal vehicle were given for the economic benefit of the Employer. Therefore, this deviation from normal duties constituted a "Special Errand" for the Employer and rendered the accident compensable.

Duty Disability Benefits

Anderson v. County of Ashland, Claim No. 2020-003661 (LIRC March 31, 2025). This case addresses eligibility for duty disability benefits for work injuries under Wis. Stat. § 40.65, which allows employees in protective occupations to recover benefits when a job-related injury or disease leads to a likely permanent disability and causes the worker to retire (or suffer other specified adverse employment consequences). Here, a deputy sheriff asserted cervical, shoulder and bilateral arm injuries (including cubital and carpal tunnel) after a slip and fall accident while working. The record had evidence of pre-injury medical treatment for cervical, back and shoulder complaints. The Employer contested permanent injury because the medical records and testimony about the injuries sustained from the slip and fall were inconsistent. The compensation judge held the Applicant failed to meet his burden of proof of showing a permanent disability leading the Applicant's retirement and denied the request for benefits. The Labor and Industry Review Commission affirmed. The Commission noted that the Applicant did not initially report a work injury when he began seeking medical treatment and that the Applicant bears the burden of proving all elements of his claim. The Commission found that no permanent injury/disability was caused by the work incident.

Evidence

Demuth v. Mayo Clinic Health System NW WI Reg, Inc., LIRC 2020-016160 (December 26, 2024). The Applicant treated with a Minnesota surgeon (Dr. Buttermann) without a referral from

a Wisconsin medical provider. Dr. Buttermann recommended various scans, which were performed at a Wisconsin facility that was closer to the Applicant. The Respondents paid for the scans performed in Wisconsin but not for the treatment with Dr. Buttermann. The Applicant then requested that APNP Storlie (practicing at a Wisconsin Mayo Clinic) make a formal referral to Dr. Buttermann. That formal referral occurred prior to the second office visit with Dr. Buttermann. However, at a Hearing which addressed whether surgery recommended by Dr. Buttermann, to be performed in Minnesota, was payable by the Respondents, the Applicant did not submit medical records reflecting there was a referral from APNP Storlie to Dr. Buttermann. The Respondents argued at the hearing that there was no such referral in evidence, and, therefore, the treatment was not payable because it was medical treatment out of state without the necessary referral. The Applicant's testimony was not supportive of a confirmed referral prior to the initial medical appointment, and she believed any referral was given by phone. The administrative law judge awarded all benefits sought by the Applicant. The Labor and Industry Review Commission ultimately affirmed. However, upon initial review to the Commission, the initial briefs addressed the evidence and testimony at the hearing. The Applicant then submitted a supplemental response brief with an attached medical record with the referral from APNP Storlie to Dr. Buttermann. The Respondents objected to the supplemental brief and submission of new evidence. The Commission indicated the evidence would be permitted as an exhibit unless there was an objection. When the Respondents objected, the Commission remanded the case for a second hearing. That second hearing was solely for the purpose of taking into evidence the additional medical record as an exhibit. The parties were permitted to make objections and arguments regarding the document. The Respondents objected to the additional evidence because it was not filed at least 15 days prior to the initial hearing as required by the statute, and there was no good cause for failing to timely file the document. The case was then returned to the Commission on the merits of the original case. The Commission's rationale for affirmance of the benefits awarded was that the Respondents implicitly agreed to the first date of treatment with the Minnesota provider by paying for the scans ordered by Dr. Buttermann at the first visit. The studies would not have been performed but for the treatment provided and were done in anticipation of additional treatment. The additional medical record submitted at the second hearing were appropriate to be considered on its merits because the Respondents had access to the relevant medical records and knew or should have known that the submitted record existed.

Exclusive Remedy

Towle v. School District of Brown Deer, Claim No. 2014-006535 (LIRC November 29, 2024). The Applicant began to work as a district business manager for the Employer, a school district, beginning July 1, 2008. He was placed on administrative leave on February 9, 2009, for alleged irregular accounting and business practices. Subsequently, the Employer made public statements concerning the Applicant, which the Applicant alleged were defamatory and negatively affected his ability to obtain employment in his chosen field. He initially filed a circuit court action for defamation in 2010. The Employer filed a motion for summary judgement claiming, among other things, that the defamation claim was barred by the exclusive remedy provision of the Worker's Compensation Act. The circuit court agreed and granted summary judgement for the Employer. This was affirmed by the Court of Appeals. The Applicant's petition for review was denied by the Wisconsin Supreme Court. The Applicant then filed a Hearing Application claiming injury to his reputation causing a loss of earning capacity. The administrative law judge dismissed the claim without prejudice. The Labor and Industry Review Commission affirmed. While it is a quasi-judicial administrative agency that is bound by the rulings of published Wisconsin appellate court precedent, and while that precedent holds that the exclusive remedy for an employee who alleges that his employer has defamed him rests with the Wisconsin Worker's Compensation Act, there is no recovery available under that Act if the act of defamation does not result in a mental or physical harm consistent with the definition of "injury" under Wis. Stat. § 102.01(2)(c). The Commission reviewed the relevant court cases cited by the parties concerning application of the exclusive remedy provision involving defamation claims against an employer. The Commission held that the case history arguably demonstrated that the applicable Court of Appeals holdings may be based upon misapplied precedent. Despite this observation, the Commission noted it was bound by the holdings of published Court of Appeals Decisions. Accordingly, the Applicant's case was properly brought before an administrative law judge as a worker's compensation claim. However, there was no alleged mental or physical harm attributable to the alleged defamation and, therefore, no "injury" as that term is defined in the Act. The Commission further rejected the Applicant's argument that the Respondents were judicially estopped from disputing his worker's compensation claim after they had

successfully argued that his civil claim was barred by the exclusive remedy provision of the Act. The Respondents made the same argument before the Commission but additionally argued that the Applicant failed to establish facts that would allow a recovery under the Act. These positions were not "clearly inconsistent" with each other.

Misconduct / Substantial Fault

Bolson v. Mole Lake Band, Hearing No. 24200917EC (LIRC October 11, 2024). The Applicant played a "prank" on a coworker. The coworker was not offended. The coworker did not attend the hearing. The only witness for Mole Lake Band was an HR director who had no firsthand knowledge of the incident. The Applicant described the conduct as a joke between two friendly coworkers who openly talked and joked about sex in the workplace. [The Employee taped a dildo under her coworker's desk in such a manner that when she sat down, it would hit her.] The Employee testified that she and the coworker laughed about it afterward; and the Employee had been previously the subject of a similar prank herself. The prank may have been done in poor judgement, but it was not offensive to the coworker nor did it create an intimidating, hostile, or offensive work environment. While the Employer indicated it had a policy prohibiting sexual harassment, this was not provided as an exhibit. Further the Employee did not receive a copy of the policy. While the Employer claimed the Employee attended training on sexual harassment prior to the discharge date, there was no evidence how this would have alerted her that this conduct was unacceptable. Therefore, the Employer failed to meet its burden to prove her conduct amounted to either misconduct or substantial fault, pursuant to Wis. Stat. 108.04(5)-(5)(g). *Georgia Maxwell dissented. She would find there was discharge for misconduct under Wis. Stat. 108.04(5)(d), which defines misconduct as including "one or more threats or acts of harassment, assault, or other physical violence instigated by an employee at the workplace of his or her employer" or, alternatively, under the now codified standard outlined in Boynton. All employers have a significant vested interest in prohibiting acts of sexual harassment at the workplace that not only could create an unsafe working environment for its employees but could also potentially subject it to liability for sexual harassment under state or federal law.*

Salinas v. Acro Metal Stamping Co., Hearing No. 24604558MW (LIRC October 25, 2024). The Applicant was discharged pursuant to the Acro Metal Stamping Company's attendance policy, of which the Applicant had acknowledged receipt with her signature. Therefore, she was discharged for misconduct pursuant to Wis. Stat. 108.04(5)(e). In the Petition for Review, the Applicant made assertions which were not made at a hearing (including how staff was treated and pay allegedly withheld). The Commission can only review the evidence submitted at a hearing. There was no newly discovered evidence to warrant a new hearing. The Applicant's claim that the tribunal decision is unfair is not considered as the Commission is required to apply the statute as written and interpreted by the courts and does not have authority to deviate from binding precedent. The Applicant was erroneously awarded $1,460.00 pursuant to the Department's misapplication or misinterpretation of the law. This is not required to be repaid by the Applicant because it was Department error. The misapplication of the law determination was made apparent by the Court of Appeals decision in *Bevco Precision Mfg. Co. v. LIRC, 2024 WI App 54 (petition for supreme court review pending).*

McGee v. Absolute Home Care LLC, Hearing No. 24603198MW (LIRC October 29, 2024). The Applicant worked for Absolute Home Care LLC at a group home as a caregiver. Her shifts started at 3 p.m. She had concurrent employment at a childcare facility. Her shift ended there at 2 p.m. Her coworker at the childcare facility was chronically late. The Applicant could not leave that facility until her coworker arrived. She was late to work for Absolute Home Care LLC on approximately 30 occasions between January 2, 2024 and April 26, 2024 (the 120 days prior to her discharge). The Applicant was also absent three times during that period of time. She communicated with Absolute Home Care LLC each time that she was going to be late or was absent. She was provided a written warning for attendance and then terminated when she was again absent. Absolute Home Care LLC had a written attendance policy. That was not placed in evidence at the hearing. The Applicant did not acknowledge receipt of the policy with her signature and was unaware that the number of attendance occurrences could result in discharge under the policy. Her discharge was not for misconduct or substantial fault. The policy does not govern the discharge because the Applicant was not aware of the provisions of the policy and did not sign it (both of which are required for the policy provisions to apply to the evaluation for misconduct). Further, the Applicant did not fail to provide the Employer with notice and/or have a valid reason for her absence on more than two occasions in the 120 days prior to her discharge. Because her absences were for valid reasons and with notice, and she could not be expected to leave children in a child care facility without proper supervision, and her co-workers arrival time was beyond her control, her tardiness to Absolute Home Care LLC cannot be considered intentional or grossly negligent. Similarly, her

attendance infractions were due to illness of the Applicant, her child, and her grandmother; and her tardiness was due to a worker's failure to arrive at work on time and her duty not to leave children unattended, and therefore, not within her reasonable control and thus not substantial fault.

Hudson v. Kwik Trip, Inc., Hearing No. 42006430MD, (LIRC December 19, 2024). The Applicant was hired by Kwik Trip on May 16, 2023. Her employment was terminated on July 19, 2024 for poor attendance. The Applicant was given a written warning for attendance concerns on February 24, 2024 after missing nine days of work. She was issued a second written warning on April 3, 2024, following another three missed days of work. She then missed another two days of work in June of 2024 and received a verbal warning. After the verbal warning she was late for 12 out of the following 17 shifts and her employment was terminated. Kwik Trip argued that the Applicant was terminated for misconduct and that she was not eligible for unemployment benefits. Kwik Trip argued that the Applicant was aware of its written attendance policy and that she had acknowledged reviewing the policy by clicking "agree" during an online training course. The Labor and Industry Commission did not believe that clicking "agree" satisfied the requirements of Wis. Stat. § 108.04(5)(e):

> "Absenteeism by an employee 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 found that clicking the "agree" button did not satisfy the common definition of a signature nor did it demonstrate an "intent to sign." Therefore, the Commission found that Kwik Trip's attendance policy was not applicable. Nonetheless, the Commission proceeded to analyze whether the Applicant had been absent on more than two occasions within the 120 day period before her termination, found that she had, and found that she had not provided adequate notice or valid reasons for her attendance issues. The Commission found that "looking for new housing and not having reliable transportation to work were not valid reasons to miss work," and denied unemployment benefits.

Delossantos v. Hormel Foods Corp., Hearing No. 24009689MD, (March 31, 2025). The Applicant was discharged on October 21, 2024 for violating the Employer's harassment policy. On October 14, 2024, the Applicant approached a female coworker, moved close to her, and placed his face close to her face. The coworker found this conduct to be offensive. She pushed the Applicant away and reported the incident to her supervisor. That supervisor reported the incident to an HR manager. The HR manager suspended the Applicant, pending investigation, on October 16, 2024. He investigated the incident ,which included taking statements from both the Applicant and the coworker, and viewing video of the incident. After concluding his investigation, the HR manager determined the Applicant had violated the employer's harassment policy, and discharged the Applicant. This policy provided for discharge after a single incident of harassing conduct. The Labor and Industry Review Commission affirmed a determination that the Applicant was discharged for misconduct within the meaning of Wis. Stat.§ 108.04(5)(d). The Applicant did not participate in the initial hearing. At that hearing, the Employer presented undisputed testimony from its HR manager regarding the contents of a video of the incident. The manager testified that, on video, he saw the Applicant approach a female coworker and attempt to kiss her. He then saw the coworker push the Applicant away. The HR manager indicated the Applicant provided the HR manager with a statement during the HR manager's investigation. In that statement, the Applicant did not deny that he moved close to the coworker, that he put his face close to her face, or that she pushed him away. He denied that his intent was to kiss the coworker; he explained that he was trying to smell her breath. When the HR manager asked why, the Applicant responded that he did not know. When an employer has video of an incident, and an individual disputes the contents of the video or the facts of the incident shown in the video, the Commission has found that testimony about the contents of the video is insufficient. However, here, the Applicant did not dispute the contents of the video. His statement to the HR manager provides an alternate, though not credible, motive for his actions, but does not dispute the actions that would be visible in the video. The Commission therefore finds the employer's testimony about the contents of the video to be reliable, competent evidence.

Occupational Exposure

Weigel v. Goodwill of Southeastern WI, Claim No. 2022-020485 (LIRC January 16, 2025). The Applicant worked for more than 20 years in a commercial laundry. The Applicant handled soiled laundry which could have blood and other chemicals on it, which the

Applicant could smell. He also had to add powder detergents and bleach to the equipment. The Applicant also had to blow dust off machines, and then sweep it up from the ground. Additionally, he cleaned filters. The Applicant did not wear a mask unless he was blowing down dust and cleaning dryers (apart from when masks were required for all due to COVID). The washers and dryers ventilated into the room. The Applicant developed a cough about seven months after being required to wear a mask for COVID. He was working a significant amount of overtime in the three months or so before he developed the cough because the Employer was short on employees. He alleged that exposure to chemicals during employment was the cause of diagnosed interstitial lung disease. MSDS sheets indicated proper ventilation was required for a number of the utilized chemicals. The Applicant lived in the basement of his parents' house. There was no change in his living arrangement for about 30 years. There was some mold on the basement ceiling because of a leaky upstairs toilet a few years prior to his alleged injury and some mold in his room due to a leaky roof around the same time. His medical history included a positive allergy test for dust mites. The Applicant's symptoms improved when he was released from work for an extended period of time (between injury dates) even though he spent most of his time at home in the basement. The original claim listed a date of injury of October 15, 2021 when the Applicant first sought medical treatment for a persistent cough. He later alleged that he sustained an injury after additional exposure in March 2022, at which time he returned to work, but had to leave again after 2.5 days of work because of a recurrence of symptoms. The Respondents objected to the later date of injury being asserted on the basis of lack of notice. The Applicant was permitted to claim both dates at the time of the hearing; however, the Respondents were given the opportunity to submit an updated independent medical examination to address the second date of injury. Dr. Habel performed an independent medical examination and opined the Applicant's condition was personal in nature. He noted the Applicant's father (who was a plumber) had the same diagnosis. He opined the Applicant's employment for 20 years without a change in chemicals, and without being required to wear a mask but for COVID, deemed that employment safe. The unnamed administrative law judge held the Applicant sustained a work-related injury in March 2022, when he stopped working after a recurrence of symptoms. The Labor and Industry Review Commission affirmed. The Commission held there was likely also an injury sustained in October 2021. However, the medical experts did not provide specific support for that date of injury and the Commission cannot speculate on injuries without a medical opinion to reply upon. The Applicant had a dramatic change in his condition after a brief time back in the work environment in March 2022. The MSDS sheets and the Applicant's credible testimony shows that he was exposed to numerous chemicals and dust and particulates at work. Dr. Habel did not explain why the Applicant would have had such an acute reaction after returning to the workplace. Therefore Dr. Habel's opinion that the condition was merely personal is not credible. The consideration of the second date of injury was appropriate. The Respondents were on notice the Applicant was claiming an occupational injury and not a traumatic event. The responsibility for determining the correct date of injury rests with the administrative law judge and, on appeal, the Commission.

Occupational / Repetitive Injuries

Hickmon v. Frito Lay, Inc., Claim No. 2021-008471 (LIRC June 28, 2024). The Applicant filed a Hearing Application alleging he developed right side carpal tunnel syndrome as a result of his daily activities as a route sales representative for Frito Lay. He worked in this capacity from 2016 to 2022. This job involved delivering snacks from a distribution center to different retail stores. The Applicant testified that he spent 15% of his day driving a truck, 15-20% of his day unloading product, and 75-80% of his day stocking shelves at the various retail stores. He testified that he typically worked 10-14 hours per day, 7 days per week. A director from the Employer testified on behalf of the Respondents. The director testified that the Applicant did not work the type of hours he claimed to have worked. The payroll records proved that he never worked a 7-day week in his six years of employment, he never worked more than ten hours per day, and he only worked ten hours a day on six occasions. The director also testified that the Applicant's job activities were not repetitive because his job tasks were widely varied throughout the day. The director also provided a video simulating some of the Applicant's job activities and narrated about those tasks during his testimony. The Applicant relied upon the WKC-16-B of Dr. Crimmins. Dr. Crimmins opined that the work activities aggravated and accelerated pre-existing carpal tunnel syndrome CTS beyond its normal progression. Dr. Crimmins was under the impression that the Applicant "does demanding repetitive work." The Respondents relied upon the independent medical examination report by Dr. Maldonado. Dr. Maldonado opined that the work activities were not sufficient to have contributed to the

carpal tunnel syndrome condition. The Administrative Law Judge denied the Applicant's claim. The Labor and Industry Review Commission affirmed. The Applicant clearly exaggerated the amount of time he spent performing his job duties. The job video did not show any "particularly repetitive" tasks. Further, it was not clear whether Dr. Crimmins had an accurate understanding of the job duties at issue. *See Pressed Steel Tank v. Indus. Comm'n*, 255 Wis. 333, at 335 (1949).

Estevez v. Timber Creek Resource, LLC, Claim No. 2021-024349 (LIRC August 30, 2024). The Applicant claimed he developed an "incisional hernia" as a result of heavy lifting he was doing as an assembler for the Employer. The Applicant was hired by the Employer in December of 2020. His job involved assembling wood pallets. This job involved lifting up to 200 pounds and constant material handling throughout the day. In June of 2020, prior to being hired by the Employer, the Applicant was involved in a motorcycle accident, which resulted in the need for multiple abdominal surgeries. He was eventually discharged with no restrictions following these surgeries and passed a pre-employment physical prior to being hired by the Employer. At the Hearing, the Applicant testified that he "felt a pop or a tear" at work in February or March of 2021, while lifting a pallet over his head. He continued to work as usual for the next month or two. He testified that he experienced ongoing pain in his abdominal area during this time, but never reported the injury. In April or May, the Applicant noticed a bulge in his groin area and sought treatment for the first time. His primary care provider, Dr. Luy, diagnosed a hernia near the area of his prior surgical site. The Applicant told Dr. Luy about the incident at work and explained he thought that heavy lifting caused the hernia. Dr. Luy did not believe the hernia was caused by work. Rather, he believed it was caused by the surgeries after the motorcycle accident. The Applicant first reported the alleged work injury to the Employer on June 14, 2021, when he provided them with a letter from Dr. Luy imposing work restrictions. The Employer advised he could not return to work until he was cleared for full duty. The Applicant underwent hernia repair surgery, performed by Dr. Murphy, on December 14, 2021. He was released without restrictions on January 6, 2022. At the Hearing, the Applicant relied on the WKC-16-Bs by Dr. Luy and Dr. Murphy. Dr. Luy had reversed his opinion on causation for reasons that were not explained. Dr. Murphy opined that the Applicant's work activities were a material contributory causative factor in the progression of the hernia, and that the work activities aggravated and accelerated a pre-existing condition. The Respondents relied on the medical record review of Dr. Goodman. Dr. Goodman opined that the hernia condition was the result of the abdominal injuries and surgeries. Dr. Goodman did not believe that lifting at activities at work played a causal role. The administrative law judge awarded benefits. The Labor and Industry Review Commission affirmed. The Commission held that the *E.F. Brewer and Meade/ McCarthy* cases did not apply because the hernia at issue in this case was an incisional hernia, not an inguinal hernia. The Commission rejected the opinion of Dr. Goodman because he reached his conclusions without examining or interviewing the Applicant. The Commission believed that the failure to examine or interview the Applicant led Dr. Goodman to have a less accurate understanding of the nature of the applicant's job duties.

Permanent Partial Disability

Welch v. Paloma Legacy, LLC, WC Claim No. 2021-006391 (LIRC March 31, 2025). The Applicant filed a Hearing Application alleging an injury to his left knee on January 5, 2021. The Applicant began working as a maintenance technician for the Employer in December of 2020. On January 5, 2021, the Applicant was carrying a heavy table, lost his balance, and his left leg hyperextended. The Applicant felt an immediate popping sensation followed by pain and numbness. The Applicant had a prior history of left knee treatment. In July of 2011, the Applicant had injured his left knee when he fell from a ladder. He was subsequently diagnosed with ACL and medial meniscus tears. He underwent an ACL reconstruction and medial meniscectomy by Dr. Fideler in October of 2011. Following the January 5, 2021 incident, the Applicant began treating with Dr. Fideler once again. Dr. Fideler opined that the January 5 incident had torn the previously repaired ACL. Dr. Fideler also diagnosed significant degeneration within the medial compartment of the left knee. The Applicant underwent a left knee arthroscopy with medial meniscectomy on February 25, 2021. Dr. Fideler opined there was grade IV degenerative changes in the medial compartment and did not believe a repair of the ACL was feasible. On March 26, 2021, Dr. Fideler issued a WKC-16 form wherein he assessed 15% permanent partial disability for the prior accident in July of 2011, and another 15% permanent partial disability for the most recent accident on January 5, 2021. Dr. Fideler also opined that the Applicant would require a total knee replacement in the future. The Applicant went about two years before going back to see Dr. Fideler again for left knee pain in February of 2023. Dr.

Fideler recommended a total knee replacement. That surgery was carried out on March 1, 2023. Dr. Fideler then assessed another 50% permanent partial disability. The Respondents obtained a records review with Dr. Niesen. He opined that the January 5, 2021 incident was not an injury, but a manifestation of a pre-existing condition. Dr. Niesen did not address permanent partial disability \ in his report. The administrative law judge adopted the opinions of Dr. Fideler and awarded 50% permanent partial disability benefits to the Applicant. The judge acknowledged that the permanent partial disability assessed for the two surgeries that took place after the January 5, 2021 injury needed to be "stacked," but also recognized that the pre-existing 15% permanent partial disability needed to be subtracted from the permanent partial disability otherwise due. Therefore, the judge awarded 50% (i.e., 50 + 15 – 15 = 50). The Labor and Industry Review Commission affirmed in part and reversed in part. The Applicant argued that the judge should have held that the Applicant sustained a total of 80% permanent partial disability as a result of both injuries and resultant surgeries, and that 15% should have been deducted from the 80%, resulting in a permanency partial disability award of 65%. The Commission disagreed. The Commission, citing *DaimlerChrysler v. LIRC*, held that stacking of permanent partial disability ratings is only allowed when an injured worker undergoes multiple surgeries that are attributable to the same work injury. Here, only two of the surgeries were attributable to the January 5, 2021 incident. Therefore, only the two permanent partial disability ratings could be "stacked" upon one another. The Commission agreed with the Judge's ultimate finding that 50% permanent partial disability was due as a result of the January 5, 2021 work related injury. The basis of the calculations was different because "the department now calculates benefits due in these situations differently" than the Commission has done in the past. Rather than simply deducting the pre-existing permanency percentage from the post-injury total, the department now deducts the amount of weeks attributable to the pre-existing permanent partial disability from the total value of the scheduled body part (in weeks), and then applies the full stacked amount against that reduced number of weeks. In this case, the pre-existing 15% permanent partial disability amounted to 63.75 weeks. These 63.75 weeks were deducted from the total value of the knee of 425 weeks, leaving 361.25 weeks. The stacked ratings of 65% are then applied against the reduced total of 361.25 weeks, resulting in 234.81 weeks of disability being awarded to the Applicant. This was a higher number of weeks than the 212.50 weeks awarded by the judge using the previously-prescribed method of permanency apportionment.

Permanent Total Disability

Kaiser v. Sharona's Bar, LLP, Claim No. 2019-007933 (LIRC June 28, 2024). The Applicant filed a Hearing Application alleging she sustained head, neck, and mental injuries as a result of a slip-and-fall at work on January 17, 2019. The Applicant worked as a bar tender for the Employer for approximately two years prior to the injury. The bar was uninsured at the time of the injury, so the Uninsured Employer's Fund assumed responsibility for the defense of the case. The Applicant claimed she was rendered permanently and totally disabled as a result of the slip-and-fall. The Applicant did not seek any treatment until January 22, 2019. When she began seeking treatment, she complained of headaches, difficulties with concentration, nausea, fatigue, and emotional issues. She was diagnosed with a concussion without loss of consciousness. However, the medical records indicated that she treated for a variety of similar issues for years prior to January 17, 2019. In 2018 she was receiving care for depression, anxiety, and migraine headaches. She was also treated for cervical radiculopathy and a two-level fusion had been proposed, prior to the alleged injury, but was not carried out. The Applicant relied upon WKC-16-B reports by Dr. Newgent, Dr. Grunert, and Dr. Siebert. Dr. Newgent did not treat the Applicant, but diagnosed her with a severe traumatic brain injury along with cervical radiculopathy. He assessed 60% permanent partial disability and issued permanent restrictions. Dr. Grunert also did not treat the Applicant, but diagnosed her with panic disorder and agoraphobia. He assessed 4% permanent partial disability. While he acknowledged the Applicant had a prior history of anxiety "in the remote past," he believed she "ha[d] clearly coped well with this prior to her slip and fall injury." Dr. Siebert diagnosed a concussion but explained it was unknown as to whether there was any permanent injury. Dr. Siebert opined that the Applicant needed to undergo neuropsychological testing in order to assess whether there were any permanent impairments. The Applicant submitted a vocational report by John Woest, who opined the Applicant was not capable of being retrained and was 100% vocationally disabled under the odd-lot doctrine. The Respondents relied on reports by Dr. Burgarino and Dr. Sani. Dr. Burgarino conducted two independent medical examinations. He opined that the Applicant did not sustain a concussion, but rather a contusion. He further opined that the Applicant reached end-of-healing within six weeks, with no permanent injury. Dr. Sani opined that the Applicant sustained a concussion.

He opined that her subsequent symptoms were not consistent with an ongoing concussion problem but rather were attributable to her anxiety and other psychiatric disorders which were pre-existing. He also opined that her cervical radiculopathy was clearly pre-existing and was unchanged by the slip-and-fall. The administrative law judge denied the Applicant's claims. The Labor and Industry Review Commission affirmed. The Commission held that Dr. Newgent, Dr. Grunert, and Dr. Siebert had not reviewed the Applicant's pre-injury records and were not aware of the Applicant's prior problems. The Commission credited the opinions of Dr. Sani and determined that the injury resolved by February 28, 2019. The Commission did not credit the opinions of Dr. Burgarino because he did not opine that the Applicant sustained a concussion, although he also found that the injury resolved within six weeks, as did Dr. Sani.

Polkey v. DMJ Services, Claim No. 2021-025270 (LIRC August 5, 2024). The Applicant had mid-back pain, with permanent restrictions which allowed him to rest his back for two minutes after 30 minutes of standing. The administrative law judge determined that the Applicant was permanently and totally disabled with these restrictions. The Labor and Industry Review Commission affirmed. The Employer had presented an occupational expert report which identified types of jobs which would accommodate the Applicant's restrictions. The Employer asserted that the Applicant failed to establish his entitlement to permanent total disability status. The Commission held that it was "not realistic" to assume that a 2-minute rest break would be a sufficient period or rest, or that any employers that would actually tolerate such frequent breaks. The Commission held that the Applicant satisfied showing permanent total disability status by these restrictions. The Commission noted the burden thereafter shifted to the Employer to demonstrate that "...the injured employee is actually employable and that there are actual jobs available to him." While the vocational expert's report listed six job categories which might be acceptable, that report failed to show that any such job was actually available to the Applicant in his work market.

Procedural Issues

Kamrath v. Premiere Labor, Inc., Claim No. 2018-008363 (LIRC October 9, 2024). A Hearing Application was filed for disputed injury claims. The Applicant failed to appear for the noticed hearing, leading to dismissal of the claim by the administrative law judge. The Applicant timely appealed and asserted that the hearing should be re-set due to case law generally allowing a further hearing if the non-appearance resulted from "excusable neglect." The explanation provided for missing the hearing was that the Applicant had been unable to attend the hearing due to "exigent circumstances" outside of his control. However, those circumstances were never explained – although it was alleged that the circumstances "involved multiple state departments, law enforcement agencies, and municipal authorities." The Labor and Industry Review Commission affirmed the dismissal of the Hearing Application. Case law defined excusable neglect as the type of act that a reasonably prudent person under similar circumstances would take. From the evidence in the record, the Applicant had not established what circumstances had prevented his appearance at the hearing, and had not established that a reasonably prudent person would act similarly under similar circumstances. [NOTE: The decision specifically explained to the Applicant that this dismissal was without prejudice, so there was still time to re-file the Hearing Application under the appropriate statute of limitations period.]

Psychological Injury

Letendre v. City of Superior, Claim No. 2022-006500 (LIRC January 16, 2025). The Applicant had a Master's degree in emergency management leadership. He completed registered nursing coursework. He is a registered firefighter and certified paramedic. The Applicant worked as an emergency medical technician and paramedic for 14 years. He then completed police officer training. During his employment as a police officer, the City of Superior relied upon the Applicant's background and experience as a paramedic to provide advanced emergency medical services when needed. He was assigned to the City's Emergency Response Team. The Applicant alleged three incidences exceeded the ordinary stress that all police officers may expect and experience, and these were causative of his post-traumatic stress disorder. First, in April 2018, the Applicant was assigned to significant responsibility during the response to the Husky Refinery explosion. In this role, he was apprised of the risk of another explosion that could release hydrogen fluoride gas. He became concerned of substantial risk to the public and his coworkers as well as his family members (who were in the area that would be affected by the release of gas). The Applicant had been directed to not alert anyone (including his family) of the risk for fear of spreading a panic. After about 24 hours, the fire was brought under control without a second explosion. Next, six months later, he responded to a call involving a minority individual who was shot by while officers at a crime

scene. The Applicant was responsible for administering emergency medical care. The wounds were life threatening. The Applicant continued to assist paramedics after they arrived, including during transportation to the hospital. The Applicant was afraid the individual would die and was anxious about being involved in the shooting of a minority by white police officers. The third incident occurred several days after the George Floyd murder. He was assigned to operate an armored vehicle for crowed control. A vehicle was accelerating toward their vehicle and they almost had to ram that vehicle to keep it from moving down a line of officers. The vehicle turned away in time, but the Applicant was concerned about being involved in a dramatic public incident that could result in his imprisonment. The unnamed administrative law judge denied the Applicant's claim for benefits. The Labor and Industry Review Commission reversed. The Husky Refinery incident was potentially life threatening to many individuals, including the Applicant's family. He was in charge of coordinating the government response to the incident over a prolonged period, during which catastrophic loss of life could have occurred. He was precluded from warning his family of the life-threatening risk. The Husky Refinery incident, as well as the shooting incident that involving prolonged administration of emergency aid during an incident which could have become an inflammatory racial incident, both would fit in the extraordinary stress standard for any police officer.

Streicher v. County of Milwaukee, Claim No. 2022-021131 (LIRC April 30, 2025). The Applicant was a deputy sheriff. He was injured driving on patrol duty when he ran a red light causing a collision. The deputy had minor physical injuries, but the driver of the other car was killed in the accident. The deputy was charged and served some prison time for homicide by negligent use of a motor vehicle. As a result of the conviction, he could no longer carry firearms, a requirement for the job. The deputy resigned his position. He alleged that he sustained post-traumatic stress disorder and major depression from the accident. His Hearing Application requested disability benefits. The Employer denied the request, arguing that the mental injury did not result from a situation of greater dimensions than the day-to-day mental stress for his position, and that the tensions and post-traumatic stress was what all similarly situated employees must experience as part of the job. The administrative law judge disagreed and awarded the disability benefits. The Labor and Industry Review Commission affirmed. The Commission detailed the two part test for a Duty Disability benefits which was satisfied for this matter: (1) finding a mental injury resulted from a situation of greater dimensions than the day-to-day mental stresses and tensions and post-traumatic stress that all similarly situated employees must experience; and (2) and that the employer certifies that the mental injury is a duty-related injury. Here the Commission held that it was quite persuasive that co-workers testified there was no other known deputy collision resulting in death from a squad car accident. Further, the clinical psychotherapist testified that in treatment of more than 400-officers over a 35-year career, no other cases were known where an officer killed another in a crash with their vehicle. There was "overwhelming" evidence establishing an extraordinary circumstance leading to the mental injury, such that benefits were appropriate.

Statute of Limitations

Jones v. Assata High School, Claim No. 2024-000418 (LIRC June 28, 2024). The administrative law judge held a Pre-Hearing Conference with the pro se Applicant and Respondents, in which it was confirmed that the Applicant alleged a traumatic injury occurring on September 5, 2017; that she did not file her Hearing Application until December 2023; and that Respondents had not paid any benefits for the alleged injury. Following the Pre-Hearing, the administrative law judge issued a Decision finding the Applicant's claims were barred by the statute of limitations. As such, the Hearing Application was dismissed with prejudice. The Applicant filed a timely Petition for Commission Review. The Labor and Industry Review Commission noted that the Applicant argued, in all capital letters, that it was unlawful to oppress a claimant and withhold payment on a valid claim. The Commission further noted that the Petition was listed as filed by "The Law Firm of Drusilla Jones Principal LLC" as the Applicant's representative, and that her reasons for filing the Petition including insurance fraud; litigated, no compromise; closures due to Covid-19; jurisdiction none; the State of Wisconsin is a "fictitious person;" venue in the U.S. District Court for the Eastern District of Wisconsin; and notice of claim/notice of suit/demand for payment. The Commission strictly enforced the Statute of Limitations and affirmed the administrative law judge's Decision. The Applicant provided no arguments or reasons for which the statute of limitations did not apply.

Unreasonable Refusal to Rehire

Navin v. Meritor Automotive, Inc., Claim No. 2000-026360 (LIRC September 25, 2024). The Applicant filed a Hearing Application asserting an unreasonable failure to rehire after a work injury. The records established that the nurse and Insurer were aware of work restrictions. The Applicant's attorney was communicating with the Insurer about the Applicant returning to work. However, no evidence was presented at hearing that anyone at the Employer had been aware of any ability and availability of the Applicant to return to work. The administrative law judge dismissed the claim. The Labor and Industry Review Commission affirmed. The Applicant is ultimately responsible for communicating to the Employer about a release to work. An applicant asserting an unreasonable failure to rehire must establish three things: (1) that he/she was an employee of the employer; (2) that he/she sustained a compensable work injury; and (3) that the employer subsequently denied him/er rehire. An implicant element of the third requirement is that the Applicant provide notification to the Employer that he is available to return to work. This typically includes provision of a medical release. The evidence showed that only the Insurer was kept informed of the restrictions status, although the insurer had no ability to control employment. While the Applicant asserted he notified the Employer of his availability to return to work the credible evidence does not support this assertion. The Insurer was under no legal obligation to provide the documentation regarding restrictions to the Employer. The Applicant has the ultimate responsibility to make sure the Employer knew about the release to return to work and that the Employer knew the Applicant was available to work. The Applicant never directly contacted the Employer to fulfill the straightforward obligation. ✦

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