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Wisconsin Worker's Compensation Update

In This Issue

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Decisions of the Labor and Industry Review Commission

Appeals

Rivera v. Nestle USA, Inc., Claim No. 2023-012003 (LIRC July 15, 2025). The applicant was injured as a result of either an assault against the applicant or a fight between two co-workers. The applicant and the co-worker who was also involved in the incident were both terminated. The pro se applicant sought medical treatment, temporary disability benefits, unreasonable refusal to rehire penalties, and a number of claims that were outside the scope of the Workers' Compensation Act. Dr. Barron opined that the applicant reached the end of healing prior to the date assigned by the treating provider. The unnamed Administrative Law Judge awarded medical expenses and temporary disability benefits following a specific knee injury that required two surgeries. However, the judge denied temporary total disability benefits after Dr. Barron's assigned end-of-healing date.

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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.

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The claim for the remaining period of temporary total disability benefits was the only issue on appeal. The judge specifically did not find the applicant credible due to a number of inconsistencies in his testimony, as well as demonstrated significant animosity against the respondents and toward the litigation process post-injury. The Labor and Industry Review Commission reversed. The applicant may not have been credible and may have harbored significant animosity against the employer; however, the medical records and expert opinions supported the applicant remaining in the healing period during the period of time claimed after the date identified by Dr. Barron. The applicant attempted to submit exhibits with his appeal to the Commission. Those were not accepted or considered. Further, the cases cited did not stand for the claimed propositions. Nevertheless, the medical records supported the applicant's claim for wage loss benefits. The scope of the Commission's review, being on a de novo basis, permitted the Commission to award benefits notwithstanding the issues with the applicant's testimony and poor handling of the appeal.

APPORTIONMENT OF PPD

Stanek v. City of Beloit, Claim No. 2017-005612 (LIRC July 22, 2025). Upon review by the Commission in 2018, it was determined that the applicant sustained a compensable left knee injury on January 6, 2017. He was awarded 5% permanent partial disability for a meniscal repair surgery. This decision was not appealed and became final. Subsequently, the applicant underwent a total knee replacement, and a dispute arose as to the extent of additional permanent partial disability attributable to the work injury. The respondents relied upon two IME reports from Dr. Thomas Viehe, in which he opined that the work incident and resulting arthroscopic surgery were partially responsible for the applicant's total knee replacement. He further opined that the "biggest cause" of the knee replacement surgery was the applicant's fairly advanced preexisting arthritis of the left knee. He assessed a total of 60% permanent partial disability at the left knee, 50% for the total knee replacement and an additional 10% for the lost range of motion. Dr. Viehe apportioned 75% of the permanent partial disability rating to preexisting degenerative joint disease and 25% to the work injury and subsequent arthroscopic surgery. The primary issue before the Commission was whether Dr. Viehe's opinion was sufficient to invoke the provisions of Wis. Stat. § 102.175(3), resulting in an award for the total knee of only 15%, instead of the full 60%. The Commission noted that Wis. Stat. § 102.175(3) uses the word "disability," not the word "condition." While there is no definition of "disability" in Chapter 102, the Commission found it instructive that Wis. Stat. § 102.61 incorporates the provisions of the Rehabilitative Services Administration Act under 29 USC 701 to 796l, which defines an individual with a disability as an individual who "…has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment." The first requirement of Wis. Stat. § 102.175(3)(a) is that there must have been a preexisting "disability." Only then does the statute look to the cause of such disability. The Commission noted

that the applicant had no preexisting left knee disability prior to the work injury and that, pursuant to the holding of *DaimlerChrysler c/o ESIS v. LIRC* and *Glenn May*, the applicant is entitled to the minimum PPD rating for each cumulative surgery attributable to one work injury. Therefore, the minimum total PPD rating in this case is 55%. However, Dr. Viehe credibly assessed a total of 60% PPD based in part upon his assessment of loss of range of motion. Therefore, the applicant is entitled to 60% PPD at the left knee.

ARISING OUT OF

Harazin v. Tri City National Bank, Claim No. 2022-012608 (LIRC September 30, 2025). The applicant worked as a customer service representative. She alleged a low back injury as a result of sitting down on a chair that a colleague had left at a higher height than she had anticipated. She did not report the injury immediately and did not treat for two days. The initial medical record indicated she reported back pain after getting up after sitting in a chair for a while. There was no mention of symptoms beginning when she sat in a chair that was at a higher height than expected. She treated for a few months and reported resolution of most symptoms. A few months later, she treated again and underwent an MRI and X-ray. She did not treat again for about five years. She then underwent more extensive treatment, including a hip replacement and extensive chiropractic treatment. The unnamed Administrative Law Judge denied the applicant's claims. The Labor and Industry Review Commission affirmed. The applicant was not credible, in part due to the inconsistent claimed mechanisms of injury. Therefore, her subjective reporting of symptoms made her treating provider's opinions less persuasive. Dr. Wojciehoski's opinion that the proposed mechanism of injury—sitting down on a chair at the wrong height—was not sufficient to cause the level of injury alleged by the applicant was adopted. The applicant worked for 12 years without restrictions after the injury. Her imaging revealed degenerative changes. The recurrence of pain and renewal of medical treatment after almost six years without significant treatment was too distant in time to logically correlate with the original incident under the facts of this case.

EMPLOYMENT RELATIONSHIP

Novak v. Innovative Companies et al., WC Claim No. 2019-011855 (LIRC Oct. 16, 2025). The Applicant filed a Hearing Application for injuries he sustained while working as a carpenter on March 19, 2019. Beginning in March 2019, the Applicant began working to construct a strip mall. The issue presented in the case was who the Applicant's employer was on the date of injury, Innovative Companies or Van Rite & Father, Inc. Prior to beginning work on the strip mall project, the Applicant was employed by Innovative Companies. Sometime in February 2019, the owner of Van Rite & Father, Dan Van Rite, contacted Bill Schmook requesting workers to help him construct a strip mall. Schmook's business was slow, and he said he had workers to spare. The two agreed that the workers would be paid $27.50 per hour. The Applicant was one of the Innovative workers who ended up working on the strip mall project. While working on the strip mall project, Dan Van Rite and his foreperson, Joe Soquet, directed all of the work being done. Bill Schmook was never onsite and provided no oversight or direction to anyone involved with the strip mall project. On the day of the injury, the Applicant was helping to install a system of roof trusses. The Applicant did not agree with the way that Dan Van Rite and Joe Soquet wanted to install the roof trusses, believing it was improper and unsafe. However, the Applicant followed their instructions and was eventually seriously injured when the roof trusses collapsed. The accident triggered an OSHA investigation. During the investigation, the Applicant told investigators he was

an employee of Van Rite & Father. Bill Schmook gave a similar statement. Dan Van Rite denied the Applicant was his employee, instead alleging that he worked for Innovative, which was a subcontractor on the project. Both Innovative Companies and Van Rite & Father denied employing the Applicant on the day in question in the workers' compensation suit. At the hearing, the Applicant testified that, contrary to the statements he made to OSHA, he believed he was working for Innovative Companies when injured. He testified that Bill Schmook had threatened to have his probation revoked, which is why he lied to OSHA investigators earlier in the case. Bill Schmook testified that the Applicant was working for Van Rite & Father when injured. Dan Van Rite maintained that the Applicant was not his employee when injured. The Administrative Law Judge found that Innovative Companies was acting as a "temporary help agency" on the strip mall project under Wis. Stat. § 102.01(2)(f). This entailed a finding that Innovative had "placed" the Applicant to work at Van Rite & Father and, therefore, that Innovative Companies was responsible for workers' compensation benefits. Innovative Companies appealed, and the Labor and Industry Review Commission reversed. The Commission found that in order to be a "temporary help agency," the statute "requires compensation to be paid by the employer with whom the employees are placed to the placing employer…" In this case, Van Rite & Father did not pay Innovative Companies for the Applicant's services, nor did it pay the Applicant directly for any of the work he performed. After finding that Innovative was not acting as a temporary help agency, the Commission applied the "loaned employee" test laid out in *Seaman Body Corp*. to determine who the liable employer was. This test asks: (1) whether the employee actually or impliedly consented to work for a special employer; (2) whose work was being performed at the time of injury; (3) who had the right to control the details of the work; and (4) for whose primary benefit the work was being done. The Commission found that Van Rite & Father was liable as the "special employer" in this case and was responsible for all workers' compensation benefits otherwise due to the Applicant.

MISCONDUCT / SUBSTANTIAL FAULT

Duran Ronco v. Marian Milwaukee, Inc., Hearing No. 23602328MW (LIRC Aug. 8, 2025). The employee worked in accounting for the employer for approximately 15 months. She performed her job duties very well from November 2023 through August 2024. She received a positive performance review and a pay raise in August 2024. Following her performance review, the employee's job performance significantly declined. She received numerous verbal warnings. She failed to perform her job duties accurately and appropriately—the same duties she had performed without concern prior to the performance review. She continued to repeat mistakes and errors after the performance review. The employee was discharged following numerous warnings regarding her performance and continued poor performance. The Labor and Industry Review Commission determined that the employee was terminated for misconduct under the *Boynton Cab* standard. When there is no evidence that an employee is capable of successfully performing a job, poor performance does not constitute misconduct because there is a lack of evidence that the poor performance is intentional or negligent. However, when an employee has demonstrated the ability and capacity to perform the work in the past, a recurrent pattern of negligent acts can amount to gross negligence under Wis. Stat. § 108.04(5).

Kornmeyer v. ServiceMaster Commercial Cleaning, Hearing No. 25200863EC (LIRC Aug. 21, 2025). The employee was discharged for poor attendance. She did not follow the employer's policies regarding whom to contact if she would be late or unavailable for a shift on several occasions. She also failed to follow the policies

regarding the time frame within which she was required to contact the employer if she was unavailable for a shift on a number of occasions. She was given approval to take a personal day on one occasion despite not following the required policy provisions. Subsequently, the employer discharged the employee because her attendance was unreliable. The employer's policies did not provide for discharge for failure to follow the attendance requirements. Further, the employee was not informed of the terms of these attendance policies. The Labor and Industry Review Commission determined that the employee was not terminated for misconduct or substantial fault. The employee could not have been discharged pursuant to the employer's policy because the policy did not provide for discharge for attendance violations. Therefore, Wis. Stat. § 108.04(5)(e) was not applicable. There was no misconduct under the *Boynton Cab* standard. The employee provided credible evidence that she notified her manager and provided medical documentation supporting her absences. The employee was unaware that the policy required notice to be given to the office rather than to a manager. There was no documentation that this policy was communicated to the employee. Therefore, there was no intentional and substantial disregard of the employer's interests or of the employee's job duties and obligations, nor negligence so gross or repeated as to demonstrate equal culpability. Her actions also did not constitute substantial fault. She was sick during some of the days of absence, which was beyond her control. Her notice to the manager was sufficient for purposes of this evaluation. Finally, her request for a personal day off, although not within the time frame identified in the policies, was granted without any indication that it would be held against her.

Thomas v. Co-Staff Corp., Hearing No. 25006183MD (LIRC Dec. 5, 2025). The Employer discharged the Employee for violation of its policy against alcohol use on August 13, 2025. The policy provided that "an employee who appears under the influence of alcohol at work can be discharged." Here, the Employer alleged that a client complained that the Employee appeared intoxicated. The Employee underwent a breathalyzer test, which came back with a blood alcohol content of 0.06%.The Commission affirmed the Administrative Law Judge's decision that the Employer had not proven the discharge was for misconduct under Wis. Stat. § 108.04(5)(a). While the Employee admitted to using alcohol and did not dispute the breathalyzer results, she maintained that she was not intoxicated and could work as normal. The Commission held that, without a BAC of 0.08% or greater, a presumption of intoxication was not appropriate. The Employer could have established intoxication by way of firsthand testimony, such as slurred speech, difficulty walking, and so on. However, without any firsthand testimony of signs of intoxication, the Employer failed to prove the Employee had violated the Employer's policy on alcohol use.

OCCUPATIONAL DISEASE

Gendrich v. City of West Allis, Claim No. 2024-000405 (LIRC September 18, 2025). This Employee had intermittent periods of employment with noise exposure for the City of West Allis. He requested occupational hearing loss benefits after his retirement in 2019. When awarded compensation for hearing loss, the Employer appealed, arguing that it should not be responsible for the first period of employment (which ended in 1986) and that it should be able to deduct hearing loss reflected in a 2011 audiogram (before the second period of employment began with the City of West Allis). The Labor and Industry Review Commission affirmed the award of benefits for all hearing loss. Significant to its decision was the fact that there was no evidence of "noisy exposure" at any of the other work performed outside of the City. The statute (§ 102.555(4)) allows an injury date to be selected

by the employee under four factors, including the last day worked before retirement, as elected here. It was irrelevant that the employee had intermittent employment because the last employer is the responsible party for hearing loss. Under the facts of this matter, the responsible Employer was thus properly the City of West Allis, despite a gap in employment years. Regarding the Employer's request to deduct impairment loss based on the 2011 audiogram—arguing "prior" hearing loss impairment from the total hearing loss awarded—this request was also rejected. The reasoning was that the City of West Allis was the sole source of noise exposure in this matter. The Employee had not been compensated previously for any hearing loss based on the 2011 testing, so the award of all measured impairment was appropriate.

PERMANENT TOTAL DISABILITY

Tuggle v. Dollar Tree Stores, Inc., Claim No. 2020-015347 (LIRC Aug. 20, 2025). The applicant sustained a specific work-related injury resulting in a concussion. She alleged entitlement to various benefits, including permanent total disability benefits. She did not notify her treating provider of her preexisting symptoms and treatment. Dr. Burgarino performed an in-person examination and reviewed all prior medical records. He opined that the injury was temporary and had fully resolved. A video of the incident was introduced at the hearing. The unnamed administrative law judge dismissed her claims in their entirety, and the Labor and Industry Review Commission affirmed. The applicant's testimony was not credible. The medical records conflicted with her testimony. Specifically, she failed to comply with a pain medication contract (she had fewer narcotic pills than expected, and her drug test failed to show the narcotic in her system). Her report of high levels of pain conflicted with her failure to take pain medication for the reported symptoms. She testified with good recall of all claimed post-injury symptoms and issues but minimized her preexisting conditions and symptoms that had resulted in approval of an SSDI claim. She claimed confusion about the restrictions that led to the SSDI approval and qualified her answers to minimize the impact of those restrictions. Finally, the video of the incident, in conjunction with the initial post-injury medical treatment, supported the conclusion that it was unlikely the applicant sustained an injury as significant as claimed.

STATUTE OF LIMITATIONS

Wilson v. City of Milwaukee, Claim No. 2017-029268 (LIRC June 18, 2025). The applicant worked as a police officer for the City of Milwaukee from 2001 until his resignation on October 2, 2018. He subsequently filed a claim for a mental injury in the nature of PTSD and major depression as a result of an incident in which he shot and killed an 18-year-old intellectually disabled young man at close range in 2004, fourteen years before his resignation in 2018. As a result of his mental injury, he alleged he was permanently unable to work as a police officer and applied for duty disability benefits. The Commission addressed, among other issues, whether the 12-year statute of limitations applies to duty disability retirement applications. The respondents argued that the applicant's claim was barred by the twelve-year statute of limitations. However, the Commission noted that Milwaukee City Ordinance 36-05-03 contains no statute of limitations that restricts an applicant from filing for duty disability retirement benefits. The only timing limitations indicate that an application for regular or duty disability retirement benefits must be filed not less than 30 days, nor more than 90 days, before the effective date of retirement. Thus, a person could apply for duty disability benefits decades after the incident that caused an injury

that ultimately disabled the person from further duty, and the claim would not be time-barred as long as it was filed within the 30–90 day window. The respondents further argued that Wis. Stat. § 62.624 specifically states that the procedures in Wis. Stat. §§ 102.16 to 102.26 apply to appeals of denials of duty disability retirement claims, and that this includes the statute of limitations outlined in § 102.17(4). However, the Commission noted that only the procedures in §§ 102.16 to 102.26 apply, not the substantive provisions. Since it is well established that the applicable statute of limitations is substantive law, it was not incorporated into § 62.624, which covers duty disability benefits for a mental injury. The Commission noted that this interpretation makes sense because the substantive duty disability retirement provisions are contained in the Milwaukee County ordinances, not the workers' compensation law. Therefore, the workers' compensation statute of limitations does not apply to appeals of denials of duty disability retirement benefits. The Commission ultimately denied the applicant's claim on the grounds that the applicant failed to prove that he sustained PTSD and major depression as a result of the 2004 incident.

Donnelly v. Oshkosh Corp., WC Claim No. 2008-020198 (LIRC Oct. 16, 2025). The Applicant filed a Hearing Application "to toll the 12-year statute of limitations to prevent the insurer from being absolved of its obligation to pay ongoing medical expenses." The Administrative Law Judge dismissed the Hearing Application without prejudice, as all compensation had been paid and, presumably, there was nothing in dispute. The Labor and Industry Review Commission affirmed the ALJ's dismissal of the Hearing Application without prejudice. The Applicant argued that a dismissal of the Hearing Application would result in the 12-year statute of limitations lapsing and, therefore, that the ALJ's decision "effectively denies compensation." The Commission did not reach the issue, noting instead that "the [C]ommission does not believe the statute of limitations began to run until the reserve or restricted bank account established as a condition of approval of the [prior] compromise agreement was depleted." Therefore, the dismissal here would not result in the expiration of the statute of limitations.

SUFFICIENCY OF EVIDENCE

Peterson v. Menard, Inc., WC Claim No. 2012-023179 (LIRC Oct. 16, 2025). The Applicant filed a Hearing Application alleging he sustained a permanent injury to his back during a motor vehicle accident on September 6, 2012. One of his treating physicians, Dr. Jung, found that the accident directly caused a permanent back injury and rated permanent partial disability at "10–15 percent" for "limitations in mobility…secondary to pain and exacerbation with lifting, bending, and twisting." Another treating physician, Dr. Bratanow, found that the accident caused a permanent aggravation of a preexisting back condition and imposed permanent restrictions of no lifting greater than 30 pounds and limited squatting, kneeling, and standing. The respondents obtained an IME with Dr. Fetter, who found that the Applicant did not sustain any back injury in the accident and that the back conditions at issue were preexisting and degenerative. Dr. Fetter found there was no permanent disability and no need for any permanent restrictions. The Administrative Law Judge (ALJ) awarded 15% permanent disability and found that the permanent restrictions imposed by Dr. Bratanow were credible. The respondents appealed to the Labor and Industry Review Commission, arguing that there was no permanent disability and that the

ALJ erred by "cherry-pick[ing]" findings from the opinions of Dr. Jung and Dr. Bratanow. Specifically, the respondents argued that Dr. Jung assessed permanent disability but no permanent work restrictions, whereas Dr. Bratanow assessed permanent restrictions but no permanent disability. The Commission affirmed the ALJ's decision in part and reversed in part. The Commission found that Dr. Jung "did not indicate what factors might justify a rating at the higher end of the range [he assessed]." The Commission explained that the Applicant was able to continue to work, subject to restrictions, ever since the accident and never underwent any surgical procedure that warranted minimum permanent disability. The Commission rejected the respondents' argument against "cherry-picking" among expert opinions and cited *Manitowoc County* v. *DILHR* for the holding that the Commission may accept part of an expert's opinion while rejecting others.

SAVE THE DATE!

2026 WORKERS' COMPENSATION SEMINAR

Wednesday, June 10, 2026

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