March 2019

Volume XVIII

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ATTORNEYS AT LAW

Wisconsin Worker's Compensation Update

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Decisions of the Wisconsin Supreme Court

Misconduct

***Wisconsin Department of Workforce Development v. Wisconsin Labor and Industry Review Commission*, 914 NW2d 625 (Wis. 2018).** The Employer's Benefits Manual specifically provided in its attendance policy that an employee who was in the probationary period could be terminated if he or she, on one occasion, missed work without having called in two hours before their shift. The applicant did not call in when she missed a shift for flu-like symptoms. She was terminated. The Labor and Industry Review Commission held she was entitled to unemployment benefits. Wis. Stat. §108.04(5)(e) provides that a violation of an employer's policy regarding attendance, if the policy is in a written manual signed by the employee, constitutes misconduct. However, another provision within the same statute specifically states that more than two absences in 120 days constitutes misconduct. The Commission interpreted the two statutory provisions together to mean that, for any absences to qualify as "misconduct," there would have to be at least the statutory minimum of two absences in 120 days. The Commission basically held the two absence requirement was a "floor" despite the handbook provision allowing for termination for violation of only one absence. The Court of Appeals agreed with the Commission. The Supreme Court reversed. The statutory language was clear. The plain language of Wis. Stat. 108.04(5)

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(e) allows an employer to adopt its own absenteeism policy that differs from the policy otherwise set forth in 108.04(5)(e). Termination for the violation of the employer's absenteeism policy will result in disqualification from receiving unemployment compensation benefits even if the employer's policy is more restrictive than the absenteeism policy set forth in the statute. Further, the Supreme Court noted that, under its recent decision in *Tetra Tech EC, Inc. v. Department of Revenue*, 914 N.W.2d 21 (Wis. 2018), the interpretation of the law by an administrative agency was no longer automatically deferred to, and under the due weight analysis, it found no basis to justify the Commission's interpretation of the statute which appeared contrary to the statute's plain language.

Standard of Review

***Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 382 Wis. 2nd 496 (Wis. 2018).** This case, while technically not a worker's compensation case, will impact future Wisconsin cases when appeals are taken from any Commission order. The Supreme Court held that courts will no longer defer to conclusions of law reached by an administrative agency. The courts will only give such conclusions "due weight" while considering the experience, technical competence, and specialized knowledge of the administrative agency. The Supreme Court has indicated for some time that it was contemplating reconsidering the practice that it had developed over the years, of deferring to an administrative agency's conclusions of law. The Supreme Court has now made this change. The opinion is a very interesting one if you enjoy the concept of divisions of powers between the three branches of government. From a worker's compensation point of view, however, the important thing to remember about the decision is that an agency's conclusion of law is no longer "the law." A reviewing court now does have authority to review whether or not the conclusion is correct. However the agency's conclusion will be given "due weight" when the interpretation of the law involves technical competence or specialized knowledge which the agency might have.

***Wisconsin Bell, Inc. v. LIRC and Charles E. Carlson*, 283 Wis. 2d 624 (Wis. 2018).** This case is not a worker's compensation case. It is applicable to worker's compensation law only in that it involved the issue of what degree of respect or authority a court should assign to an administrative agency's conclusion of law in light of the *Tetra Tech* decision. This case involved an action brought under the Wisconsin Fair Employment Act. A disabled person, Mr. Carlson, sought benefits under the Act. The Labor and Industry Review Commission interpreted the Fair Employment Act. The Commission held that Wisconsin Bell had intentionally discriminated against Mr. Carlson. The Supreme Court reversed. The facts are not of importance to our evaluation. The Supreme Court noted that it is now reviewing the administrative agency's interpretation and application of statutes *de novo*. This was based upon the *Tetra Tech EC, Inc.* case. Based upon the new standard of review, "the court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. 227.57(5). The review of the Commission's findings of fact remains more limited. "If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgement for that of the agency as to the weight of the evidence on any disputed finding of fact." Wis. Stat. 227.57(6). The court will set aside or remand a matter to the agency based on a factual deficiency only if "the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." Wis. Stat. 227.57(6) Substantial evidence does not mean a preponderance of evidence. It means whether, after considering all of the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact." *Milwaukee Symphony Orchestra, Inc.* ✦

Decisions of the Wisconsin Court of Appeals

Arising Out Of

***Michael Bukovic v. Labor and Industry Review Commission*, 2018 WL 6523326 (Wis. Ct. App. 2018 (final publication decision pending).** The applicant had purchased a private welder for his personal use. That welder used argon gas. The applicant did not have argon gas or an argon tank. He had decided to take an acetylene gas tank from his employer and transfer argon gas (from his employer) into it so that he could take the argon gas home for his private use. In order to transfer the argon gas into the acetylene tank, the applicant brought a hose from home. When his manager saw him arrive at work with the hose in hand, he asked the applicant why he had brought the hose to work. The applicant indicated he needed to put some fittings on the hose in order to do some work at home. However, the applicant, while unsupervised, attempted to use his personal hose to transfer the argon into the acetylene tank. Argon is stored at a higher pressure than an acetylene tank is designed to handle. The tank exploded, injuring the applicant. The applicant asserted that he intended to pay for the gas later. He acknowledged that he had no work-related reason to be near the gas tanks when the explosion occurred. The employer did allow employees to buy items out of its stock of items. However, the applicant had not asked to purchase the argon gas and had also not asked to use the acetylene tank to transport the argon gas. The administrative law judge denied the applicant's claim on the basis that his activities did not arise out of or incidental to his employment. The evidence established that the applicant intended to pilfer the argon gas and to purloin the acetylene tank which he had unilaterally decided was abandoned. The Circuit Court of Forest County and the Court of Appeals affirmed. The applicant was not involved in a mere insubstantial deviation from work as asserted. Instead, he had undertaken a complete abandonment and departure from his work responsibilities and duties. The applicant was in a substantial deviation from his employment when the incident occurred, and was, thus, no longer in the course of his employment.

Employment Relationship

***Glowacki v. Lakeview Neurorehab Center Midwest*, 383 Wis. 2d 602 (Wis. Ct. App. 2018) (unpublished).** The applicant was a clinical psychotherapist. She was hired originally by Lakeview Neurorehab Center Midwest (hereinafter "Midwest"). In order to expand its services, Midwest created a related entity Lakeview Care (hereinafter "Care"). Four employees from Midwest were "allocated" to Care. This change allowed Midwest to provide expanded services under a new license and under new billing parameters. Both Midwest and Care were owned by Lakeview Care Partners Management, which was owned by two people. The applicant and her supervisor were both directed and supervised by an employee of Midwest. The clinic facility, office, staff, and general supplies used by the applicant for her practice were all provided by Midwest. The applicant was injured at work when attacked by a patient. The applicant sued Midwest for its alleged negligence. Midwest raised as a defense the argument that it was the employer and that the applicant's sole remedy was worker's compensation. The applicant asserted that her employer was Care. The Circuit Court granted summary judgment to Midwest. The Court of Appeals affirmed. The sole remedy clause of the worker's compensation statute applies to Midwest as the employer and to its worker's compensation insurer. The primary test for determining whether or not a person is in the service of another and, thus, in an employee-employer relationship, is whether or not the alleged employer has a right to control the details of the work. While paycheck for the applicant was drawn on Care, this was solely for revenue enhancing purposes and it had nothing to do with what entity had the right to control the details of the work. The evidence reflected Midwest controlled supervision and provided all of the supplies, materials, etc., and the applicant was clearly an employee of Midwest for purposes of the worker's compensation statute. There is no evidence Midwest possessed a second persona so completely independent from, and unrelated to, its status as employer that the law would recognize it as a separate legal person. [Dual persona doctrine (wherein an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second

capacity that confers on him obligations independent of those imposed on him as employer) would otherwise be an exception to the exclusive remedy provision of the Worker's Compensation Act.]

Exclusive Remedy

***Payton-Myrick v. Labor and Industry Review Commission*, 384 Wis. 3d 270 (Wis. Ct. App. 2018) *(unpublished)*.** The applicant had a long established history of back, neck and low back problems. In July 2009, while bending over to pick up a piece of paper under her desk, the applicant fell forward out of her office chair. The applicant asserted that the incident precipitated, aggravated and accelerated her degenerative condition. The treating physician, Dr. Kurpad, concluded that as a result of the work-related injury, the applicant needed to undergo a lumbar fusion. Dr. Orth, who performed an independent medical examination, opined that the applicant did not need a fusion. He further opined that any such procedure was unrelated to the work incident. Dr. Burton also provided a causation opinion on behalf of the employer and insurer. Dr. Burton opined the applicant sustained merely a temporary work-related injury and that the surgery was not causally related to that temporary injury. The applicant elected to undergo the fusion (which failed). Another subsequent surgery intended to correct the failure, similarly failed. The administrative law judge held that the involved incident did aggravate, precipitate and accelerate the previous degenerative condition. The administrative law judge held the medical expenses for the surgery were necessary and reasonable. The Labor and Industry Review Commission agreed with Dr. Kurpad in part, and with Dr. Orth in part. The Commission held the applicant did sustain a work-related injury. However, the Commission held that the work-related injury was temporary in nature and did not necessitate surgery or any permanent disability. On appeal to the Circuit Court, the applicant asserted a right to disability benefits under Wis. Stat. §102.42(1m). [Wis. Stat. §102.42(1m) provides that if an employee who has sustained a compensable injury undertakes in good faith invasive treatment that is generally medically acceptable, but that is unnecessary, the employer shall pay disability benefits.] The Commission objected to the applicant raising that argument at the Circuit Court, because the argument had not been advanced in the appeal to the Commission. The Circuit Court refused to find the argument was waived. The case was remanded to the Commission for the Commission to determine whether or not the applicant had undertaken the surgeries in good faith. The Court of Appeals agreed with the Circuit Court that the argument should not be deemed waived. However, the Court of Appeals reversed the Circuit Court based on *Flug v. Labor and Industry Review Commission*, 376 Wis. 2d 571 (Wis. 2017), which it held was the decisive precedent in this case. The *Flug* decision made it clear that, if the treatment received was necessitated by a pre-existing condition not caused or worsened by the work-related injury, the issue of whether or not the treatment was undertaken in good faith was not relevant because such treatment would not be for a compensable work injury. Here, because the Commission concluded that there had not been a permanent aggravation, acceleration, and precipitation of the underlying condition that caused the need for surgery, there was not an underlying work injury which necessitated surgery. Credible and substantial evidence supports the Commission's decision. Therefore, the issue of whether or not the employee had undertaken the surgery in good faith was not relevant.

Loss of Earning Capacity

***William Hyde v. LIRC, Daimler Chrysler Motors Company*, 382 Wis. 2d 832 (Wis. Ct. App. 2018) (unpublished).** The applicant sustained an admitted work-related lumbar injury. His treating physician and surgeon opined the applicant could work eight hours per day within specific restrictions. Later, the treating physician opined the applicant could only work four hours per day. A pain management specialist agreed with permanent four hour restrictions (recommended by a therapist following a Functional Capacity Evaluation). Dr. Aschliman performed an independent medical examination and opined the applicant could work eight hours per day. Subsequent to some additional surgeries, the applicant's vocational expert's opined the applicant sustained 70-75% loss of earning capacity. The employer and insurer's vocational expert opined he sustained 45-55% loss of earning capacity. An unnamed administrative law judge adopted Dr. Aschliman's opinions regarding restrictions and workability. The administrative law judge awarded the applicant 55% loss

of earning capacity. The Labor and Industry Review Commission affirmed. The Circuit Court and the Court of Appeals affirmed. The determination of the extent of an applicant's disability is a question of fact. The Commission's findings are reviewed and not those of the administrative law judge. The court shall not substitute its judgement for that of the Commission as to the weight or credibility of the evidence on any finding of fact. Wis. Stat. 102.23(56). Instead, the court seeks to locate in the record, the credible and substantial evidence to support the determination, rather than weighing any opposing evidence. *Vande Zande*. The evidence in support of the finding need not comprise preponderance or the great weight of the evidence, it need only be sufficient to exclude speculation or conjecture. *Bumpas*. Here, the record amply supports the Commission's conclusions. The Commission's findings were based on Dr. Aschliman's professional opinion. There is credible and substantial evidence in the record to support the Commission's decision. The treating physician's opinion changed, and the subsequent opinion was less credible than the earlier opinion because he did not adequately explain his changed opinion. Further, the physical therapy evaluator did not satisfactory connect the results of the Functional Capacity Evaluation to his conclusion that the applicant could work only four hours per day. Finally, the applicant testified that he had not looked for work for the past year, but that he might be able to work eight hour days if he took his medication.

Standard of Review

***Wise v. Labor and Industry Review Commission*, 2018 WL6787950 (Wis. Ct. App. 2018)(final publication decision pending).** The applicant was hired as a caregiver at Grand Horizons. She slipped and fell in an icy parking lot while leaving the facility on the date of injury. The applicant eventually required a replacement of the left hip and, subsequently, a replacement of the right hip. She also reported related low back symptoms. The MRIs reflected the applicant had pre-existing avascular necrosis in both femoral heads in her hips. The applicant, however, had never sought treatment nor reported any hip related symptoms to any medical care provider prior to the time of the accident. The medical records were extensive and conflicted somewhat regarding the extent of pain, when the pain started, and a number of related issues. The administrative law judge held that the applicant's left hip condition was aggravated, precipitated and accelerated by the fall, and that the applicant had sustained a consequential soft tissue back injury. The Labor and Industry Review Commission reversed. The Circuit Court of Winnebago County affirmed. The Court of Appeals reversed and remanded. The decision of the Commission is reviewed by the Court of Appeals, not the decision of the Circuit Court. Whether or not the work-related injury precipitated and aggravated a pre-existing condition is a question of fact. A court should not substitute its judgment as to a fact, for that of the Commission, when the weight or credibility of the evidence on any finding of fact is at issue. Credible and substantial evidence is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion. The Commission's decision was dependent upon the Commission holding that the applicant had fully recovered from any aggravation to the left hip caused by the fall, no later than March 4, 2013. (The independent medical examiners had opined that the effects of any temporary aggravation would have ended by that date.) The basis for the independent medical examiner's opinion is a clear misinterpretation of the medical records relied upon, and the record evidence as a whole. Based upon the evidence, it defies logic and common sense that the applicant had fully recovered from the aggravation of the work-related injury on March 4, 2013. The Commission's holding was, therefore, unsupported by credible and substantial evidence. There is no reading of the record which could reasonably lead the Commission to its finding. ✦

Decisions of the Wisconsin Labor and Industry Review Commission

Arising Out Of

Bach v. Hospice Advantage Inc., Claim No. 2016-014617 (LIRC May 31, 2018). The applicant alleged she sustained a knee injury after she slipped and fell on ice on March 1, 2016. She alleged that she was walking to work and slipped and fell on an icy parking lot. Her treating physicians opined the fall caused disability by precipitation, aggravation and acceleration of a pre-existing progressively deteriorating or degenerative condition beyond normal progression. Dr. Bartlett performed an independent medical examination. He noted the records reflected the applicant had been diagnosed with a loss of medial meniscal function five years prior to the injury. Surgery was recommended at that time, but never completed. He opined the applicant's ongoing symptoms were the result of degenerative arthritis and not a meniscal tear. Administrative Law Judge O'Connor denied the applicant's claims. He adopted Dr. Bartlett's opinions as more credible. The applicant repeatedly failed to make reasonable concessions regarding her condition prior to the work-related injury. The applicant failed to treat for almost one month post alleged injury. Further, the original medical records failed to indicate any work-related injury was sustained. The Labor and Industry Review Commission affirmed. There are repeated, clear, references in the medical records to the applicant's knee locking. This, together with her prior history of left knee injury and falls, makes it not credible that she never felt a locking sensation but nevertheless described the same to her physicians. The applicant's testimony was not credible and was inconsistent with the medical records. Therefore, there is legitimate doubt that the applicant's fall on the claimed date of injury was caused by a slip and fall as opposed to an idiopathic fall related to her prior medical condition of proclivity to left knee locking. Further, the applicant initially sought treatment for her left knee condition under her private health insurance. She did not bring the worker's compensation claim until she learned the private insurer would not cover her proposed meniscal surgery. The applicant has a law degree and has dealt with medical insurance issues related to prior injuries. It is not credible that, if she knew her fall had been caused by a slip and fall in the course of employment, she would not have immediately claimed the medical and disability coverage under worker's compensation.

Cities and Villages Mutual Inc. Co. v. Kedrowski, City of Stevens Point, Claim Nos. 2013-028657, 2016-001124 (LIRC June 19, 2018). The applicant was a firefighter and paramedic. He sustained work-related injuries to his low back on October 7, 2013 and November 12, 2013. The October 7, 2013 injury resulted from lifting several heavy patients. The treating physicians did not opine a permanent injury was sustained. The November 12, 2013 injury also occurred from lifting an obese patient. Dr. Hendricks diagnosed the applicant with sacroiliac joint dysfunction and right piriformis syndrome. He assigned a two percent permanent partial disability to the body as a whole. EMC conceded the injuries and paid medical expenses for both injuries and indemnity benefits for the second. The applicant sustained a third work-related injury to his low back on January 11, 2016. The applicant sustained the injury after climbing three flights of stairs while carrying a 250 pound stretcher of equipment, and returning down the stairs carrying a patient. The applicant reported an instantaneous onset of pain with that effort. He described the pain as much worse than the pain he experienced in 2013 and 2014. The City was self-insured and its claims were administered by Cities and Villages Mutual Insurance Co. (CVMIC) at the time of the 2016 work-related injury. The City and CVMIC paid temporary total disability compensation and medical expenses. CVMIC filed a reverse hearing application seeking reimbursement from EMC for the benefits paid. CVMIC asserted that the January 11, 2016 injury was not a new injury but simply a manifestation of the applicant's October 7, 2013 injury. Administrative Law Judge Landowski denied CVMIC's application without hearing, based upon stipulated facts and exhibits. The Labor and Industry Review Commission affirmed. CVMIC misstated Dr. Hendricks' opinions regarding the January 11, 2016 injury. CVMIC asserted that Dr. Hendricks opined that the 2013 injuries caused a permanent injury to the applicant's back, and that the 2016 injury was a manifestation of that injury, not a new injury. However, Dr. Hendricks described the 2016 injury as an aggravation of the pre-existing injury, which the Commission considered more than a manifestation of the pre-existing injury. Further, Dr. Monacci

performed an independent medical review and opined that the event of January 11, 2016 was not a mere manifestation of the applicant's pre-existing low back pain syndrome. He opined the incident was an aggravation of his condition beyond normal progression. The Commission held the applicant recovered from his 2013 injuries as evidenced by his performance of unrestricted duty with no medical treatment for nearly two years before sustaining a new work-related injury in 2016. Further, the mechanism of injury in January 2016 involved an extraordinary effort by the applicant. This effort could reasonably cause more than a manifestation of his prior condition.

Bayer v. Marinette Marine Corp., Claim Nos. 2015-009885, 2016-007204 (LIRC June 29, 2018). The applicant had a substantial history of shoulder complaints prior to the alleged injuries. The applicant's treating physicians did not accurately describe the alleged mechanism of injury. The mechanisms outlined by the treating physicians were confusing. Other records were inaccurate. Some of the treating physicians comingled the claim for traumatic versus occupational injuries. Other treating physicians did not have an accurate understanding of the alleged mechanism of injury. The independent medical examiner opined the applicant did not sustain a work-related injury. The Administrative law Judge awarded benefits. The Labor and Industry Review Commission reversed. The applicant acknowledged errors in history, but asserted that errors do occur in histories. This may be true; however, the errors that occurred reflected a significant misunderstanding of the incident that allegedly caused the injury and makes the physician's opinions suspect. The physician further only opined that it was "conceivable" that an injury occurred as the result of a specific incident. Instead, the independent medical examiner had an accurate understanding of the claimed injury. The records reflect he performed a very thorough examination and review of the medical records. There is legitimate doubt the applicant sustained a work-related injury.

Jurkiewicz v. County of Milwaukee, County BHD, Claim No. 2016-018194 (LIRC June 29, 2018). The applicant worked for the Milwaukee County highway maintenance department. On June 23, 2015, the applicant experienced right leg soreness after spraying for weeds along a three-mile stretch of highway. He was carrying a 40 to 50 pound backpack. He reported intensifying soreness the next two days. He did not report the injury until he experienced leg collapse at work on June 29, 2015. Dr. Schwab, an orthopedic surgeon, opined that x-rays showed osteonecrosis (avascular necrosis) with likely subchondral fracture. Dr. Schwab indicated that the osteonecrosis was a chronic condition and the work incident was likely an acute exacerbation of a previously asymptomatic condition. He indicated that the most likely etiology for the osteonecrosis was excessive alcohol use. Dr. Schwab opined both a specific and repetitive injury had been sustained. In a letter dated April 22, 2016, which responded to questions posed by the applicant's

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attorney, Dr. Schwab opined it was possible that the work duties described by the applicant could create an acute exacerbation of a previously asymptomatic hip that had pre-existing osteonecrosis. Dr. Schwab opined there was no evidence that the work duties described by the applicant would have been a cause of or risk factor for osteonecrosis. Dr. Schwab opined that, because the applicant denied any hip pain prior to June 23, 2015, it was reasonable to assume that the activities which caused the pain were a substantial factor in necessitating the treatment provided. Dr. Xenos performed an independent medical examination on January 14, 2017. He opined that the applicant's symptoms were likely secondary to a manifestation of his underlying, preexisting osteonecrosis and that those symptoms were consistent with the natural history of the underlying condition including collapse of the osteonecrotic lesion. Dr. Xenos opined that, in general, routine activities were not considered a cause of osteonecrotic femoral head collapse. He opined such collapse is considered to be a natural progression of the underlying process related to the location of the lesion in the femoral head. The administrative law judge awarded benefits. The Labor and Industry Review Commission reversed. Dr. Schwab's opinions were, on balance, more unsupportive than supportive of the applicant's claim of a work-related hip injury. Dr. Schwab unambiguously described the work incident as an acute exacerbation of a previously existing, previously asymptomatic chronic condition. He identified the applicant's past alcohol abuse as the most likely etiology. Dr. Schwab later opined that it was reasonable to conclude that the symptoms were brought on by the applicant's work. He did not indicate that this symptom onset could be related to more than an acute exacerbation of the applicant's underlying idiopathic condition. Further, Dr. Schwab's did not provide support for checking both causation boxes. Dr. Schwab's April 22, 2016 letter contained ambiguities and was inconsistent in its causation opinion. Dr. Xenos provided a credible, straightforward explanation for the symptomatic manifestation of the applicant's preexisting, degenerative right hip osteonecrosis. That opinion was consistent with the accompanying evidence of a bilateral hip condition and consistent with the longstanding nature of the applicant's idiopathic condition. Dr. Xenos credibly opined that the regular work activities were not a causative factor in the onset or progression of the osteonecrosis. Dr. Schwab's April 22, 2016 opinion also stated that there was no evidence that the applicant's work duties would have been a cause of or risk factor for osteonecrosis. As a result, the Commission determined that there was no causative relation between the condition and the work activities.

Acker v. Speedway Super America, LLC, Claim No. 2013-006284 (LIRC July 18, 2018). The applicant worked part-time at a gas station. She alleged that, on February 23, 2013, she was injured while cleaning a drip pan under a roller grill. She pulled the large, wide drip pan out from under the roller grill to clean underneath, and the pan was at her chest level. She used a circular motion to clean up the drippings. She heard her shoulder make a pop and felt a sharp pain in her shoulder with one of the motions. Her arm was fully extended. She had been cleaning for about a minute or two when this happened. She underwent an MRI that showed a small nondisplaced tear involving the posterior superior labrum. Dr. Boyle diagnosed post-traumatic right shoulder pain and a possible symptomatic superior labrum anterior-posterior tear. He recommended physical therapy and a follow-up visit in three weeks. The applicant did not go to physical therapy and cancelled her follow-up appointment. She did not seek medical treatment because she did not have insurance. Dr. Boyle provided a written response to the applicant's attorney indicating that the applicant's MRI demonstrated minor findings not to be significant, that the February 23, 2013 reported exposure likely caused the applicant's symptoms, and that she reached end of healing as of April 3, 2013, the date of her canceled appointment. He did not authorize any other time off or restrictions. He opined that additional evaluation/treatment was not indicated and no impairment/disability was applicable. Dr. Grossman performed an independent medical examination. He opined that circular motion above shoulder height was not the type of activity that would cause significant tissue yielding or structural breakage and it was not a medically plausible cause for a SLAP tear. He thought it was conceivable that the applicant had a minimal overuse event that resulted in symptoms at that time. More than a year after treatment with Dr. Boyle, the applicant was referred to Dr. Gershtenson. Dr. Gershtenson diagnosed the applicant with a posterior superior labral tear. He opined that her reported activity at work was likely to have caused the labral tear. Dr. Gershtenson indicated she would almost certainly need surgery. She preferred to observe her symptoms. She subsequently obtained full-time employment with Hertz Car Rental. She cleaned from one to ten cars per day. She worked there approximately six or seven months. She then underwent right shoulder surgery.

Dr. Gershtenson opined that the work incident directly caused the applicant's disability. The unnamed administrative law judge granted the applicant's request for benefits. The Labor and Industry Review Commission reversed. The circular motion performed by the applicant at or above shoulder height is not the type of activity that would cause significant tissue yielding or structural breakage. This was not a medically plausible cause for her SLAP tear. The applicant was not credible because she denied pre-existing complaints with her shoulder when treating with Dr. Gershtenson, but provided a history to Dr. Boyle after the injury indicating that she had some minor shoulder discomfort before the work incident. The Commission, therefore, discredited Dr. Gershtenson's opinions because they were based on an inaccurate medical history.

Burden of Proof

Rangle v. Tailwaggers Doggy Day Care LLC, Claim No 2017-013498 (LIRC November 8, 2018). The administrative law judge issued a default Order for the employer's failure to appear on a refusal to rehire claim. The exhibits were limited to descriptions of the work injury and resulting medical treatment. There was no testimony from the applicant or any competent evidence to establish any unreasonable refusal to rehire, the applicant's average weekly wage, whether the applicant was employed in a regular full-time or part-time position, or whether the applicant had sustained 52 weeks of lost wages. The administrative law judge, nevertheless, ordered compensation for 52 weeks of lost wages based upon full time employment, at an average weekly wage of $340.00. The Commission reversed for a determination regarding excusable neglect. (*See Default Judgement* category, below.) Under proper circumstances it might be appropriate to issue a default order for failure to appear. However, even if such a judgment is appropriate, the applicant still has the evidentiary burden to establish essential facts in support of his or her claim. In a default judgment, the fact finder accepts as true all competent evidence offered. However, the competent evidence must still be submitted and entered into the record. Therefore, even if there was no excusable neglect and a default order again issued, both parties should be allowed to submit evidence regarding the applicant's part or full-time status and the amount of lost wages.

Davis v. Jenkins, Claim No. 2014-024439, (LIRC November 20, 2018). The applicant worked as a bouncer at a nightclub called the Ivy Lounge in Milwaukee. He alleged that he sustained a head injury in a bar fight. The applicant could not determine the worker's compensation carrier. He filed an application for benefits with the Uninsured Employers Fund (UEF). The applicant listed Jenkins as his employer because he believed Jenkins owned the Ivy Lounge. When Jenkins failed to respond to a letter and voicemail regarding the applicant's claimed employment, the UEF determined that Jenkins employed the applicant. The UEF sought reimbursement for payment of medical expenses related to the work injury. Jenkins filed a reverse hearing application to seek a determination that he was not the applicant's employer. The administrative law judge held Jenkins was not the employer. The Labor and Industry Review Commission remanded the case. The UEF asserted Jenkins was the "applicant" because he filed the reverse hearing application, that Jenkins had to prove that he was not the employer, and that he failed to do so. This is not correct. The applicant (and the UEF who stands in his shoes) has the burden of proof because applicant seeks to receive benefits under the Worker's Compensation Act, even if the alleged employer filed the reverse hearing application for a determination as to the correct employment relationship. The applicant /UEF must prove, beyond a legitimate doubt, all of the facts essential to recovery of compensation. The applicant must prove that he was an employee and that an employer/employee relationship existed.

Tomasini v. Classic Concrete, Claim No. 2016-014312 (LIRC November 20, 2018). The applicant allegedly sustained a left ankle injury on June 3, 2016. He alleged that he was walking with a wheelbarrow when it tipped over, he fell down and twisted his ankle, and the wheelbarrow hit his ankle. There were no witnesses. Two coworkers' testimonies contradicted the applicant. There was nothing apparent that would indicate to his coworkers that he had injured his left foot or ankle. The applicant testified he had planned to drive up north with his wife on the date of the alleged injury but instead had to go to the emergency room because the pain was unbearable. The record indicated that he stated he was pushing a wheelbarrow and it tipped, causing bricks to fall out onto his left ankle, and that he rolled his ankle at the same time. His treating physician referenced bricks falling onto the applicant's medial lower leg and foot as the mechanism of injury. The applicant filed a hearing application in March of 2017, alleging that he injured his left foot/ankle by "fall + bricks from wheelbarrow fell on leg + foot." The employer does not use bricks in its concrete work. The applicant admitted at the hearing

that there were no bricks involved in the work incident. The applicant acknowledged that the reference to bricks was a mistake. Dr. Barron performed an independent medical record review. Dr. Barron identified a number of records that he reviewed, including statements taken from the applicant, the applicant's supervisor, and the applicant's coworkers, but did not attach the referenced documents to his report. The unnamed administrative law judge granted the applicant's application. The Labor and Industry Review Commission reversed. The applicant's testimony was not credible due to inconstancies and contradictions in his testimony and that of the other witnesses, as well as the applicant's mischaracterization of the work incident. The Commission did not credit the treating physician's medical opinion because it was based on an erroneous mechanism of injury. However, the Commission also did not credit Dr. Barron's medical opinion because he relied on information that was not medical (the claims file notes), and which was not in the record. The applicant had the burden of proof and failed to prove beyond a legitimate doubt that he sustained a work-related injury.

Causal Connection

Kothlow v. Menard, Inc., Claim No. 2014-029554 (LIRC May 31, 2018). The applicant sustained a work-related injury on January 14, 2014. A potted plant tipped over and the upper branches and foliage of the plant struck her on the shoulder and neck while she was sitting in a chair. She stated she was more frightened than hurt when the incident originally occurred. She finished her work shift. She treated with Dr. Bodeau the following day. She was diagnosed with a contusion of the left shoulder. She treated a few weeks later and reported her symptoms had entirely resolved. Her examination revealed no pain or swelling and her range of motion was back to her baseline. Dr. Bodeau opined she reached end of healing. A WKC-16 was completed indicating that she had no permanent disability as a result of this incident. She reported ongoing symptoms which Dr. Bodeau related to a prior work-related injury with another employer. During treatment a few months later, he noted that the applicant had just completed a settlement for the prior injury and that the applicant now reported the symptoms began after the January 2014 incident. Dr. Bodeau subsequently completed a WKC-16B. He opined the 2014 incident precipitated, aggravated and accelerated a pre-existing progressively deteriorating cervical spine condition beyond normal progression. He opined the cervical symptoms never fully resolved after the 2014 incident and were masked by her shoulder symptoms. Dr. Barron performed an independent medical examination and adopted Dr. Bodeau's first opinion (that there was a temporary contusion that resolved within a few weeks, with no permanent disability). Administrative Law Judge Minix determined that the applicant sustained a work-related injury which was temporary in nature and nothing more than a minor contusion, from which she fully recovered within a few weeks. The Labor and Industry Review Commission affirmed. The applicant alleges the administrative law judge rendered his own diagnosis by finding the work incident only temporarily aggravated the applicant's neck condition, in the absence of any such medical diagnosis. While there was no such medical diagnosis, the administrative law judge did not make up that diagnosis. He did not make a finding that the work incident temporarily aggravated the applicant's neck condition. Instead, the judge determined that she sustained an injury and rejected the idea that she sustained a disabling neck injury. The applicant and her physician initially reported the plant impacted the applicant's shoulder and not her neck. She reported she was pain free within two weeks after the incident occurred. Dr. Bodeau opined she had fully recovered at that point. The applicant did not report that she had continued neck pain until five months after the incident. This pain was not dissimilar to what she reported prior to the incident. Further, Dr. Bodeau originally opined there was no connection between the incident and disability cervical condition. While an expert's change of mind does not necessarily detract from the new opinion, the evidence suggests Dr. Bodeau arrived at the new opinion through an inaccurate recollection of the applicant's clinical history. Finally, the photographic evidence of the plant and location of the plant reflects only the leafy and pliable part of the plant struck the applicant. It is a reasonable inference that Dr. Barron's opinion regarding causation was based upon a belief that the force involved in the toppling of the plant was insufficient to be causally related to the progression of the applicant's cervical disc protrusion.

Claim and Issue Preclusion

Russell v. Trek Bicycle Corp., Claim No. 2016-008163 (LIRC August 31, 2018). The applicant sustained a significant injury while riding his bicycle on the employer's premises over his lunch hour. See Voluntary Recreation category for additional factual background. The applicant filed a claim in civil court initially,

alleging negligence against the employer and other parties. This claim was dismissed on summary judgment after a determination that the defendants were cloaked with immunity under Wis. Stat. 895.52(6)(e) (the Wisconsin Recreational Immunity Statute). The applicant did not dispute the statement, in the civil claim, that he was not acting within the scope of his employment at the time of his injury. This does not result in Claim Preclusion in the worker's compensation court. The circuit court proceeding has no preclusive effect on the worker's compensation claim. There is no claim preclusion. In order for this to apply, there must be (1) an identity between the parties or their privies in the prior and present suits, (2) an identity between the causes of action in the two suits, and (3) a final judgement on the merits in a court of competent jurisdiction. Claim preclusion may not apply where issues of subject matter jurisdiction arise. The Worker's Compensation Act is the exclusive remedy available to employees who sustain work-related injuries. The applicant could not have raised his worker's compensation claim in circuit court. The civil court lacked subject matter jurisdiction over the worker's compensation claim. The applicant is, therefore, not precluded from bringing his claim under the Act in an action before the Division. Similarly, there is no issue preclusion bar. In determining whether issue preclusion applies, one must first decide whether an issue of fact or law was actually litigated and determined by a valid judgement, the determination of which was essential to the judgement. Under the applicable case law, where such a showing is made, the determination is conclusive in a subsequent action whether on the same or different claim unless the application of issue preclusion precepts offend principles of fundamental fairness. In the civil claim, the employer argued it was immune from liability under the civil Recreational Immunity Statute. The employer's motion proposed various findings of fact, including a statement that the applicant's use of the trails on the date of injury was for non-business activities beyond the scope if his employment for the employer. The release signed by the applicant supported this position. The applicant did not dispute the proposed findings of fact. The civil court did not evaluate whether the applicant's activities on the date of injury went beyond the scope of his employment for the employer. The specific issue before the Division is whether the applicant was performing services growing out of and incidental to his employment in accordance with the statute and case law. The circuit court's decision is silent on this question. The court could not and did not litigate the matters currently in dispute and, therefore, there is no issue preclusion. A finding by the Division that the applicant was in the course of employment would not be inconsistent with the circuit court's action against the employer. Whether the employee is acting within the scope of his duties is a different analysis than under the present case. The Worker's Compensation Act does not require an injury be within the "scope of employment;" instead, the evaluation is whether the employee is performing services growing out of and incidental to his employment per the case law.

Compromise Agreement

Swenson v. Just One More Ministry, Claim No. 2017-012963 (LIRC October 5, 2018). An administrative law judge approved the terms of a compromise agreement. The applicant subsequently filed fifteen separate petitions for commission review of the order approving the compromise. The applicant also submitted an application to reopen the compromise agreement. An administrative law judge issued an order dismissing the application to reopen the compromise. This was dismissed without prejudice at the request of the applicant. The applicant's subsequent petition was considered a request for review of the dismissal order and/or another request to reopen the compromise. Pursuant to Wis. Stat. 102.16(1)(b), requests to reopen compromise agreements must first be submitted to the department and not the commission. This must be done within one year from the date an award was entered based on the compromise. If the department denies the request to reopen the compromise, the party can submit a timely petition for commission review. The commission has no jurisdiction to review a request to reopen a compromise prior to final adjudication by the department. Only one of the petitions for commission review was filed after the department's adjudication of the applicant's request to reopen the compromise. The commission has no jurisdiction to accept the previously filed petitions for review. Further, the department's order dismissing the application at the applicant's request, without prejudice, was not a final adjudication. This order did not award or deny compensation. Therefore, under Wis. Stat. 102.18(3)(providing a party in interest can petition the commission for review for a decision awarding or denying compensation), the commission also did not have jurisdiction to accept the petition submitted after that order was issued. The applicant can file a new application with the department to reopen the compromise, no later than one year after the order approving

the compromise agreement. The applicant's assertion that medical expenses were not being paid in accordance with the terms of the compromise was a separate enforcement issue. The applicant could file a subsequent hearing application to address this issue after discussing the matter with the insurer's attorney.

Default Judgment

Rangle v. Tailwaggers Doggy Day Care LLC, Claim No 2017-013498 (LIRC November 8, 2018). The applicant sustained a conceded injury from a dog bite. The administrative law judge issued a default Order based upon the employer's failure to appear at the scheduled hearing on November 22, 2017. The judge held there was an unreasonable refusal to rehire. The administrative law judge awarded ordered compensation for 52 weeks of lost wages based upon full-time employment at a weekly wage of $340.00. The employer submitted an affidavit with its Petition for Review by the Labor and Industry Review Commission. The employer's president asserted that no one from the employer ever received a notice of hearing. She indicated that the mailbox opened at both the front and back sides and that, on occasion, delivered mail had fallen out of the back side into a ditch. The employer also indicated that mail service was disrupted in front of the workplace due to construction. She also submitted wage records, indicating that the applicant worked as a part-time employee for a total of 53 hours and earned $403.59 in her employment. The Labor and Industry Review Commission set aside the administrative law judge's decision and remanded for further proceedings. An established procedure exists when reviewing a default order issued for a party's failure to appear. The Commission initially assumes that the non-appearing party's explanation for failure to appear is true, unless there is something in the record making that explanation inherently incredible. Assuming that it is not inherently incredible, the next step is to determine whether the explanation, if assumed to be true, would constitute "excusable neglect." If the explanation meets that standard, a remand is necessary. The excusable neglect standard was articulated in *Hedtcke*: "that neglect which might have been the act of a reasonably prudent person under the same circumstances. It is not synonymous with neglect, carelessness, or inattentiveness." The employer's mailbox explanation could constitute excusable neglect. The Commission remanded the case to the Division for a hearing to determine whether or not the employer's failure to appear was due to excusable neglect.

Disfigurement

Vang v. Pro Metal Works, Claim No. 2014-00776 (LIRC October 31, 2018). The applicant's right hand middle and ring fingers were accidentally crushed in the brake press at work. He required surgery and amputation of portions of the fingertips. His restrictions were accommodated. The applicant testified that he found performing the job duties difficult. However, he did not report that to the employer. The employer testified that alternative accommodations would have been made if the employee had notified the employer he was having difficulty performing his duties. The employee walked off during a shift and quit his employment. The employee applied for a position with a different company prior to quitting this employment. The employee was terminated from that employment seven months later for attendance reasons. He subsequently worked for several different companies. The unnamed administrative law judge awarded disfigurement benefits. Under *Landowski v. Harnischfeger Corporation*, the applicant's employment status (to determine whether Wis. Stat. 102.56(2) applies) on the date of the hearing applies. The applicant was not employed by the date of injury employer on the date of the hearing. The administrative law judge, therefore, held the potential wage loss standard under Wis. Stat. 102.56(1) versus the actual wage loss standard under Wis. Stat. 102.56(2) is applicable. The Labor and Industry Review Commission reversed and denied all disfigurement claims. The applicant's employment status on the date of the hearing is not applicable in this case, as compared to *Landowski*, because the applicant in this case quit his employment for the employer voluntarily, whereas the applicant in *Landowski* was laid off. Further, subsequent to *Landowski*, in *Gajewski v. B&E General Contractors*, the Commission held that the applicability of the proper subsection depends on whether the applicant was laid off or fired versus voluntarily quit. The Commission held that, if the employee voluntarily quit, then Wis. Stat. 102.56(2) is applicable. Wis. Stat. 102.56(2) states, "If an employee who claims compensation under subd. (1) returns to work at the employer who employed the employee at the time of the injury, or is offered employment with that employer, at the same or higher wage, the department or the division may not allow that compensation unless the employee suffers an actual wage loss due to the disfigurement." Wis. Stat. 102.56(1) contains similar provisions for employment at a different company, but with a potential wage loss standard. Here, the employer

returned the applicant to an ongoing position at the same wage he had been earning on the date of injury. The applicant failed to demonstrate actual wage loss due to the disfigurement. The only actual wage loss sustained was temporary and due to the applicant's attendance violations, subjective functional concerns and personal choice.

Employment Relationship

Davis v. Jenkins, Claim No. 2014-024439, (LIRC November 20, 2018). The applicant worked as a bouncer at a nightclub called the Ivy Lounge in Milwaukee. He alleged that he sustained a head injury in a bar fight. The applicant could not determine the worker's compensation carrier. He filed an application for benefits with the Uninsured Employers Fund (UEF). The applicant listed Jenkins as his employer because he believed Jenkins owned the Ivy Lounge. When Jenkins failed to respond to a letter and voicemail regarding the applicant's claimed employment, the UEF determined that Jenkins employed the applicant. The UEF sought reimbursement for payment of medical expenses related to the work injury. Jenkins filed a reverse hearing application to seek a determination that he was not the applicant's employer. In the meantime, Jenkins began to make payments to UEF. Jenkins provided evidence that Centercourt Pub & Grill used the Ivy Lounge as overflow, the Ivy Lounge evolved into a nightclub restaurant, and that Ivy Lounge was used to boost sales for Centercourt. Jenkins indicated that the Ivy Lounge was nothing more than a brand name. Jenkins additionally provided a printout from the Wisconsin Compensation Rating Bureau which indicated that Travelers Indemnity Company of Connecticut held a worker's compensation policy for Connections Ticket Services, Inc., which was located at the building location of the Ivy Lounge. Jenkins indicated that the same individuals owned Centercourt and Connections. Jenkins had provided some of this information to UEF prior to filing the reverse hearing application; however, the UEF did no further investigation and instead demanded Jenkins make payment. The unnamed administrative law judge held that Jenkins did not employ the applicant. The UEF determined that Jenkins was the employer due only to lack of contradictory evidence. The Labor and Industry Review Commission set aside the decision and remanded. The Commission held that all putative employers/potential owners have an interest in seeing that the liabilities of potential co-owners are properly determined. This cannot be accomplished with individualized hearings. The Commission remanded the case for one hearing with all of the potential employers. It is possible that the other potential employers would provide proof that Jenkins was the proper employer.

Evidence

Groesnick v. Professional Detailing Network, Inc. Publicis Touchpoint Solutions, Claim No. 2013-012166 (LIRC November 20, 2018). The applicant filed a hearing application seeking additional compensation for a conceded injury. The employer and insurer submitted an unsigned WKC-16B in support of the defenses. (The applicant did not raise an objection to this lack of proper certification at the hearing, but did raise it before the Labor and Industry Review Commission.) The applicant failed to submit some or all of her proposed medical evidence to the respondents 15 days prior to the hearing date, in violation of Wis. Stat. § 102.17(1)(d)(3). The applicant offered no cause for her failure to comply with this statutory directive. The unnamed administrative law judge attempted to remedy the applicant's failure to timely submit evidence by allowing a representative of the respondents to temporarily remove the applicant's proposed exhibits and make copies of the documents, before returning the documents to the proceeding. The unnamed administrative law judge thereafter accepted the exhibits into evidence. The applicant also, on her own, attached a medical record to a WKC-16B. The Labor and Industry Review Commission remanded the matter for a new hearing. The applicant properly objected to the lack of certification by the employer and insurer's experts. The failure to raise the objection at the hearing did not forfeit the argument. Even though a reviewing court will normally not consider issues not properly raised before an administrative agency, the court does retain the power to consider such issues. Under *Bunker vs. Labor and Industry Review Commission*, where all the necessary facts are of record and the issue is a legal one of great importance, reviewing courts may choose to decide the issue. However, the administrative law judge's findings were compromised by the unorthodox procedure used to admit the applicant's exhibits. Remand is appropriate because the evidence submitted by both the applicant and the respondents was either inadmissible or indeterminate with regard to the disputed issues. The Commission did warn all the parties that they need to follow the procedures for securing competent medical evidence and timely file such evidence. The applicant was also advised to refrain from attempting to supplement the record in the future at the Commission (should the case proceed to the Commission

again). Finally, the administrative law judge was warned to not accept into evidence any medical document that was altered by a party or compromised by entry of personal commentary on the document.

Hearing Loss

Maybee v. City of Janesville Fire Dept., Claim No. 2001-010925 (LIRC November 20, 2018). The applicant sought payment for hearing aid expenses more than 12 years after the last payment of compensation made by the employer and insurer. Because the applicant's hearing application was filed more than 12 years after the last payment of compensation, the Work Injury Supplemental Benefit Fund (WISBF) was originally impleaded as a party. Prior to the hearing date, WISBF asserted that WISBF had no potential liability in the matter because Wis. Stat. §102.555(11) provides compensation for permanent partial disability, due to occupational deafness, may be paid only if there is over 20 percent binaural hearing loss. The applicant's hearing loss did not exceed 20 percent binaural. The Division mistakenly accepted the WISBF's pre-hearing assertion that it could, therefore, not be liable for the applicant's hearing aid expense. The Division removed WISBF as a party to the proceeding. WISBF did not participate in the hearing or in the appeal before the Labor and Industry Review Commission. The Commission set aside the Division's order and remanded for further consideration. Wis. Stat. § 102.55(11) precludes liability only for permanent partial disability and not liability for medical treatment expenses. Accordingly, the WISBF may have potential liability for medical expenses and the proceeding should not have gone forward without WISBF as a party.

Issue Preclusion

Joosten v. Miller Masonry & Concrete, Inc., Claim Nos. 2001-019919, 2004-041400 (LIRC November 8, 2018). The applicant sustained several work-related injuries. On November 28, 2007, an unnamed administrative law judge issued an interlocutory order which included an award for 75 percent loss of earning capacity. The applicant's claim for permanent and total disability was dismissed. At the end of his decision, the administrative law judge used the following language to reserve jurisdiction: "The Department reserves jurisdiction for further claims. The above findings are not to be relitigated as far as they go." This decision was not appealed. On December 19, 2014, the applicant submitted a new application for hearing. He asserted that he had become permanently and totally disabled due to alleged deterioration in his cervical condition, attributable to either, or both, of the work injuries. The employer and insurer asserted that the first administrative law judge's decision fully and finally decided the permanent total disability issue and it was now foreclosed by the doctrine of issue preclusion. The applicant petitioned pro se and did not address this legal issue. Instead, he simply argued that he was now permanently and totally disabled. On June 6, 2017, a second administrative law judge held that the applicant's claim for permanent total disability was barred by the doctrine of issue preclusion. Jurisdiction was reserved in accordance with the findings of the first administrative law judge's decision. The Labor and Industry Review Commission reversed. Nowhere in his 2007 decision did the first administrative law judge dismiss the claim for permanent total disability "with prejudice." The administrative law judge's language was ambiguous. It was unfortunate that such language was used without further explanation. The Commission inferred that the first administrative law judge did not intend to foreclose the issue of the applicant's future disability, both medical and vocational, given the possibility that his circumstances could change. Two of the five fundamental fairness tests used for determining whether or not issue preclusion should be invoked are applicable. These two tests include: "Is the question one of law that involves two distinct claims or intervening contextual shifts in the law; and (2) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication of the initial action?" The issue of permanent total disability is a factual/legal question. It would be fundamentally unfair and a denial of due process not to allow the applicant the opportunity to prove his new claim before the fact finder.

Jurisdiction

Gonzalez v. ISPC Castallow Inc Co., Claim No. 2014-012666 (LIRC August 31, 2018). The applicant sustained a compensable medial meniscus injury to the left knee. The applicant also alleged a lateral meniscus injury to the same knee. He amended his claim to assert a claim under Wis. Stat. 102.35(3) for unreasonable refusal to rehire. A hearing was held and the administrative law judge determined the applicant sustained injuries to both menisci and awarded benefits. The claim for unreasonable refusal to rehire benefits was reserved. The order was interlocutory. The Labor

and Industry Review Commission reversed and determined the applicant had not sustained compensable lateral injury. The decision was not interlocutory. That decision was not appealed. The applicant filed a new hearing application alleging bad faith, on the basis of a claimed unreasonable delay in payment of compensation due for the medial meniscus injury. Administrative Law Judge Enemuoh-Trammel dismissed the application on the basis of lack of jurisdiction. The Labor and Industry Review Commission affirmed. The issue of bad faith was ripe for adjudication prior to the original hearing held. This was true until the Commission issued its original decision. However, the applicant did not amend the original hearing application to assert a bad faith claim, nor did he bring any such claim until after receipt of the Commissions original decision. The original decision from the administrative law judge was interlocutory for unresolved issues, including unreasonable refusal to rehire. However, no bad faith issue was raised and, thus, no such issue was unresolved. The Commission's original order was considered final with respect to all issue not reserved pursuant to Wis. Stat. 102.18(4)(a). This statute provides: "unless the liability under s. 102.35(3), 102.43(5), 102.49, 102.57, 102.58, 102.59, 102.60 or 102.61 is specifically mentioned, the order, finding or award are deemed not to affect such liability." Apart from those claims listed in 102.18(4)(a), and the issue of medical expenses pursuant to case law, the Commission's original order resolved all other issues stemming from the applicant's claim. This decision was final. There was specifically no jurisdiction reserved over additional issues, including the alleged prior act of bad faith under Wis. Stat. 102.18(1)(bp). The applicant was still within the twelve year statute of limitations applicable for the original injury claim. However, the claim is not available when issues are resolved with a final unappealed decision.

Loss of Earning Capacity

Liegakos v. Old Carco, LLC, Claim No. 1999-062505 (LIRC July 31, 2018). The applicant sustained a conceded back injury on November 3, 1999. Administrative Law Judge Mitchell found that the applicant sustained a 55 percent loss of earning capacity in 2002. In November 2014, the applicant filed a hearing application alleging that he had become permanently and totally disabled due to more restrictive functional limitations. He testified that he began experiencing increased back pain around 2011. In 2012 or 2013, his prescription for Norco, five times a day, was changed to Percocet, six times a day. He received eleven sets of epidural steroid injections between December 2011 and April 2014. He began excessively using a heating pad for pain relief, to the point that it was causing scarring on his back. He underwent a trial use of an external spinal cord stimulator and a trial use of an external morphine pain pump. In July 2015, an internal morphine pain pump was surgically implanted. The applicant testified that he had to cease performing chores around the house, such as raking, mowing the grass, or weeding. (The applicant had testified to an inability to perform some of these same activities at the 2002 hearing.) His treating physician, Dr. Stauss, (who had treated the applicant since 1999) refused to revise his permanent work restrictions. Dr. Johnson performed a functional capacity type evaluation, once, in July 2016. Dr. Johnson opined that, as a result of the work injury, the applicant required new permanent restrictions. Based on these restrictions, the applicant's vocational expert opined that the applicant was totally and permanently disabled. Dr. Brown performed an independent medical examination. He opined that the applicant's prior permanent restrictions were appropriate. Video surveillance showed the applicant engaging in activity in his yard and outside on his stoop. The activities included pulling and removing branches from a nearby tree, bending and squatting, and using a hose to water his stoop. Administrative Law Judge McKenzie denied the applicant's claims. The Labor and Industry Review Commission affirmed. Dr. Johnson's opinion was not credible. His opinion conflicted with the opinion of the applicant's treating doctor. Dr. Johnson misstated the cause of the applicant's condition as the result of return-to-work activities when in fact the applicant engaged in practically no return-to-work activities after his November 1999 injury. No imaging indicated a significant change in the applicant's condition. The video surveillance contradicted the applicant's testimony. The activities depicted in the video were more consistent with Dr. Stauss' restrictions than they were with Dr. Johnson's restrictions. To change a prior finding of loss of earning capacity, there must be a substantial change in the applicant's ability to perform work due to progression of the work-related injury. There was not a substantial change in the applicant's abilities in this case.

Medical Issue

Liegakos v. Old Carco, LLC, Claim No. 1999-062505 (LIRC July 31, 2018). The applicant was prescribed various narcotic pain medications after the work-related injury. In the six to seven years prior to the hearing involved in this case,

the medication was increased and treatment changed. This was based upon his treating physician's recommendations. He also underwent an invasive pain pump implementation. Dr. Brown performed an independent medical examination and opined the ongoing pain treatment was not medically necessary or reasonable, including the implantation of the pump. The employer and insurer stopped paying some of the medical expenses. Administrative Law Judge McKenzie ordered the claims paid. The applicant reasonably and in good faith relied upon the medical opinions of his treating physician for the treatment of a conceded injury, and, therefore, the employer and insurer are still responsible for payment of all medical treatment related to the work-related incident. The Labor and Industry Review Commission affirmed on this issue. The administrative law judge relied upon Spencer, which held that, as long as the applicant engages in medical treatment undertaken in good faith, even if that treatment is later determined to be unnecessary and unreasonable, the employer and insurer are responsible for payment. The recent decision in *Flug* does clarify that the treatment must be for a compensable injury. Treatment which is for a personal/not work-related compensable injury does not need to be paid for by the employer and insurer. However, based upon the independent medical examiner's opinion, the necessity of ongoing/future narcotic treatment is in reasonable dispute. This case is appropriate for the dispute resolution process under Wisconsin Administrative Code § DWD 80.73 (which provides a process by which the insurer and health care provider can respond to each other as to why the treatment is necessary or not, and puts the question of necessity in the hands of an impartial expert or panel of experts).

Mental Injury

Mattson v. Aurora Healthcare, Inc., Claim No. 2015-011429 (LIRC June 29, 2018). The applicant worked as a registered nurse at a medical facility from December 2010 until October 2014. She asserted that she developed post-traumatic stress disorder (PTSD) due to extraordinary stress she experienced while working there. Prior to this employment, the applicant treated for a number of mental conditions/issues including: depression, adult attention deficit disorder, suicidal ideation, memory-based learning disorder, anxiety, and lack of concentration. She was prescribed medication, pre-injury, to treat a number of those conditions. She also worked in three medical settings before working for the employer. During her prior medical related employment, she reported difficulties with making decisions and prioritizing. She also stated that management was not supportive, she had conflicts with coworkers, and she felt that she was the recipient of criticism or blame. Based on her mental health, the applicant had restrictions placed on the amount of patient contact she could have and the length and number of shifts she could work. While working for the employer, the applicant encountered the same problems. At the applicant's request, the employer placed her on a work improvement plan in an attempt to address her performance issues. Her performance did not improve. Her mental health declined, at times resulting in paranoia and delusions, requiring leaves from work and various work restrictions. She ultimately resigned her position in lieu of receiving a corrective action. The applicant's psychiatrist opined that the employer's failure to fairly develop a program of support for the applicant was the stressor leading to the development of applicant's PTSD. Dr. Meyer referred to the employer's failure to adhere to restrictions imposed, staff harassment, and lack of supervisory support. Dr. Lynch performed an independent medical examination. He diagnosed the applicant with psychosis in remission, memory-based learning disorder, and a history of anxiety, depression, attention difficulties, and bipolar disorder. Dr. Lynch opined that the psychotic break the applicant experienced did not occur because of her employment with the employer. He noted that her symptoms had predated employment for the employer. Dr. Lynch further disagreed with Dr. Meyer's PTSD diagnosis based on a lack of exposure to actual or threatened death or serious injury. Dr. Lynch opined that, using the DSM-V definition of PTSD, a failure to provide avenues of support was not a stressor that could lead to PTSD. Administrative Law Judge Konkol dismissed the application. The Labor and Industry Review Commission affirmed. Dr. Meyer's opinions contradicted his own prior findings that the employer had been supportive and helpful. Dr. Meyer's opinion was predicated exclusively on what the applicant told him during a time when she was experiencing delusions. Moreover, even if the applicant had established a causal relationship between her work and her condition, she did not establish that she sustained a compensable mental injury. Under the School District No. 1 standard, a non-traumatically caused mental injury must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees

must experience. The stresses and strains the applicant experienced must be measured against the stresses and strains that similarly situated employees face. The applicant was not bullied or harassed by management or other coworkers. The employer followed its normal protocol in handling the applicant's work performance issues. Numerous other nurses encountered the same matters of which the applicant complained. None of those matters could be said, singly or collectively, to be out of the ordinary from the countless emotional strains and differences encountered by nurses on a daily basis.

Anderson, Sarah v. City of Madison, Claim No. 2015-026938 (LIRC July 18, 2018). The applicant was employed as a police officer. In October 2011, her sister died unexpectedly. Around the same time, she also had marital difficulties. She sought counseling and took time off work through June 2012. In October 2012, her divorce became final and her dog died. The alleged work incident occurred on October 7, 2012. On this date, she had left her duty rifle in her squad car instead of taking it to the armory. The next officer to use the car returned the rifle to the armory. Another police officer took the rifle and disassembled/ field stripped the rifle, placed it in a soft case, and put the case on a top shelf in the armory where it was not easily seen. He placed a Post-It note in the applicant's mailbox indicating where the rifle could be found. He then joked about this with another officer. At the beginning of her next shift, the applicant could not locate her rifle. She did not see a Post-It note. During the course of her shift, she thought about where the rifle could be and what she would do tactically if there was a call and she needed her rifle. By the end of the shift, she thought it was possible that her ex-husband (also a police officer) had taken the rifle and she was concerned for the safety of her children. She called her children and told them to go to a family member's house. Within minutes of calling her children, a sergeant found the rifle. The applicant had been unable to locate the rifle for about eight hours. A similar incident previously occurred with another officer's handgun. At the time the rifle was found, she was in shock and disbelief that a fellow officer had taken her rifle. She emailed the officer and thanked him for securing the rifle but stated that she considered his actions to be harassment. Her lieutenant indicated that the incident would be investigated. The applicant did not receive information about when the investigation was going to be conducted. The officer continued to work. The department sent squads to her house to check on her, which she felt was bullying. She believed the department did not take care of her, she was being bullied and shoved out by her supervisors. She felt betrayed and scared. She indicated the rifle incident "shattered" her view of the relationship between officers. She sought counseling. The officer was charged with untruthfulness, firearm safety violations, immoral or offensive conduct, and harassment by the department for the rifle incident. The applicant then underwent a fitness for duty evaluation. Dr. Spierer determined that she met the criteria for axis I diagnosis of dissociative amnesia, a form of dissociative disorder, and that she manifested characteristics of dissociative fugue. He opined that she was unable to perform the duties of a police officer. The applicant filed two additional supportive expert medical opinions. One physician opined the external stressors made her vulnerable to the development of a psychiatric disorder after the rifle incident. Administrative Law Judge O'Connor dismissed the application. The Labor and Industry Review Commission affirmed. The applicant failed to meet her burden of proof under the *School District Number 1* standard. The court must consider whether a person of ordinary sensibility performing the duties of the job would be subjected to greater stress than those who are similarly situated. Here, the applicant was dealing with a number of external stressors (divorce, anniversary of a sibling's death, etc.) that contributed to her psychological condition. The applicant failed to meet her burden to prove that the rifle incident was so egregious and out of the ordinary from the strains of a similarly situated police officer that a police officer of ordinary sensibility would suffer a nontraumatic mental injury as a result of the rifle incident and the department's response. Instead, most of the applicant's anxiety about the incident appeared to have been a result of her erroneous thoughts about what happened and the way she chose to interpret the events. This was a duty disability case and the court also held the applicant did not suffer a duty disability under Wis. Stat. § 40.65.

Occupational Injury

Eddington v. Adrich Chemical Co Inc., Claim No. 2015-027399 (LIRC May 15, 2018). The applicant worked for approximately nine years as a packaging operator for a chemical manufacturing company. He performed his job duties under an exhaust system. He did not use a respirator. On the date of claimed injury, a chemical leaked out of a container the applicant was handling, and onto his glove. The applicant inhaled the fumes, felt dizzy and had tingling in his chest and throat. He treated with a physician's assistant the same day

and reported mild discomfort to his upper airway and a minor headache. He was released to work but was advised to avoid exposure to chemicals. Two months prior to this incident, the applicant experienced shortness of breath when climbing stairs at home. He received treatment for shortness of breath with exertion. The medical records confirm a pre-existing pulmonary impairment consistent with development of asthma. The applicant underwent additional medical treatment over the next few weeks. He reported pleuritic chest pain, persistent cough and shortness of breath with activity. The following month, the applicant reported he had increased dyspnea with exertion over the past several years. His physician reported reactions to chemicals he was exposed to at work, including shortness of breath with any and all activity. His physician opined the work injury precipitated, aggravated and accelerated the asthma; and that the asthma was caused by an appreciable period of workplace exposure that was either the sole cause or at least a material contributory causative factor in the asthma onset or progression. Dr. Habel performed an independent medical examination. He opined that the applicant had undiagnosed asthma prior to the work-related injury. He opined the applicant had a temporary aggravation of his asthma that resolved in one day. There was no testimony regarding specific details about the nature and extent of the job duties. Administrative Law Judge Konkol adopted Dr. Habel's opinion and denied the claim for benefits. Based upon the applicant's testimony, it is unclear what factors of the job, including tasks, exposure or movement were a material contributory or causative factor of the condition. The applicant, therefore, did not sustain an occupational lung injury arising out of or incidental to the employment on or about November 12, 2015. The Labor and Industry Review Commission affirmed. The applicant discussed his chronic problems with breathing difficulties associated with exertion, with his treating physician prior to the alleged injury. His symptoms at the time of the hearing included shortness of breath. The treating physician's opinion regarding causation rested on the applicant's report that he had a reaction to chemicals that he was exposed to at work and had symptoms for a year. The record does not support the treating physician was aware of the chemicals the applicant was exposed to, or the extent of such exposure. There is nothing in the record demonstrating what the treating physician relied upon or based his ultimate causative opinion on. The applicant's testimony lacks sufficient details to support the opinion of the treating physician. The treating physician provided no opinion regarding a traumatic work incident. He instead opined an occupational injury occurred. The opinions are confusing, inconsistent (internally and with the applicant's claims), and thus not credible. The fact that the applicant worked around and handled chemicals does not inexorably lead to the conclusion that his asthma was caused by work exposure.

Suprise v. Pierce Mfg., Inc., Claim No. 2016-030358 (LIRC July 31, 2018). The applicant started working for the employer in 2006. His job duties included assembling fire panels and welding fire truck bodies. According to the applicant, the work environment was dirty, dusty, and smoky. He had a history of sinus issues dating back to at least 1993. In 2012 an ENT specialist, Dr. Vandenberg, found a mass in the applicant's right nostril. This was determined to be an extranodal NK/T-cell lymphoma of the nasal type. The applicant was successfully treated with chemotherapy and radiation. He continued to have sinus problems. He eventually resigned on June 2, 2017. Dr. Vandenberg opined that the applicant's ongoing exposure to welding fumes directly caused his disability. Dr. Vandenberg opined that the applicant sustained a 50 percent permanent partial disability to his body as a whole. Dr. Blake performed an independent medical examination. He opined that the applicant's lymphoma was unrelated to his workplace exposure. Dr. Blake noted that the applicant had preexisting documented history of recurrent sinusitis which preceded his employment with the respondent. Dr. Blake opined that, after a careful review of the medical literature, he could not find a single case that associated extranodal NK/T-cell lymphoma of the nasal type with welding activity, or a case that implicated welding as a cause of the applicant's type of lymphoma. Dr. Blake further stated that any exposure to hexavalent chromium in the course of his welding activity would have been below the permissible exposure limit. Administrative Law Judge Falkner dismissed the hearing application. The Labor and Industry Review Commission affirmed. Dr. Vandenberg did not provide a credible mechanism of causation. Dr. Vandenberg also contradicted himself without explanation when he signed various forms entitled "Attending Physician's Return to Work Recommendations" where he selected "Not Work Related" for the applicant's chronic sinus issues and headaches. Dr. Blake conducted a review of the

medical literature and could not find a single case that associated the applicant's condition with his type of work. Dr. Blake's opinion was well-reasoned and based on a review of the applicant's medical records, a physical examination of the applicant, and the current medical literature about the specific nasal lymphoma suffered by the applicant.

Bretl v. Marinette Marine Corp., Claim No. 2016-004518 (LIRC November 20, 2018). On August 16, 2006, the applicant was welding inside a ship's fuel tank when an equipment fire started in a tank chamber adjacent to him. His respirator mask dislodged and the applicant inhaled some black smoke. When filling out the injury report, however, the applicant only indicated that he sustained a wrist sprain. The applicant testified that, after the incident, he began to experience a throat symptom that persisted for the rest of his career. The applicant continued to work. He first received medical treatment after a 2008 pulmonary function test when he experienced choking difficulty. A chest x-ray then demonstrated minimal left basilar atelectasis. A pulmonary function test showed reduced lung capacity. The applicant returned to work. Two years later, Dr. Khayat diagnosed symptoms suggestive of reactive airway disease, possibly related to the work-related incident. The applicant continued to work until he was terminated in 2015. His respiratory difficulties increased after his termination. On January 13, 2016, Dr. Khayat completed a questionnaire drafted by the applicant's attorney. He diagnosed the applicant with moderate restrictive lung disease, reactive airway disease, dyspnea, and cough. He opined that the applicant's condition was occupationally caused and that it was possible that there was also a direct causation component. At the applicant's attorney's request, Dr. Brown also examined and evaluated the applicant. Dr. Brown diagnosed the applicant with "(1) Dysphonia, dyspnea, cough, and limited endurance secondary to moderate reactive airway disease and moderate restrictive disease (intrinsic lung disease); (2) Obesity." Dr. Brown attributed the condition to direct work causation rather than occupational disease. Dr. Habel performed an independent medical examination. Dr. Habel diagnosed the applicant with chronic cough due to a lengthy history of poorly treated gastroesophageal reflux disease (GERD), in addition to reduced total lung capacity and dyspnea consistent with restrictive physiology due to the applicant's elevated body mass. The applicant testified not being aware that he was previously diagnosed with GERD. He did acknowledge that he took Protonix (which the records indicated was for the GERD diagnosis). However, Dr. Habel indicated the applicant acknowledged to him that he had experienced problems in the past with GERD and treated for the same. Medical records indicated noncompliance with medication for his GERD. Air emissions of contaminants at the workplace were within OSHA guidelines. The applicant regularly wore a respirator for the vast majority of his time employed there. The applicant heated his house with a wood-fired boiler and that he supplied the wood for the fire prior to 2012. Maintenance included almost weekly cleaning of creosote build-up in a pipe extending from the boiler to the chimney flute. The unnamed administrative law judge granted the applicant's application for benefits. The Labor and Industry Review Commission reversed. The applicant had a chronic cough and restrictive lung physiology due to poorly-treated GERD along with an elevated body mass. This was not a work-related lung condition. Dr. Khayat did not provide a credible medical explanation for his relation of multiple diagnoses to the applicant's work exposure with the employer. Neither Dr. Khayat nor Dr. Brown adequately addressed Dr. Habel's causation opinion relating the applicant's symptoms to GERD and obesity. The applicant was not a credible witness. He testified that, immediately after the work incident, he experienced throat symptoms that continued for the rest of his work career. However, he did not mention any throat, lung, or breathing symptoms when completing the injury report. He did not receive any treatment that could possibly be related to the effects of the work incident until he experienced choking difficulty two years post injury. The choking difficulty was at least as likely to be related to GERD as to a residual effect from the work incident.

Penalty

Rouse III v. Milwaukee Transport Services Inc., Claim No. 2013-013536 (LIRC August 31, 2018). The parties settled the applicant's worker's compensation claim. An Order approving the compromise agreement was issued February 8, 2017. The employer issued checks to the applicant and his attorney on February 16, 2017. The funds were transferred to cover those checks on February 24, 2017. The third party administrator mailed the checks on February 28, 2017. There was a one day delay in receipt of payment. The applicant subsequently asserted a claim for inexcusable delay of payment following a Department order for payment. The payments were ordered to be made within 21 days from the date of the order and were received by the applicant

on the 22nd day after the order. Administrative Law Judge McKenzie dismissed the claim. Payment was issued via mailing within the 21 day time frame accounted for in the Order. The statutory provisions were satisfied by the employer and its administrator issuing payment one day before the 21st day mandated. Therefore, there was no inexcusable delay under Wis. Stat. 102.22(1). The Labor and Industry Review Commission affirmed with modification. The Commission does not condone any delay in receipt of a payment due pursuant to an order from which no appeal is made. All orders are issued on the basis that payment will be received by the due date. While the one day delay in receipt of payment is not condoned, it is inferred from the facts that there was no intent to delay, nor any actual negligence by the employer in providing for timely payment. The negligence of the third party administrator is imputed to the employer because the administrator was its agent. However, because the delay was only one day, the minimal negligence was on the part of the employer's agent rather than the employer itself, and the inappropriateness of such a large monetary penalty for such a short delay, discretion under Wis. Stat. 102.22(1) was be exercised to forego assessment of the ten percent penalty for inexcusable delay.

Permanent Partial Disability

Lehman v. Fincantieri Marine Group, LLC, Claim no. 2015-025125 (LIRC May 31, 2018). The applicant sustained bilateral upper extremity injuries as a result of use of vibrating tools. His treating surgeon referred him to Dr. Sherrill for evaluation of permanent partial disability. Dr. Sherrill opined the applicant had 35% permanent partial disability at the right wrist for median nerve dysfunction. Dr. Sherrill rated the applicant with an additional 10% permanent partial disability to the right wrist for painful range of motion and scar. He assigned the applicant with 5% of the left upper extremity for carpal tunnel syndrome status post satisfactory surgical repair. He assigned another 5% at the left upper extremity for painful surgical scar with persistent swelling and limited function. The applicant reported numbness in his thumb and the first two fingers of his right hand. He reported that he had difficulty maintaining a grip on some things and had some incidents with burning himself and having a crush injury to his thumb because of the numbness. The applicant continued to work in his date of injury position. Dr. Bax performed an independent medical examination. He noted the applicant's left hand symptoms had resolved and were fine. Dr. Bax noted the applicant still had numbness in his right thumb and two fingers. He also noted the applicant dropped things and had nocturnal paresthesia. Dr. Bax opined the applicant had 0% permanent partial disability of the left hand. He noted the applicant had normal sensation, full range of motion and full strength. Dr. Bax opined the applicant sustained 5% permanent partial disability to the right wrist because of residual symptoms. Administrative Law Judge Falkner held the applicant sustained 45% permanent partial disability to the right upper extremity. The sensory and physical deficits made it more difficult for the applicant to work. He held the applicant sustained 5% permanent partial disability to the left hand. There was some loss of ability that was probably affecting the applicant's work. There was no award appropriate solely for the surgery because there are no regularly minimums for carpal tunnel surgery and because this procedure with good to excellent results usually results in no disability. The Labor and Industry Review Commission modified the decision. The applicant sustained 0% permanent partial disability to the left wrist. The applicant had an excellent result and does not require pain medication for his wrist despite reports of a persistent painful scar. Dr. Bax' opinion is more credible for an excellent result from carpal tunnel surgery when there is normal sensation, full range of motion and full strength. The applicant sustained 20% permanent partial disability to the right wrist. Dr. Sherrill assigned 10% for residual scar and range of motion. However, the applicant does not need to take pain medication. Therefore, a 2% rating is more appropriate for residual pain and loss of range of motion. Dr. Sherrill rated another 35% for loss of sensory perception. This was based upon his opinion that the applicant had one half of the impairment provided for in DWD 80.32(10) for total medial sensory loss. However, the dorsal side of the applicant's right hand had less sensory loss and light touch testing was essentially intact. Therefore, the applicant did not sustain half of a complete sensory loss. Instead, the applicant sustained 18% permanent partial disability for the sensory loss (approximately 25% of the middle ground of the rating for total sensory loss). For scheduled injuries, the schedule in Wis. Stat. 102.52 is presumed to include its own award for loss of earning capacity. The loss of earning capacity evaluation is inherent in the schedule. The applicant is permitted to recover physical permanent partial disability despite the fact that the applicant returned to his prior job and essentially has no wage loss. The reasonable relationship between a permanent

partial disability benefit award and impairment of earning capacity is already built into the schedule for scheduled injuries.

Schwab v. County of Jefferson, Claim No. 2015-001493 (LIRC August 31, 2018). The applicant sustained a specific work-related left knee injury. She underwent multiple surgeries for ongoing knee symptoms. She was provided a two percent rating following one procedure and an eight percent rating following another. She then underwent a unicompartmental medial knee replacement. The applicant was assigned 45 percent permanent partial disability to the knee. Dr. Lemon performed a records review and opined the surgeries were unrelated to the work-related injury. The parties entered into a full and final compromise which was approved. The parties noted the applicant was claiming 45 percent permanent partial disability to the knee. The applicant returned to work for the employer. Approximately five years later, in 2015, the applicant sustained another specific work-related left knee injury. She underwent another several surgeries, including a total left knee replacement. The applicant was assigned 60 percent permanent partial disability to the knee. Dr. Summerville performed an independent medical examination. He opined the applicant sustained only a left knee contusion as a result of the 2015 incident. The decision did not outline the nature of the administrative law judge's decision. The Labor and Industry Review Commission indicated it affirmed that decision in part and reversed in part. The treating physician's opinion regarding causation and the 60 percent permanent partial disability rating to the left knee, as a result of the 2015 work-related injury, is credible. However, the applicant sustained 45 percent partial disability to the left knee as a result of the 2008 unicompartmental medial knee replacement. That 45 percent rating must be deducted from the current rating. Therefore, only 15 percent additional compensation is due for the 2015 work-related injury. When there is an identifiable disability attributed to a prior injury, that disability is deducted from the disability assessed for a subsequent injury to the same body part. Only when there are multiple surgeries, each attributable to and taking place after the ***same*** work-related injury, are the disabilities stacked (added together for a cumulative award). Here, the applicant had previously undergone a unicompartmental medial left knee replacement in 2008, for which the minimum permanent partial disability assessment is 45 percent. The contemplation of a total knee replacement as an alternative at the time of the 2010 compromise does not result in the applicant giving up the right to claim that a new, subsequent injury, accelerated the need for a total knee replacement. Further, the prior eight percent and two percent ratings for other prior surgeries were provided prior to the 45 percent rating, and were logically subsumed in the 45 percent assessment. Overpayment of temporary total disability must be subtracted from the permanency award.

Permanent Total Disability

Barnes v. Bremner Food Grp, Inc., Claim No. 2015-010274 (LIRC June 19, 2018). The applicant sustained an admitted head injury. Testimony regarding the mechanism of injury was inconsistent. The applicant treated for headaches, including migraines, for several years prior to this injury. Her symptoms continued post injury. A CT scan and MRI were performed. The MRI showed findings consistent with chronic migraine headaches. Neither revealed signs of traumatic brain injury. The applicant treated with Dr. Lancaster at the Mild Traumatic Brain Injury Clinic. He noted that significant residual physical and cognitive sequelae would not be expected at that time. He opined significant emotional factors were contributing to her current presentation. Three treating doctors supported her claim for full disability. Dr. Novom performed an independent medical examination. He noted few findings consistent with severe disability during his first examination. Dr. Novom opined the applicant was being overtreated. Dr. Novom opined that the applicant showed signs of symptom exaggeration. He opined that the applicant was capable of histrionic behavior. The applicant appeared at the hearing using a walker. She appeared very debilitated, hunched over and deliberate of movement. She reported ongoing pain and dizziness, even with sitting. She reported that she could not pick anything up because it hurt her head. She could bend and squat some. The applicant testified that, if she did as much as ten minutes of sweeping, she was in bed for the two days. She testified that any motion at all made her light-headed and dizzy. The respondents presented video surveillance from a little over five weeks prior to the hearing. The surveillance showed the applicant driving a motor vehicle as if movement did not make her dizzy. The applicant moved about and exhibited no signs of alleged dizziness or similar dysfunction. The applicant lifted in a manner that did not indicate she had concerns of a headache. The applicant did not use a walker. She had no signs of possible gait instability or uncertainty. She bent and straightened up with

fluidity and ease. She engaged in much more than ten minutes of activity without apparent difficulty. Administrative Law Judge Falkner dismissed the applicant's claim for permanent total disability. The Labor and Industry Review Commission affirmed. The applicant asserted that it was uncontradicted that her post-concussion syndrome medically led to post-traumatic stress disorder, with an associated set of extreme physical and psychological limitations that rendered her permanently and totally disabled. However, the surveillance and Dr. Novom's opinions contradicted these assertions. Further, the supportive medical opinions were based upon the applicant's version of events, which were not credible. Therefore, the foundation of the applicant's supportive medical opinions was flawed and there is legitimate doubt that the applicant is entitled to any additional disability indemnity.

Crass v. Tradesman International Inc., Claim No. 2014-003413 (LIRC October 25, 2018). The applicant was employed as a maintenance electrician. He was on a lift approximately 25 feet in the air when the lift was hit and tipped over. He sustained significant pelvic, spinal and rib fractures as a result of the incident, in addition to shoulder and wrist injuries. The applicant reported ongoing low back and left lower extremity pain after he reached the end of healing. He testified that he could, however, perform some chores on his 80 acre farm. Dr. Friedel performed an independent medical examination at the request of the employer and insurer. Dr. Friedel opined the applicant required light-duty restrictions, six hours per day, and additional functional restrictions, due to the unscheduled injuries. The treating physician opined the applicant could only work up to four hours per day. The employer provided the applicant transitional thrift store employment for a period of time; however, this ended when the applicant's condition did not improve. The applicant did not look for work after the injury occurred. He did not accept offered rehabilitation services by DVR. He testified that he did not intend to seek employment, and he was delaying applying for social security benefits until age 70 so that he would receive a higher monthly amount. When considering the treating physician's restrictions, both vocational experts opined the applicant was odd lot permanently and totally disabled. The employer and insurer conceded the applicant sustained 65% loss of earning capacity based upon their vocational expert's opinion when considering Dr. Friedel's assigned restrictions. The unnamed administrative law judge held the applicant was permanently and totally disabled. The treating physician's opinions regarding restrictions were adopted. The Labor and Industry Review Commission reversed. Dr. Friedel's opinion regarding restrictions was clearly explained and more well founded than the treating physician's opinions. The employer and insurer's independent vocational expert's opinion that the applicant sustained only 65% loss of earning capacity was credible and consistent with Dr. Friedel's medical opinions. The applicant has transferable skills and could secure employment. His failure to seek work, ignoring a contact from DVR and testimony regarding a lack of intention to seek work, reflects he withdrew from the labor market. This undercuts a permanent and total disability benefit claim.

Crossen v. Harley-Davidson Motor Co. Group LLC, Claim No 2013-031064 (LIRC October 25, 2018). The applicant alleged she sustained a work-related back injury as a result of a specific incident. She removed a three to four pound item from a turntable and started to transfer the item to a different table. The item hit a bar but the impact did not knock the item out of her hands. She subsequently placed the item on the table, took a step, and felt pain in her groin and back. The applicant saw a nurse and was provided ice. The applicant did complete her shift. She continued to self-treat with ice. She then treated with a chiropractor and pain management physician. The applicant was released to full duty work. An MRI revealed the applicant had significant scoliosis. The applicant reported occasional flare ups over the next two and a half years until she retired. At the time of the hearing, she had ongoing pain inside her left leg, back and groin. Her physicians agreed her ongoing symptoms were likely caused by an osteophyte formation at L2-3. This did not appear until two years after the alleged injury occurred. Two independent medical experts (Dr. Cederberg and Dr. Wojciehoski) opined the applicant sustained merely a manifestation of a pre-existing condition. Administrative Law Judge Minix held the applicant sustained a temporary work-related injury and was not permanently and totally disabled. The Labor and Industry Review Commission affirmed. The incident was minor. Dr. Cederberg's opinion that the minor nature of the mechanism of injury could not have caused a significant injury and the ongoing symptoms are a manifestation of the pre-existing condition was credible. The applicant's release without restrictions shortly

after the incident occurred was a significant factor. Further, the doctors agreed that the primary source of the applicant's ongoing symptoms (the osteophyte formation at L2-3) did not become symptomatic until approximately two years after the work-related incident.

Joosten v. Miller Masonry & Concrete, Inc., Claim Nos. 2001-019919, 2004-041400 (LIRC November 8, 2018). The applicant sustained several work-related cervical injuries. On November 28, 2007, an administrative law judge issued an interlocutory order which included an award for 75 percent loss of earning capacity. The judge dismissed the applicant's claim for permanent and total disability benefits. The applicant, after an unspecified date in the year 2008, did not continue to look for work. Since 2008, the applicant had not had any genuine attachment to the labor market. Dr. Graunke began treating the applicant in May 2010 and continued to see him on an almost monthly basis. On August 31, 2015, Dr. Graunke opined that "[the applicant] has seen a gradual decline in his condition since I have been following him and it seems quite unlikely that he will have any improvement in the future unless some new treatment is developed . . . Based on his condition and prognosis, I do not think that [the applicant] would qualify for any type of gainful employment either now or in the future." The applicant's vocational expert opined that, based on Dr. Graunke's opinion, the applicant would not qualify for any type of employment now or in the future. He specifically opined that the applicant was permanently and totally disabled. On December 19, 2014, the applicant filed another application for hearing. He asserted that he was permanently and totally disabled due to alleged deterioration in his cervical condition, attributable to either, or both, of the work injuries. On June 6, 2017, a second administrative law judge held a hearing. He issued an order finding that the applicant's claim for permanent total disability was barred by the doctrine of issue preclusion. [See Issue Preclusion category, above, for additional information regarding this issue.] The Labor and Industry Review Commission held issue preclusion did not apply but that the applicant was not permanently and totally disabled. The applicant did not look for work after 2008, and had no genuine attachment to the labor market after that period of time. The medical and vocational evidence submitted by the applicant did not credibly support the claim that his circumstances changed after the decision of November 28, 2007. Dr. Graunke's statement constituted a vocational opinion unaccompanied by any discussion of physical restrictions. Dr. Graunke's clinic records revealed assessments of the applicant's overall condition that were inconsistent with his statement that the applicant would not qualify for any type of gainful employment. Dr. Graunke provided no credible medical explanation for this vocational opinion. The applicant's vocational consultant, meanwhile, based his opinion on Dr. Graunke's vocational opinion. He did not address the extent of the applicant's loss of earning capacity based upon the independent medical examiner or earlier treating physician's assessment of permanent restrictions. The independent medical examiner's opinions regarding permanent restrictions were credible. Those restrictions did not render the applicant permanently and totally disabled.

Retraining

Karpes v. Tradesman Int'l, Inc., Claim Nos. 2013-027630, 2015-000831 (LIRC June 19, 2018). On August 29, 2013, the applicant sustained a work-related left ACL tear which required a repair. The applicant sustained an aggravation on October 24, 2014. He eventually underwent a second surgery in September of 2015. The applicant continued to work for the employer in light-duty positions until he was terminated in July of 2016. Dr. Kulwicki performed an independent medical examination. He opined the applicant required no work restrictions. The applicant underwent a functional capacity evaluation on July 21, 2016. The therapist indicated that the applicant could rarely kneel and crawl, and occasionally crouch. On August 1, 2016, Dr. Angeline opined that the applicant required the permanent restrictions as outlined in the Functional Capacity Evaluation. The applicant applied for services through the Department of Vocational Rehabilitation (DVR). The counselor at DVR prepared an Individualized Plan for Employment (IPE) on November 4, 2016. The counselor recommended the applicant obtain a two-year Associate degree in a CNC program. Ms. Veith prepared an independent medical examination report for the employer and insurer. She opined that retraining was not necessary under Dr. Kulwicki or Dr. Graf's opinions that the applicant had no permanent work restrictions. Ms. Veith opined that, under Dr. Angeline's restrictions, the applicant could not return to his carpentry job with the employer. She opined that the applicant could obtain a job under Dr. Angeline's restrictions without retraining and that such a job would be in line with the applicant's pre-injury earnings when considering his annual salary. If the applicant's hourly wage was considered for full-time, year-round work, retraining

would be necessary because the jobs would not pay within 15% of his hourly wage. She also opined that the applicant could work as a welder, which would require a two-semester training program and would return him to his pre-injury hourly earnings. The administrative law judge's decision is not specifically outlined in the decision. The Commission held that the applicant had permanent work restrictions and, thus, was eligible for vocational retraining benefits. Under the *Massachusetts Bonding* presumption, a DVR counselor's IPE program is presumed valid unless there was fraud (via highly material facts misrepresented) or an abuse of discretion (abuse of administrative power). The potential for a vast improvement of the applicant's preinjury wage earning capacity is not applicable. Alternative, less expensive, programs are not relevant. Further, the fact that the training may improve the applicant's pre-injury wage is not dispositive. Vocational retraining generally is to restore earning capacity and potential, not simply to replace lost wages. A finding that vocational retraining may increase an applicant's earning capacity above the preinjury level does not alone make the program unreasonable. The record did not establish that the applicant misrepresented highly material facts to the DVR, or that the DVR abused its administrative power in approving the retraining plan. Therefore, the IPE prepared by DVR was appropriate.

Supplemental Benefits

Haydysch v. Holmes Carpentry, Inc., Claim No. 2015-014373 (LIRC May 31, 2018). The applicant sustained a significant work-related injury resulting in a permanent quadriplegia. He was deemed permanently and totally disabled as a result of the injury. Benefits were conceded and paid to the Applicant accordingly. The employer and insurer also conceded and paid a $20,000.00 liability to the Work Injury Supplemental Benefit Fund. This payment was to fulfil the obligation under Wis. Stat. 102.59(2). A reverse hearing application was filed to seek to relieve the employer and insurer of the obligation to pay more than $20,000.00. An unnamed administrative law judge ordered the employer and insurer to pay a total of $80,000.00 to the Work Injury Supplemental Benefit Fund because they were obligated to indemnity the applicant for a June 8, 2015 injury that caused quadriplegia. The Labor and Industry Review Commission reversed. The employer and insurer have no obligation under Wis. Stat. 102.59(2) to pay an additional $60,000.00 to the Work Injury Supplemental Fund based on an injury to the applicant on June 8, 2015. Wis. Stat. 102.59(2) states: "in the case of the loss or of the total impairment of a hand, arm, foot, leg, or eye, the employer shall pay $20,000 into the state treasury. The payment shall be made in all such cases regardless of whether the employee or the employee's dependent or personal representative commences action against a 3rd party as provided in 102.29." The plain meaning of Wis. Stat. 102.59(2) is to assess a single contribution to the Work Injury Supplemental Benefit Fund of $20,000.00 in the event of any of the conditions of the statute is satisfied in a compensable injury. Even if the statute is ambiguous, the most reasonable interpretation, in light of the legislative history, is to require an employer to make only one payment of $20,000.00 to the fund so long as there is a loss or total impairment of any of the listed body parts in a compensable injury.

Temporary Total Disability

Karpes v. Tradesman Int'l, Inc., Claim Nos. 2013-027630, 2015-000831 (LIRC June 19, 2018). On August 29, 2013, the applicant sustained a work-related left ACL tear which required a repair. The applicant sustained an aggravation on October 24, 2014. He eventually underwent a second surgery in September of 2015. Dr. Kulwicki performed an independent medical examination. He determined the applicant reached the end of healing as of June 3, 2016 (the date of his evaluation). On August 1, 2016, Dr. Angeline determined that the applicant reached the end of healing. The administrative law judge's decision was not outlined in the decision. The Labor and Industry Review Commission noted the applicant was only entitled to temporary disability compensation while the applicant remained in a healing period. The healing period ends where there has occurred all of the improvement that is likely to occur as a result of treatment and convalescence. The Commission credited Dr. Kulwicki's opinion that the applicant reached a healing plateau as of June 3, 2016. Although the applicant continued to have physical therapy and treated with Dr. Angeline after June 3, 2016, the applicant testified that he did not really know if he improved at all during this time, but possibly got more strength in his leg. The Commission expressed legitimate doubt that the applicant needed any additional time for medical healing.

Unreasonable Refusal to Rehire

Inman v. Morgan Tire & Auto LLC, Claim No. 2014-007042 (LIRC October 31, 2018). The applicant worked as a shop foreman and lead technician. He sustained a conceded surgical, left shoulder injury. Temporary restrictions post-surgery were accommodated. He then underwent another surgery. The surgeon assigned the applicant permanent restrictions. The employer subsequently wrote to the applicant, and outlined their recent telephone conversation. The employer noted that assigning essential job functions to other teammates was not a workable accommodation. The applicant was advised his employment was separated because he was unable to perform essential job functions. The applicant was advised he could reapply if his ability to perform the essential job functions improved. The applicant denied discussing the accommodation of permanent restrictions and essential job functions with the employer. He later conceded having a discussion with the employer but not recalling the content of the discussion. The applicant acknowledged his physical restrictions prevented him from performing a number of job duties at the employer's facility. However, the applicant asserted his date of injury positions did not require performance of those job duties. The employer's manager testified regarding the job duties the applicant would need to perform in his date of injury positions. The unnamed administrative law judge held the employer had unreasonably refused to rehire the applicant. The applicant was awarded 52 weeks of lost wages. The employer was able to accommodate the applicant's temporary restrictions, and therefore, it should not have been a hardship to offer continued employment after the assignment of the permanent restrictions. The Labor and Industry Review Commission reversed and dismissed the claim under Wis. Stat. 102.35(3). The employer's manager testified credibility that the applicant's date of injury position duties included tasks that were incompatible with the applicant's permanent restrictions. The employer demonstrated it had reasonable cause to terminate the applicant's employment because of his physical inability to perform all duties required in several different positions at the facility. The court in *DeBoer Transportation v. Swenson* held that Wis. Stat. 102.35(3) does not contain accommodation requirements. The *DeBoer* holding is clear that an employer is not required to rehire an injured worker if to do so requires the employer to fashion an accommodation, to change its valid business protocol or alter substantial, long standing employment policies. Here, to rehire the applicant within his assigned permanent restrictions would have required the employer to substantially modify the job duties regularly required of any individual employed in any applicable job position. There was reasonable cause for termination and no pretextual motive.

Riech v. SM & P Utility Resources, Inc., Claim No. 2016-029538 (LIRC November 30, 2018). The applicant alleged he sustained a work-related knee injury one week after he began employment, while in training. This injury was not conceded. He reported pain and swelling in his knee. The employer permitted him to perform classroom training for the two days after the alleged incident occurred. The applicant then took the following two days off work at the employer's suggestions, because of his reports of ongoing knee symptoms. When he returned, his restrictions were accommodated. The applicant did not miss any in-class training. His supervisor opined his performance the second week of training was poor. He could not perform as expected given his experience and training. This was not based upon any physical capabilities. The applicant did not retain information that was being taught. He was apathetic toward his job. He crossed a road without looking both ways, not at a crosswalk, and a minivan had to stop and wait for him to pass. This was reported to a supervisor by a peer coach immediately. The supervisor did not believe that the applicant would be able to pass certification given his performance during training. The supervisor terminated the applicant two business days later. Administrative Law Judge Eneuoh-Trammell held the applicant sustained a work-related injury, but that there was reasonable cause for discharge. The claim for unreasonable refusal to rehire was dismissed. The Labor and Industry Review Commission affirmed. The applicant's medical expert was more credible and causation for a work-related injury was established. The applicant demonstrated he was an employee, who sustained a work-related injury, and was discharged. The employer, therefore, had the burden to demonstrate reasonable cause for the discharge. This burden was met. The applicant was terminated for reasons not related to the work-related injury. The applicant did not get the job or understand the nature of the business. He consistently demonstrated that he lacked the competence to perform the job. The employer terminated the applicant for performance issues and violating a safety rule, and not because of the knee injury.

Torres v. RP's Pasta Co., Claim No. 2015-027890 (LIRC November 30, 2018). The applicant sustained a conceded right shoulder injury. He was terminated during the healing period. The employer asserted that the applicant was terminated for lack of motivation, "unmotivating" behavior towards his coworkers, and an alleged incident of harassment. Administrative Law Judge Lake held that the employer violated Wis. Stat. § 102.35(3) for unreasonable termination. The Labor and Industry Review Commission affirmed. Wis. Stat. § 102.35(3) places upon the injured employee the prima facie burden of demonstrating that (1) he was an employee of the employer, (2) he was injured in employment with that employer, and (3) he was not rehired or was discharged. Upon establishment of those evidentiary facts, the burden shifts to the employer to show a reasonable cause for the failure to rehire or discharge. Here, the employer's explanations for its decision to discharge the applicant were not credible. The employer referenced a crude, but offhanded and rather innocuous comment as "just so opposite of the culture of what I try to represent at RP's as an owner." However, the employer had not overtly disciplined the applicant for alleged prior behavior that a reasonable person would have considered significantly more serious. Other evidence, which was proffered to support allegations of "unmotivating" behavior, was alternately nonexistent, hearsay and/or incredible. Because the employer's testimony was discredited, the employer did not meet its burden of proving that reasonable cause existed to discharge the applicant.

Wellness Programs

Russell v. Trek Bicycle Corp., Claim No. 2016-008163 (LIRC August 31, 2018). The employer encouraged its employees to be fit. The facility was equipped with a gym, locker rooms and showers. Fitness classes and bike riding classes were available. Facilities were available to store personal bikes. Since at least the 1990s, the employer knew the employees were using private trails just north of the employer's headquarters for running, hiking and cross country skiing. The employer had a lease agreement with the owner of the trails for formal use of the property by the employer's employees for business and personal purposes. Employees had to sign a release and carry a trail pass while on the trails for personal purposes. The applicant executed the release for personal use of the trail which indicated that each employee deciding to participate in the non-business activities on the property outside the scope of his or her employment was doing so voluntarily. The applicant was salaried. His lunch hour was flexible. He did not have to punch out and was free to do as he pleased. On the date of injury, he decided to ride his personal bike over the lunch break to engage in physical fitness of a personal benefit to him. He sustained a significant injury while he was on the private trails on this date, which rendered him a T9 complete paraplegic. Administrative Law Judge Enemuoh-Trammel dismissed the application for worker's compensation benefits. The Labor and Industry Review Commission agreed with the dismissal of the application. The applicant was voluntarily participating in a personal, recreational bicycle riding activity designed to improve his well-being when he was injured. The applicant's salary did not include remuneration for non-work activities such as his recreational bicycle riding on the date of injury. His claim is subject to the statutory coverage exclusion in Wis. Stat. 102.03(1)(c)(3). This statute provides that "an employee is not performing service growing out of and incidental to employment while engaging in a program, event, or activity designed to improve the physical well-being of the employee, whether or not the program, event or activity is located on the employer's premises, if participation in the program, event, or activity is voluntary and the employee receives no compensation for participation." The three pre-requisites to coverage under the statute include (1) the employee is engaged in an activity designed to improve his well-being; (2) the activity is voluntary; and (3) the employee receives no compensation for participating in the activity. The statute does not require that a formal wellness program has been established. It only requires an activity designed to improve the physical well-being of the employee. This clearly applies to recreational bicycle riding. The employer encouraged the activity and took steps to promote it on a personal basis. Wisconsin case law does not establish a clear distinction between the personal comfort doctrine and coverage during recreational activities. Personal comfort analyses have historically addressed momentary divisions, which may be seen as distinct from the deliberate and usually extended abandonment of work that characterizes recreational activities. The significant analysis considers the degree of deviation from the work-related purpose, the degree of time and space deviation from employment and whether or not the applicant was being compensated at the time he or she was pursuing the activity. Here, the

applicant's activity involved a substantial physical and temporary deviation from any work-related activity. The applicant was on the employer's premises at the time of the work-related injury. The applicant was salaried. However, no part of his salary was paid for regular lunch breaks. He was, therefore, on an unpaid break. During those breaks (including the one he was taking when he was injured), the applicant was not performing any work duties for the employer. His outing was voluntary and personally motivated. There was no identified work-related purpose for his personal activity which constituted a voluntary, deliberate and substantial deviation that occurred during an unpaid break. ✦

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