


WISCONSIN
Worker's Compensation Forum, Inc.

2020 Forum
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LEGISLATIVE AND CASE LAW UPDATE



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LEGISLATIVE UPDATE

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WCAC PROPOSED BILL

- Contained minimal changes to the statutory structure of Chapter 102
- Proposed returning Administrative Law Judges to the Department of Workforce Development
- Was submitted to the legislature in December of 2019

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FAILURE OF THE AGREED BILL PROCESS

- After considerable lobbying efforts, the Assembly refused to put the Agreed Bill on the committee agenda
- Because the Assembly would not consider the Agreed Bill, neither would the Senate
- The Agreed Bill died without ever coming to committee vote in January of 2020

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PTSD BILL FOR POLICE OFFICERS AND FIREFIGHTERS

- A separate bill was proposed by the Assembly for a reduced burden of proof for PTSD for police officers and firefighters
- This PTSD Bill was passed by the Assembly and sent to the Senate
- The PTSD Bill had add ons addressing some of the proposals from the WCAC Bill

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AT THE SENATE 2019 BILL 511

- Contained the PTSD proposal for firefighters and first responders
- Proposed allowing a client of an employee leasing company to provide workers compensation coverage for the leased employees
- Specified that payment is not due to the Work Injury Supplemental Benefit Fund when a death is causal to a violation of the employer's drug and alcohol policy

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COVID-19 AMENDMENT

- The legislature created a presumption of compensability for first responders under Section 102.03(6), Stats. effective March 12, 2020
- First responders include police, fire, EMT's, paramedics and health care workers
- If the first responder was exposed to a COVID positive person in the workplace and developed COVID, the condition was presumed to be work-related
- COVID presumption ended June 11, 2020

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CASE LAW UPDATE

- Court of Appeals Decisions
- LIRC Decisions

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Brown v. Muskego Norway School District Group Health Plan
 2018AP1799 (Ct. App. 10/16/2019)
 Not recommended for publication

- Brown was injured in a motorcycle accident.
- Brown traveled between two Plants for Gardner Pet Group as part of his job.
- On the day of the accident Brown didn't know if he was going from one Plant to the other. He was not scheduled to work at the second Plant.
- The employer reported this was a work-related injury and the workers compensation carrier began paying Brown's bills. Brown rejected the workers compensation payments and pursued a third-party action.
- All medical bills were paid by MNSD, the group health plan, totaling over \$500,000.

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The health plan strikes back

- In the civil action, the health plan was named as a subrogated party. The health plan filed a counterclaim seeking a finding that Brown was in the course of his employment at the time of injury.
- The Court of Appeals found Brown in the scope of his employment and ordered Brown to reimburse the health plan \$514,000.
- The Court noted the health plan could not intervene in a workers compensation case, and further found the court wasn't required to remand the issue of scope of employment for a workers compensation hearing.

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Graef v. Continental Indemnity Company
 2018AP1782 (Ct. App. 02/04/2020)
 Not recommended for publication

- Graef sustained a compensable work-related injury. He was gored by a bull at a livestock yard.
- Continental Indemnity first approved certain medications, and later denied liability for the same treatment. The prescription medication was to treat depression.
- Graef suffered a self-inflicted gunshot wound to the head. He sued Continental in Circuit Court for negligently failing to authorize payment for his anti-depressant medications.

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Was the gunshot wound compensable?

- The court noted there was a remedy available to Graef under the Workers Compensation Act.
- The court concluded the exclusive remedy provision prevented Graef from suing Continental Indemnity in civil court for the negligent refusal to pay for his prescription anti-depressant medications.
- The court noted Graef had to prove his attempted suicide was based on his wrongfully denied prescription medication. However, the court noted that Graef had a cause of action under the Workers Compensation Act to prove his injuries were compensable, or that the carrier acted in bad faith by denying the prescription medications.

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Kasal v. Stryker Corporation
2019AP1017 (Ct. App. 03/17/2020)
Not recommended for publication

- Kasal was injured at work by a faulty piece of equipment.
- Kasal sued the manufacturer of the equipment leased by his employer.
- Kasal's lawyers sought the employer's assistance in investigating the claim, but both the employer and workers compensation insurer declined. The workers compensation carrier retained legal counsel to assist in the recovery of the workers compensation payments in the civil action and sought recovery of legal fees from the eventual settlement.

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No inclusion of attorney fees in Section 102.2g distribution

- The workers compensation carrier argued their lawyers' fees and costs should be included in the distribution of the settlement proceeds.
- Kasal opposed apportioning attorneys' fees and costs. Kasal argued the workers compensation insurance policy did not provide for reimbursement of those fees.
- The court found the absence of a clause in the insurance policy including recovery of attorneys' fees was a fatal flaw in the contract and denied the carrier's claim for fees.

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Welter v. LIRC
2018AP1940 (Ct. App. 04/28/2020)
Not recommended for publication

- Welter had a compensable knee replacement in 2003. In 2009 she began working as a driver for a school bus company. She had no restrictions.
- In December of 2013 she sought treatment for pain in her knee and was told her hardware was possibly loosening.
- In January of 2014 she slipped and fell in the employer's parking lot and claimed the fall injured her knee. She claimed benefits against the bus company for repair of the prosthetic knee joint.

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Defenses to Medicare's claim

- Welter settled her case against the bus company, but left open her claim for future medical expenses and for reimbursement of any payments made by Medicare.
- Welter filed a new Application for the amounts paid by Medicare.
- The ALJ and LIRC found that Welter's 2nd knee replacement was not caused by the slip and fall in the bus company's parking lot.
- The Court of Appeals affirmed, based on LIRC's interpretation of the medical evidence. There was no reimbursement ordered to Medicare because there was no new injury to the knee.

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McRoberts v. LIRC
 2019AP481 (Ct. App. 07/28/2020)
 Not recommended for publication

- McRoberts slipped and fell in the employer’s parking lot in 2013. She claimed an injury to her back.
- McRoberts claimed permanent and total disability benefits based on a non-surgical back injury causing a 3% functional permanent disability.
- The employer relied on an IME to deny liability for any permanent disability arising out of the slip and fall. The Administrative Law Judge and LIRC relied upon the IME report to deny permanent total disability benefits.

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A typo may be just a typo

- McRoberts appealed LIRC’s order relying on the IME report on the basis of a “phantom” MRI report identified by the IME physician, but not appearing in the medical records.
- McRoberts argued the error by the IME physician made the report incredible as a matter of law.
- The court found the error was insufficient to make the IME physician’s report incredible as a matter of law. LIRC’s denial of permanent total disability benefits was sustained.

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**LIRC DECISIONS
 AND
 TIPS FROM THE COMMISSIONERS**

- The employee’s medical evidence should respond to the issues raised by the employer’s medical evidence.
- The IME physician needs to explain his/her position. The IME physician must know the specifics of the job responsibilities in occupational claims.
- Occupational injuries are more likely to be accepted than traumatic injuries when causation is at issue.

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Bartz v. Gulfstream Aerospace
 Claim No. 2016-003739
 (January 31, 2020)

- Bartz worked as a mechanic repairing airplanes. Bartz claimed repetitive use of hand tools caused carpal tunnel syndrome (CTS).
- Evidence relied upon by the IME physician and the ALJ suggested Bartz was able to use his hands portaging canoes on a fishing trip to Canada while claiming to have CTS.
- The ALJ denied benefits and LIRC reversed, finding the repetitive use of hand tools was causative in the development of CTS based on the treating physician’s opinion. LIRC discounted the IME based on the applicant’s testimony that he did not portage canoes.

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Gilson v. Procter & Gamble Paper Products
 Claim No. 2017-026246
 (February 20, 2020)

- Gilson claimed a traumatic back injury in 2004 and eventually settled the claim in 2019. She filed a second Application for hearing alleging an occupational injury to her back as a result of lifting in the workplace with a date of injury in 2015.
- Gilson had periodic back treatment between 2004 and 2015. Unsuccessful back surgery was performed in 2013. Gilson returned to work in a clerical position in 2015 and claimed 25% permanent disability.
- LIRC found an occupational injury to the back with a date of injury of September 21, 2015, the date the applicant was placed on light duty restrictions. LIRC's 14 page order is a good discussion of the occupational injury standard.

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Rapala v. Vick Trucking Company
 Claim No. 2010-007142
 (February 7, 2020)

- Rapala had a compensable spine injury resulting in a 30% permanent disability. Rapala applied for retraining benefits and went through a program sponsored by the DVR to obtain a real estate sales agent license.
- Rapala wanted to continue his education to obtain a real estate appraiser's license. The DVR did not sponsor the program. The employer denied liability for retraining benefits after Rapala passed the real estate sales license test.
- LIRC awarded TTD benefits even though Rapala was only attending classes part time through the date he passed his sales test. LIRC denied retraining benefits for further classwork finding both the DVR did not approve the appraiser's program and that Rapala failed to regularly attend classes as required by the statute.

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Johnson v. Commercial Floorings
 Claim No. 2017-002548
 (March 19, 2020)

- Johnson claimed bilateral CTS caused by repetitive use of his hands driving, loading and unloading trucks. Benefits were awarded by the ALJ.
- The respondents appealed based on the medical reports of Dr. White and Dr. O'Brien. Both experts stated that repetitive work does not cause CTS. However, both experts explained why the actual job responsibilities did not cause hand injuries.
- LIRC reversed the award of benefits based on the medical causation issue and found the IME physicians provided a better explanation of causation than the treating physician.

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Sueflohn v. Hooper Corp.
 Claim No. 2013-003297
 (May 8, 2020)

- Sueflohn claimed both a cervical spine and right shoulder injury from a traumatic slip and fall occurring on December 13, 2012. The injury to the right shoulder was conceded and a 5% permanent disability was paid. The Application was based on a second recommended shoulder surgery and a cervical permanency.
- The ALJ found the traumatic injury did cause both a cervical and shoulder injury, and found the applicant's testimony regarding the onset of symptoms credible.
- LIRC affirmed the award of benefits for both the spine and the second shoulder surgery based on their evaluation of the credible medical evidence. The 15 page decision from LIRC includes a concurrence and dissent. LIRC found the descriptions and explanations provided by the treating physicians were better than the analysis provided by the IME physicians.

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Alfaro v. Bagels Forever, Inc.
Claim No. 2016-010043
(July 23, 2020)

- Alfaro claimed a non-traumatic mental injury caused by unusual stress in the workplace. Alfaro worked for the employer for 18 years and claimed he was harassed and bullied by co-workers.
- The ALJ dismissed the Application for non-traumatic mental injury based on the applicant's failure to demonstrate unusual stress in the workplace.
- LIRC affirmed the denial based on School District No. 1's burden of proof. The interesting facts of the case did not persuade LIRC that Alfaro had been singled out for unusual treatment in the workplace.

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Clark v. PPG Industries
Claim No. 2016-010868
(August 7, 2020)

- Clark worked for PPG for over 30 years. Clark developed bladder cancer and claimed the bladder cancer was caused by his exposure to chemicals in the workplace.
- The ALJ found Clark failed to meet his burden of proof because he could not show that he was exposed to a specific chemical in the workplace which caused his bladder cancer.
- LIRC reversed finding the medical reports and scientific studies submitted by Clark were sufficient to demonstrate that work exposure was a material causative factor in the development of the bladder cancer.

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QUESTIONS?

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