

- ### Notable LIRC Decisions
- (October 2022 – July 2023)
- LIRC decisions between October 2022 and July 2023 42 decisions
 - Most dealt with credibility determinations between experts
 - 5 chosen for being a bit more unique

Rohde v. Appvion

Claim No. 2019-003331
(February 2023)


Knee injury – Claimed traumatic & occupational

Pain in knee while doing work activities and was limping afterwards. When walking through employee-designated crosswalk after work, knee gave out and fell

44 years of employment in various physical jobs

AIJ & LIRC opined no to traumatic injury but yes to occupational.

Today's importance? Wis. Admin. Code § DWD 80.32



Lateral & meniscus tears repaired in same surgery.

- Treating surgeon: 14% PPD
- Respondent IME: 5% PPD

Respondent argued § DWD 80.32(4) doesn't require separating surgeries like § DWD 80.32(11) does for the back

- "Each disc treated or surgical procedure performed will qualify for a 5% rating."

(d) Knee	
Arthroscopy, arthroscopic procedure, 170°	40%
Remaining range: 130° - 137°	25%
Remaining range: 100° - 90°	30%
Prosthesis total	40%
Partial	45%
Removal of patella	To be based on functional impairment
Total or partial meniscectomy (open or closed procedure)	5%
Excision to treat acute	5%
Anterior cruciate ligament repair	Maximum of 10%

Poll Question:

Should both a medial and a lateral meniscectomy warrant a mandatory 5% rating?

A: Yes, the statutory total should be 10%

B: No, the statutory total should be 5%

LIRC's Decision

"Total or partial meniscectomy (open or closed procedure)" is written in the singular, so both a medial and lateral meniscectomy warrants 5% for a statutorily-mandated 10% rating.

Awarded 14% PPD (by both ALJ and LIRC)

Huebner v. Keith R. Olmstead & Sons

Claim No. 2019-023455
(March 2023)

Serious motor vehicle accident with LOC

- Semi-truck trailer rebounded by an SUV who ran a stop sign
- Regained consciousness upside down covered in gasoline—was pulled from truck while someone else extinguished the fire
- Driver the SUV passed away

Claimed injuries to left hip, right shoulder, and head

- Physical TBI with LOC
- PTSD
- Mood disorder
- Personality disorder
- Behavioral disorder because of the TBI

Claimed 5% PPD for physical TBI and claimed 10% PPD for mental disability

ALJ's Decision

- Applicant sustained both a physical TBI and a mental injury because of the TBI
- Assessed 5% PPD for the TBI
- Declined to adopt additional 10% PPD for mental injury because the condition was not disabling beyond 5%



- Both parties appealed
- Applicant argued mental TBI manifested changes in symptoms that were separate from the physical TBI
 - Respondent argued PPD for a purely mental injury is not permitted due to no LOEC

Poll Question:

- Should the applicant be awarded PPD for a mental-only injury?
- A: Yes, a physician supported the claim for functional disability
 - B: No, PPD for a mental-only injury is not allowed when no LOEC is sustained

LIRC's Decision

- Applicant did sustain a mental-only injury, but PPD is not appropriate under *Wells*
- Because he has no restrictions for his mental-only injury and is barred from LOEC, PPD is inappropriate under § 102.44(6)

Interlocutory order issued, so LOEC (and later PPD assessments) may be made in the future if the situation changes.

Denman v. Cardinal Glass Industries, Inc.

Claim No. 2013-016801
(May & July 2023)

- 2013 knee injury (meniscus tear) resulting in surgery
- Meniscus tear and 5% PPD was conceded via Dr. Grossman IME
- Treating surgeon assessed 8% PPD due to post-surgical complications



Claim settled on a limited basis in 2016

Important language from the 2016 limited compromise agreement:

The compromise agreement "is intended to include any claims for temporary disability and permanent partial disability accruing on or before July 12, 2016."

The compromise agreement gave the respondents a credit "on any and all additional claims as if PPD of 8% . . . had actually been paid."

"This compromise is limited to claims accruing on or before July 12, 2016, and permanent partial disability up to 8% at the level of the left knee."

Why does this matter?
Denman ultimately underwent a TKA in 2020

Poll Question:

Should the respondents get a credit against the mandatory-minimum 50% PPD rating due to the 2016 limited compromise agreement giving an 8% PPD credit?

A: Yes, the respondents should get an 8% credit

B: No, the mandatory minimum should still be stacked

LIRC's Decision

ALJ & LIRC opined the 50% mandatory minimum is stacked on top of prior PPD
• *Danker/Chrysler*.

Prior credit doesn't count because there is no way the language about "disability accruing on or before July 12, 2016" could apply to a 2020 surgery.

Crary v. Mainstream, Inc.

Claim No. 2019-025315
(July 2023)

Dispute over vocational retraining benefits following a left shoulder injury.



Necessary background:

- Compensability determined after a hearing in 2021.
- Left hip and lumbar spine injuries were denied (pre-existing).
- LOEC and vocational testimony presented in 2021, but issues were revisited after hearing following opinion that only left shoulder was related.
 - Applicant testified in 2021 that schooling "was never a good thing" for him.

Applicant's Arguments	Respondent's Arguments
Spoke or interviewed with 138 employers in 6 months	Extremely difficult to separate restrictions related to non-work injuries (hip and back) from work-related injuries (shoulder)
Disclosed to the DVR that he had a learning disability	DVR never provided transcript of first hearing (schooling was "never a good thing" for him)
Underwent neuropsychological testing at DVR	DVR never provided ALJ's decision regarding hip and back injuries
DVR reviewed all medical records	Independent expert opined that applicant would be unable to complete classes required for retraining
DVR approved him for vocational retraining	<ul style="list-style-type: none"> Applicant already failed a math class and refused to retake it
Independent expert agreed with vocational retraining	

ALJ's Decision

Vocational claim dismissed because the respondent's vocational expert was more credible because the applicant was not likely to succeed with retraining

Poll Question:

Should the ALJ have approved the applicant's claim for vocational retraining?

A: Yes, the applicant is entitled to retraining because the DVR said so

B: No, the applicant did not prove he would succeed with retraining

LIRC's Decision

Reversed the ALJ's decision and paid the vocational claim.

ALJ used the incorrect legal standard.

"The commission *must* order the payment of rehabilitation benefits for the first 80 weeks absent proof that material facts were concealed or that DVR abused its administrative discretion."

- Emphasis in original

Nothing "highly material" from the 2021 hearing transcript would have been excluded from the medical records, interview, neuropsychological report, and vocational testing that DVR reviewed.

- Massachusetts Binding*

Velasquez v. Central Processing Corp.

Claim No. 2020-005766
(July 2023)

Pelvic crush injury

- Respondents conceded hip fracture, pelvis fracture, sciatic and inferior gluteal neuropathy, and post-surgery heterotopic ossification
- Respondents conceded 2% PPD to hip before hearing
- Applicant alleged 20% PPD to BAW (lumbar spine) at hearing

ALJ & LIRC opined that although no lumbar injury was directly sustained, lumbosacral plexus injury deals with nerves emerging from lumbar and sacral vertebrae—it's more proximal than the hip, so it's a BAW injury

Today's importance? PPD guidelines

Respondent Expert's Opinion:

- "The residuals classified as sciatic and inferior gluteal neuropathy are due to a lesion of the hip and not a lumbar spine injury"
- 2% PPD rating should be to the hip alone.



Applicant Surgeon's Opinion:

- **2020:** 60% lower extremity impairment related to injuries sustained, which translates to 20% PPD to BAW based on the AMA 5th Edition Guide to the Permanent Impairment.
- **2021:** "AMA guidelines are widely accepted and that is what I typically use to determine disability. Regardless, I believe [applicant] has significant impairment and would stick with 20% whole person impairment."

ALJ's Decision

Surgeon believes 20% PPD is warranted under any standard, so the ALJ awarded 20% PPD to the BAW.

Poll Question:

Should the surgeon's PPD assessment based (at least somewhat) on AMA Guidelines be adopted for a Wisconsin PPD rating assessment?

- A: Yes, the surgeon's assessment is valid and based enough on Wisconsin standards
- B: No, the surgeon cannot use the AMA Guidelines to assess PPD ratings

LIRC's Decision

AMA Guidelines cannot be used for scheduled injuries, but they can be *referred to* for non-scheduled injuries.

- Far more goes into BAW assessments than just AMA Guidelines

When questioned about using the AMA Guidelines, the surgeon indicated in his 2021 opinion that “*regardless*” of the use of guidance on how to assess disability, he would still assess the applicant with a 20% impairment to the body as a whole.”

- Emphasis in original

Significant functional impairment represented to support 20% PPD opinion.

**LEGISLATIVE UPDATE:
ADVISORY COUNCIL**

Advisory Council

Created to advise on policy matters concerning the development and administration of the worker's compensation law.

Maintains stability of worker's compensation system without regard to partisan changes in the branches of government.

Provides a vehicle for labor and management representatives to play a direct role in recommending changes to the worker's compensation law.

DWD Website

Meetings and Proposals

Meeting in July 2023

- Labor provided 17 proposed changes.
- Management provided 17 proposed changes.

Meeting in September 2023

- Update this after 9/27 call

Labor Proposals

1. Increase max PPD rate by \$20 every year
2. Broaden employer safety violations to encompass regulations from other departments/agencies, and modify the 15% increase to be applied to anything paid
3. Eliminate the concept of dependency in death benefit claims
4. Bump PTD supplemental benefits to include injuries prior to 2009 (rather than 2003)
5. Provide statutory scholarship benefits for children when a parent's injury causes death

6. Allow payment of medical expenses to extend the statute of limitations
7. Remove statute of limitations for shoulder replacements and spinal fusions
8. Increase amount of unaccrued benefits that can be released in compromise agreements to \$50,000 (currently \$10,000)
9. Amend § 102.29 to allow the employee to control the settlement decision
10. Index weekly benefits for PTD to the rate in effect at the time the benefit accrues for periods more than 6 years after the date of injury

11. Require employers to display a DWD-approved poster of WC employee rights in the workplace (or on employee-accessible website), including information on opioids and alternative treatments

12. Expand the TTD rate in an amount equal to 100% of the employer contribution for a worker's group health care if the employer fails to continue to provide health insurance coverage during the TTD period

13. Allow loss of earning capacity claims for scheduled injuries (if retraining is attempted and cannot restore or if retraining is not feasible)

14. Amend MRR report rules to act the same as IME reports (limiting to one expert, disclosing all reports obtained, and limiting to one every 6 months).

15. Two-fold approach for opioids/alternative treatment:

- Attempt to manage pain with best available treatment while trying to minimize opioids
- If worker becomes addicted, deal with the aftermath of it.

16. Expand communicable disease causation presumption to:

- Include public-facing essential workers in addition to "first responders"
- Include any employee whose employer has had 5+ employees contract an epidemic virus or bacterium
- Apply indefinitely regarding epidemic viruses or bacterium

17. PTSD Coverage for emergency medical responders

Management Proposals

1. Medical fee schedule by 1/1/25

2. DWD should certify databases of the average health service fees paid to health service providers (rather than fee DRP)

3. Allow employer-directed care for the first 90 days of treatment (outside of ER care), so long as there's a list of at least 6 providers (at least 3 geographically accessible)

4. Reduce statutory minimums for PPD by 50% when surgery resulted in no permanent functional disability

- 5. Require DHA to approve compromise agreements—regardless of number of weeks in dispute—when both parties are represented
 - For limited agreements, require a new AFH be filed to bring any additional claims
- 6. Allow lump sum PPD payments to be made up front for unaccrued benefits in disputed claims
- 7. Require providers to follow DWD-established treatment guidelines for 90 days after injury
- 8. Terminate PTD benefits once worker is eligible to receive old-age SS retirement benefits
 - If eligible at time of injury sum of all indemnity benefits should be capped at 5 years (TTD/TPD capped at 2 years) with benefits terminating at death if it occurs within the 5-year window

- 9. Allow employer/insurer to initiate utilization review of health care services by an independent doctor
- 10. Prohibit minimum PPD rating stacking—have the expert provide an actual rating
- 11. Require work exposure to be the predominant cause for a compensable N-T injury
- 12. Allow an employer/insurer to request that PTD ratings be re-evaluated every 3 years
- 13. Lower death benefits in PTD claims to 500 weeks from disability (rather than 1,000)
 - If death occurs within 500 weeks and is linked to the injury death benefit due as usual but aggregate of PTD benefits may not exceed 500 weeks
 - If death not causally related to the injury no death or burial allowance is payable

- 14. Reduce statute of limitation to 2 years for all claims except:
 - No SOL when occupational disease is caused by exposure to toxic substances
 - No SOL for medical expenses when conceded injury requires prosthesis or artificial joint
- 15. Simplify process for tolling statute of limitations
 - Require dismissal of pending AFH when there are no disputes or active claims
 - SOL is tolled when AFH is pending, but SOL shall not be extended due to filing an AFH
 - Consideration paid for compromise agreement is not considered an advancement of benefits
 - When indemnity settlement exists, date for SOL is official as of date of indemnity payment
- 16. Eliminate employer and employee safety violation claims (it's a no-fault system)
- 17. Eliminate use of third-party observers in psychological IMEs to protect patient confidentiality and promote open dialogue

What's Next?

- Update this after 9/27 cal

Questions?
