Wisconsin Workers' Compensation Case Law Update

McCOLLUM CROWLEY

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Interesting cases from 2023 and 2024

- Thank you to Scott Wade and Gary Stanislawski for assistance in providing advice and recommendations for cases to discuss.
- Disclaimer. These are only my brief summaries and opinions on cases. Please read any case in full before applying to your cases or factual situation.

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JUNE 2024 – GOOD FOR RESPONDENTS

- There were three decisions in June 2024 that were favorable for the Respondent employer/insurer. All three were denied by the Administrative Law Judge based on the Applicant's medical evidence not meeting the Applicants burden of proof.
- **Meyer v JFTCO 2017-008693**. Applicant claimed a low back injury and asserted entitlement to benefits related to a low back surgery.
- Dr. Floren for Applicant and Dr. Monacci for Respondents. ALJ concluded Dr. Floren did not base his opinions on the correct medical history. He did not review prior imaging and noted the Applicant's surgery was on the opposite side than it really was.

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Good for the Respondents (cont.)

- Dr. Monacci reviewed all past medical records and his opinion was found more credible by the ALJ.
- The ALJ denied the Applicant's claim for benefits and LIRC affirmed.
- **Takeaway**: Give your medical experts the pre-existing medical records and imaging to review. If your report has a more thorough than the other side you have a chance.

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Good for Respondents cont.

- **Kaiser v Sharona's Bar - UEF Claim# 2019-007923**. 29 page decision from LIRC. UEF admitted the Applicant sustained a temporary concussion, but recovered without any restrictions or PPD.
- Applicant appealed, pro se, claiming she sustained a cervical and mental injury and that she was entitled to PTD benefits.
- Applicant had a long history of treatment for cervical complaints and multiple mental health issues.
- ALJ denied the Applicant's claim for additional benefits and LIRC affirmed.
- This was a Dr. Grunert (for Applicant) vs Dr. Burgarino and Dr. Sani opinions (for Respondents).

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Good for the Respondents cont.

- **Hickmon v Frito Lay Claim# 2021-008471.** Applicant claimed repetitive motion/occupational exposure for right carpal tunnel syndrome.
- ALJ denied the Applicant's claim finding the Applicant failed to meet his burden of proof that his work was a material contributory causative factor.
- Applicant worked as a route salesman for the Respondent Employer for about 5 years delivering snacks to stores. He claimed having to lift boxes, scan items, stock items, and put away boxes caused his carpal tunnel syndrome.
- Applicant's expert, Dr. Crimmins found the carpal tunnel related to work, but on the WKC-16b only checked boxes 11 and 12. He did not check box 13 for the occupational exposure question.
- LIRC noted the fact Dr. Crimmins did not check box 13 was not a fatal error.

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Good for the Respondents cont.

Hickmon (cont.)

- LIRC concludes the Respondent's expert, Dr. Maldonado had a better understanding of the Applicant's work duties.
- Dr. Maldonado had all the **medical records and reviewed a video** of the Applicant's work duties. He did better job of explaining why the carpal tunnel syndrome was not work related.
- LIRC affirmed the ALJ's decision and denied the Applicant's claim.

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A MAN SHALL LEAVE HIS MOTHER

***75 YEAR OLD ITALIAN WOMEN WON A COURT ORDER TO GET HER SONS TO MOVE OUT**

***She filed suit claiming her sons 40 and 45 years old, and with jobs, failed to move out of the family home and paid no rent or provided any domestic chores.**

***The women claimed she had to spend her entire pension on food and living expenses for her and her adult sons and they refused do move out.**

***The court in Italy ordered the sons to move out. The judge referred to the sons as "bamboccioni" which means big babies, in English.**

This is Just Interesting

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Demars v Fincantieri Marine Group
2020 CV 1014 Aug. 21, 2024 Ct. App.

- * Loaned Employee case. WIS. STAT §102.29(7)
- Employee sustained an admitted injury in 2018. He was employed by a company called Bosk as a painter and was assigned to work for FMG, a ship builder, as a painter.
- Bosk and FMG had a contract for Bosk to provide labor and services to FMG for painting. The agreement also had an indemnification agreement to defend and indemnify FMG against claims.
- Employee received workers' compensation benefits from Bosk, but also filed a third party complaint against FMG.

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Demars cont.

- FMG tendered defense to Bosk alleging contractual indemnity and breach of contract. FMG subsequently filed a third-party complaint against Bosk for breach of contract and indemnity. Bosk denied its duty to defend and indemnity FMG.
- Bosk subsequently filed a motion for summary judgment asserting the employee was loaned to FMG and Bosk should be dismissed under the loaned employee doctrine. The issue of "loaned" employee was brought up in the motion.
- Circuit court found the employee was a loaned employee under the test first established in Seamon Body Corp. V Industrial Commission of Wisconsin. 1. Employee consented to work for FMG, 2. Employee was doing work of FMG, 3. FMG had the right to control work, and 4. FMG was the primary beneficiary of work. Therefore, employee's claims against FMG were barred due to the exclusive remedy doctrine.
- Court of appeals does an extensive review of the loaned employee doctrine and found the employee was a loaned employee to FMG and therefore could not file a claim against them.

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Freude v Berzowski and DiRenzo & Bomier LLC
2023 AP 764

Recommended for publ. Ct. App. Aug. 7, 2024

- THIS IS WHY I DON'T REPRESENT PLAINTIFFS
- Legal Malpractice Claim involving scope of representation
- Plaintiff signed a retention agreement with the law firm that limited scope of representation to worker's compensation claim and not other claims.
- Plaintiff later learned he had potential third party claim which the workers' compensation attorney didn't pursue. Statute of limitations passed.
- Plaintiff, injured employee, claimed legal malpractice for failure to file a third-party claim.
- Court of Appeals held the limited scope agreement did not require the attorney to pursue other claims on behalf of Plaintiff/Employee.

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David Polkey v DMJ Services
WC Claim# 2021-025270 LIRC Aug. 2024

- Applicant claimed injury for thoracic spine in August 2021
- Conceded claim with conceded work restrictions, but the parties disputed the extent to which the restrictions impacted his ability to work. Applicant was 58, 10th grade education level and most of his life spent working removing and installing furniture.
- Applicant had a vocational evaluation to support PTD benefits
- Respondent's vocational expert listed vocational *categories* of jobs the Applicant could do to dispute PTD claim in an attempt to rebut the Applicant's vocational expert.
- ALJ held that categories of jobs did not rebut the presumption of odd-lot and the LIRC affirmed.
- Take away – need to identify specific jobs that are currently available. This is difficult due to current hiring trends.

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David Moser v Kemps, LLC
WC Claim# 2023-015470 LIRC Feb. 2024

- The battle over who has authority to issue Orders. DHA v DWD
- DWD issued a default Order because the Respondents had not filed an Answer.
- Respondents woke up and appealed the Order to LIRC questioning whether DWD had authority to issue the default Order.
- LIRC concluded that DHA had authority to issue Orders pursuant to HA §4.04 (2) and HA §4.04 (3). This allows DHA to make findings, issue orders and awards.
- LIRC remanded the case to DHA to issue the Order and approve a Compromise Agreement that was recently reached.
- LIRC set aside DWD decision and remanded to DHA to issue Order.

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Velasquez v Central Processing Corp.
WC Claim# 2020-005766 LIRC July 28, 2023

- Scheduled v unscheduled injury
- AMA guidelines and applicability to workers' compensation claim
- Facts: Employee sustained a crushing injury to his pelvis and hip when a 4000lb metal piece fell on him. His treating physician assigned a 20% rating to the body as a whole under the AMA guidelines claiming the employee had some symptoms into his back.
- Employer and insurer had an IME with Dr. Kulwicki. He opined the employee had PPD and rated it to the hip and lower extremity.
- The ALJ concluded that where an injury to a scheduled body part, such as the hip creates disability to an unscheduled part, an award of whole body PPD is appropriate.

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Velasquez v Central Processing Corp. (cont.)

- The ALJ concluded, despite there being no WKC-16b supporting a back injury, that the employee sustained a lumbosacral plexus injury and the complained of back pain was best represented by an unscheduled injury. (*None of the experts disputed there were at least some nerve implications in the back*)
- LIRC affirmed the ALJ's decision.
- LIRC also concluded that the AMA guidelines can be instructive in unscheduled injury cases, and therefore the treating physician's opinions were not fundamentally flawed.

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Burdick v Woodmans Food Market, Inc.
WC Claim# 2018-007347, LIRC Oct. 2023

- Safe place statute and safety violation claim for a 15% increase in benefits under Wis. Stat. §102.57.
- Applicant was operating a forklift and his leg was pinched between the forklift and a rack. He ultimately lost his lower leg.
- Applicant claimed the forklift was "jumpy" and not operating correctly. He further claimed the Respondents were aware of condition.
- There was an OSHA report with investigation of the issue, but no violations were found.
- Respondents established the Applicant had been trained, written up in the past, and safety policy was enforced.
- Respondents produced video of incident which showed the incident and LIRC found in favor of the Respondents.
- Takeaway – preserve videos and get OSHA reports.

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Porter v United States Fire Protection WC Claim#2016-022147, LIRC Nov. 2023

- Unreasonable refusal to rehire claim under Wis. Stat. §102.35 (3).
- The Applicant sustained injury to his hand and was placed on light duty. He became drowsy at work from taking Percocet. The Respondent Employer timed the amount of time he took to use the bathroom.
- Respondent Employer offered a severance check and asked him to sign a severance agreement. Applicant refused.
- Respondent Employer terminated Applicant for excessive use of time in the bathroom. ALJ found in favor of the Respondent Employer and denied the Applicant's claim.
- LIRC concluded the Respondent Employer failed to meet their burden of proof in establishing the termination was for reasonable cause and not because of the work injury.
- LIRC overturned and found Applicant had met burden of proof
- Video of employee sleeping on job
- Employee was written up for disappearing and failing to wear safety glasses

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Freund v GGNSC Superior National WC Claim Nos 2014-001266 & 2020-012743 LIRC Dec. 2023

- Employee filed a Hearing Application asserting injury to her hand and low back.
- Parties reached a settlement. A compromise agreement was drafted and signed by the Applicant and the Applicant's attorney.
- Applicant's attorney emailed the compromise to the Respondent's attorney for signature and to the judge requesting approval without the Respondent's attorney's signature.
- Applicant died, for unrelated reasons, two days before the Applicant's attorney had submitted to the Respondent attorney.

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Freund (cont.)

- Respondents refused to sign the compromise.
- An Amended Application was filed by the attorney for the estate requesting enforcement of the asserted compromise agreement.
- ALJ refused to review the compromise asserting no authority to review a compromise that had not been signed by all parties.
- LIRC affirmed noting Wis. Stat. §102.16(1) and Wis. Admin Code 80.03 required departmental approval of a compromise before it an be considered valid.

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Gillespie v Froedtert Health Group 2021-005812 LIRC Dec. 2023

- Applicant worked for Respondent as a sterile processor of medical equipment.
- While attending an in-service she fainted and was taken to the ER. She alleged injuries to her shoulder and spine.
- There was no information in the ER notes as to what caused the Applicant to faint. There was mention of lack of eating or drinking fluids.
- The issue was whether the Applicant's fall was idiopathic and not compensable or was compensable under the positional risk or zone of danger analysis.
- The ALJ concluded the Applicant fainted for unknown reasons and therefore her injuries were not compensable.
- LIRC affirmed noting there was no medical evidence to support claim and Applicant fainted for unknown reasons.

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Carrington-Fields v City of Milwaukee WC Claim# 2021-027026 LIRC Jan. 2024

- Applicant injured neck while grabbing a garbage cart. She reported the injury the same day and made a report to the Employer the next day, but did not seek treatment for two months.
- A year before the injury the Applicant had been involved in a MVA and sought treatment for her neck.
- Applicant's treating physician, Dr. Maciolek, eventually awarded 3% PPD and ordered FCE. He had not reviewed the Applicant's pre-existing medical records and stated the Applicant had no history of pre-existing problems with her neck.
- FCE found employee had inconsistent performance.

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Carrington-Fields (cont.)

- Respondents had IME with Dr. Maric who concluded no injury.
- ALJ found in favor of Respondents and denied the Applicant's claim.
- LIRC affirmed ALJ decision noting the treating physician based his opinions on an inaccurate history of events and stated there was no pre-existing history of treatment.
- LIRC affirmed the Applicant had not met her burden of proof.
- Takeaway – make sure your experts have all the medical history.

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Abrahamson v Capstone Logistics, LLC 2021-026930 LIRC Jan. 2024

- Applicant worked as a grocery selector for Employer. He threw a pallet and claimed injury to his shoulder and neck.
- Respondents conceded shoulder injury, but denied neck injury.
- Applicant got work restrictions and asked his Employer what he could do. Employer refused to tell him what jobs were available and suspended him for two days due to non-attendance.
- Applicant then returned to work and advised he needed to attend physical therapy. He told the HR representative about the appointment and left. When he returned from the appointment he was fired. The HR representative told him he was being rude and negative.

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Abrahamson (cont)

- One of the issues was whether the Applicant was terminated for misconduct or substantial fault.
- The ALJ concluded there was no medical evidence to support a neck injury, but also found the Applicant had not refused work and there was no misconduct.
- LIRC affirmed the ALJ and noted there was no evidence the Respondents had made a specific work offer to the Applicant and there was no evidence he was terminated for misconduct or substantial fault.
- Takeaway – job offers should be in writing and reasons for termination documented.

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Kelley v Village of Mount Pleasant WC Claim# 2020-022190 LIRC Apr. 2024

- Horseplay case involving two police officers. One of them injured his knee while wrestling the other. The ALJ found the claim compensable.
- The incident was captured on the officer's body cam and lasted less than a minutes.
- LIRC first ruled that because there was no animosity between the two officers it would not be considered a "fight" case.
- The Employer and Insurer had asserted a "horseplay" defense. The four factors to prove in horseplay are:
  - Extent and seriousness of the deviation
  - Completeness of the deviation and whether it constituted abandonment of duty
  - Extent to which the practice of horseplay had become an accepted part of the employment.

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Kelley v Village of Mount Pleasant (cont.)

  - Extent to which the nature of employment may be expected to include horseplay.

- LIRC affirmed the ALJ and found:
  - Not a substantial amount of time
  - Not a complete deviation
  - There was evidence of frequent bantering; video showed a Sargent watching the proceedings and smiling

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Boyea. v BSG Maintenance Corp WC Claim# 2019-000822 Aug. 2023

- A pre-hearing was held because the Employee was refusing to attend an IME during the pandemic.
- Employee was ordered to attend IME.
- She went to the IME site, but had concerns about safety of building. She had some comorbities and was concerned about exposure.
- Judge dismissed Hearing Application without prejudice. Judge issued a second order denying TTD benefits for period the employee refused to go to the IME.
- LIRC held the second order violated due process and required the necessity of a hearing. However, LIRC concluded the Applicant must comply with the requirement of attending an IME with the safety precautions noted. Respondents may file a Reverse Hearing Application if they want to address non-compliance.

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Vote: If you could play with a puppy right now, which one would you choose?

- A. Labrador
- B. Husky
- C. French Bull Dog
- D. Golden Retriever
- E. German Shepard
- F. None of the above: I want a kitty.

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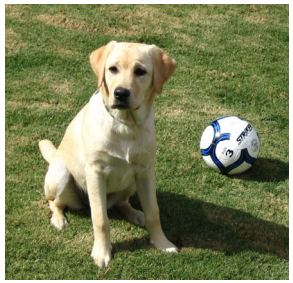
My favorite dog is:……
My favorite sport is:……



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Legislative update

- PPD rate changed for injuries on or after March 24, 2024 to $438 and will increase to $446 for injuries on or after January 1, 2025.
- Statute of limitations, 6 years for traumatic and 12 years for occupational injury. Amendment affects when the clock begins to run. Statute of limitations on a limited compromise agreement starts on the date of the order being issued.
- Closing of files authority is with DWD not DHA. (See Moser decision above)
- Compensation advancements – employers and insurers can advance unaccrued PPD without penalty and without approval from DWD or OWCH

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Legislative update cont.

- UEF maximum increased from $1 Million to $2 Million.
- Same sex marriages for definition of dependents. Removed reference to husband and wife. This is important for death benefits.
- Advanced practice nurse prescriber changed to APRN – advanced practice registered nurse allowing them to be accepted medical examiners and issue certified medical reports.

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