Wisconsin Worker's Compensation Claims

Case Law Update

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1.0 Introduction

This paper was presented at the 2005 Annual Seminar of the Wisconsin Association of Worker's Compensation Attorneys, Inc., on July 21, 2005. It discusses decisions by the supreme court and published decisions by the court of appeals since the association's last seminar in July 2004.

Note: All of the cases discussed are available on the Internet from:

The Wisconsin Court System, at:
http://wicourts.gov/opinions/index.htm

-or-

The State Bar of Wisconsin, at:

http://www.wisbar.org/Content/NavigationMenu/Legalresearch/Wisconsinlawandgovernment/Wisconsin_law_and_go.htm

2.0 Supreme Court Decisions

2.1 *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, 278 Wis. 2d 111, 692 N.W.2d 572

Issue: Whether an administrative decision may be based solely upon uncorroborated hearsay evidence in the form of written medical reports

2.11 Case Summary

Gehin worked as a housekeeper for the University of Wisconsin Hospital. She injured her back in the course of her employment in May 1992, although she continued working for about 11 months until April 1993. When she went off from work because of her continued back problems, she applied for long-term income continuation benefits that were available to her as part of her employment. The plan administrator, United Wisconsin Group, approved payment of those benefits. In September 1993, Dr. Whiffen did a spinal fusion.

From September 1994 through Spring 1997, Gehin underwent a job retraining program through Division of Vocational Rehabilitation at Mendota Mental Health Institute in Madison, doing clerical work about 24–30 hours per week.

Dr. Whiffen submitted a report in February 1997, indicating that Gehin could do full-time work, with restrictions. In March 1997, Dr. Whiffen submitted a report indicating that Gehin could do her former job, but with various restrictions.

Early in May 1997, United Wisconsin Group determined that Gehin no longer met the criteria for the income continuation benefits, as to inability to perform any substantial gainful activity, effective April 30, 1997. In about September 1997, United Wisconsin Group obtained a report on a record review by Dr. Redlin.

Gehin requested that United Wisconsin Group reconsider its termination decision. In December 1997, United Wisconsin Group had Gehin examined by Dr. Lemon and he submitted a report. In January 1998, United Wisconsin Group upheld its termination of Gehin's benefits.

Gehin then asked the Department of Employee Trust Funds (ETF) to review the termination of her benefits, and in July 1998, ETF affirmed the termination. Gehin appealed. Gehin retained a physician, Dr. Shannon, who examined her in 1999 and reviewed her records.

The Wisconsin Group Insurance Board then conducted an evidentiary hearing before an examiner in October 2001. At the hearing, there was live testimony by the claimant herself; by her physician, Dr. Shannon; and by a staff person of the Department of Employee Trust Funds. The claimant and Dr. Shannon consistently disagreed with the opinions in the written reports by Drs. Whiffen, Redlin and Lemon.

The decision by the Group Insurance Board relied upon the written reports of Dr. Whiffen, Dr. Redlin, and Dr. Lemon, in rejecting the testimony of the claimant and Dr. Shannon. The decision by the Group Insurance Board affirmed the termination of the income continuation benefits.

The hearing before the Group Insurance Board was conducted under Wis. Stat. Chapter 227, the rules of procedure and review for administrative proceedings. Gehin appealed and the circuit court reversed the termination decision by the Group Insurance Board. The court of appeals then reversed the circuit court, and affirmed the decision by the Group Insurance Board. The supreme court reversed the court of appeals, and affirmed the order of the circuit court in finding that the Group Insurance Board did not have grounds to terminate the income continuation benefits.

The supreme court conducted a certiorari review under Wis. Stat. § 40.08(12), that applies to reviews of decision by the Group Insurance Board. The court reviewed the sufficiency of the evidence upon which the Group Insurance Board relied in reaching its decision, and the court noted the sufficiency of the evidence on a certiorari review is identical to the substanial evidence test used for the review of administrative proceedings under Wis. Stat. Chapter 227.[1]

[1] Wis. Stat. § 227.57(6) provides,

> (6) If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds

None of the parties disputed the fact that the written reports by reports by Drs. Whiffen, Redlin and Lemon are hearsay. The supreme court determined that the written reports, although hearsay, were properly admitted into evidence at the hearing. The court then applied its own decision in *Folding Furniture Works, Inc. v. Wisconsin Labor Relations Board*, 232 Wis. 170, 189, 285 N.W. 851 (1939), in holding that uncorroborated hearsay evidence alone does not constitute substantial evidence.

The court concluded that,

> ¶51 Although the admission of hearsay evidence makes administrative agency procedures simpler for both the litigants (who are frequently unrepresented) and the agency personnel, the relaxed evidentiary standard is not meant to allow the proceedings to degenerate to the point where an administrative agency relies only on unreliable evidence. The courts are required, under Wis. Stat. § 227.57(6), to "set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence."
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> ¶52 Properly admitted evidence may not necessarily constitute substantial evidence.
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> ¶53 In defining substantial evidence more than 65 years ago, the Wisconsin Supreme Court declared in Folding Furniture Works, Inc. v. Wisconsin Labor Relations Board that "[m]ere uncorroborated hearsay . . . does not constitute substantial evidence."
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> ¶54 The Folding Furniture court declared that the purpose of allowing the admission of hearsay evidence is to free administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force. Thus the Folding Furniture court adopted the language from the U.S. Supreme Court case Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938), that mere uncorroborated hearsay or rumor does not constitute substantial evidence.
>
> ¶55 This or similar language can be found in other Wisconsin cases. In Village of Menomonee Falls, for example, the court reiterated that "administrative bodies should never ground administrative findings upon uncorroborated hearsay."
>
> ¶56 The rule that uncorroborated hearsay alone does not constitute substantial evidence allows an agency to utilize hearsay evidence while not nullifying the relaxed rules of evidence in administrative hearings. The rule prohibits an administrative agency from relying solely on uncorroborated hearsay in reaching its decision. This rule defining substantial evidence has

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that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

> been followed in Wisconsin since Folding Furniture was decided in 1939. There has been no suggestion that this rule has hindered the operation of state administrative agencies.

Gehin v. Wisconsin Group Ins. Bd., 2005 WI 16 [footnotes omitted].

> ¶80 Weighing the nature of the doctors' responses, the importance of the facts sought to be proved by the hearsay medical reports to the outcome of the proceedings and considerations of economy; the evidence opposing the hearsay reports; the lack of any corroborative evidence supporting the hearsay reports; the failure of the Department of Employee Trust Funds to call the doctors to testify; and the outcome for each party, our conclusion that the Group Insurance Board should not have relied solely on the hearsay evidence is appropriate in the instant case, even under Perales.

Gehin v. Wisconsin Group Ins. Bd., 2005 WI 16 [footnote omitted]. Therefore, the supreme court affirmed the order of the circuit court, in reversing the decision by the Group Insurance Board as to the termination of Gehin's income continuation benefits.

2.12 Analysis — How Will Gehin Impact Worker's Compensation Claims?

The decision in *Gehin* raises three issues:

- Will the *Gehin* precedent be applied on worker's compensation claims under Chapter 102?
- If so, how will it be applied?
- What will be the consequences of applying the *Gehin* precedent?

The supreme court notes in Gehin that various Wisconsin administrative agencies have already followed the rule from *Folding Furniture Works, Inc. v. Wisconsin Labor Relations Board*, 232 Wis. 170, 189, 285 N.W. 851 (1939), in holding that an administrative decision may not be based solely upon uncorroborated hearsay evidence. The court noted that the Labor and Industry Review Commission has applied that rule. The court cited as several examples, including one equal rights decision and two unemployment insurance decisions by LIRC. *Gehin*, 2005 WI 16 at ¶105.

Gehin involved review of a decision by the Group Insurance Board in an administrative proceeding under Wis. Stat. Chapter 227. Worker's compensation claims are subject to review under the Worker's Compensation Act, Chapter 102, instead of Chapter 227.[2] However, the supreme court applied a substantial evidence test in *Gehin*, and that test is essentially the same standard that applies to decisions by the Labor and Industry Review Commission under Wis. Stat. § 102.23(6):

> **(6)** If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award

[2] Wis. Stat. § 102.23(1)(a).

> depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

Unlike Chapter 227, the Worker's Compensation Act includes language detailing the admissibility and the probative value of certified practitioners' reports, and also certified treatment records. Wis. Stat. §102.17(1)(d) provides, in part:

> (d) The contents of certified medical and surgical reports by physicians, podiatrists, surgeons, dentists, psychologists and chiropractors licensed in and practicing in this state and of certified reports by experts concerning loss of earning capacity under s. 102.44 (2) and (3), presented by a party for compensation *constitute prima facie evidence as to the matter contained in them*, subject to any rules and limitations the department prescribes. Certified reports of physicians, podiatrists, surgeons, dentists, psychologists and chiropractors, wherever licensed and practicing, who have examined or treated the claimant, and of experts, if the practitioner or expert consents to subject himself or herself to crossexamination *also constitute prima facie evidence as to the matter contained in them*. Certified reports of physicians, podiatrists, surgeons, psychologists and chiropractors are admissible as evidence of the diagnosis, necessity of the treatment and cause and extent of the disability. Certified reports by doctors of dentistry are admissible as evidence of the diagnosis and necessity for treatment but not of disability. Any physician, podiatrist, surgeon, dentist, psychologist, chiropractor or expert who knowingly makes a false statement of fact or opinion in such a certified report may be fined or imprisoned, or both, under s. 943.395. The record of a hospital or sanatorium in this state operated by any department or agency of the federal or state government or by any municipality, or of any other hospital or sanatorium in this state which is satisfactory to the department, established by certificate, affidavit or testimony of the supervising officer or other person having charge of such records, or of a physician, podiatrist, surgeon, dentist, psychologist or chiropractor to be the record of the patient in question, and made in the regular course of examination or treatment of such patient, *constitutes prima facie evidence in any worker's compensation proceeding as to the matter contained in it, to the extent that it is otherwise competent and relevant*. [Emphasis added.]

Black's Law Dictionary defines prima facie evidence as follows:

> **PRIMA FACIE EVIDENCE**. Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficent. State v. Burlingame, 146 Mo. 207, 48 S.W. 72.

On a recent petition for review of an unpublished decision by the court of appeals in *Ott v. LIRC*, Case No. 03-3427 (Wis. Ct. App. Sept. 8, 2004), the supreme court asked the parties to submit briefs on the subject of whether the case would involve issues as to the application of *Gehin*. *Ott* is a duty disability claim by a firefighter under Wis. Stat. § 40.65. Contested duty disability claims are litigated before an ALJ of the Worker's Compensation Division, under the same rules of procedure as a worker's compensation claim. Therefore, a decision by the supreme court, applying the *Gehin* decision to a duty disability claim, would mean that *Gehin* does apply to

worker's compensation claims. However, the supreme court did not agree to accept *Ott* on appeal.

As of 6/29/05, there are no worker's compensation claims pending in the supreme court. However, a published decision by the court of appeals could resolve the issue as to the application of *Gehin* to worker's compensation claims. So far, we do already have an *unpublished* decision by the court of appeals that addresses the issue in a worker's compensation claim: *Wicke v. LIRC*, Appeal No. 2004AP2914 (Wis. Ct. App. May 17, 2005).[3] Even though it is an unpublished decision, it is of particular interest since it does squarely address the issues as to whether *Gehin* would apply to worker's compensation claims and how it would apply.

In *Wicke*, the court of appeals affirmed a decision by the Labor and Industry Review Commission that Wicke failed to establish he sustained a compensable injury. The court of appeals held that,

> ¶2 Wicke, his wife and two of Wicke's fellow workers testified that Wicke injured himself while moving heavy tables at work. Both Wicke and his wife stated, however, that Wicke experienced neck and shoulder pain before that date. Mrs. Wicke noted that his neck and shoulder pain made it difficult for him to do some recreational activities like steering his snowmobile. Their testimony is consistent with the emergency room medical report by Dr. Eric Dichsen: "He awakened with this [pain] 5 days ago... He denies any trauma...." A handwritten emergency/outpatient record from March 24, 2002 notes that Wicke did a lot of pushing and pulling at his job, but was unable to recall any specific injury. Dichsen's March 24 report states the pain began seven days earlier. Wicke denied any trauma or precipitating event, but simply awakened with pain and he has had these same symptoms intermittently for the past two years. A physical therapy note dated March 25, 2002 indicated that Wicke had neck and right arm pain over one year ago that would usually go away with medication. That note indicated the pain occurs every two or three months and caused Wicke to have difficulty steering his snowmobile.
>
> ¶3 Whether Wicke sustained an accidental injury that arose while performing services incidental to his employment is a question of fact, and we must affirm the Commission's finding if it is supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6).1 Wicke had the burden of proving beyond legitimate doubt all of the facts essential to recovery of compensation. *See* ***Leist v. LIRC***, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994). It is the Commission's function to reconcile inconsistencies and conflicts in the evidence. *See* ***Valadzic v. Briggs & Stratton Corp.***, 92 Wis. 2d 583, 598, 286 N.W.2d 540 (1979). The Commission is the sole judge of the witnesses' credibility and the weight of their testimony. *See* ***Semons Dept. Store v. DILHR***, 50 Wis. 2d 518, 528-29, 184 N.W.2d 871 (1971). The Commission may not rely entirely on uncorroborated hearsay. ***Gehin v.***

[3] The decision is an unpublished, *per curiam* decision. Wis. Stat. § 809.23 provides that,

> An unpublished opinion is of no precedential value and for this reason may not be cited in any court of this state as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case.

> ***Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶56, 278 Wis. 2d 111, 692 N.W.2d 572. We review the Commission's, not the circuit court's decision. ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342. 204 N.W.2d 457 (1973).
>
> ¶4 Wicke's argument that the Commission's finding is based solely on uncorroborated hearsay fails for two reasons. Dichsen's report is not hearsay and it is corroborated. Wicke's prior inconsistent statements to Dichsen are not hearsay under WIS. STAT. § 908.01(4)(a) and (b). Wicke argues that the statements were not made by him, but by his wife because he was in too much pain to respond to the doctor. That argument is inconsistent with the medical report which describes Wicke as "alert and orientated and answers questions appropriately." The statements were also corroborated by the nurses' notes, the physical therapist's notes, and the testimony of both Wicke and his wife.
>
> ¶5 Because Wicke's testimony was impeached by inconsistent statements he made when he initially sought medical treatment, the Commission is free to disregard his and others' testimony that contradicted the medical reports. An employee's failure to give a doctor the same account of the alleged workrelated injury warrants the Commission to entertain a legitimate doubt about the injury. ***Bumpas v. DILHR***, 95 Wis. 2d 334, 345-46, 290 N.W.2d 504 (1980).

In *Wicke v. LIRC*, the court of appeals did cite *Gehin* for the proposition that, "The Commission may not rely entirely on uncorroborated hearsay. *Gehin v. Wisconsin Group Ins. Bd.*, 2005 WI 16, ¶56, 278 Wis. 2d 111, 692 N.W.2d 572." The court then ruled that the Commission did not rely entirely on such evidence in this case. The court of appeals also held that:

> ¶6 Wicke argues that statements he made within seventy-two hours of the injury are not admissible under WIS. STAT. § 904.12(1). The rules of evidence do not apply to administrative proceedings. ***Gehin***, 2005 WI 16 at ¶31. The Commission, in its discretion, can consider medical records contemporaneous with the injury. *See* WIS. STAT. § 102.17(1)(d);[2] and WIS. ADMIN. CODE § DWD 80.22.
>
> [2]WISCONSIN STAT. § 102.17(1)(d) provides that medical records constitute "prima facie evidence" of the truth of the matters addressed in them. Wicke argues that the evidence "disappears upon introduction of evidence to the contrary." The presumption, not the evidence, "disappears." See *Scholz v. Industrial Comm'n*, 267 Wis. 31, 41b, 65 N.W.2d 1 (1954). The evidence continues to exist and it is the commission's function to determine its weight and reconcile any inconsistencies.

The decision in *Wicke* is somewhat problematic because of the fact that the formal rules of evidence do not apply to administrative proceedings, including worker's compensation claims.[4] In *Wicke*, the court of appeals held that, "Wicke's prior inconsistent statements to Dichsen are not hearsay under WIS. STAT. § 908.01(4)(a) and (b)." Thus, the court of appeals relied upon

[4] The rules of evidence are Wis. Stat. Chapters 901–911. Chapter 908 defines hearsay and establishes exceptions to the hearsay rule.

the rules of evidence in determining that Wicke's prior inconsistent statement are, by definition, *not* hearsay evidence.

However, the court of appeals in *Wicke* further held that, "Wicke argues that statements he made within seventy-two hours of the injury are not admissible under WIS. STAT. § 904.12(1). The rules of evidence do not apply to administrative proceedings." Thus, after applying § 908.01(4)(a) and (b) from the rules of evidence, the court then rejects the application of § 904.12(1).

That same anomaly is true of the decision in *Gehin.* For example, the supreme court cites the definition of hearsay from § 908.01(1) of the rules of evidence. *Gehin*, 2005 WI 16 at ¶30, footnote 48. In the next paragraph, the supreme court specifically notes that the rules of evidence do *not* apply to administrative proceedings. *Gehin*, 2005 WI 16 at ¶31.

In *Gehin*, the supreme court held that it was not clear whether the written medical reports by three physicians were admitted into evidence as exceptions to the hearsay rule. *Gehin*, 2005 WI 16 at ¶31. However, the court noted that it doesn't really matter, because:

> ¶89 Without deciding whether all or any parts of the written medical reports in the present case are admissible under a hearsay exception, we conclude that the court of appeals' reasoning that hearsay evidence is unreliable only when it does not fall within a hearsay exception confuses the admissibility of hearsay with the issue of the probative force to be accorded the hearsay evidence by an administrative agency decision-maker. Hearsay that is subject to an exception is still hearsay, and therefore the substantial evidence rule applies even to evidence admitted as an exception to the hearsay rule.

Gehin, 2005 WI 16 at ¶89.

At this point we would appear to already have the answer to the first issue posed above: Will the *Gehin* precedent be applied on worker's compensation claims under Chapter 102? Although it is an unpublished decision, the court of appeals did apply *Gehin* in *Wicke v. LIRC.* The second issue is: If so, how will it be applied? We may already have a partial answer to that question, at least as to treatment records that are offered to rebut the employee's claim that that injury occurred at work, when the records document a history of injury that is inconsistent with the employee's testimony at the hearing. As noted by the court of appeals, the employee's prior inconsistent statements to a health care provider are *not* hearsay under Wis. Stat. § 908.01(4)(a) and (b). That is, such prior inconsistent statements are not exceptions to the hearsay rule. They are instead, by definition, *not* hearsay to begin with.

We still don't know how the courts will apply *Gehin* on worker's compensation claims that rely upon written practitioners' reports, without any live testimony by a practitioner at the hearing. For example, a worker's compensation claim may be litigated entirely upon the basis of evidence in the form of: (1) a WKC-16-B report by the treating practitioner, (2) a WKC-16-B practitioner's report by a independent medical examiner, and (3) the testimony of the employee at the hearing. The language of § 102.17(1)(d) of the Worker's Compensation Act does expressly provide that such certified reports are prima facie evidence of the matters asserted in

the reports. On that basis, it can be argued that the legislature has determined such certified reports are not only admissible in evidence, but also that they have been accorded special probative force. The same would be true of certified treatment records.

Thus, it does appear that *Gehin* will be applied on worker's compensation claims. The decision in *Wicke* gives us some idea how *Gehin* may be applied when a decision is based upon treatment records. Nevertheless, there are still some serious issues as to how *Gehin* will be applied in other situations, and we still don't have any real clue as to the long-term consequences of applying *Gehin* on worker's compensation claims.

2.2 *Anderson v. MSI Preferred Ins. Co.*, 2005 WI 62, 271 Wis. 2d 820, 677 N.W.2d 733

Issue: Attorney fees as reasonable costs of collection on third-party liability claim under § 102.29

Anderson was injured in a motor vehicle accident while in the course of his employment. Anderson sued Jones, who caused the accident, and his liability insurer. The worker's compensation insurer, Accident Fund, paid worker's compensation benefits in a total amount of $8,711.98, and was joined in the action because of its reimbursement claim under Wis. Stat. § 102.29. The action was settled at a mediation when the liability insurer offered its policy limits of $25,000.

The circuit court conducted a hearing to determine the distribution of the settlement proceeds under the statutory formula under § 102.29(1). The attorneys for Anderson and for the worker's compensation insurer both submitted affidavits supporting their claims for attorney fees and costs. The attorney for Anderson submitted a contingent fee agreement and claimed a fee of one-third, plus costs. The attorney for the worker's compensation insurer submitted an affidavit stating a claim for attorney fees and costs of $7,472.97, but without noting what hourly rate was applied, and with no itemization of the work performed, the number of hours billed, or the disbursements.

Out of the total settlement of $25,000, the circuit court approved attorney fees and costs as "reasonable costs of collection" under § 102.29, in a total amount of $17,730.12. That is, the court approved $10,257.15 to Anderson's attorney ($8,333.33 one-third contingent fee and $1,923.82 as costs), and $7,472.97 to the as fees and costs attorney for the worker's compensation insurer.

Anderson appealed the award of attorney fees to the worker's compensation insurer. In an unpublished decision, the court of appeals affirmed the circuit court decision. Upon appeal, the supreme court held that:

> ¶21 Anderson argues that to join in the pressing of the claim requires the worker's compensation carrier to demonstrate that its attorney's activities substantially contributed to making the third party pay. He asserts that the worker's compensation carrier should not recover reasonable attorney fees for activities that merely duplicate the activities of the injured party's attorney, or

> merely document the amount of its lien interest, and are not effective or necessary in procuring a recovery from the third party.
>
> ¶22 In advancing this argument, Anderson recognizes that the court of appeals held to the contrary in *Zentgraf v. The Hanover Insurance Co.*, 2002 WI App 13, ¶14, 250 Wis. 2d 281, 640 N.W.2d 171. Because we agree with and adopt that reasoning, we see no reason to depart from that precedent.

The supreme court concluded that the circuit court had a duty to determine the reasonable costs of collection, by first determining whether each party's attorney fees are reasonable. The court noted the analysis is complicated by the fact that Anderson's attorney charged a contingent fee, while the attorney for the worker's compensation insurer was working on an hourly basis. The circuit court must evaluate the reasonableness of each party's attorney fees under the criteria of the Supreme Court Rule 20:1.5(a). The circuit court must then separately evaluate the total cost of collection and determine whether that sum is reasonable.

The supreme court concluded that:

> ¶45 In sum, we conclude that Wis. Stat. § 102.29(1) does not require a worker's compensation attorney to demonstrate that his or her activities substantially contributed to obtaining recovery from the third party, or that the activities were taken on behalf of the employee, in order to join in the pressing of a claim. However, the cost of collection must be reasonable. Because the circuit court did not consider whether the total costs of collection in this case were reasonable in light of the amount recovered, and because the court lacked sufficient information upon which to base its determination regarding attorneys' fees, we reverse the court of appeals' decision and remand the matter to the circuit court for a determination of what the reasonable costs of collection are and how those costs are to be apportioned between the attorneys.

3.0 Court of Appeals Decisions

3.1 Peterson v. Arlington Hospitality Staffing, Inc., 2004 WI App 199, 276 Wis. 2d 746, 689 N.W.2d 61

Issue: Application of exclusive remedy provision to a claim by an employee against an employer for negligent hiring, training and supervision, when the injury is a sexual assault committed by a coemployee

Peterson was employed at a hotel owned and operated by Arlington. While working in the hotel, Peterson was sexually assaulted by a coemployee of the same hotel. The coemployee had a lengthy history of criminal behavior.

Peterson brought an action against Arlington in circuit court, alleging negligent hiring, training and supervision of the coemployee who committed the sexual assault. The circuit court granted

Arlington's motion for summary judgment on the basis that the action was barred by § 102.03(2), the exclusive remedy provision of the Worker's Compensation Act. Wis. Stat. § 102.03(2) provides that:

> **(2)** Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier. This section does not limit the right of an employee to bring action against any coemployee for an assault intended to cause bodily harm, or against a coemployee for negligent operation of a motor vehicle not owned or leased by the employer, or against a coemployee of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance.

Upon appeal to the court of appeals, Peterson argued for creating a public policy exception to the exclusive remedy provision for a claim by an employee against an employer for negligent hiring, training and supervision when the injury is a sexual assault committed by a coemployee. The court of appeals rejected that argument.

> We hold that the WCA's purpose, history and application do not support the judicial fashioning of such an exception and, therefore, the exclusive remedy provision bars Caroline L. Peterson's claim. We also reject Peterson's constitutional challenge to the WCA. Accordingly, we affirm the circuit court's order for judgment granting Arlington Hospitality Staffing, Inc., f/k/a Amerihost Staffing, Inc.'s motion for summary judgment.

Peterson, 2004 WI App 199, ¶1.

In rejecting Peterson's arguments, the court of appeals distinguished its decision in *Lentz v. Young*, 195 Wis. 2d 457, 468–73, 536 N.W.2d 451 (Ct. App. 1995), in which an employee brought an action for against the employer for intentional infliction of emotional distress caused by the sexual harassment of the employer, and the court ruled that the claim was *not* barred by the exclusive remedy provision. The court noted that in *Lentz*,

> We held that "where an employer injures an employee through his or her intentional conduct, the injury is not an 'accident' under the WCA, at least to the extent that such intentional conduct involves sexual harassment." *Id.* at 472.

Peterson, 2004 WI App 199, ¶17.

However, the court of appeals also pointed out that:

> *Lentz*, therefore, must be limited to its facts. It is simply a narrow exception that applies when the employer is a sole proprietor and has intentionally caused the employee's injury.

Peterson, 2004 WI App 199, ¶20.

3.2 Shira v. Reliance Nat. Indemnity Co., 2005 WI App 10, 278 Wis. 2d 354, 691 N.W.2d 882

Issue: Application of a reducing clause that allows for the reduction of UM policy limits for WC benefits received, when the WC death benefits were paid to the State Work Injury Supplemental Benefit Fund, because the insured had no dependents

Shira died in a motor vehicle accident while in the course of his employment. The accident was allegedly caused by an uninsured motorist. At the time of his death, Shira was not married and he had no children. Since he had no dependents, the worker's compensation death benefits of $159,000 were paid into the state Work Injury Supplemental Benefit Fund, as required by Wis. Stat. § 102.49(5)(b).

Shira had two policies of motor vehicle insurance with uninsured motorist (UM) coverage in a total amount of $150,000. Shira's parents brought a wrongful death action against their son's motor vehicle insurer, to recover the proceeds of the UM coverage.

The UM coverage of both motor vehicle insurance policies included reducing clauses for amounts paid as worker's compensation benefits. The motor vehicle insurer argued that the proceeds of the UM coverage were to be reduced by the amount of the worker's compensation death benefits paid into the Work Injury Supplemental Benefit Fund. Shira's parents argued that the reducing clauses only apply to worker's compensation benefits that were paid to the insured, or to the insured's heirs or estate.

The court of appeals agreed with Shira's parents and held that:

> ¶15 Like the hypothetical insured discussed in ***Schmitz***, Scott purchased coverage that would put him in the same position he would be in if the uninsured tortfeasor had liability limits equal to the amount of UM or UIM coverage purchased. *See* 255 Wis. 2d 61, ¶38. By purchasing $150,000 in UM coverage, Scott guaranteed that he, or his heirs or estate, would recover a total of $150,000, through payments by the tortfeasor, worker's compensation, disability payments and UM payments. *See* WIS. STAT. § 632.32(5)(i). To deny recovery in this case would deny Scott the benefit of the coverage he purchased and would provide a windfall for American Family. This would be contrary to both § 632.32(5)(i) and the expectations of the insured. *See* ***Danner v. Auto-Owners Ins.***, 2001 WI 90, ¶57, 245 Wis. 2d 49, 629 N.W.2d 159 ("We interpret insurance contracts to meet the reasonable expectation of the insured.").

The motor vehicle insurer petitioned the supreme court for review, and the supreme court accepted the case on March 8, 2005.

3.3 E. C. Styberg Enginering Co., Inc. v. LIRC, 2005 WI App 20, 278 Wis. 2d 540, 692 N.W.2d 322

Issue: Compensability of injury sustained during recreational activity

Hetchler sustained a knee injury while playing softball during a paid break period and claimed worker's compensation benefits. The Labor and Industry Review Commission (LIRC) held that the injury is compensable and the court of appeals affirmed.

The decision by the court of appeals discussed case law touching upon issues as to whether a particular injury arose out of the employment in various fact situations involving recreational activity, horseplay, personal comfort, and curiosity.

State Young Men's Christian Ass'n v. Industrial Commission, 235 Wis. 161, 292 N.W. 324 (1940) (hereafter ***YMCA***) — A medical student was employed by the state YMCA as a counselor to assist the first aid medical director at YMCA's summer camp, during a certain period for a stated sum, plus room and board, with the privilege of using the camp's recreational facilities when not actively occupied in performing his duties. The employee was not entitled to compensation under the Workmen's Compensation Act for an injury sustained while playing tennis on a camp court, as he was exercising a personal privilege apart from the employer's interests and performing no duty, even though he was subject to call at all times except during one 24-hour period each week.

Maahs v. Industrial Commission, 25 Wis. 2d 240, 130 N.W.2d 845 (1964) — The employee had momentarily deviated from his duties to satisfy an idle curiosity. The decision permitted payment of compensation in "curiosity cases."

Schwab v. DILHR, 40 Wis. 2d 686, 162 N.W.2d 548 (1968) — The employee sustained an injury from off-duty, off-premises activity, namely, driving home from a supervisory social gathering to which the employee's personnel manager had invited him. The injury was not compensable because social and recreational activities do not come within the course of one's employment simply because the employer receives some benefit in the form of increased employee morale and efficiency.

Marmolejo v. DILHR, 92 Wis. 2d 674, 680, 285 N.W.2d 650 (1979) — The supreme court stated, "Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred …."

Bruns Volkswagen, Inc. v. DILHR, 110 Wis. 2d 319, 328 N.W.2d 886 (Ct. App. 1982) — The employee was injured while wrestling with another employee. Horseplay was part of the workplace environment and the employee's participating in such horseplay was within a zone of risk created by circumstances of the employment, so the injury arose out of employment

Nigbor v. DILHR, 120 Wis. 2d 375, 355 N.W.2d 532 (1984) — LIRC's conclusion was reasonable in finding that the employee's conduct, in engaging in horseplay which resulted in his death, was a substantial deviation from his employment and that he was thus not performing services growing out of and incidental to his employment at time of the accident.

The court of appeals discussed *YMCA* at length, since the supreme court's 1940 decision in that case is ordinarily cited for the proposition that an injury while engaged in recreational activity is not compensable. The court of appeals distinguished *YMCA* and noted that, "One could easily conclude that being off duty, rather than merely on a short break as in the instant case, was not a *momentary* and *insubstantial* deviation from employment." *E. C. Styberg Enginering Co., Inc. v. LIRC*, 2005 WI App 20, ¶ 19.

The court of appeals further observed that,

> ¶23 Alternatively, there is a strong argument that *YMCA* is no longer good law. We stated as much in *Bruns Volkswagen, Inc.*, and the supreme court cited our decision's interpretation of *Maahs* with approval in *Nigbor* when it stated that the courts have moved away from the harsh rule that all deviations from employment preclude recovery of worker's compensation benefits. *See Bruns Volkswagen, Inc.*, 110 Wis. 2d at 323-24; *Nigbor*, 120 Wis. 2d at 384.

In trying to reconcile the existing case law, the court of appeals pointed that each worker's compensation case is governed by its own facts and circumstances, so that the language in an opinion must be considered in connection with the particular facts of the case. *United Wisconsin Ins. Co. v. LIRC*, 229 Wis. 2d 416, 423, 600 N.W.2d 186 (Ct. App. 1999).

The court of appeals held that the decision by LIRC is entitled to great weight deference. The court noted that LIRC adopted a rule from Professor Larson's treatise.[5]

> ¶14 Having observed that *Schwab*, *Marmolejo*, *Bruns Volkswagen, Inc.*, and *Nigbor* adopted rules from the Larson treatise, LIRC elected, in light of that fact, to follow § 22.03 of ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW (2004), which established a rule for injuries incurred from recreational activities on the employer's premises during lunch and break periods. LIRC summarized LARSON & LARSON as follows. First, most such injuries are compensable. *See* ***id.*** § 22.03[1], at 22-5. Second, there are three alternative conditions that

[5] The decision by the court of appeals does not quote the entire rule from Professor Larson's treatise. The decision by LIRC in Hetchler v. E. C. Styberg Engineering Co. Inc., WC Claim No. 2000-027319 (LIRC Aug. 28, 2003) notes that:

> According to Professor Larson's treatise, "recreational activities during the noon hour on the premises have been held compensable in the majority of cases," 2 Larson § 22.03[1], at least where the activity has persisted long enough that a reasonable employer would be aware of it so that it has become an incident of employment, 2 Larson § 22.03[2]. The Larson treatise goes on to state that while some courts have additionally required an employer benefit or a showing that participation in the sporting activity was compelled by the employer, the "better rule" and the one adopted by the treatise, is that recreational activities are within the scope of employment when one of at least three possible alternative conditions is met:
>
> (1) [The recreational activities] occur on the premises during a lunch or recreation period as a regular incident of employment; or
>
> (2) The employer by expressly or impliedly requiring participation, ... brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial and direct benefit from the recreational activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.
>
> 2 Larson, § § 22.01, 22.03.

> can satisfy the "within the course of employment test," the one relevant to this case being whether the activity has gone on long enough for a reasonable employer to become aware of the activity. *See id.* §§ 22.01, 22.03[2], at 22-8-22-9. Third, therefore, recreational activities are within the course of employment when they have gone on long enough to become an incident of employment. *See id.* § 22.01, at 22-2.
>
> ¶15 Applying this treatise rule to the instant case, LIRC determined that compensation was appropriate. First, Styberg had put up the basketball hoop on its premises and invited employees to use it. Second, credible testimony in the record established that after this time workers frequently played basketball and softball. LIRC concluded that based on its affirmative actions with regard to the hoop, Styberg should have become aware by the time of Hetchler's injury that employees were playing sports during their breaks.

Editorial note: The decision in *E. C. Styberg Enginering Co., Inc.* did not deal with related issues under Wis. Stat. § 102.03(1)(c)3. Section 102.03(1)(c)3 provides, in part:

> An employee is not performing service growing out of and incidental to employment while engaging in a program designed to improve the physical well-being of the employee, whether or not the program is located on the employer's premises, if participation in the program is voluntary and the employee receives no compensation for participation.

The decision in *E. C. Styberg Enginering Co., Inc.*, resulted in a proposal by the management team on the Worker's Compensation Advisory Council to amend the foregoing statute to apply to "a program, activity or event." As of July 21, 2005, the Worker's Compensation Advisory Council is still in the process of negotiating the next set of amendments to the Worker's Compensation Act.

3.4 *Kontowicz v. American Standard Ins. Co. of Wis.*, 2005 WI App 22, 278 Wis. 2d 664, 693 N.W.2d 112

Issue: Award of interest on a personal injury liability claim, under § 628.46

Kontowicz v. American Standard Ins. Co. of Wis., 2005 WI App 22, 278 Wis. 2d 664, 693 N.W.2d 112, deals with two personal injury actions. One case was settled and the other went to a jury trial. The plaintiffs in both actions claimed interest under Wis. Stat. § 628.46 from the liability insurers, and the circuit courts awarded interest. The insurers appealed and the cases were consolidated on appeal.

Section 628.46 provides, in part:

> 628.46 **Timely payment of claims**
>
> (1) Unless otherwise provided by law, an insurer shall promptly pay every insurance claim. A claim shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of the loss. If such written notice is not furnished to the insurer as to

> the entire claim, any partial amount supported by written notice is overdue if not paid within 30 days after such written notice is furnished to the insurer. Any part or all of the remainder of the claim that is subsequently supported by written notice is overdue if not paid within 30 days after written notice is furnished to the insurer. Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer. For the purpose of calculating the extent to which any claim is overdue, payment shall be treated as being made on the date a draft or other valid instrument which is equivalent to payment was placed in the U.S. mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery. All overdue payments shall bear simple interest at the rate of 12% per year.
>
> . . . .
>
> (3) This section applies only to the classes of claims enumerated in s. 646.31(2).

Section 646.31(2) provides that:

> (2) Classes of claims to be paid. No claim may be paid under this chapter unless the claim is in one of the following classes:
>
> . . . .
>
> (d) Third party claimants. A claim under a liability or workers' compensation insurance policy, if either the insured or the 3rd party claimant was a resident of this state at the time of the insured event.

In both cases, the circuit court awarded interest to the plaintiffs under the foregoing statutes. Both liability insurers appealed on the issue as to whether § 628.46 allows an award of interest on a personal injury claim. The court of appeals reviewed the statutory history and noted that the original version of § 646.31(2), specifically included a subsection on claims for bodily injury or personal injury, but that language was repealed by the legislature in 1999. On that basis, the court of appeals concluded that:

> By eliminating the bodily injury and personal injury language from the statute, the legislature has preserved eligibility for a more narrow group, specifically: (1) third parties whose claims arise under the policy in the same manner and under the same provisions as the named insured, and (2) third-party worker's compensation claimants.

Kontowicz, 2005 WI App 22, ¶ 18.

The court of appeals also discussed worker's compensation claims and noted that:

> ¶20 Courts have also extended protections to third-party claimants in worker's compensation cases. The rationale behind the worker's compensation system is that workers accept smaller recoveries in return for coverage regardless of fault; by contrast, a third-party tort victim "is not the object of a sweeping statutory scheme designed to promote the compensation of injuries in a

> routine, largely nonadversarial manner." *See Kranzush*, 103 Wis. 2d at 65. The legislature's extension of the Wis. Stat. § 628.46 interest penalty to third-party worker's compensation claimants is consistent with the special relationship created between claimant and insurer under the worker's compensation statutes.

Kontowicz, 2005 WI App 22, ¶ 20.

Editorial Note: As a result of the decision in *Kontowicz*, some applicant's attorneys are now claiming interest under § 628.46 on contested worker's compensation claims. There is now an issue as to how that statute would apply to worker's compensation claims.

First of all, there is some confusion resulting from the reference to "third-party claimants in worker's compensation cases." Under § 102.29 of the Worker's Compensation Act, a third-party claim is a tort claim against a third party who is someone other than the employer. However, as used in *Kontowicz* and § 646.31(2)(d)., a third party is someone who is not an insured under the policy of insurance. Thus, in a worker's compensation claim, the employer is the insured and the injured employee is the third-party claimant.

There is still an issue arising out of the fact that we have a separate statute under the Worker's Compensation Act that provides a penalty for delayed payments, and for interest on awards: Wis. Stat. § 102.22. Thus there is a question as to which statute would apply: § 628.46 or § 102.22.

> ¶14 It is a cardinal rule of statutory construction that where two conflicting statutes apply to the same subject, the more specific controls. *American Fed. of State, County & Mun. Employees Local 1901 v. Brown County*, 146 Wis. 2d 728, 735, 432 N.W.2d 571 (1988).

Return of Property in State v. Jones, 226 Wis. 2d 565, 594 N.W.2d 738, 743 (1999).

> It is a general rule of statutory interpretation that a statute setting forth a specific procedure takes precedence over a statute setting forth a general procedure otherwise applicable. *State ex rel. S.M.O. v. Resheske*, 110 Wis. 2d 447, 453-54, 329 N.W.2d 275, 278 (Ct. App. 1982).

Gerth v. American Star Ins. Co., 166 Wis. 2d 1000, 1012, 480 N.W.2d 836 (Ct. App. 1992).

Since § 102.22 is the more specific statute, it can be argued it is the controlling statute that takes precedence over the more general provisions of § 628.46.

3.5 Myers v. General Casualty Co. of Wisconsin, 2005 WI App 49, 694 N.W.2d 723

Issue: Validity of a reducing clause for worker's compensation benefits on automobile liability policy UM coverage

Myers was injured in a motor vehicle accident while operating a motor vehicle in the course of his employment. The accident was caused by an uninsured motorist. Myers received worker's compensation benefits of more than $213,000. Myers had a motor vehicle insurance policy that

included uninsured motorist (UM) coverage of $100,000 per person, but with a reducing clause for worker's compensation benefits.

Wis. Stat. § 632.32(4)(a) requires that a motor vehicle liability insurance policy must include UM coverage. In 1995, Wis. Stat. § 632.32(5)(i) was enacted to authorize insurers to include reducing clauses in UM coverage.[6]

Myers attacked the validity of the reducing clause in his policy on the basis that it did not comply with the provisions of § 632.32(5)(i), and that the reducing clause was contextually ambiguous when read in conjunction with other provisions of the policy. The court of appeal rejected both arguments and upheld the validity of the reducing clause.

3.6 Green v. Advance Finishing Technology, Inc., 2005 WI App 70, ___ Wis. 2d ___, 695 N.W.2d 856

Issue: Determining reasonableness of share allocated to spouse on settlement of third-party liability claim under § 102.29

Green sustained a respiratory injury in the course of her employment as a result of chemical exposure, and she received worker's compensation benefits. Green and her husband then brought a third-party products liability action against the manufacturer of the chemical.

The third-party liability action was settled at a court-ordered mediation for $112,500. The worker's compensation insurer asserted a claim for reimbursement under Wis. Stat. § 102.29, for past and future worker's compensation benefits in a total amount of $116,725.

The Greens sought court approval of the settlement, with 75% allocated to the claim of the injured employee and 25% allocated to her spouse for loss of consortium. The worker's compensation insurer objected to the proposed allocation of 25% to the spouse, since the spouse's derivative claim for loss of consortium is not subject to division under the statutory formula of § 102.29.

The worker's compensation insurer argued that the settlement proceeds were insufficient to pay its statutory reimbursement claim, and the circuit court failed to value the claims and distribute the funds pro-rata through a methodology articulated in *Brewer v. Auto-Owners Ins. Co.*, 142 Wis. 2d 864, 418 N.W.2d 841 (Ct. App. 1987). The court of appeals agreed and held that *Brewer* requires,

> [W]here claims not subject to sec. 102.29(1) allocation compete for insufficient settlement proceeds with claims subject to sec. 102.29(1) allocation, the trial court should follow this formula:
>
> 1. Determine the value of each claim;
>
> 2. Pro-rate the settlement proceeds between all claims;

[6] The statute was created by 1995 Wis. Act 21, section 4–5.

3. Distribute the amounts allocated to those claims not subject to sec. 102.29(1), Stats.:

    a) deduct reasonable collection costs;

    b) distribute the balance to claimants;

4. Distribute claims subject to sec. 102.29(1), Stats., as follows:

    a) deduct reasonable collection costs;

    b) allocate 1/3 to [employee or representative];

    c) out of balance, the insurance carrier is to be repaid for the payments it has made or is obligated to pay;

    d) any funds remaining must be paid to the [employee or representative].

Brewer, 142 Wis. 2d at 869, as quoted in *Green*, 2005 WI App 70, ¶8.

The court of appeals remanded the case to the circuit court to apply the methodology of *Brewer*.

3.7 *Keller v. Kraft*, 2005 WI App 102

Issue: Application of the exclusive remedy provision to a MVA in which a firefighter for the Milwaukee Fire Department collided with a police officer for the City of Milwaukee

The court of appeal reviewed a third-party liability claim by a firefighter who was injured in a motor vehicle accident in which he collided with a vehicle operated by a police officer. Both parties were on duty at the time. The firefighter sustained personal injuries and he received worker's compensation benefits. He sued the police officer and the City of Milwaukee in a third-party liability action.

The issue is whether the claim is barred by the exclusive remedy provision of the Worker's Compensation Act, since both the firefighter and the police officer were employees of the City of Milwaukee. The firefighter argued that the action was subject to an exception under the exclusive remedy provision, for claims against a coemployee of the same employer when there would be liability of a governmental unit to pay judgments under a collective bargaining agreement or a local ordinance.

The firefighter argued that a section of the Milwaukee City Charter was a local ordinance that satisfied the requirements of § 102.03(2), as an exception to the exclusive remedy provision. The court of appeals held that the legislative history of the cited section from the Milwaukee City Charter was never actually adopted as an ordinance, so that it did not satisfy the requirement of § 102.03(2), as an exception to the exclusive remedy provision.

3.8 Labor Ready, Inc. v. LIRC, Appeal No. 2004AP1440 (Wis. Ct. App. June 21, 2005) (publication recommended)

Issue: Whether the claimant was an employee of a temporary help agency, when he went to a hiring hall, completed a application for employment, and made himself available for work, even though he had not yet received a job assignment

Labor Ready, Inc. is a temporary help agency that operates a hiring hall. Powell went to the hiring hall seeking work, he completed an Application for Employment, and he remained at the hiring hall to wait for a work assignment. While he was waiting he was assaulted by another person who was also waiting for a job assignment.

The issue is whether Powell was an employee, so that he would be entitled to worker's compensation benefits, when he was injured while waiting for a job assignment. The court of appeals held that,

> ¶11 WISCONSIN STAT. § 102.07(4)(a) defines an "Employee" as "[e]very person in the service of another under any contract of hire, express or implied…." The principal test for determining whether a Chapter 102 employer-employee relationship exists is whether the alleged employer had the right to control the details of the employee's work. ***Kress Packing Co. v. Kottwitz***, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973). In making this determination, four secondary factors are considered: "(1) The direct evidence of the exercise of the right of control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right to fire or terminate the relationship." ***Id.*** Applying this test, we conclude, as did the Commission, that Powell was an "employee" as that term is defined in § 102.07(4)(a).

The court of appeal also concluded that,

> ¶20 Powell was, therefore, performing a service incidental to his employment. Specifically, he was, as the Commission concluded, "on the employer's premises at the employer's direction for an employment-related purpose, within a reasonable interval after his last work assignment." Based on these facts, Powell was "performing service growing out of and incidental to his or her employment," *see* WIS. STAT. § 102.03(1)(c), and had likewise satisfied the other conditions of liability identified in § 102.03. We agree with the Commission that "coverage for applicants who are injured while on the employer's premises for an employment-related purpose and pursuant to the employer's direction, even though the actual employment duties have been interrupted for a reasonable interval, is the law in Wisconsin." Thus, we conclude that Powell was entitled to worker's compensation.

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Philip Lehner received his undergraduate degree from Northwestern University in 1970 and his J.D. from the University of Wisconsin Law School in 1973. He is a member of the Racine firm of Hankel, Bjelajac, Kallenbach, Lehner & Koenen, LLC. His practice is limited exclusively to the defense of worker's compensation claims for employers and insurance carriers throughout the state. He is a frequent lecturer and author on Wisconsin worker's compensation law and claims management. He served as the chairperson of the Wisconsin Manufacturers & Commerce (WMC) Worker's Compensation Council for 1994–1999. He served as the president of the Wisconsin Association of Worker's Compensation Attorneys for 2003, and he currently serves as the Webmaster for the association.

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