# 2007 CASE LAW UPDATE

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"We lawyers know well, and may cite high authority for it if required, that life would be intolerable if every man insisted on his legal rights to the full."
Frederick Pollock, English Judge

## I. SUPREME COURT

***Acuity v. Olivas***, 2007 WI 12, January 25, 2007

Miguel A. Olivas, a drywall installer, and five other workers he knew obtained work from Steve Tenpas Drywall. Tenpas told Olivas in order for him to obtain work from Tenpas, Olivas had to have worker's compensation insurance. Olivas purchased a worker's compensation insurance policy from Acuity. The policy was written with a payroll estimate of $25,000.00, resulting in an initial premium of $3,513.00 for one year of coverage. Olivas did not elect coverage for himself under the policy, pursuant to Wis. Stat. Sec. 102.075(1). Olivas did not list with Acuity's agent the names or payroll of any of his drywall crew members.

At the end of the policy year, Acuity hired an auditor to review Olivas' payroll. The auditor located a 1099 tax form showing that Olivas had been paid more than $190,000.00 by Tenpas during the year the insurance policy was in effect. Further investigation indicated that Olivas distributed a large amount of the $190,000.00 to the five drywall crew members. Therefore, Acuity sent Olivas a bill for additional premiums of $32,192.30.

Olivas refused to pay the additional premium, contending he did not employ the other five drywall hangers. Olivas said he did not control the work group. He did not control the hours they worked. He did not hire or fire the workers. Each worker was responsible for his own tools and supplies. According to Olivas, the group of workers would divide whatever money they received from Tenpas based on the work each performed. Olivas dealt with Tenpas only because he was the only one of the workers who spoke English and had appropriate "papers."

A trial was held in the Circuit Court for Sheboygan County, after which the trial judge determined that Olivas' crew were independent contractors pursuant to Wis. Stat. Sec. 102.07(8)(b). Therefore, the trial court dismissed Acuity's complaint, finding that Acuity was not entitled to collect a premium on non-employees. Acuity appealed to the Wisconsin Court of Appeals, which affirmed the trial court's dismissal, but for a different reason. The appeals court held that Olivas' crew were independent contractors, but instead of applying Wis. Stat. Sec. 102.07(8)(b) to assess that status, the appeals court applied general common law principles.

Acuity again appealed, this time to the Wisconsin Supreme Court. The supreme court affirmed the trial and appellate courts, but again for a different reason. The supreme court, applying Wis. Stat. Sec. 102.07(8)(b), determined that Olivas' crew were not independent contractors. However, the supreme court refused to find that Olivas' crew were employees of Olivas, agreeing with Olivas that Acuity did not establish that the crew members were Olivas' employees under Wis. Stat. Sec. 102.07(4)(a).

The court agreed that the workers did not meet the nine-part test contained in the statute, but held that no employment relationship existed between the workers and Olivas.

To determine whether an employment relationship exists under Wis. Stat. Sec. 102.07(4), the primary test is whether the employer has the right to control the details of the work. In applying this test, four factors are considered: (1) direct evidence of the exercise of the right of control; (2) the method of payment of compensation; (3) furnishing of equipment or tools for the performance of the work; and (4) the right to fire or terminate the employment relationship. **Applying this test, the court held that the workers were not employees of Olivas, and Acuity therefore could not assess the additional premium.**

***Daimler-Chrysler v. LIRC***, 2007 WI 15, February 2, 2007

The applicant, Glenn May, sustained a left knee injury in the scope of his employment with Daimler-Chrysler. He underwent surgery, but his knee did not improve. His treating surgeon subsequently assessed 15% PPD to the left knee. The applicant underwent a second knee surgery, which led to full recovery and a 10% PPD assessment.

The applicant therefore sought a total of 25% PPD, arguing that Wis. Admin. Code § DWD 80.32(4) required the respondent to pay a minimum PPD rating each time the applicant underwent surgery. The respondent argued he was only entitled to 10%, based on the treating doctor's final report. The Court upheld the LIRC's determination that the applicant was entitled to 20% PPD – the 10% minimum rating for each surgical procedure.

The Court held that the LIRC could interpret Wis. Admin. Code § DWD 80.32(4) to award a cumulative minimum PPD for multiple ligament repair procedures, even if the total minimum awarded is ore than the highest PPD assessment in the record. Likewise, Wis. Stat. Sec.102.18(1)(d) does not prohibit PPD awards in excess of the highest PPD assessment in the record, but creates a presumption of reasonableness for PPD awards that fall within that range.

NOTE: The defendant-respondents moved the court for reconsideration on the ground that the court based its decision on a statute not in effect when the injury to Glenn May occurred. That motion was denied in an opinion filed on March 30, 2007. The court did add the following footnote at the end of ¶ 39 of their opinion:

> Wisconsin Stat. § 102.32(6)(b) became effective March 30, 2004. Wis. Act 144. It was therefore not in effect at the time of May's accident. We draw on it here not as a statement of the law in 1999, but because it demonstrates that the LIRC's interpretation

of §102.18(1)(d) is reasonable.

***Aslakson v. Gallagher Bassett Services***, 2007 WI 39, March 29, 2007

The Uninsured Employers Fund (UEF) is a nonlapsible trust fund created to compensate employees who suffer injuries compensable under the Worker's Compensation Act, but whose employers are uninsured. Aslakson, an employee of an uninsured employer, filed a claim against the UEF on January 7, 2000, for a 1998 injury. Gallagher denied the claim and maintained that denial following an independent medical evaluation report which established liability.

Following an ALJ's order in favor of the applicant, Gallagher paid only a small percentage of the ordered amount while pursuing appeals and did not pay the balance until September 2003, after the Court of Appeals upheld the ALJ's order. Aslakson then filed a bad faith tort claim against the UEF and Gallagher, as its administrator, in Dane County Circuit Court. The Court of Appeals heard the case on interlocutory appeal and allowed dismissal of the tort claim against Gallagher, finding that it was exempt from all liability for bad faith by operation of the statutory penalty provision in Wis. Stats. Sec. 102.18(1)(bp), which serves as the exclusive remedy provision for bad faith in Wis. Stats. Ch. 102, even though that provision did not impose any penalty on the Department or its agents. The supreme court reversed and remanded to the circuit court for reinstatement of the tort claim against Gallagher.

The Wisconsin Supreme Court held that the Worker's Compensation Act does not provide a penalty for acts of bad faith committed by a third party administrator acting as an agent of DWD in administering a claim against the UEF and that the Act's exclusive remedy provision regarding penalties in Wis. Stats. Sec. 102.18(1)(bp) does not apply to the DWD or its agents and thus does not bar a common law bad faith tort claim against the administrator acting as the DWD's agent in such cases.

The UEF was dismissed based on sovereign immunity. The supreme court remanded to the circuit court for reinstatement of the tort claim against Gallagher.

*NOTE:*

It is possible that this decision could be extended to allow tort claims against third party administrators acting as agents for worker's compensation insurance carriers, even if they are separate legal entities from the insurance carrier and employer (e.g. "captive" administrators– third party administrators that are not the insurer or the employer, but a named third party due to their administration of the claim). At several points in the decision, the court highlights the language of Wis. Stat. Sec. 102.18(1)(bp), which applies to the bad faith of an "employer" or an "employer's insurer." A third party administrator is neither of these. As such, some believe that given the court's narrow reading "captive" administrators may be vulnerable to suit. Paragraphs 48, 59, and 65 lead to this inference.

***McNiel (Karl) v. Hansen (Brandon)***, 2007 WI 56, May 18, 2007

The issue was whether attempting to start the vehicle when it was connected to a machine to flush the radiator constituted "operation of a motor vehicle" within the meaning of Wis. Stat. Sec. 102.03(2). The action was undertaken during service to the vehicle when it could not be driven on a public roadway. The vehicle in question had a manual transmission and jumped forward when started, striking the plaintiff/applicant. The circuit court concluded that Brandon Hansen's action of reaching through the automobile window and attempting to start a vehicle by turning a key did not constitute "operation of a motor vehicle" as the term was used in an exception to the exclusive remedy provision of the Worker's Compensation Act (Wis. Stat. Sec. 102.03(2)).

The court noted that "operation of a motor vehicle" is not a term defined in the Act. It was decided that depending on the context, "operation" could require actually driving of a vehicle or it could refer to activating any one of the controls.

As such, the court agreed with the Court of Appeals, noting that the term was ambiguous as it had more than one reasonable interpretation. As such the court turned to the legislative history. In *Hake v. Zimmerlee*[1] the Court of Appeals reviewed the legislative history and opined that the purpose of the Act was to "allocate the cost of employment injuries to the industry of business in which they occur and, ultimately, to the consuming public as part of the price for goods or services offered." *Hake* noted that prior to 1977, the Act precluded suits against the employer's compensation insurance carrier but did not prohibit suits between coemployees for work-related injuries. In 1977, the Act was revised in accordance with recommendations from the Worker's Compensation Advisory Counsel. Essentially, the Advisory Counsel encouraged the legislature to recreate the statute so that coemployee immunity would be the rule and that coemployee liability would be the exception to the rule. To follow the purpose and intent of the Act, including the coemployee immunity rule, the court in Hake narrowly construed the exception to coemployee immunity due to negligent operation of a vehicle.

The Wisconsin Supreme Court concluded that the distinction between operation and maintenance or repairs should apply in the context of the exception to the exclusivity provision under Wis. Stat. Sec. 102.03(2). It held that injuries to workers caused by negligent coemployees while performing maintenance or repairs on a motor vehicle that could not then be driven on a public roadway were common occurrences for those workers in the vehicle repair industry and were directly related to their employment. As such, the cost of those injuries should be passed on to the industry and ultimately the consuming public; they should not be borne by the worker. The supreme court ultimately affirmed the Circuit Court's summary judgment dismissing the plaintiff's claims.

[1] 178 Wis. 2d 417, 421, 504 N.W.2d 411 (Ct. App. 1993).

The court effectively holds the applicant's injury was not caused by "operation of a motor vehicle" within the meaning of the statute.

## II. COURT OF APPEALS

***Edward Brothers, Inc v. LIRC***, 2007 WI App. 128, March 7, 2007

The worker, Vanderzee, hurt his back on the job in January 2001 and was temporarily and totally disabled. He had not ceased medical treatment, reached the end of healing, or formally claimed permanent disability when he died of unrelated causes in September 2003. At his death, Vanderzee was near the end of healing and there was enough evidence to make a determination that he had a five percent PPD. This is not really a claim for death benefits *per se*; claim for deceased's PPD paid as a death benefit.

The court noted the possibility that death benefits could be denied if at the time the worker died there was inadequate evidence to determine permanent partial disability. The court also found that the ongoing payment of TTD to Vanderzee met the requirement of Wis. Stat. Sec. 102.47 that indemnity payments have begun but not ceased before the employee's death. The court held Wis. Stat. Sec. 102.51(5) does not bar dependents from claiming compensation to which they are entitled. Wis. Stat. Sec. 102.51(5) bars dependents from claiming the injured worker's compensation (temporary disability, for instance) but Wis. Stat. Sec. 102.47 gives the dependents their own claim for PPD/PTD, so Wis. Stat. Sec. 102.51(5) did not apply to the Wis. Stat. Sec. 102.47 claim.

**The Court of Appeals held that when a worker died of causes unrelated to his work injury before permanent partial disability could be formally established his dependents may still be entitled to death benefits.**

***Graham v. Dane Co.***, 2006AP2695, Filed May 31, 2007.

An employee sustained a right knee injury in a work-related slip and fall. Surgery to repair the knee produced unfavorable results. Applicant requires the use of a cane and walks with a pronounced limp and foot drag. The ALJ awarded her $15,000 as compensation for the disfigurement.

The LIRC affirmed the ALJ's award, finding that the applicant's severe limp met the requirements of Wis. Stat. Sec. 102.56(1) for a disfigurement award ("exposed in the normal course of employment"). This decision explicitly reverses the LIRC's decision in *Spence v. POJA Heating & Sheet Metal*, WC claim no. 88-018562 (LIRC, January 20, 1994), under which

an applicant was denied a disfigurement award for a severe limp. *Spence* had relied on the historical application of Wis. Stat. Sec.102.56 disfigurement awards to injuries resulting in exposed scarring, burns, and amputations.

The employer, Dane County, appealed. The Court of Appeals, District IV, has certified the case to the Wisconsin Supreme Court. The employer argues the LIRC's interpretation of the statute is contrary to it's application for all years except 1986 to 1994. The court reports the LIRC: "Cites ***Stoughton Trailers, Inc., v. LIRC***, 2006 WI App 157, ¶27, 295 Wis. 2d 750, 721 N.W.2d 102, for the proposition that Administrative agencies may deviate from prior agency policy and practice as long as a satisfactory explanation is provided." The court went on to comment: "The quoted passage in that case refers to WIS. STAT. § 227.57(8), which ostensibly refers to an agency's exercise of discretion, rather than its conclusions of law. We are therefore not persuaded that that authority applies here." The LIRC acknowledged it had been reaching different results on essentially the same issue. The court went on to certify the issue to clarify whether the *de novo* review applies to these issues in agency review cases.

***Emmpak Foods, Inc. v. LIRC***, 2006 AP 729, June 6, 2007

The applicant worked for Emmpak Foods as an electrician. He suffered a left wrist injury on the job on June 10, 2002, but returned to work the next day working right-handed light duty work. As mandated by company policy, he was fired on July 21, 2002, for a second violation of a workplace safety rule. The applicant brought a claim for TTD from the date of his termination until January 16, 2003. The ALJ had found for the applicant and the LIRC affirmed the ALJ. Subsequently, the circuit court affirmed the LIRC. Emmpak and its insurer, National Union Fire Insurance, appealed to the Court of Appeals.

Was the applicant entitled to TTD from the date of his termination until January 16, 2003?

Yes. At the time of his termination the applicant was within the healing period and had not regained the use of his hand. He therefore suffered a wage loss while his injury limited his ability to work, meeting the statutory criteria for TTD.

Emmpak argued that the applicant's rule violation, not his injury caused the applicant's wage loss and, therefore, he was not eligible for TTD. Emmpak argued that the Court of Appeals should review the LIRC's legal conclusions *de novo* as the Commission's decision did not rest on statutory interpretation, but on the supreme court's decision in *Brakebush Brothers, Inc. v. LIRC*, 210 Wis. 2d 623 (1997). Emmpak cited *Beecher v. LIRC*, 2004 WI 88, in which the Supreme Court refused to give deference to the Commission's interpretation of prior case law.

The Court indicated that in *Beecher*, the Court mandated *de novo* review only when an agency's

legal conclusion was based on a judicially-created doctrine rather than on a judicial gloss of a statute or administrative rule. The Court noted that under the middle level of deference, due weight, argued for by Emmpak or great deference, argued by the Commission, there was no interpretation more reasonable than the one the Commission proffered. As such, the Court had to affirm the Commission.

The Commission interpreted the law to provide no exception to liability where an injured employee was terminated for cause, even when the employee continued to work post injury under restricted duty. The Court of Appeals, in looking at the statutes and case law, saw no exception, and noted that Emmpak did not point to any statutory language suggesting that an exception existed.

Emmpak argued that unlike in *Brakebush*, where an employee was out of work and received compensation when he was terminated, the applicant was working and receiving his wages when he was fired. He had no wage loss following his injury and continued to work until his termination, unrelated to his injury. The Court of Appeals rejected this argument as it "[took] an artificially narrow view of causation that goes against the purpose of the Worker's Compensation Act." ¶ 13. While the applicant's firing was the immediate cause of his loss of wage from Emmpak, it was not the only cause of his loss of employment. When he was injured, he was rendered unable to use his left hand. As he was an electrician, the injury severely limited his ability to work. He was much less employable than he otherwise would have been. **Although his termination was the reason Emmpak stopped paying his wages, the injury was still partially responsible for the applicant's economic loss.** As such, like the employee in *Brakebush*, the Court found that the applicant continued to be limited by his work related injury and had lost the ability to work due to a work related injury.

The applicant was entitled to TTD benefits from the date of his termination until January 16, 2003, when his physician opined that he had reached end of healing, as he suffered a wage loss while his workplace injury limited his ability to work.

## III. LIRC

***Whitman v. Crest Concrete Prod***, WC Claim No. 2005-034687, LIRC March 14, 2007

The applicant was involved in an auto accident on September 6, 2005, in the course of his employment. The employer brought a claim for 15% decreased compensation. The ALJ dismissed its claim and the employer petitioned the Commission for review.

The employer argued that the ALJ should have credited the opinion of Dr. Foster, who completed a WKC-16-B, dated June 15, 2006, on behalf of the employer. Dr. Foster opined that

based on Mr. Whitman's vitreous sample that to a reasonable degree of medical probability his blood alcohol content was at least .29 grams per milliliter, which was over three times the legal upper limit in the State of Wisconsin. Dr. Foster opined that within a reasonable degree of medical certainty, the deceased employee's blood alcohol concentration at the time of his death did likely cause or contribute to the motor vehicle accident. Dr. Foster did research and noted vitreous of the eye has been used extensively for toxicological analysis in recent years and was recognized as an extremely useful specimen for post-mortem alcohol determinations.

Distinguishing this case from *Heritage Mutual Ins. Co. v. Larsen*, the Commission upheld the ALJ's decision. In *Larsen*, the applicant was on a business trip and stopped to consume 4-5 mixed drinks over an hour and 45 minutes. He subsequently passed out while attempting to return to his residence, resulting in frostbite and an injury to his fingers. The Wisconsin Supreme Court noted that the Commission was entitled to draw a reasonable inference that intoxication caused the applicant in the *Larsen* case to remain asleep for an extended period, and that his injury was caused by a long exposure to the cold. In *Larsen*, a renal consultation report stated the applicant suffered from ethanol abuse and loss of consciousness along with a severe frostbite injury. The Wisconsin Supreme Court stated that the report was credible and substantial evidence to establish intoxication, and a causal link between the applicant's intoxication, his loss of consciousness and the injury.

There is no factual history in the LIRC's decision. The police report indicates the applicant was driving a semi truck during daylight hours on a four lane highway. His vehicle crossed two oncoming lanes of traffic, went down an embankment and hit a train.

**In the current case, the LIRC found there was no evidence the deceased employee suffered any ill effects of his intoxication**. Dr. Foster had not cited any persuasive information to lead the Commission to conclude that it could be established beyond a speculative level that the applicant's intoxication was a substantial factor leading to his accident on September 6, 2005, and untimely death. **The LIRC stated, "If there was evidence the applicant had been driving erratically or on the wrong side of the road or somehow operating in an unsafe manner prior to the incident this may have been a different case."**

The respondents have appealed this decision.

***Schulte v. Eastman Kodak Co.***, WC Claim No. 1997-000896, LIRC March 19, 2007

The applicant injured his back at work on March 15, 1996. In November 1996 he was taken off work. He underwent a L4-5 discectomy in March 1997. In November 1997 the applicant's surgeon released the applicant to return to work with a 60-pound lifting limit. That same month, the applicant was convicted in Federal court and sentenced to 15 months in prison.

The applicant's back pain returned in 1998. He underwent a lumbar fusion at L4-5 in March 2001. In March 2002 his treating surgeon assessed 15% PPD. In December 2003 the physician signed a functional capacity evaluation setting work restrictions limiting him to frequent lifting up to 10 pounds and occasional lifting up to 20 pounds. There was no dispute over TTD and the self-insured employer conceded PPD at 20%. At issue was the extent of his permanent disability based on loss of earning capacity and additional medical expenses.

The ALJ found the applicant had a loss of earning capacity of 35%. That figure was at the low end of the range set by the applicant's vocational expert. The self-insured employer appealed, arguing that the applicant had no loss of earning capacity as he could have been working for the employer were it not for his conviction. The employer argued the applicant had no loss of earning capacity even on the open market, given various Wis. Admin. Code § DWD 80.34(1) factors including his efforts to find work, his retraining, and the displaced worker analysis offered by their expert. The employer's expert based his opinion on the assumption that the applicant could have continued working for the employer but for his Federal conviction. However, when the applicant recovered from his initial discectomy surgery in November 1997 the employer did not actually offer the applicant work, but offered to put him on a medical leave status, although it was not yet aware of his conviction.

The Commission could not draw inferences that the employer would have offered him work in 1997 had he not gone to prison and that the employer would have continued to provide work after the fusion surgery when his work restrictions became more limiting. The Commission held that the bar on an award for loss of earning capacity under Wis. Stat. Sec. 102.44(6) did not apply in this case. Rather, the applicant was entitled to compensation from loss of earning capacity.

The Commission then examined the applicant's loss of earning capacity. The Commission did not credit the employer's expert's report, which stated the applicant had no loss of earning capacity. The employer's expert had suggested that the time the applicant spent in prison had the same effect in displacing him in the labor market or work force as economic forces or the obsolescence under the displaced worker theory. The Commission noted that not all of the applicant's time off of work was caused by his conviction and imprisonment, but that a substantial period of lost work time was due to recovering from the surgeries done as a result of the work injuries. **The Commission noted, however, that the applicant's criminal conviction played a significant role in his decreased earning capacity and was "other pertinent evidence" to be taken into consideration with respect to earning capacity. It found the employer was not liable for the portion of the applicant's loss of earning capacity attributable to his conviction and imprisonment**. Also, there were some questions regarding the applicant's efforts to find work. Those factors, and others within Wis. Admin. Code § DWD 80.34, counseled an award at the low end of the applicant's vocational expert's range.

This case teaches that employers wishing to invoke Wis. Stat. Sec. 102.44(6) bar to loss of earning capacity should offer work in writing at 85% or greater of average weekly wage.

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