CASE LAW UPDATE

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I. COURT OF APPEALS

General Motors Corp. v. LIRC, Court of Appeals, 2006 AP 1899, August 16, 2007.
Causation – Dual Theory

The applicant worked for General Motors in an assembly line, installing left front doors on vehicles beginning in November 2002. He asserted that he was often required to use his weight to pull down on the doors and force them into place. He experienced aches and pains for the first few months, then a "burning sensation [that] started in my neck," on July 14, 2003, followed by steadily increasing pain over the course of the next several days. His doctor diagnosed him with one herniated disc, which was directly caused by work activities, and one ruptured disc and one slipped disc, which were due to spondylosis that had been accelerated beyond normal progression by work activities. Applicant asserted both occupational disease injury and traumatic event injury. General Motors asserted that Wis. Stat. § 102.01(2)(c) requires a worker's compensation claimant to choose either an occupational disease when it states that an "injury" is "mental or physical harm to an employee caused by accident or disease."

The court of appeals held that the word "or" in Wis. Stat. § 102.01(2)(c) means that an applicant may establish an injury under either an occupational or traumatic theory. There is nothing in the plain language of the statute that requires the applicant to choose one or the other.

Acuity Insurance Co. v. Wittingham, Court of Appeals, 2006 AP 2379, August 29, 2007.
Sole Proprietorship – Insurance Coverage

The applicant, David Wittingham, owned and operated a sole proprietorship carpentry business called Woodland Builders. Wittingham also performed general carpentry work for another carpentry business called Carr Builders. Woodland Builders often hired other carpenters when it was performing work on its own projects, but Wittingham did not bring any of Woodland Builders' carpenters to the Carr Builders worksite.

Richard Carr, the owner of Carr Builders, testified that he hired Wittingham as an individual, and did not hire Woodland Builders. However, although Mr. Wittingham worked with other Carr Builders carpenters without the aid of any Woodland Builders carpenters, he received payment and reported his earnings in the name of Woodland Builders.

Wittingham was seriously injured at the Carr Builders jobsite. Acuity, Carr Builders' insurer, argued that because Wittingham owned a sole proprietorship, he cannot be an employee under Wis. Stat. § 102.07(8m), which reads: "An employer who is subject to this chapter is not an employee of another employer for whom the first employer performs work or service in the course of the other employer's trade, business, profession or occupation." **The court held that the statute only prohibits coverage if the sole proprietor is functioning as an employer in his or her work for a second employer.** Wittingham worked as an individual, and because he did not ask any Woodland Builders carpenters to accompany him to the Carr Builders worksite, Wittingham was not functioning as an employer for Woodland Builders, but was rather functioning as an employee of Carr Builders.

County of Dane v. L.I.R.C., Court of Appeals, 2006 AP 2695, November 26, 2007.
Disfigurement – Limp

The applicant, Gloria Graham, slipped and fell on a wet floor at work in July 2001, twisting one of her legs behind her back as she landed. As a result of the fall, Graham sustained what the administrative law judge described as a "mixture of a limp and a foot drag." The judge awarded disfigurement benefits for the limp under Wis. Stat. § 102.56(1), which states:

> If an employee is so permanently disfigured as to occasion potential wage loss, the department may allow such sum as it deems just as compensation therefor... Consideration for disfigurement allowance is confined to those areas of the body that are exposed in the normal course of employment...

In a 1986 case, *Jorgensen v. Wisconsin DVA*, LIRC awarded disfigurement benefits for a limp. In a 1994 case, *Spence v. POJA Heating*, LIRC refused to award disfigurement benefits for a limp. Here, LIRC returned to the *Jorgensen* rule, allowing disfigurement benefits to be awarded for a limp. Dane County appealed first to the circuit court, then to the court of appeals.

The court held that the LIRC's interpretation of Wis. Stat. § 102.56(1) was reasonable because it accomplished the goal of the Worker's Compensation Act of compensating injured workers for lost wage-earning power, because it is based on the fact that the language of the statute does not confine "disfigurement" to burns, scars, or amputations, and because the definition of the word "disfigure" in Webster's Dictionary is "to make less complete, perfect, or beautiful in appearance... to impair (as in beauty) by deep and persistent injuries."

Waste Management, Inc. v. LIRC, Court of Appeals, 2007 AP 2405, February 26, 2008.
Due Process – Procedure

The worker, Bowe, alleged that he had sustained traumatic event back injuries while working for three different employers. In the alternative, Bowe claimed that he suffered an occupational exposure back injury. At hearing, the administrative law judge informed the parties that he viewed the pleadings as claiming an occupational exposure back injury as to the first two employers, but not as to the third employer, Waste Management. Waste Management, therefore, proceeded at hearing with the understanding that it was defending only a traumatic event back injury claim. The

administrative law judge found an occupational exposure injury against the second employer, and dismissed Waste Management from the case. On appeal, the LIRC affirmed the finding of an occupational exposure, but named Waste Management as the liable party.

Waste Management appealed first to the circuit court, claiming that LIRC violated its due process rights by awarding benefits on an occupational exposure theory, rather than the traumatic event theory it defended against at hearing. The circuit court affirmed, and Waste Management appealed to the court of appeals. **The court of appeals reversed, holding that LIRC violated Waste Management's due process rights by not allowing it to be heard on the probative force of the evidence in support of an occupational exposure injury, or the law governing such an injury.** Under Wis. Stat. § 102.18(1)(a), a party is entitled to: 1) the right to seasonably know the charges or claims proffered; 2) the right to meet such charges or claims by competent evidence; and 3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto. Since the parties proceeded during the hearing on the understanding that traumatic injuries were being claimed, Waste Management was denied the "fair hearing" guaranteed by Wis. Stat. § 102.18(1)(a).

Michels Pipeline v. LIRC, Court of Appeals, 2007 AP 607, March 12, 2008. **Rehabilitation Maintenance Payments – Social Security Offset**

The applicant underwent vocational rehabilitation as a result of a work injury. He was paid "maintenance" benefits under Wis. Stat. § 102.61, which states that an employer must pay "maintenance" benefits when an injured employee is taking rehabilitation courses. Wis. Stat. § 102.44(5) provides that, when the injured worker receives social security disability benefits, "temporary total disability" benefits will be reduced by the amount of social security received. The "maintenance" provided by the employer, Michels Pipeline, would have been paid at the temporary total disability rate because Wis. Stat. § 102.43(5) mentions that "temporary disability" in Wisconsin worker's compensation law also means benefits paid for "maintenance" when the applicant is undergoing certain kinds of rehabilitation training. Therefore, Michels Pipeline reduced the "maintenance" payments by the amount the applicant received from social security disability. The applicant sought, and LIRC awarded, additional "maintenance" benefits at the temporary rate because there is no statute directly mandating that "maintenance" payments be reduced by the amount of social security disability received. Michels Pipeline appealed to the circuit court, who affirmed, then to the court of appeals.

The court of appeals reversed, holding that the plain language of the statutes makes "maintenance" benefits "temporary disability" benefits, and because temporary total disability benefits must be reduced by the amount of social security received under Wis. Stat. § 102.44(5), the "maintenance" payments must also be reduced.

II. LIRC

Keys v. Tower Automotive, W.C. Claim No. 2002-043158, LIRC October 29, 2007. **Temporary Total Disability – Retirement**

The applicant, Carl Keys, injured his lower back at work with Tower Automotive in September 2001. He reached an end of healing and was assessed with permanent restrictions that his employer could not accommodate. His employment was then terminated one month before he was planning to retire from the workforce. After seeking permanent partial disability and loss of earning capacity benefits, Keys entered into a limited compromise with his employer in 2003, but his back condition continued to worsen. In 2005, his doctor determined that he needed further surgery and determined that he was incapable of working. Keys then sought temporary total disability benefits, even though he had not worked since 2002 and was receiving social security retirement benefits. The administrative law judge denied his claim and Keys appealed.

The LIRC affirmed the order, holding that temporary total disability benefits cannot be awarded when the applicant is retired and there is no economic loss attributable to the work injury. Temporary total disability is intended to replace lost income. Here, there cannot be any wage loss at all because the applicant is retired from the workforce.

Hernandez v. E & B Insulation, W.C. Claim No. 2004-034423, LIRC October 29, 2007. **Medical Support – Accuracy and Credibility**

The applicant, Raul Hernandez, worked as an insulation installer. As part of his job, he was required to travel up and down ladders and scaffolding, and carry items that weighed between 30 and 40 pounds. Hernandez sought permanent total disability benefits for a back injury he claimed was sustained as a result of his occupational exposure over many years. His doctor provided medical support for his claim, but repeatedly referred to Hernandez's work activities as "heavy construction work," something that the administrative law judge held was not supported by the evidence of the applicant's job duties. The judge dismissed the application, and Hernandez appealed.

The LIRC affirmed the order, holding that a doctor's report can only be credited if it is supported by an accurate view of the applicant's work history. While installing insulation is difficult work, the totality of the evidence suggested that Hernandez's doctor believed that Hernandez performed a different job altogether. The applicant has the burden of proof in a worker's compensation case, and the judge's rejection of the doctor's opinion was proper.

Bounds v. Northwest Airlines, Inc., W.C. Claim No. 2004-028381, LIRC October 29, 2007. **Loss of Earning Capacity – Odd-Lot PTD**

The applicant, Jerry Bounds, sustained an occupational exposure back injury in 2004. His permanent restrictions included that he must be allowed to lie down from time to time. The employer accommodated all restrictions, but did not inform Bounds whether

it was acceptable for him to lie down from time to time. The employer did not prevent Bounds from lying down, and Bounds did not ask his supervisors whether he could do so. Bounds nevertheless retired after four months of accommodated work, saying in his retirement letter that the employer had failed to accommodate his restrictions. He brought a loss of earning capacity claim, and, in the alternative, claimed that he was odd-lot disabled under *Balczewski v. DILHR*, 76 Wis. 2d 487 (1977), and *Beecher v. LIRC*, 2004 WI 88, 273 Wis. 2d 136. The administrative law judge assessed 50% permanent partial disability for loss of earning capacity. Bounds appealed.

The LIRC affirmed the award but denied that the applicant quit because of a physical or mental limitation. It held that when a worker quits his employment for reasons other than physical or mental limitations resulting from a work injury, there is no loss of earning capacity claim unless, upon return to work at another employer, the actual wage loss in comparison with earnings at the time of injury equals or exceeds 15 percent. Additionally, when a worker with permanent restrictions performs some accommodated work for the employer and quits for reasons other than physical or mental limitations resulting from the work injury, the worker has demonstrated that he is not odd-lot permanently totally disabled. Here, Bounds could perform all of his accommodated work duties, and the burden is on the applicant to show that he cannot work at all. However, because of Bounds' advanced age and lifting restrictions, a 50% permanent partial disability award is appropriate for loss of earning capacity.

Seidler v. US Oil Company, Inc., W.C. Claim Nos. 2005-026908, 2003-031169, LIRC December 6, 2007. **Appeal – Timely Filing of Petition**

The applicant's attorney filed the petition for appeal one day late. The attorney claimed that he had discovered, after 5 p.m. on the day the petition was due, that the petition had not been filed. **The LIRC dismissed the appeal as untimely, holding that the applicant's attorney had not demonstrated probable good cause that the failure to file was beyond his control.** The attorney should have checked whether the appeal had been filed earlier, and could have, on the day it was due, faxed the petition for appeal to LIRC after 5 p.m., or submitted a petition online at the LIRC's website.

Rausch v. SNE Enterprises, Inc., W.C. Claim No. 2003-001173, LIRC January 15, 2008. **Twenty-Seven Years of Age – Wage Presumption**

The applicant, Richard Rausch, was nearly twenty-six years old at the time of his injury. He claimed entitlement to permanent total disability benefits at the maximum benefit rate under Wis. Stat. § 102.11(1)(g), which provides that an applicant under twenty-seven years of age is entitled to the maximum rate unless the employer can show what the applicant would have earned after reaching twenty-seven years of age. The administrative law judge awarded permanent total disability at the maximum rate, and the employer appealed.

The LIRC affirmed the finding of permanent total disability but reduced the indemnity rate, holding that the employer had demonstrated that the applicant would earn a substantially lower-than-maximum rate upon reaching the age of

twenty-seven. What an applicant would have earned within a "reasonable time" of reaching age twenty-seven will be the permanent total disability rate. Here, Rausch had worked in an unskilled job without seeking a post-secondary education since he graduated from high school. It was highly doubtful that he could reach the maximum wage after such a background.

Morzenti v. City of Ashland, W.C. Claim No. 2006-024526, LIRC January 15, 2008. **Default Award – Failure to Serve Proper Party**

The hearing application was served upon the incorrect third-party administrator. When no response to the application was received, the administrative law judge granted a default order against the insurer. The correct third-party administrator subsequently received the application, and the insurer answered within 20 days thereafter. The insurer appealed the default judgment. **The LIRC reversed the order, holding that when the incorrect administrator or insurer is served, the correct insurer is entitled to be heard on the merits.**

Hintz v. Aarowcast, Inc., W.C. Claim No. 2005-023658, LIRC January 28, 2008. **Medical Expenses – Burden of Proof**

The applicant, David Hintz, submitted medical bills to his employer's worker's compensation insurer for payment following a work injury. However, the bills and corresponding medical notes did not contain any reference to the work injury, nor did Hintz's doctors opine that the symptoms were related to the injury. The insurer declined to pay for the medical bills. The administrative law judge awarded some medical bills, but denied coverage for others, and the applicant appealed. **The LIRC held that medical bills are not covered under worker's compensation unless they are for services clearly related to the work injury, reference the work injury, or the doctor opines that the treatment is related to the injury.**

Elfering v. Wisconsin Precision Casting, W.C. Claim No. 1993-033387, LIRC January 28, 2008. **Occupational Exposure – Date of Injury**

Bernard Elfering's family claimed death benefits as the result of his occupational exposure to silica. They listed the date of injury as December 20, 2002, Elfering's retirement date. The employer claimed that the date of injury should be April 23, 1990, when Elfering missed 1.5 hours of work to attend a "precautionary" medical exam following breathing problems at work. The employer also argued that when Elfering was given a different work duty in 1993, he was "impaired" because of his silicosis. The administrative law judge determined that the date of injury was December 2002 and the employer appealed.

The LIRC affirmed the order, holding that the question in an occupational exposure case is when the disease ripened into a disabling condition. The judge in a case like this must first determine whether the evidence demonstrates that the disease affected the individual's physical ability to work. Here, Elfering's medical treatment in 1990 was not sufficient to cause a work interruption due to silicosis. Rather, he was

being monitored as a precautionary measure. Additionally, although he was transferred away from silica in 1993 to a different part of the employer's manufacturing facility, Elfering's silicosis did not affect his ability to work and earn an income.