RECENT WISCONSIN WORKER'S COMPENSATION DECISIONS
April 2008 – June 2009

"We are strongest in the broken places."
Ernest Hemingway, A Farewell to Arms, 1929.

SUPREME COURT

County of Dane v. LIRC (Supreme Court, 2006 AP 2695, January 23, 2009). **Disfigurement – Limp**

An employee, Graham, slipped and fell at work. As a result of her work injury she sustained a permanent limp. The administrative law judge awarded benefits as a result of the limp under Wis. Stat. § 102.56(1), which states that injured workers may be awarded benefits for disfigurements in "those areas of the body that are exposed in the normal course of employment" and that cause permanent wage loss. The term "disfigurement" is not defined in the statute. The plaintiff employer appealed the administrative law judge's decision to the Labor and Industry Review Commission (LIRC), which affirmed the administrative law judge's award. The plaintiff next appealed to the circuit court, which affirmed the LIRC's decision, then to the court of appeals, which affirmed. The plaintiff appealed to the Wisconsin Supreme Court.

The supreme court affirmed, holding that "disfigurement" should be given its plain meaning, which is "to make less complete, perfect, or beautiful in appearance... to impair (as in beauty) by deep and persistent injuries." The court suggested, however, that a limp must be relatively prominent and appear to affect an exposed part of the body, as opposed to being simply a motion. The employee here sustained a severe limp with a foot drag that caused the administrative law judge discomfort in watching the employee try to walk. Such a prominent limp, the court said, was severe enough to be exposed in the normal course of employment and be compensable.

"Justice and judgment lie often a world apart."
Emmeline Parkhurst, English Suffragist.

COURT OF APPEALS

Estate of Morales v. Torres (Court of Appeals, 2007 AP 1517, June 18, 2008). **Jurisdiction – Traveling Employees**

Torres was traveling in Wisconsin on a business trip with his co-worker Morales when they were involved in an automobile accident and Torres was killed. They worked for a Texas employer, who paid worker's compensation death benefits and burial expenses to Torres' estate in Texas. The estate filed a civil suit in Wisconsin against Morales and others. The defendants moved for summary judgment, contending that Wisconsin worker's compensation applied as the sole remedy. The estate argued that out-of-state employers and employees cannot be subject to Wisconsin worker's

compensation when the employer-employee relationship was created and maintained solely out-of-state. The circuit court granted summary judgment, and the estate appealed.

The court of appeals affirmed, holding that Wisconsin worker's compensation applies to out-of-state employers and employees when the accident occurs in Wisconsin, and that it bars a civil suit regarding the alleged negligence of co-workers in relation to the accident. In an issue of first impression before the court, the court of appeals determined that an employer's act of sending its employee into Wisconsin to act in the course and scope of his employment constituted a sufficient "employment relationship" for Wisconsin worker's compensation to apply. The court gave significant weight to the broad language of the worker's compensation act, which fails to provide a specific jurisdictional limit to its applicability, and to Wisconsin's traditionally liberal interpretation of the act to afford compensation when the issue is unclear.

Schreiber Foods, Inc. v. LIRC (Court of Appeals, 2008 AP 1977, February 10, 2009). **Loss of Earning Capacity – Interlocutory Awards**

A worker, Skerven, was injured in the course and scope of his employment with the plaintiff. A Department of Workforce Development administrative law judge (ALJ) awarded Skerven permanent partial disability benefits based upon his loss of earning capacity. The plaintiff later re-hired Skerven at more than 85% of his pre-injury wage, and filed a petition with the Department to reopen the ALJ's order and vacate the loss of earning capacity award based upon the language in Wis. Stat. § 102.44(6), which states that loss of earning capacity awards can only be made when the actual wage loss occasioned by the work injury exceeds 15% of the worker's pre-injury wage. The Department agreed with the plaintiff and allowed the plaintiff to cease its permanent partial disability payments while Skerven was re-employed at more than 85% of his pre-injury wage. Skerven appealed to the LIRC, which reversed the Department's decision. The plaintiff then appealed to the circuit court, which reversed the LIRC. Skerven and the LIRC appealed to the court of appeals. **The court of appeals reversed, holding that final permanent partial disability awards based upon loss of earning capacity may not be re-opened and vacated where the injured worker is later re-hired by the employer at more than 85% of his pre-injury wage.**

Kuehl v. Sentry Select Insurance Company (Court of Appeals, 2008 AP 1681, February 10, 2009) **Exclusive Remedy – Negligent Operation of a Motor Vehicle**

The plaintiff, an auto mechanic, was injured in the course and scope of his employment when a customer's van that had been raised on a vehicle hoist by a co-worker fell off the hoist. The plaintiff filed a civil suit against his co-worker, alleging that the co-worker had negligently operated a motor vehicle within the meaning of Wis. Stat. § 102.03(2), which states that injured workers may not ordinarily sue co-workers except when, among other things, a co-worker negligently operates a motor vehicle that is not owned or leased by the employer. The defendant argued that the co-worker's actions did not constitute "operation" of a motor vehicle at the time of injury. The circuit court

agreed and granted the defendant summary judgment. The plaintiff appealed to the court of appeals.

The court of appeals affirmed, holding that maneuvering a vehicle onto a hoist for repairs is not negligent operation of a motor vehicle under Wis. Stat. § 102.03(2). In McNeil v. Hansen, 2007 WI 56, 300 Wis. 2d 358, 731 N.W.2d 273, the supreme court held that "injuries to workers caused by negligent coemployees while performing maintenance and repairs on a motor vehicle that could not then be driven on a public roadway...are directly related to [the workers'] employment." Relying on this language, the court here held that moving a vehicle onto a hoist is part of the process of maintenance and repair, and does not constitute "operation" of a motor vehicle. The court further clarified that the "could not then be driven on a public roadway" language in McNeil refers to the vehicle's condition at the time the tort claim accrued, rather than the allegedly-negligent operation that led to the injury.

McRae v. Porta Painting, Inc. (Court of Appeals, 2008 AP 1946, May 20, 2009).
Course and Scope of Employment – Traveling Employee

The plaintiff was a painter traveling in his personal vehicle from his home to a work site, away from his employer's premises, before the start of the workday when he was injured in an auto accident. He claimed entitlement to worker's compensation. His employer's worker's compensation insurer denied the claim on the ground that he was not in the course and scope of his employment at the time of the accident because employees going to work are not covered until they reach the employer's premises under the "coming and going rule." The plaintiff argued that, under Bitker Cloak & Suit Co. v. Miller, 241 Wis. 653, 6 N.W.2d 664 (1942), when an employee has a duty to perform work away from the premises of the employer and is not required to report to the premises of the employer first, he is in the course and scope of employment as soon as he leaves his home and travels to the worksite. An administrative law judge (ALJ) found in favor of the plaintiff. The defendant appealed to the Labor and Industry Review Commission (LIRC), which reversed the ALJ. The plaintiff then appealed to the court of appeals, which affirmed the LIRC. The plaintiff appealed.

The court of appeals affirmed, holding that employees going directly to a worksite from their homes without first stopping at the employer's premises are not necessarily in the course and scope of their employment, and their injuries are thus not compensable under the "coming and going rule." The court distinguished the Bitker case, noting that the employee in that case had been asked, prior to the start of the workday, to detour from his normal travel directly to the employer's premises to make a service call on a customer. Where the employee's job requires him to regularly travel to a worksite away from the employer's premises, as the plaintiff's job as a painter did here, he is not in the course and scope of his employment until he reaches the worksite. The court also held that the "traveling employee doctrine" under Wis. Stat. § 102.03(1)(f) only applies when the commute prior to the workday is part of the job.

"You may not find justice in the courtroom, but you usually get what you deserve."
David Spicer, American Lawyer.

LIRC

Hoffman v. De Long Co., Inc. (WC Claim No. 2005-024167, LIRC April 29, 2008). **Disfigurement – Amputation**

The applicant lost parts of three fingers in a work accident. He was 20 years old and earned $53,325 per year at the time of the accident but had no post-secondary education or technical training. After he finished healing from the injury, he returned to work with his time-of-injury employer at the same wage. The applicant worked there for a few more months, voluntarily quit, and ultimately settled into a new job earning $11.60 per hour. He then sought benefits for disfigurement under Wis. Stat. § 102.56, noting that a potential employer had questioned whether the applicant could perform required work without the use of three fingers on one hand. The administrative law judge determined that the applicant had demonstrated a probable present or future wage loss as a result of the disfigurement, and awarded the maximum compensation for disfigurement: benefits equal to one year of employment at the time-of-injury wage.

The LIRC affirmed the order, holding that the applicant's age, education, training and previous wages demonstrated that the applicant had suffered a wage loss as a result of the disfigurement. Under Wis. Stat. § 102.56, if a worker returns to work with his time-of-injury employer at the same wage, there can be no benefits for disfigurement. If, however, the worker can demonstrate that present or future wage loss is probable, he is entitled to disfigurement benefits. Here, the applicant's young age, lack of education, and occupation as a manual laborer made it likely that he has or will sustain a significant wage loss.

Klabechek v. Extendicare Health Services, Inc. (WC Claim No. 2004-035669, LIRC May 21, 2008). **Penalty – Refusal to Rehire – Burden of Proof**

The applicant alleged a work injury and filed her treating physician's medical notes in support of her claim. The physician claimed that the injury was work related because the applicant had "noticed the occurrence of pain while at work." The parties entered into a compromise agreement. Subsequently, the applicant's employer terminated her because it had no jobs within the applicant's permanent physical restrictions. The applicant then sought unreasonable refusal to rehire benefits under Wis. Stat. § 102.35(3). The administrative law judge denied the application on the basis that there was no evidence of a work injury in the first place. **The LIRC affirmed the order, holding that when a worker's compensation claim is compromised there is no Department finding of a work injury to support an unreasonable refusal to rehire claim.** In such a case, the applicant may provide medical support to show that a work injury had occurred, but the LIRC noted that the applicant's physician's statement here was insufficient to show a causal connection between the claimed injury and the applicant's work activities.

Stumborg v. City of Wausau (WC Claim No. 2005-002604, LIRC August 28, 2008).
Penalty – Bad Faith – IME Reports

The applicant alleged a work injury that required ongoing medical treatment. The respondent obtained two independent medical examination reports, which indicated that the injury was not work related and that the applicant had reached an end of healing. The applicant had surgery after the second IME report but before the hearing. After the hearing but before the administrative law judge had issued his opinion, the respondent obtained a third IME report, which indicated that even if the applicant had suffered a work related injury she would not be entitled to ongoing medical treatment. The ALJ determined that the injury was compensable and issued an interlocutory order covering future medical expense. The respondent refused to pay ongoing medical expense or additional disability benefits associated with the ongoing medical treatment, based on the third IME report.

The applicant then brought a bad faith claim under Wis. Stat. § 102.18(1)(bp), which the administrative law judge granted with the maximum penalty. **The LIRC affirmed the order, holding that when an IME report subsequent to a hearing is substantially similar to a previous IME report with regard to causation and extent of disability, an insurance company may not rely on the subsequent IME report to disregard an ALJ's order.**

Helland v. Hypro, Inc. (WC Claim No. 1998-030692, LIRC September 18, 2008).
Penalty – Bad Faith – Minimum Permanency Rating

The applicant underwent a two-level cervical fusion with the removal of disc material. The minimum permanency rating when disc material is removed during an operation is 10% at each level, per DWD 80.32. The insurer refused to concede and pay the minimum 10% at each level, despite a Department letter informing it of the minimum permanency ratings for such a procedure. The applicant then brought a bad faith claim under Wis. Stat. § 102.18(1)(bp), which the administrative law judge granted with the maximum penalty. **The LIRC affirmed the order, holding that when an insurer knows that a procedure has been performed for which there are minimum permanency ratings specified in DWD 80.32 but refuses to pay the minimum permanency, the injured worker is entitled to the maximum bad faith penalty.**

Card v. Bartingdale Mechanical, Inc. (WC Claim No. 2007-029890, LIRC October 27, 2008). **Occupational Disease – Hearing Loss – 90 Day Rule**

The applicant alleged occupational hearing loss as a result of his exposure to harmful noise while working for the respondent. He worked for the respondent for 100 days between September 2003 and September 2004 prior to retiring. The parties stipulated that the work environment at the respondent was noisy, but the respondent argued that the applicant was not exposed to noise for a consecutive 90 days while working for the respondent. Under Wis. Stat. § 102.555, the last employer for whom an applicant worked is liable for the entire occupational hearing loss to which the employment contributed if that employment totaled at least 90 days. The administrative law judge determined that the respondent was the last employer for whom the applicant worked and whose employment contributed to his hearing loss, and awarded benefits. The respondent appealed.

The LIRC affirmed, holding that the 90 day requirement in Wis. Stat. § 102.555 does not contemplate consecutive 90 day employment in a noisy environment, but rather 90 days total. The LIRC did not resolve a conflict between prior LIRC decisions regarding whether the 90 day requirement applies to calendar days or actual work days in a noisy environment, as that issue was not pertinent to the claim.

Costabile v. Timberline Cedar Werks, Inc. (WC Claim No. 2004-041706, LIRC November 6, 2008). **Permanent Partial Disability – Healing Period – Prospective Surgery**

The applicant alleged a back injury at work and the respondents denied the claim. After undergoing treatment, the applicant's treating physicians opined that the applicant would require a surgical procedure to fully recover and reach an end of healing, but assessed 5% PPD when it became clear that the respondent would not pay for the prospective surgery. The applicant then sought work with another employer that exceeded the restrictions that his doctors had provided. The respondent argued that, although employers are generally liable for continuing temporary disability when they deny prospective medical treatment that an employee requires to reach an end of healing, the applicant's subsequent employment and his doctors' assessment of PPD demonstrated that the applicant's restrictions were unwarranted and that he had actually reached an end of healing. The administrative law judge disagreed and awarded temporary disability benefits for the period of time prior to the hearing. The respondent appealed.

The LIRC affirmed, holding that a doctor's assessment of PPD after opining that an applicant requires additional medical treatment to reach an end of healing does not establish that the applicant has actually reached an end of healing. The LIRC also determined that an applicant's employment subsequent to such an assessment by his treating doctors that exceeds his restrictions is evidence of a strong work ethic and a need for income, rather than evidence that the restrictions are not warranted.

Rogers v. Trussworks, Inc. (WC Claim No. 1992-072770, LIRC December 11, 2008). **Permanent Partial Disability – Mental Impairment**

The applicant suffered a conceded physical head injury at work. His treating physician assessed 12% PPD as a result of personality changes and cognitive deficits resulting from the injury, which the respondent disputed. The respondent re-employed the applicant at a wage rate exceeding 85% of his pre-injury wage. Under Wis. Stat. § 102.44(6)(a), when an employee is re-employed by the employer at 85% or more of his or her pre-injury wage, only PPD attributable to the employee's physical limitations is compensable. There is no provision in the statutes for compensation for mental limitations, although compensation may be awarded for loss of earning capacity for mental limitations if the employee is not employed at 85% or more of his or her pre-injury wage by the employer. The administrative law judge nevertheless awarded the 12% PPD, and the respondent appealed.

The LIRC reversed, holding that there can be no award for PPD attributable to mental limitations when the employer re-employs the employee at 85% or more of his pre-injury wage. The LIRC noted that, although it may seem inequitable to deny compensation for mental limitations caused by a work injury under these circumstances, the legislature has made the policy decision to not compensate such claims.

Brennan v. Johnny B Home Construction, Inc. (WC Claim No. 2000-009858, LIRC December 29, 2008). **Liability for Medical Expense – Causation**

The applicant suffered a cervical injury at work in 1999. The injury was conceded by the respondent and the parties entered into a limited compromise agreement in 2002, under which the respondent would continue to be liable for future medical expenses related to the work injury. When the applicant sought additional medical treatment in 2006 and 2007, he claimed that it was related to the 1999 work injury and sought payment from the respondent under the limited compromise agreement but did not provide expert medical support opining that the renewed treatment was causally related to the work injury. The claim went to a hearing, and the administrative law judge denied compensation for the renewed treatment. The applicant appealed, asserting that Spencer v. DILHR, 55 Wis. 2d 525, mandated coverage for medical expense in worker's compensation claims when the treatment is reasonable and necessary as a result of the work injury. **The LIRC affirmed, holding that Spencer addressed only the issue of reasonable and necessary medical treatment, and not whether the treatment was causally related to the work injury.** A worker's compensation applicant must provide causation support for any claim for renewed medical treatment.

Casta v. K Mart Corp. (WC Claim No. 2006-034342, LIRC March 31, 2009).
Occupational Disease – Causation – Sufficiency of Medical Opinion

The applicant was an operations manager at a K Mart store. The store had serious mold and mildew problems over the years he worked there, which allegedly caused a "musty odor." After he retired he was diagnosed with sarcoidosis, an immune deficiency that causes granulomas in the lungs. There is no medical consensus on a specific cause of sarcoidosis, but exposure to water-damaged buildings – among other environmental factors – has been associated with the disease. One of the applicant's treating physician opined that his sarcoidosis was caused by his exposure to mold and mildew while working at the respondent. The respondent's medical expert opined that the applicant's sarcoidosis appeared without cause, and that the medical literature did not support a causal link to exposure to mold or mildew. The administrative law judge denied the benefits. The applicant appealed.

The LIRC reversed, holding that while there is no medical consensus on a specific cause of sarcoidosis, the medical literature points to a strong enough association between sarcoidosis and exposure to water-damaged buildings that compensation may be awarded. The LIRC further noted that when evidence submitted in a worker's compensation claim does not show unanimous scientific consensus as to causation of a disease, compensation may still be awarded when it is scientifically probative and credible.

Tucker v. McDonalds (WC Claim No. 2008-010720, LIRC May 28, 2009)
Injury Arising Out of Employment – Non-Traumatic Mental Injury

The applicant was working as a cashier/cook when she was involved in a heated argument with a customer over an incorrect food order. During the argument, the upset customer pulled a handgun from his waistband and exhibited it, but did not aim the weapon at the applicant. The applicant then challenged the customer to shoot her. Subsequently, the applicant alleged that she suffered from post traumatic stress disorder and required extensive psychological treatment. She claimed entitlement to the medical treatment and time missed from work for the treatment. The claim proceeded to a hearing and the applicant prevailed. The respondent appealed, arguing that the applicant's prior drug abuse and sexual abuse were to blame for any psychological issues the applicant suffered from, and that the situation was not sufficient to cause a non-traumatic mental injury under Wisconsin worker's compensation.

The LIRC affirmed, holding that an employee can sustain a non-traumatic mental injury when a disgruntled customer displays a gun to the employee in a threatening manner. Non-traumatic mental injuries can only be claimed as work-related and covered under worker's compensation if they result from "extraordinary stress" that constitutes "a situation of greater dimensions than the countless emotional strains and differences that employees encounter daily without serious mental injury." School District No. 1 v. DILHR, 62 Wis. 2d 370, 377-78, 215 N.W.2d 373 (1974). The LIRC held that arguments with customers do not constitute "extraordinary stress," but that being threatened with a gun can constitute "extraordinary stress."