CORRESPONDENCE/MEMORANDUM — STATE OF WISCONSIN

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To: The Correspondents

From: Helen L. Schott

Subject: Law in Wisconsin concerning subtraction from permanent disability for preexisting conditions.

After checking all reported Wisconsin cases on this subject and Larson on Workmen's Compensation, the state of the law in Wisconsin is clear that no subtractions may be made from permanent disability for preexisting conditions unless these are disabilities and not mere conditions. Larson on Workmen's Compensation in section 59.22 discusses what kind or prior disabilities which are nonwork-related are apportionable in permanent disability. He states in his second paragraph "Apart from special statute, apportionable "disability" does not include a prior nondisabling defect or disease that contributes to the end result. Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in states having special statutes on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death. Apportionment does not apply in such cases nor in any case in which the prior condition is not a disability in the compensation sense."

I have quoted at length from Larson since his statement is so clear and so much on point to the particular problems we are having on these final work sheets. Larson makes it clear later on in this section that this applies as much to apportionment of loss of earning capacity as to permanent disability for scheduled and unscheduled conditions. You should note that he states later on "Of course, the matter is entirely different if the degenerative condition is itself the cause of the disability for which compensation is claimed quite apart from the effect of the industrial injury . An example of this limitation on the rule is one from Arizona but which is just as pertinent in Wisconsin. This is the case of a claimant with an arthritic hip joint who sustains an accident when she strained the adductor muscles of her right leg. Three physicians were consulted and the conclusions of the consultations were that she had a preexisting degenerative joint disease which activated the industrial

injury but that her present working disability was due to the preexisting arthritis and not to her injury. The court held that this medical testimony supported the Industrial Commission's finding of an absence of any physical residual impairment causally related to the accident. In this case, which was Murphy v. Industrial Commission, 20 ARIZ. APP 21, (1973), the employe clearly had a preexisting disability and the work injury did not contribute to the end result of that preexisting condition which was her working disability.

Keeping in mind this rule from Larson, we can turn to the Wisconsin cases. It appears that there is a long line of Wisconsin cases which agree with Larson on this point. The most prominent of them and the one with the clearest statement is M & M Realty Co. v. IC, 267 Wis 52 (1953). In that case, there were two industrial accidents at issue and the Commission found that although they were both back injuries, that the first back injury had caused no disability and that the person was not disabled as a result of the first injury. The examiner and the Commission went on to find that there may have been a preexisting condition; that is a somewhat weakened back, but that all disability was due to the second injury. To quote the court in that case, it stated "The fact, that structures which previously had held the disc in place between the vertebra of his back had been weakened by a prior injury, or injuries, so as to make his back more susceptible to injury, does not preclude holding the M & M Realty Company and its insurance company liable for the entire disability. Numerous decisions of this court have held that the employer takes an employe "as is" and the fact that he may be susceptible to injury by reason of a preexisting physical condition does not relieve the last employer from being held liable for worker's compensation benefits if the employe becomes injured due to his employment, even though the injury may not have been such as to cause disability in a normal person."

The court also makes it clear that preexisting conditions may not be disabilities. It states later on that "The fact, that a former injury may have produced a weakness in the employe's body making him more susceptible to further injury than would a normal individual, does not necessarily in itself establish a permanent disability of a compensable injury. Such employe might never sustain a further injury, in which case he will never be disabled." The court makes it very clear in this case that if it were established from medical testimony that the employe had sustained permanent disability as a result of his first accident the finding would be different. But as I stated before, a preexisting weakness does not establish a permanent disability of a compensable nature.

M & M Realty Co., supra, also cites a long line of cases in Wisconsin which had agreed with the doctrine found in this case. Therefore, in M & M Realty Co. in 1953 the rule was already well

established that preexisting physical conditions, without which there would not have been a serious injury, are immaterial to the duty to pay for compensation.

In Theisen v. IC, 8 Wis 2d 542 (1966), Green Bay Soap Co., Inc. v. DILHR, 87 Wis.2d 561 (Ct. App. 1976) and Casey v. IC, 30 Wis.2d 542 (1966) we have three cases citing M & M Realty Co. for this very point with approval. It is clear that from 1953 to 1966 this is good law. Brown v. IC, 9 Wis 2d 555 (1959) the court states "The fact that the employe had a preexisting diseased disc which was liable to herniate even from normal work effort as a bricklayer does not relieve the employer from liability. An employer takes an employe "as is" and if he is suffering from disease predisposing to "breakage" and an exertion required by the employement causes the "breakage" at the moment of exertion the employer is liable under the Act."

In Lewellyn v. DILHR, 38 Wis.2d 43 (1968), the court clearly stated that if there was a definite breakage or a letting go or structural change or an aggravation beyond normal progression of a preexisting progressively deteriorating or degenerative condition there was an accident causing injury or disease and the employe would recover.

The last case in this area is Semon's Department Store v. DIHLR, 50 Wis 2d 518 (1970). The employe had, in that case, a preexisting shoulder condition which inclined the employe to sustain dislocations. The employe had a 1963 accident in which she had a dislocated shoulder which further weakened the shoulder ligaments and then an accident at work in 1967 which caused another dislocation and after which surgery was performed to prevent further dislocations. After the surgery there was 10 percent loss of use of the shoulder. There was clearly a preexisting condition prior to 1967, however, the medical opinions on whether that condition was disabling were all made after the surgery in 1968. There were some opinions that after the 1963 injury there was some permanent disability but because those opinions were made in 1968 from examinations made in 1968, not much credence was placed on these opinions by the Division, the Commission, or even the Supreme Court. The Supreme Court finally stated, "Although there is some dispute as to whether the applicant has suffered a permanent disability as a result of the 1963 incident, it is undisputed that the 1963 incident did not require surgery. As a result of that incident her shoulder became unstable and had a tendency to dislocate. However, susceptibility to further injury does not necessarily establish a permanent disability." In this case the permanent disability was assessed against the second injury in 1967 in total even though everyone agreed that there was a preexisting condition which weakened the shoulder. This case also cites M & M Realty with approval.

Therefore, after review of the relevant cases in Wisconsin, it appears that unless there is an actual preexisting disability, there will be no apportionment of permanent disability assessed after an industrial accident or disease.

The only case I could find which did support an apportionment was that of Giant Grip Mfg. Co. v. IC, 271 Wis 533 (1955). In this case, the court approved a Commission's apportionment of liability for temporary disability, medical expense and permanent disability between two industrial accidents. There was competent medical testimony in that case which said that all the disability and medical expense were due to two accidents and that there was disability after the first accident. This case apportioned all of the liability for the two accidents 50/50 and was supported by competent medical testimony. We do not, in general, see these factors when we are seeing the apportionments made by the doctors. This case does not govern these situations because there is only a preexisting condition and not disability. Also, there are generally not two industrial accidents involved. Larson states that these cases should be and are handled differently when there are two industrial accidents as opposed to preexisting conditions and one industrial accident.

If there are any additional questions on this issue, they should be referred to me.

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