WISCONSIN ASSOCIATION OF WORKER COMPENSATION ATTORNEYS

SOME SELECTED CONSIDERATIONS FOR THE ADMISSION OF EVIDENCE IN WORKER'S COMPENSATION CLAIMS

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INTRODUCTION

In J.I. Case Co. v. LIRC, 118 Wis. 2d 45, 346 N.W. 2d 315 (App. 1984) the Court of Appeals recited the following:

> "The LIRC is given broad discretion in determining whether certain evidence will be considered. It is not bound by the common law statutory Rules of Evidence and may admit all testimony having reasonable probative value."

The problem with this recitation and with the approach that has sometimes been taken to the relationship between the Rules of Evidence and what appellate courts have described is the "broad discretion" afforded to the Department regarding the application of the Rules of Evidence is that it manifests a lack of appreciation for the historical context for the Rules of Evidence. The position disregards the fact that the Rules of Evidence--developing as they may be--represent a codification and distillation of hundreds of years of jurisprudential analysis. The Rules of Evidence set out in Wis. Stats. Chapter 901 through 911, are not some random accumulation of regulations. They are not technical, legal or legislative rules unconnected to a "real world" process by which the truth is discovered. They are well established guidelines for seeking the truth developed from common law. Unfortunately, the some times perceived inapplicability of the Rules of Evidence to worker's compensation proceedings can be discrediting to the hearing process. Ultimately, the Rules of

Evidence are as credible a mechanism for discovering the truth as any other system designed for that purpose.

I. THE APPLICATION OF THE RULES OF EVIDENCE

It is, of course, axiomatic at this point in the development of the law of worker's compensation that the Rules of Evidence do not "technically" apply at worker's compensation proceedings. This is articulated by exclusion in Wis. Stat. Sec. 911.01(1) which makes the Rules of Evidence applicable "to the *courts* of the State of Wisconsin,..." [emphasis added]; See also J.I. Case Co. v. LIRC, 118 Wis. 2d 45, 346 N.W. 2d 315 (Wis. App. 1984); see also Wis. Stat. Sec. 237.45(1) on the admissibility of the Rules of Evidence in administrative proceedings generally.

II. THE GENERAL RULE OF FAIR PLAY

Historically, the courts have interpreted that proceedings in worker's compensation claims should be governed by a general rule of "fair play." This rule has been extended to encompass, at least in a general sense, the admission of evidence. In Bituminous Casualty Co. v. DILHR, 97 Wis. 2d 730, 734, 295 N.W. 2d 183 (App. 1980), the court included in the concept of "fair play," as a mandate of due process that each of the parties is entitled to meet the allegations proferred by the opposing party "by competent evidence."

Unfortunately, the courts, and some times the Department and Commission, fail to recognize that the Rules of Evidence--and the principals of common law out of which they arise--are premised upon Rules of Fair Play. Through centuries of development, they are intended to separate the evidentiary "wheat" from the "chaf."

The following is a discussion of some of the Rules of Evidence and their application in worker's compensation cases that have either general application or specific interest.

III. FOUNDATIONS

The requirement for evidentiary foundations is simply a rule that requires that a component of an item of evidence satisfy certain conditions precedent to the admission of the evidence. The three most frequent areas in which evidentiary foundations are encountered in worker's compensation proceedings are: (1) lay testimony from personal observation; (2) documentary evidence; and, (3) expert evidence.

A. Lay Testimony

The requirement for a foundation with respect to the taking of testimony from a lay witness is simple. It is intended to require that a person testify only to those matters as to which he or she has "personal knowledge." (Wis. Stat. Sec. 906.02) Smith v Rural Mutual Insurance Co., 20 Wis. 2d 592, 123 N.W. 2d 496 (1963). Thus, an applicant's witness cannot testify to the physical activities of a job unless he or she has either performed the job or has personally observed the performance of the job duties by another. Similarly, respondent's counsel cannot call as a witness to dispute the applicant's proof of the job's physical requirements a human resources employee who has neither performed the job nor observed its performance. On more than one occasion, I have seen human resources personnel appear at a hearing to testify regarding the requirements of an employment position which existed at a time that predated the commencement of his or her employment by years. Permitting such testimony regarding what the job activities may have been

by such a witness is patently inappropriate.

The exception of the rule requiring that a lay witness testify only to matters of personal observation is on the occasion when a witness expresses an opinion which is both based upon perception and helpful to understand his or her testimony or to resolve an issue of fact. *See Wis. Stat. Sec. 907.01.* Thus, for example, a witness to an auto accident who is in a reasonable position to judge the speed of a vehicle may express an opinion on the subject. City of Milwaukee v. Berry, 44 Wis. 2d 321, 171 N.W. 2d 305 (1969). It should be noted that such an opinion is not considered an expert opinion but a lay opinion based upon reasonable observation. Thus, the Rules of Evidence sanction the opportunity to call a co-employee to establish, for example, that employment activity is "fast paced," or that the physical responsibilities of the job are difficult, etc.

B. Documentary Evidence

Foundations for the admissibility of documentary evidence are set out in Wis. Stat. Sec. 909.01 and Sec. 909.015. Basically, the foundation requires that any writing, diagram, photograph, etc. be identified and authenticated as the thing which it purports to be and as originating from a source of authority. Thus, while some documents are self-authenticating because their creation and maintenance are attended by sufficient guarantees of trustworthiness, see Wis. Stat. Sec. 909.02, the vast majority of documents offered for admission into the evidentiary record require a foundation--usually in the form of a foundation witness. Thus, for example, personnel records require a custodian of records from the personnel office. Similarly, the use of photographs may require that the photographer be available to testify to the time and place of the photograph as well, if there is a challenge, to the chain of custody of those photographs from the date of their being taken

to the date of their production for the consideration of the Administrative Law Judge. Of course, in most instances, opposing counsel will stipulate to the foundation for photographic evidence. However, in those occasions, when the stipulation does not occur, the attorney offering the photographs must be prepared to lay a foundation.

It is important to realize that there is a difference between laying a foundation that satisfies criteria of authenticity and otherwise making the authenticated document admissible into the evidence. An illustration of the distinction is set out in Rodgers v. Leader Nursing & Rehabilitation Home, Claim No. 93068739 (decided December 11, 1997). In that claim, the applicant attempted to establish a claim for retraining benefits by submission of certified DVR records. She did not, however, call the DVR counselor to testify. In ruling against the admissibility of the hearsay evidence of the certified DVR records represented, the Commission described:

> "In this case the applicant introduced certified copies of DVR records to establish that she was certified for retraining by DVR in 1996 (Exhibit D, and in the letter from a counselor showing that she had been certified for services in 1994 (Exhibit E). However, no one from DVR actually testified, neither the applicant's counselor nor DVR's record custodian. Consequently both Exhibit D and E are inadmissible hearsay under the Wisconsin Rules of Evidence.

Clearly, the Commission recognized the difference between authentication and admissibility. Authentication is simply the first step in the process. As described above, some records are self-authenticating because they are prepared and maintained with sufficient guarantees of trustworthiness. Thus, an authenticating witness is not necessary. However, there is a significant distance between establishing that a document is what it says it is (authentication) and getting that document into the record of evidence. As the Commission in *Rodgers* describe, one alternative would have been to call the DVR counselor to testify in person. The other would have been to call

a records custodian in an attempt to make the record admissible pursuant to the exception set out in Wis. Stat. Sec. 908.03(6). In either event, the evidentiary issue with which applicant's counsel was confronted is the difference between authentication and admissibility. Obviously, counsel could easily establish that a document is what it purports to be without bringing it within a purview of admissibility (either by definition or exception). In this case, the counsel did not recognize the distinction between those independent requirements. Ultimately, the Commission correctly remanded the matter for an evidentiary resolution of the admissibility issue through the testimony of a DVR counselor or a custodial witness.

It is important to understand that when an item of documentary evidence is offered in evidence, the document itself becomes the "witness." If the contents of the document, or any part thereof, is excludable, the document itself, or the excludable portion thereof, should be rejected by the Administrative Law Judge. Thus, for example, if an IME relies upon information generated by the investigation of an insurer or employer into the circumstances of a claim and the IME makes reference to such materials, those portions of his or her report should be stricken. ***See Appendix A.*** In this respect, one should be aware that while Wis. Stat. Sec. 907.03 permits an expert witness to rely his or her opinion upon inadmissible evidence if the information is of a kind reasonably relied upon by experts in the field, this "expert's reliance" statute does not make the information itself admissible into the evidence. Gibson v. State 55, Wis. 2d 110, 197 N.W. 2d 813 (1972) Thus, a party to a worker's compensation claim cannot "bootstrap" inadmissible evidence into the record by having his or her physician or vocational expert reference it in a report.

1) The Best Evidence Rule

The best evidence rule is a common law Rule of Evidence relating to the admissibility of written evidence and requires that the document itself be produced for its contents to become a part of the evidentiary record. Wis. Stat. Sec. 910.02 and 910.04. From my experience, this rule is probably the Rule of Evidence most commonly ignored by Administrative Law Judges. Even judges otherwise familiar with the Rules of Evidence have been known to permit a witness to testify to the contents of a letter that was sent, an observation in an employment personnel file, a document generated in the course of an investigation into the injury, etc.

2) E-mails

As we have all become painfully aware, e-mail communications within businesses and corporations and even from without have invaded and revolutionized the ways in which people communicate. They are effectively documented telephone calls. As such, they represent the proverbial "loose cannon" in the world of communications. As nominal as my personal familiarity with electronic communications is, I have had a number of experiences involving the use of e-mail communications at hearing. The most frequent of such communications useful at trial deal with e-mails among personnel within a corporation or business. ***See Appendix B***. However, I have also had experience where e-mails from employees to employer personnel have proved salient. ***See Appendix C.*** Firstly, it is important to note that notwithstanding any assertions of confidentiality, there is no evidentiary privilege which attaches to e-mail communications that does not otherwise exist in the law. Thus, notwithstanding the description in the e-mail to the effect that "this communication is confidential and intended only for the directed recipient" there is nothing to

protect the communication from introduction into the evidence unless it is otherwise attended by evidentiary privilege, e.g. attorney client communications, husband wife communications, etc.[1] As is the case with documentary communications generally, the evidentiary foundation for the introduction of e-mail is simply intended to establish that the communication is what it purports to be and, more specifically, originates with the purported sender. Thus, the foundation focuses on the credibility establishing the identity of the sender or recipient and the trustworthiness of the method by which the communication takes place. Attached hereto as ***Appendix D*** is a sample form for the laying of a foundation for the admissibility of an e-mail communication.

The focus of the foundation laid for the admissibility of e-mail is that of identification and authentication. For purposes of laying the foundation for an e-mail which has been sent, the foundation is no different than the evidentiary foundation that one would use to identify, authenticate and offer for admission a communication sent by post-mail. On the necessity of the foundation, see In re Maxcy's Estate, 262 Wis. 89, 54 N.W. 2d 194 (1952). The difficulty comes in with identifying and authenticating an item of e-mail which is *received.* You will note from **Appendix D** that the

[1]Note: For a discussion of the distinction between confidentiality and privilege specifically relating to the fact e-mail communications are not attended by the statute of privilege, see the recent decision in In re the Matter of a John Doe Proceeding: LTSB v. State of Wisconsin, Supreme Court Case No. 02-3063-W holding that electronically stored communications of the statutorily created Legislative Technology Service Bureau were not protected from the discovery subpoena of the Dane County District Attorney in a John Doe proceeding.

intention of the foundation is to verify the identity of the sender. The foundation is a combination of an attempt to establish electronic communications as a trustworthy mechanism of communication as well the familiarity of the sender with the subject matter of the communication. Because the sender's address may be fabricated or misrepresented on the computer, the electronic communication that e-mail employs is not attended by the same guarantees of trustworthiness which posted-mail enjoys. Thus, if the sender in fact denies having sent the e-mail, and challenges his or her participation in the commination, it may in fact be necessary to call as a foundation witness a representative of the server organization to testify to the electronic mechanisms by which the accuracy of communications between the sender and receiver are assured. ***Imwinkelried, Edward J., Evidentiary Foundations, Fifth Edition, LexisNexis*** (2002; originally printed in 1980).

C. Expert Witnesses

The foundation required for the admissibility of an expert opinion is basically that which establishes his or her expertise to testify in a given subject which is not otherwise known to or given to understanding by a lay person. Additionally, the subject of the opinion must otherwise assist the Administrative Law Judge in understanding the evidence. Wis. Stat. Sec. 907.02; see also Lemberger v. Koehring Co., 63 Wis. 2d 210, 216 N.W. 2d 542 (1974). Because a trial to an Administrative Law Judge is, in effect, a trial to a "learned" finder of fact, great latitude is given to the Administrative Law Judge with respect to the extent to which a foundation of qualification is required for expert witnesses. General Accident Life Insurance Corp. v. Industrial Commission, 223 Wis. 635, 271 N..W. 385 (1937). Such finders of fact as Administrative Law Judges are considered less likely to be misled by "junk science" or other forms of speculative expertise.

It is clear pursuant to Sec. 907.02 that the admissibility of an opinion from an expert witness turns upon two factors:

1) That the witness be qualified to speak with expertise by virtue of his or her "knowledge, skill, experience, training or education...."; and,

2) That the "specialized knowledge" premised upon which the witness testifies will assist the trier of fact in understanding the evidence.

One of the most common occasions as to which an issue arises vis a vis these criteria include IME's who express opinions as to whether or not any injury occurred. See the discussion of the physician's report in Wick v. Merrill Area Public Schools, Claim No. 2002-014249 (decided. May 7, 2004 attached as ***Appendix E*****).** I would submit that unless the physician purports to have expertise in accident and incident reconstruction, he or she has no "specialized knowledge" from which to express an opinion regarding a matter of fact rather than an issue of medical dispute.

Another such example arises out of what is referred to as non-traumatic mental injury claims (colloquially referred to as "mental/mental" claims). Under such circumstances, the applicant must establish that the stressors to which he or she were exposed are "beyond those common to occupational and non-occupational life." Wis. Stats. Sec. 102.01(2)(c). On various occasions, I have seen both applicant and respondent psychologists and psychiatrists express opinions as to whether or not the employee was exposed to "unusual stress" in the workplace. Clearly, unless such a psychologist or psychiatrist also professes to have expertise of a vocational nature which qualifies him or her to perform a comparative analysis regarding the stressors to which the claimant was exposed and those to which similarly situated employees are exposed, the opinions should be excluded. Because of the admissibility of certified medical reports pursuant to Wis. Stat. Sec. 102.17(1)(d), in virtually every occasion the Administrative Law Judge will admit the report

describing that he or she will give it such evidentiary weight as it deserves. However, Wisconsin Administrative Code DWD Sec. 80.22(1) describes with respect to certified medical reports that matter stated in such reports which would not be competent or material evidence if given as oral testimony shall not be considered competent or *prima facie* evidence if objection is made unless otherwise corroborated by competent testimony or evidence.

IV. HEARSAY EVIDENCE

A. The Definition

Firstly, from a definitional standpoint, while everyone is aware that hearsay is defined as a statement made not under oath and not subject to cross examination offered for the truth of the matter asserted, too few are aware of those statements that do not fall within the perimeters of this definition.

It is important to note that statements offered other than to establish the truth of the matter, i.e. intent such as discussed in Leger v. DILHR, 50 Wis. 2d 651, 185 N.W.2d 300 (1971) are not exceptions to the Hearsay Rule. They are simply not contained within the definition of hearsay. Similarly, a statement inconsistent with a witness's in-trial testimony and an admission of a party opponent are *not* hearsay by definition. See Wis. Stat. Sec. 908.01(4)

There is a great deal of confusion about whether or not hearsay evidence is admissible in worker's compensation proceedings and, if admissible, the extent to which such evidence may support a finding of fact. In Rodgers v. Leader Nursing Home & Rehabilitation, Claim No. 93068739 (decided December 11, 1997) the Commission recited:

"...An ALJ may admit hearsay evidence in a worker's compensation hearing if the

> hearsay has probative value...however the respondent is correct in pointing out that such hearsay evidence, perhaps admissible, may not serve as the sole basis for a finding in a contested case...."

In Erickson v. DILHR, 49 Wis. 2d 114, 181 N.W. 2d 495 (1970) the Supreme Court affirmed a reversal of a Department dismissal of a claim to benefits on the grounds that the dismissal relied in part on the testimony of a nurse who described what she had heard about the applicant's report of injury. In effect, the nurse testified that she had heard that the applicant made statements to another nurse at the time of his admission to the "plant hospital" failing to describe a work injury. Citing to Wisconsin Telephone Company v. Industrial Commission, 263 Wis. 380, 57 N.W. 2d 334 (1953), the court affirmed that a finding of fact made by the Department may not be based upon hearsay evidence. The elimination of the hearsay relating to the statement of the applicant left the *prima facie* case of the applicant "unimpeached" and the Department's dismissal was reversed.

The importance of the Hearsay Rule to proceedings in worker's compensation claims is as significant by the Rules of exception as it is by the Rule of Hearsay itself. Leger v. DILHR, 50 Wis. 2d 651, 185 N.W. 2d 300 (1971) was a case involving a traveling salesman who was killed while walking on a highway having left a tavern at which he had stopped while on a business trip. The obvious issue is as to whether or not he had deviated from the purpose of the trip and not yet returned to the business purpose by the time of his death. While in the tavern, the decedent had made statements describing his intention to sell a car that evening. While the record before the court failed to reveal whether the hearsay statements were admitted into the evidence, the respondents "strenuously" argued on appeal that the statements were inadmissable. The court concluded that the statements were admissible as "declarations of intention ...." [at p 5]. Because the record before the Supreme Court failed to disclose how the Department ruled on the "hearsay evidence," the matter

was remanded for further findings regarding whether or not the Department admitted and considered the statements of the decedent. The clear inference of the decision is that the decedent's statements were sufficiently probative to *require* that the Department document its ruling on the statements as a part of its rationale for dismissal of the claim.

In any case, an understanding of the unique manner in which the worker's compensation law treats the Rule of Hearsay is obviously necessary to be fully equipped to prepare evidence for the hearing. Reduced to its simplest concepts, the Rule of Hearsay requires an understanding of the following:

1. The definition of hearsay evidence; including evidence excluded from the definition;

2. An understanding of the 24 exceptions to the Rule of Hearsay set out in Sec. 908.03(1) through (24);

3. An understanding of the seven exceptions to the Hearsay Rule set out in Sec. 908.045 which depend upon the unavailability of the declarant.

Because the definitional concepts and the Rules of Exception are sometimes so loosely perceived and applied, there can be confusion regarding the admissibility of a particular hearsay statement. Thus, for example, it is necessary to distinguish between a present sense impression set out in Wis. Stat. Sec. 908.03(1) and a statement of recent perception set out in Wis. Stat. Sec. 908.45(2). Similarly, there is a significant difference between an admission of a party opponent as described in Wis. Stat. Sec. 908.01(4)(b) and a statement against interest set out in Wis. Stat. Sec. 908.045(5).

Obviously, this is not the place to discuss the full measure of the application of the Rule against Hearsay. However, I will venture some general discussions regarding the concepts described above as well as examples of their use within the worker's compensation forum.

B. Medical Proof and the Rule Against Hearsay

As discussed above, Wis. Stat. Sec. 102.17(1)(d), which is obviously peculiar to worker's compensation proceedings, is--for worker's compensation purposes--a 25th exception to the Rule of Hearsay. The statute provides that the contents of certified medical reports "constitute *prima facie* evidence as to the matters contained in them." However, due to the discretion for the admissibility of hearsay evidence permitted by Wisconsin Administrative Code Sec. DWD 80.12(1)(c), the Department or the Commission may admit medical reports into the evidence notwithstanding the absence of a WC-16B certification. In Vande Kolk v. Quad Graphics, Inc., Claim No. 1999-019801 (decided July 25, 2001) the Commission admitted into the evidence narrative medical reports uncertified by attachment to a WC-16B medical report form. In permitting the narrative reports into the evidence, the Commission described:

> "The lack of certification makes Dr. Toivonen's reports hearsay. The ALJ may admit hearsay evidence into a worker's compensation hearing if the hearsay has probative value...There is no demonstrated prejudice to the applicant in admitting the reports since the applicant's attorney actually had Dr. Toivonen's reports for two years."

See Appendix F

In Wicke v. Merrill Area Public Schools,, Claim No. 2002-014249 (decided May 7, 2004) the Commission considered the use of the phrase "*prima facie* evidence" used in the statute. Specifically, the Commission described the phrase as intending to reflect that the contents of a WC-16B medical report form represents "presumed fact" which stands unrebutted in the absence of contrary evidence and may be considered established fact. However, the introduction of contrary

evidence places the contents of this WC-16B report into the realm of all evidence to be weighed by the trier of fact. See also Erickson v. DILHR, supra. For a further--and lengthier--discussion of *prima facie* evidence, and the rebuttal thereof, see Istvanek v. County of Kenosha, Claim No. 2000045183 (decided. March 25, 2004). An interesting opposition to the ruling in *Wicke* is the ruling in Donovan v. Milwaukee Transport Services, Inc., Claim No. 1999-034575 (decided April 30, 2001) in which the Commission distinguishes between certified medical records and a WC-16B medical report form prepared by a practitioner. Specifically, citing to Lange v. Federal Express, Claim No. 94026706 (decided March 20, 1996) the Commission asserted that:

> "...Treatment/office notes alone, which are certified by the custodian but not by the practitioner, are not *prima facia* evidence of diagnosis or cause in the extent of disability."

Completely unrelated to the fact that Administrative Law Judges are "learned" finders of fact, are concerns about the admissibility of hearsay evidence. The status of Administrative Law Judges as experienced triers of fact relates directly to the admissibility of evidence which might have greater prejudicial than probative value. See Wis. Stat. Sec. 904.03 The obvious import of the analysis is that an experienced trier of fact will not be mislead by the inappropriate prejudicial effect of evidence the probative value of which is outweighed by the prejudicial effect. That is, the Administrative Law Judge will be able to weigh the probative value of the item of evidence without being prejudicially mislead by inappropriate emotional or psychological inference. It should be noted that this is not a concern with respect to the admission of hearsay evidence. The admission of hearsay evidence is a due process issue. It has nothing to do with whether or not the trier of fact is "learned" or "unlearned." It has to do with the constitutional entitlement of a party to a claim to

know the witnesses against him/her/it and to have a reasonable opportunity to meet the evidence against him/her/it with "competent evidence." Bituminous Casualty Co. v. DILHR, supra. Thus, for the Administrative Law Judge to rule that hearsay evidence will be admitted but he or she will not be "mislead" by such evidence misses the point of the objection.

C. Statements Made For Purposes of Medical Diagnosis or Treatment

Wis. Stat. Sec. 908.03(4) permits the admissibility into the evidence of statements which had been made for purposes of medical diagnosis or treatment. The exception does not appear to distinguish based upon the declarant. That is, the statement may be made by the patient, the treating practitioner or, presumably, some one tangential to the relationship, e.g. a nurse or staff member of the medical provider. ***Appendix G***

The rationale for this exception to the Hearsay Rule is that it is presumed that statements made in the course of diagnosis and/or treatment will not be fabricated. See Noland v. Mutual of Omaha Insurance Co., 57 Wis. 2d 633, 205 N.W. 2d 388 (1973). In Wicke v. Merrill Area Public Schools, 2002-014249 (decided May 7, 2004) the Commission considered the admissibility of medical records that documented an employee's failure to have described his work injury very early in the course of his treatment, i.e. close in time to the alleged injury. Applicant's counsel objected to the admissibility of the medical records on several grounds, including hearsay. ***See Appendix E*** In ruling that the medical records were admissible, the Commission resorted to several exceptions to the hearsay rule, including Wis. Stat. Sec. 908.03(4) which, as described by the Commission, were admissible as "statements made for the purpose of medical diagnosis or treatment are not excluded hearsay, even if the declarant is available as a witness." ***at page 4***

V. IS THERE A MISSING WITNESS "INSTRUCTION" IN WORKER'S COMPENSATION CLAIMS?

Wisconsin jury instruction Wis. JI-Civil No. 410 provides:

> "If a party fails to call a material witness within its control, or whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness."

The import of the instruction is to communicate to the trier of fact that if a witness within the control of a party to a claim whose testimony would "naturally" be expected to be favorable to that party fails to produce the party as a witness, a reasonable inference may be drawn that had the witness been called to testify his or her testimony would have been adverse to that party. On various occasions in the course of trying cases to Administrative Law Judges, I have heard Administrative Law Judges make reference to the inference created by the failure to call such a witness. Clearly, the Commission has been known to draw adverse inferences when a party in possession of evidence--such as for the proof of a wage--fails to produce it or otherwise explain its absence. See Wisconsin Worker's Compensation Uninsured Employee's Fund v. Urban Artifacts, Claim No. 1999-2413 (decided May 9, 2000) and Wilson v. Urban Artifacts, 1998000072 (decided February 24, 1999). On some occasions, I have seen Findings of Fact and Order make reference to that inference. The principal problem with dealing with such "absent witness" inferences is that a party--disadvantaged by the lack of discovery--cannot always reasonably anticipate those witnesses which the attorney should be expected to call. Often, until the testimony of the applicant of witnesses for the respondent is heard, opposing counsel is not aware of the need for rebuttal evidence.

CONCLUSION

As discussed, I would submit that faithful reliance upon the Rules of Evidence both enhances the credibility of the evidentiary process of a worker's compensation claim and assists in guaranteeing a search for the truth. From a review of the decisions of the Commission over the last several years, including those set out in the decisions in *Rodgers, Wicke,* and the like, it would appear that the Commission agrees. The fact is that in the last two decades the worker's compensation practice has becoming increasingly litigative and sophisticated. The Rules of Evidence, assisting as they do the search for the truth and arising out of common law, can only be helpful in dealing with the complication that arises out of this level of sophistication.

APPENDIX D

Sample Foundation for Admitting E-mail as Documentary Evidence

There are a number of ways suggested for laying the foundation for the admissibility of e-mail. ***Imwinkelried, Edward J., Evidentiary Foundations, Fifth Edition, LexisNexis.*** The following is a sample method for proving the contents of an e-mail. It is a simple example and becomes more complicated if the component of the e-mail alleges fabrication in light of the ability to enter a fictitious name into the address of the sender or recipient.

The witness is the recipient of the e-mail:

Q: What is your name?

A: Jane Doe.

Q: How are you employed?

A: I am an assistant to the human resources department of the _____ Construction Company.

Q: As an HR assistant, is it a part of your responsibilities to communicate with injured employees to determine the status of medical treatment, the availability of work within the medical restrictions of injured employees, etc.?

A: Yes it is.

Q: Typically, how do injured employees communicate with your office?

A: In various ways: they come by, they call, they e-mail, etc.

Q: When the communication is by e-mail, what is the e-mail address to which

communications are set?

A: We invariably receive e-mail communications at org.mail@_____ Construction Company.

Q: For how long has the _____ Construction Company used this e-mail address to communicate with employees and others:

A: For about 5 years.

Q: What is your practice as an HR assistant at _____ Construction Company with respect to reading e-mail?

A: I review my e-mail at least once a day.

Q: In the past have you received e-mail from a sender identified as "claimant for TTD.com"?

A: Yes.

Q: On these occasions, who do you understand to be the sender at the e-mail address of "claimant for TTD.com"?

A: James claimant.

Q: What experience have you had to conclude that James claimant is the sender whose e-mails originate that "claimant for TTD.com"?

A: In the past I communicated with James in that way and subsequent to such communications have spoken with him about the communications that make it clear--at least to me--that he is the originator. We discussed the contents of e-mail communications from time to time and he has always had full knowledge if not personal knowledge of the subject of the e-mails.

Q: For example?

A: Each time he receives a release to return to work with restrictions he later comes by or calls to ask as to whether there is work within those restrictions.

Q: On occasion have you sent e-mail to James at "claimant for TTD.com"?

A: Yes.

Q: Based on your discussions with James, do you have reason to believe that he received e-mail sent to that address?

A: Yes.

Q: Why?

A: Because his conversations with me confirm his knowledge of the e-mail in various ways.

Q: For example?

A: Well if I sent an e-mail inquiring as to whether or not this position can modify the restrictions to change the weight restriction, he will call me or come by to indicate that he has spoken to his physician about it and he is either willing or unwilling to do so.

Q: I show you what has been marked as Respondent's Exhibit 10. Have you seen this document before?

A: Yes I have.

Q: What is it?

A: It is a copy of an e-mail that I received from "claimant for TTD.com" on February 29, 2004.

Q: When did you first see this document?

A: When I first printed it after having read it.

Q: When was that?

A: February 29, 2004

Q: How do you know that?

A: Because I read my e-mail every day.

Q: Did you print it personally.

A: Yes I did.

Q: What did you do with the print-out?

A: I gave it to my boss.

Q: Did you answer it?

A: Yes I did.

Q: To what e-mail address did you send your reply?

A: To “claimant for TTD.com.”

Q: Did you subsequently come to discuss the subject of Exhibit 10 with James?

A: Yes.

Q: What discussion did you have with James to indicate his receipt of your reply?

A: He told me that....

As you can see, the purpose of the foundation is to establish the identity of the sender. The foundation is really one of identification and authentication. The admissibility of the document once it is identified and authenticated is for practical purposes no different than that which exists for “snail mail.” In re Maxy’s Estate, 262 Wis. 89, 54 N.W.2d 194 (1952).