STATE BAR OF WISCONSIN
25TH ANNUAL WORKER'S COMPENSATION UPDATE
MEDICAL/FACTUAL CAUSATION

September 20 & 21, 2001
Thomas J. McSweeney
Administrative Law Judge
Wisconsin Department of Workforce Development
Worker's Compensation Division
P.O. Box 7901
Madison, Wisconsin 53707-7901

All life depends on a flow of information. Information is carried by physical entities such as books or sound waves or brains but is not itself material. Information in a living system is a feature of the order and arrangement of its parts, which arrangement provides a code or language. When these codes are transmitted, they provide the control that maintains the order that is the essence of life.

J. Z. YOUNG
Programs of the Brain (1978)

I. STATUTORY LAW

A. Section 102.03(1)(e) reads:

(e) Where the accident or disease causing injury arises out of the employe's employment.

II. RECENT CASE LAW

A. White v. LIRC, 239 Wis. 2d 505 (Ct. App. 2000) which read as follows at pages 510, 516:

Following a hearing, the ALJ issued a written decision granting White's claim for additional benefits related to his shoulder injury. In addition, the ALJ rejected White's occupational back disease claim based on White's failure to maintain his burden of proof.

* * *

The portion of Delahunt's report that purports to establish the causal link between White's occupational back disease and his employment with Olympic reads as follows:

His current back disability appears to be related to his long work exposure as a drywaller. The symptomatology initially did appear

while he was at work. It is my opinion that because of the prolonged exposure to the heavy work of a drywaller that he has this current low back disability.

White argues that these statements satisfied his causation burden because he had worked for Olympic for at least eight months prior to his last day of employment. He reasons that "[t]his eight months of employment with Olympic *had to contribute* to [his] disease." (Emphasis added.) But that is not what the report says; instead, that is White's interpretation of the report. LIRC held that Delahunt's report is deficient because it does not specifically tie White's occupational back disease to his employment with Olympic. Or, at best, it is ambiguous on this question. We agree. (Emphasis added.)

B. What does White v. LIRC teach us?

1. White has both kinds of so-called causation disputes.

a. The first is a "causation dispute" as to whether a back injury occurred at all.

b. The second is a "causation dispute" as to whether there is a "causal connection" between an established shoulder injury and a claim for additional benefits. This is actually an "extent of disability" issue.

III. RECENT LIRC DECISION

A. It is fatal for a medial doctor to check the wrong box when addressing questions 11, 12 & 13? No.

1. The Commission in Pallamolla v. Ametek Lamb Electric, Inc. et. al. (Claim no. 1997-067422 decided on December 12, 2000) stated:

In other words, while Dr. Schumaker may not have marked the appropriate box on the practitioner's report form, the most reasonable view of the record supports the ALJ's finding of causation sufficient to support an award. In reaching that conclusion, ALJ and the commission are permitted to elevate the substance of hearing testimony and narrative explanations provided by medical experts over the marked box on the report. (Emphasis added.)

B. It is wise for a medical doctor in some cases to not check any box and simply respond "See attached" referring to a narrative report?
Yes, in some cases.

IV. MAJOR AREA OF CONCERN

A. Does substantial factor analysis (material factor analysis means the same thing) apply to accident questions 11 and 12? Probably, but it depends on who you ask.

1. Does substantial factor analysis apply to a dispute whether an injury occurred? Review Lange v. LIRC, 215 Wis. 2d 561, 564, 568 (Ct. App.1997).

2. Does substantial factor analysis apply to a causal connection/extent of disability dispute after an injury stipulated to or found by the Department? See Risa A. Anderson case in appendix.

B. Does "aggravation analysis" apply to a question 13 occupational disease case?

1. The Wisconsin Supreme Court stated in Maynard Electric Steel C. Co. v. Industrial Comm., 273 Wis. 38, 47 (1956): " . . . in both of those cases there was medical testimony to support the commission's findings that these short periods of exposure had aggravated a pre-existing silicosis." (Emphasis added.) See also Shelby Mut. Ins. Co v. DILHR, 109 Wis. 2d 655 (Ct. App. 1982).

C. Origin of the Current Language of Questions 11, 12 & 13.

1. Harry Benkert and the summer of 1986.

a. Harry Benkert's request for assistance was answered by ALJ Ronald J. Ryan.

b. In late 1986 new questions emerged with such changes as to elimination of the word "disease" from question 13. P.S. The poor medical doctors did not understand "disease" meant a gradual, progressive or cumulative injury; they interpreted the word as it is used by both patients and doctors in ordinary conversation.

c. The word "event" was used rather than "accident" because for example an intentional shooting on the job would not be an accident.

Editorial comment: The word "accident" should replace the word "event" because the word "event" is causing confusion.

d. Are such cases as Lewellyn v. ILHR Department, 38 Wis. 2d 43 (1968) and Universal Foundry Co. v. ILHR Department, 82 Wis. 2d 479, 487-88 footnote 5 (1978) the same sort of cases as Roe v. Wade or Miranda v. Arizona or are they simply cases decided only on their own facts?

Answer: Lewellyn and Universal Foundry were never intended by the Wisconsin Supreme Court to be legislative-style general pronouncements of law. Roe and Miranda announced principles governing an entire class of cases rather than just deciding the case before the court on the facts of that particular case.

D. Is "breakage" a required element of either accident question 11 or accident question 12?

Answer: Breakage is not a requirement of either question 11 or question 12.

V. CLOSING THOUGHT

A. Physicist Niels Bohr once said: "You are not thinking, you are just being logical." What this specifically means in this context is that attorneys need to study the case law and when necessary explain the applicable case law to the doctors in writing or verbally or both. Case law is not pure logic. Judges just like legislators make decisions based on practical factors that are often far removed from logic. It is also important to remember that the law on occasion allows the agency to "play doctor." For example, section 102.18(1)(d) allows the agency to add or deduct 5% from a functional rating. A far more important example is the following language from Leist v. LIRC, 183 Wis. 2d 450, 461-62, 515 N.W.2d 268 (1994): "Or, LIRC could have cited to medical text to support its conclusion that someone with a herniated disc would exhibit different symptoms and behavior. LIRC did none of these." (Emphasis added.) This language means that under some circumstances that LIRC and the Department as well may "play doctor" regarding some causation disputes. I personally believe that the words "medical text" are broad enough to include materials found on the Internet. The Department or the Commission must "cite" to these sources meaning referring to them in the decision and if necessary attaching them as an appendix. Internet materials would probably always have to be attached because web sites change constantly.