Wisconsin Association of
Worker's Compensation Attorneys, Inc.
Third Annual Seminar
July 21, 2005
Middleton, Wisconsin

Accident/Accident

Accident/Disease

Disease/Disease

Work Injury/Non-Work Injury

in the Context of a

Permanent Total Disability Case

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I. Accident/Accident

A. *Giant Grip Mfg. Co. v. Industrial Commission*, 271 Wis. 583, 74 N.W.2d 182 (1956)

Applicant sustained a back injury in 1951 while employed with Giant Grip Manufacturing Company. A second back injury occurred in 1952 while the applicant was working for F. Butkiewicz & Sons. Applicant's physician, Dr. Winter, testified that both incidents were a factor in the applicant's disability.

The Court held that all treatment post December 22, 1952, i.e., second accidental injury date, was equally related to both injuries. Thus, both carriers/employers were directed to pay 50% of the applicant's disability and medical treatment.

This was the first case allowing apportionment among two accidental injuries (while not a permanent total disability case [PTD]), it does lend some insight as to the Court's stance regarding apportionment. Indeed, apportionment, in the context of accident/accident cases, has been codified in Wis. Stat. Sec. 102.175(1) as follows:

> **Apportionment of liability**
> If it is established at the hearing that 2 or more accidental injuries, for each of which a party to the proceedings is liable under this chapter, have each contributed to a physical or mental condition for which benefits would be otherwise due, liability for such benefits *shall* be apportioned according to the proof of the relative contribution to disability resulting from the injury.** [emphasis added].
>
> **According to the Department's footnote, *medical evidence* on the exact percentage contribution by each injury is *not necessarily required*. [emphasis added].

B. *Semons Department Store v. DILHR*, 50 Wis. 2d 518, 184 N.W.2d 871 (1971)

In 1951, the applicant dislocated her left shoulder while descending a flight of stairs (non-work related). A second dislocation occurred in 1963 while the applicant was employed with Great Atlantic and Pacific Tea Company (A & P). Since the 1963 work injury, the applicant had intermittent difficulty with daily activities, namely the sensation of slipping. When removing a box from a high shelf in 1967 while at work at Semons, the applicant suffered a third dislocation. This injury resulted in surgery to prevent further dislocations.

Semons argued that the applicant suffered a permanent partial disability (PPD) from the A & P work injury. However, there was no medical evidence to substantiate this. Therefore, the Court noted that liability cannot be divided among several employers without evidence in the record supporting a finding that both work injuries contributed to the disability (in this case, 10% PPD). Because, in part, an employee's predisposition to injury does not relieve the employer from liability for benefits, Semons was responsible for the

claim without any contribution from A & P or its carrier.

Again, while not a PTD case, it shows that an applicant is not compensated for a pre-existing disability and that there needs to be at least some type of medical evidence regarding the initial injury being related to subsequent treatment/disability (after the second accidental injury).

C. *Green Bay Soap Co. v. DILHR*, 87 Wis. 2d 561, 275 N.W.2d 190 (Ct. App. 1979)

The applicant had three compensable back injures in 1957, 1958 and 1968 while Employers Mutual Liability Insurance Company of Wisconsin was on the risk. Temporary total disability (TTD) benefits were paid, the last payment being in January 1969. The applicant sustained three additional back injuries in 1973, 1974 and 1975 (last day worked [LDW]).

It was determined that the applicant suffered a 30% PPD prior to the LDW (May 30, 1975). In addition, the applicant was unable to work and was deemed PTD based on the rationale set forth in *Balczewski v. DILHR*, 76 Wis 2d 487, 251 N.W.2d 794 (1977). While the employer did not dispute the PTD decision, it alleged that the Second Injury Fund [Wis. Stat. § 102.59(1)] (Fund) should pay 30% of the PTD claim based on the 30% PPD assessed before the LDW.

The Court ruled that it was the 1975 injury date alone that resulted in PTD. In other words, the examiner did not find that the applicant's pre-existing disability (A & P injury) contributed to the total disability or that the applicant was 70% disabled from the May 1975 work injury. When an employer is deemed responsible for disability benefits for life, there is no apportionment, i.e., no payment from the Fund.

D. *Buresh v. Wissota Tool & Machine*, WC Claim No. 97-019890 (LIRC Jan. 30, 2002)

The applicant suffered two conceded accidental work injuries in 1987 and 1986. The applicant's treating physician, Dr. Bodeau, opined that both injuries contributed equally to the applicant's condition. The Administrative Law Judge (ALJ) determined the applicant PTD beginning on May 7, 1998. The only question remaining was apportionment.

The Labor and Review Commission (Commission/LIRC) found that both accidental work injuries substantially and materially contributed to the total disability. Based on Dr. Bodeau's medical opinion, liability was apportioned equally between the injuries. LIRC stated that "[l]iability for permanent total disability rests with the employer(s)/carrier(s) on the risk for the injury or injuries which have the effect of pushing an injured worker into the 'odd lot' category ..."

E. *Femrite v. Sullivan Brothers*, WC Claim No. 00-048341 (LIRC Nov. 19. 2002)

The applicant sustained two conceded back injuries in 1993 and 2000 with different employers. The only question was the respective liabilities of the insurers. At a prehearing conference, the ALJ ordered each carrier to pay 50% of the applicant's ongoing TTD benefits.

The Commission upheld the ALJ's order, pursuant to Wis. Stat. Sec. 102.175(2), directing both carriers to split TTD payments pending a hearing regarding liability. The statute states:

> If after a hearing or prehearing conference the department determines that an injured employee is entitled to compensation but that there remains in dispute only the issue of which of 2 or more parties is liable for that compensation, the department may order one or more parties to pay compensation in an amount, time and manner as determined by the department. If the department later determines that another party is liable for compensation, the department shall order that other party to reimburse any party that was ordered to pay compensation under this subsection.

In light of the aforementioned cases holding that PTD can be apportioned under Wis. Stat. §102.175(1), it follows that PTD benefits can be directed to be paid by an ALJ pursuant to Wis. Stat. Sec. 102.175(2) when the only issue to determine is which employer/carrier (or combination thereof) is liable.

F. *Schneider v. Golden County Foods, Inc.*, WC Claim No. 00-035728 (LIRC Dec. 23, 2002)

In July 2000, the applicant was injured working as a millwright for Engle Construction (Engle). The applicant's symptoms were consistent with a herniated disk at L5-S1. Even though he continued to experience leg and back pain, he was released to work without restrictions in August 2000 (2% PPD was conceded and paid).

In November 2000, while working for Golden County Foods (Golden), the applicant had sudden worsening of his radiating pain while lifting trays of potatoes weighing 35 lbs. An MRI showed large disc herniations at L4-5 and L5-S1. Surgery was done and 12% permanency was assessed by the surgeon, Dr. DeWeerd.

Regarding causation (apportionment), Dr. DeWeerd assessed 100% against Engle. Dr. Weiss, Golden's independent medical examiner (IME), attributed 1/3 against Golden and 2/3 against Engle (in part, due to the development of a left foot drop). Dr. Cederberg (Engle IME) opined that work activities at Golden permanently aggravated the applicant's condition causing the surgery (he did not provide an apportionment opinion).

The ALJ found that when there are two work injuries and the second injury was a material factor in causing the need for the most recent treatment/surgery, the entire liability for the condition rests with the second injury (there can be no apportionment). The Commission reversed citing Wis. Stat. § 102.175(1), *Semons* and *Giant Grip*. LIRC noted that the ALJ's reference to the legal principle that an employer takes workers as they find

them without the subtraction for the effects of a previous work injury, would only be applicable (per *Semons*) to the circumstance in which a preexisting injury or condition is completely separable from the effects of a later accidental injury.

G. *Stoflet v. Rodriguez Construction*, WC Claim No. 02-034547 (LIRC Feb. 27, 2004)

In June 1998, the applicant was struck by a bobcat carrying a large bucket full of asphalt while working for Rodriguez Construction (Rodriguez). A cervical MRI illustrated multilevel degenerative disc disease with stenosis at C3-C6 and a moderate disc bulge at C6-7. The applicant was given the option of having a three level carpectomy at C4, 5 and 6. The surgery never took place as the carrier denied responsibility and the health insurer stated it was work related. In the meantime, the applicant was assessed 5% PPD.

In July 2002, the applicant was driving a truck on the interstate while employed for Maynard, Monsen & Sons, Inc. (Maynard) and was hit by another truck coming the opposite direction. A second MRI was done; it was nearly identical to the first. A four level fusion was done in March 2003.

Dr. Block, the applicant's surgeon, believed both accidental injuries aggravated the applicant's condition beyond normal progression, but did not provide an apportionment opinion. Dr. Weiss (Rodriguez IME) stated the July 2002 motor vehicle accident was the sole cause of the ultimate surgery. Dr. Karr (Maynard IME) apportioned the surgery 90% Rodriguez and 10% Maynard. A treating physician, Dr. Doers, agreed with Dr. Karr.

The ALJ assessed 100% liability against Maynard. In support of this ruling, the ALJ noted (a) the applicant could drive truck after the initial work injury, (b) after the second injury, surgery was recommended ASAP and (c) the surgery suggested after the first accidental injury was a three level procedure whereas the ultimate surgery was a four level fusion.

The Commission believed the Rodriguez injury resulted in a permanent cervical injury. And, given the apportionment opinions, felt that both injures were causal. Thus, LIRC determined both injuries were equally (50/50) responsible for the March 2003 surgery and associated TTD. Moreover, it was noted that the applicant would ultimately be eligible for a minimum 40% PPD rating based on Wis. Admin. Code § DWD 80.32(11) and, therefore, each carrier would be liable for 50% of the same.

H. *Thompson v. Villa Maria Health Care*, WC Claim No. 00-052327 (LIRC May 13, 2005)

The applicant had a back injury in the military resulting in a laminectomy at L5-S1. Thereafter, the applicant suffered two conceded back injuries at Villa Maria Health Care while moving a hospital bed. The first injury, in February 1999 when Wausau Business Insurance (Wausau) was on the risk, resulted in an L4-5 laminectomy performed by Dr. Rieser. The applicant returned to work, seemingly without any limitations, in June 1999. In February

2000, the second injury occurred when Connecticut Indemnity Company (Connecticut) was the carrier. Ultimately, the applicant underwent three additional back surgeries, including a posterior and anterior fusion at L4-S1. This resulted in a foot drop.

Dr. Rieser apportioned as follows: 60% against the 1999 injury; 30% against the 2000 injury; and 10% against an "industrial injury" (presumably the military injury/pre-existing condition).Wausau's IME, Dr. Becker, opined that any treatment after September 1, 1999 (1999 injury end of healing date), would be related to the 2000 work injury. Connecticut's IME, Dr. Fielden, related all treatment to the initial injury.

The ALJ concluded the applicant PTD. Because the ALJ believed that PTD could not be apportioned, Connecticut was hit for 100% of the claim. The Commission reversed noting *Giant Grip* and *Buresh*. LIRC agreed with Dr. Rieser's apportionment. However, it assessed PTD 66 2/3 against Wausau and 33 1/3 against EBI. In other words, the Commission, without explanation, divided up the 10% attributed to the "industrial injury" (6 2/3 % vs. 3 1/3%). The only commentary by LIRC was that Wis. Stat. Sec. 102.175(1) only allows for apportionment for accidental injuries of which each is a party to the proceedings. Because the "industrial injury" of 10% did not meet this requirement, LIRC seemingly spilt the same between the carriers based on Dr. Rieser's 60:30 assessment.

This case, along with *Schneider* and *Stoflet*, illustrate the significant risk the parties take by not obtaining apportionment opinions.

II. Accident/Disease

A. *Burkeland v. Madison Freight Systems*, WC Claim No. 94-038061 (LIRC Feb. 26, 1995)

An accidental injury occurred in 1991 while Transportation Insurance Company (Transportation) was on the risk. An occupational disease injury affecting the applicant's back resulted in a 1993 injury date (LDW) with West Bend Mutual Insurance Company (West Bend) as the carrier.

Regarding causation, the applicant's treating physician, Dr. Stitgen, opined that the accidental injury and work exposure were each 50% responsible (an MRI revealed herniations at L4-5 and L5-S1; discectomy recommended). Transportation's IME, Dr. Gredler, seemingly agreed that both injuries contributed to the applicant's condition. Dr. Aschliman, on behalf of West Bend, apportioned 50% to the applicant's pre-existing condition and 50% to his industrial activities.

Given the applicant's limited complaints after the first injury (and before the second injury), as well as LIRC's belief that the condition was not disabling during this time [the applicant seemingly could not have worked without complaints if he was suffering from a herniated spinal disc(s)], the Commission placed the entire liability for disability and medical treatment on West Bend. As for apportionment, LIRC just avoided the issue by noting that the medical records did not support the medical opinions that the accidental injury resulted in ½

of the herniation/injury. Therefore, LIRC indicated the 1991 injury was simply a "progression of the occupational disease."

B. *Kretschmer v. General Stamping, Company Inc.*, WC Claim No. 99-034099 (LIRC Aug. 30, 2000

In 1997, while Regent Insurance Company (Regent) was the worker's compensation insurer, the applicant was injured lowering a 40 lb. basket of parts into a degreaser solution. A cervical spine MRI showed slight bulging at C6-7. In July 1997, a decompression and fusion was done. The applicant was allowed to return to work with restrictions of no overhead work or working with his neck flexed.

In 1999, while Connecticut Indemnity Company (Connecticut) was the carrier, the applicant began to experience problems when working, including spot welding which required him to look down. The pain worsened until the applicant left work early on February 23, 1999. A second MRI was done and showed bulging at the annulus at C5-6. A second fusion was required.

The applicant's surgeon, Dr. Flatley, opined that the February 1999 injury accelerated a pre-existing condition beyond normal progression. Regent's physician, Dr. Shapiro, noted the applicant's workplace activities were of sufficient magnitude and frequency to constitute a material contributory causative factor in the progression of the disease. Dr. Lemon, on behalf of Connecticut, stated the applicant's ongoing neck pain was related to his pre-existing multilevel degenerative disc disease and prior surgery as opposed to the alleged minor work event.

While LIRC acknowledged that the applicant's 1997 surgery was a factor in his condition as of early 1999, it proclaimed that "when subsequent work exposure is a material contributory causative factor in the progression of a pre-existing condition, even a pre-existing condition that may be expected to worsen on its own, the insurer at risk during the period of work exposure is liable under an occupational disease theory." In other words, no apportionment in an accident/disease case.

C. *Kenar v. Great Lakes Dart Mfg. Inc.*, WC Claim No. 02-036061 (LIRC Dec. 23, 2003)

On January 1, 1998, the applicant injured his back while lifting a heavy box at Great Lakes Dart Manufacturing, Inc. while The Travelers Indemnity Company of Connecticut (Travelers) was at risk. A week later, an L5-S1 discectomy and laminotomy was performed by Dr. Klein. The claim, including 5% PPD, was conceded and paid.

In April 2000, the applicant was working as an electrical apprentice at Wil Surge Electric (Surge) which required climbing, crawling, bending and occasional lifting; Maryland Casualty Company (Maryland) was the insurer. By May 2001, the applicant complained of low back pain. Dr. Klein, on November 8, 2001, did a second surgery at L5-S1 (occupational injury date).

Dr. Klein opined that the applicant's second disc herniation (actually reherniation) should relate back to the original work injury in 1998. Travelers' expert, Dr. Aschliman, implicated the applicant's underlying degenerative lumbosacral spondylosis, the 1998 injury (and resulting surgery) as well as the work activities as an electrician. There is no mention in the Commission's decision if Maryland retained an IME.

LIRC found Dr. Aschliman most credible regarding medical causation. However, with respect to legal causation, it was noted that Surge hired the applicant "as is," i.e., with a weakened disc (although not disabling). LIRC felt that occupational exposure was at least a contributory and causative factor in the onset and progression of the L5-S1 reherniation and consequent surgery.

Regarding apportionment, the Commission noted that Wis. Stat. § 102.175(1) only allowed division of liability in accidental injury cases. Moreover, LIRC also commented that there is no apportionment between a traumatic injury and an occupational disease. Indeed, the Commission cited *Travelers Insurance Company v. DILHR*, 85 Wis. 2d 776, 782, 271 N.W.2d 152 (Ct. App. 1978) [discussed later on in the disease/disease context], as follows:

> Sec. 102.01(2)(f), Stats., [currently Wis. Stat. § 102.01(1)(g)2.] provides, 'Time of injury,' 'occurrence of injury,' or 'date of injury' means ... in the case of disease the last day of work for the last employer whose employment caused disability ... *Judicial construction of this provision has imposed the entire liability upon the last employer whose employment caused the disability resulting from the disease, without contribution from prior employers whose employment also caused the disease*. The liability of each employer's insured is determined in the same manner. If a single employer has had successive insurers, liability is imposed upon the insurer whose policy was in force at the time the disability occurred. (emphasis added in original).

As such, Maryland, as the insurer on the occupational injury date, was fully liable for the November surgery, related medical expenses and, ultimately, any resulting disability.

D. *Williams v. County of Rock*, WC Claim No. 02-036217 (LIRC Dec. 22, 2004)

The applicant was a Deputy Sheriff for Rock County. While on the job, he was involved in a rather violent motor vehicle accident in 2000 and sustained a whiplash-type injury. Other than missing a few days of work, by way of sick leave, the applicant did not suffer much, if any, residual symptoms. However, an MRI showed a bulging disc and medical notes indicated a "ripped" ligament. Even so, there was no permanency rating assessed nor any work restrictions provided.

The applicant returned to the force without any limitations. His duties were varied and included boat patrol on a rather large lake and teaching of self-defense tactics. These activities involved a great deal of stress and strain on the applicant's neck. On November, 21, 2001, Dr. Bogdanowicz performed a cervical fusion (occupational date of injury).

As for causation, Dr. Bogdanowicz assigned 70% to the accident and 30% to the applicant's work activities. Dr. Weiss, on behalf of the respondents, examined the applicant and noted that his complaints relative to the motor vehicle accident resolved by April 2001. Moreover, in order for the applicant's work activities to be considered a material causative factor, Dr. Weiss believed he would have had to been involved with heavy lifting of greater than 75 lbs. on a regular basis or, at least, overhead lifting of 40 lbs.

The ALJ ordered temporary and permanent functional benefits to be paid pursuant to Dr. Bogdanowicz's apportionment opinion, i.e., 70% accidental and 30% disease. On appeal, the Commission affirmed, but awarded all benefits based on the 2001 occupational work exposure. LIRC noted both *Kretschmer* and *Kenar* for the proposition that there is no apportionment between an occupational disease and a traumatic injury.

III. Disease/Disease

A. *Employers Mut. Liab. Ins. Co. v. McCormick*, 195 Wis. 410, 217 N.W. 738 (1928)

The applicant was totally disabled (and ultimately died) due to contracting tuberculosis at the workplace. The sole question was which of the three successive insurers were liable for the award. The Court arrived at the following longstanding rule:

> The company that had insured the compensation liability at the time disability occurred is the one that must pay the compensation awarded. This rule will work no injustice to any individual carrier or employer, because the law of averages will equalize burdens imposed by this act among the employers and the compensation insurers of the state. *Id.* at 740

In other words, the carrier last on the risk for the date of disability is liable for the full award. Statistically over time, liability among carriers should "be a wash."

B. *Zurich General Accident & Liability Ins. Co. v. Industrial Commission*, 203 Wis. 135, 233 N.W. 772 (1930).

The applicant was totally disabled (and ultimately died) due to contracting pulmonary tuberculosis superimposed on his pneumonoconiosis. Zurich General Accident & Liability Insurance Company (Zurich) was on the risk before July 1, 1926; Employers Mutual Liability Insurance Company (Employers) was the carrier thereafter.

In 1920 and 1922, the applicant had periods of disability due to his lung disease. He returned to work after each episode. On August 21, 1923, the applicant sought, and was provided, a transfer to outdoor work (avoid dusty activities). The Court determined that the applicant's employment after August 1923 did not contribute to his disability/death. The Court stated:

> [I]t should be held that the 'time of accident,' within the meaning of the statute in occupational disease cases, should be the time when disability first occurs; that the employer in whose employment the injured workman is and the insurance carrier at that time are liable for the total consequences due thereto. So that if the end result, whatever it may be, is inevitably due to exposure already complete, that employer and that carrier become liable accordingly. If the disability is partial and there is a recovery and a subsequent disability with subsequent exposure, then it will be necessary for the commission to determine whether the subsequent disability arose from a recurrence or is due to a new onset induced by a subsequent exposure. If it finds that the disability is due to a new onset, the employer and the carrier on the risk at the time the total disability manifests itself shall be liable accordingly. If, however, there is no subsequent exposure which contributes to the disability and the disability is a recurrence of the former occupational disease, then the employer in whose employment the employee is when the recurrence takes place is not liable and so the insurance carrier upon the risk at that time is not liable on that account. *Id.* at 776.

The real key is whether there is a recovery and a subsequent causative exposure.

C. *Northwestern Asbestos and Cork Co. v. Industrial Commission*, 21 Wis. 2d 554, 124 N.W.2d 628 (1963)

The applicant was an applier of insulation. He worked with asbestos between 1937-1961. While is was common in the industry for employees to work with a number of different employers, the applicant primarily worked for Northwestern Asbestos and Cork Company (Northwestern) between 1937-1955. In 1955, the applicant began experiencing a shortness of breath. Between 1956-1961, the applicant worked mostly for Northwestern, but also worked for three other employers, all of which utilized asbestos. In 1956, he noticed a "little cough" and was ultimately hospitalized for three weeks. In 1957, he was diagnosed with bronchitis (in retrospect, the diagnosis should have been asbestosis). In 1961, the prior symptoms were more pronounced. After an x-ray, he was told to immediately quit (LDW = April 14, 1961). Of note, the applicant's last day of employment with Northwestern was in March 1961.

The Commission found the date of injury to be March 5, 1961 pursuant to Wis. Stat. Sec. 102.01(2). Dr. Dickie noted the applicant was likely suffering from asbestosis as far back as 1957 (when Northwestern was on the risk). Dr. Dickie testified that it is a progressive disease and, once contracted, is not aggravated by subsequent exposure. Dr. Grossman felt that once the condition is acquired to any substantial degree, it is progressively disabling regardless of additional exposure.

The Court affirmed the Commission's determination that (a) the applicant had the disease in 1956; (b) subsequent exposure with other employers did not materially affect his condition and (c) the date of injury was in March 1961.

D. *Travelers Insurance Company v. DILHR*, 85 Wis. 2d 776, 271 N.W.2d 152 (Ct.

App. 1978)

The applicant worked for Crucible Steel for about 15 years as a chipper and grinder before working in the shipping department. His last day of employment was on January 2, 1973. He contracted silicosis caused by his employment and was deemed PTD. Travelers Insurance Company (Travelers) insured the employer from 1950-June 30, 1972. Thereafter, Royal-Globe (Royal) was on the risk.

Dr. Kaufmann attributed 20% of the applicant's condition to his last six (6) months of employment (Royal) and 80% to the employment before July 1972 (Travelers). The Department apportioned PTD liability accordingly. The Circuit Court found Royal 100% responsible.

The Court of Appeals stated that "[t]he Worker's Compensation Act does not provide for apportionment of liability for occupational disease as between successive employers whose employment caused the disease or between the insurers of those successive employers or the successive insurers of a single employer whose employment caused the disease." *Id.* at 782. Accordingly, the judgment was affirmed.

E. *Shelby Mutual Insurance Company v. DILHR*, 109 Wis. 2d 655, 327 N.W.2d 178 (Ct. App. 1982)

The applicant worked as a laborer for West Milwaukee. His duties included garbage collection, road repair work (which required heavy lifting) and shoveling. Iowa National Mutual Insurance Company (Iowa) insured West Milwaukee until September 1976; thereafter, Shelby Mutual Insurance Company (Shelby) was on the risk. The applicant suffered numerous injuries to his low back at work. The last occurring in November 1976. He returned to work after the injury and was on vacation when he felt a sharp pain in his back after he sneezed while carrying a box (10-15 lbs). He never returned to work; rather, he had surgery to remove a herniated disk in March 1978.

The Commission found that the applicant sustained an injury arising out of his employment on an occupational basis and that the date of injury was his last day worked, i.e., December 17, 1976. Thus, Shelby was responsible for the full claim (TTD and 30% PPD).

On appeal, Shelby contended that it should not be responsible as no significant on-the-job trauma occurred while it was the insurer. The Court of Appeals noted that *Travelers* resolved this issue. Indeed, there is no apportionment of liability for occupational disease between the successive insurers of a single employer whose employment caused the disease.

F. *General Casualty Company of Wisconsin v. LIRC*, 165 Wis. 2d 174, 477 N.W.2d 322 (Ct. App. 1991)

The applicant worked for Sharon Plumbing (Sharon) when he suffered a job-related back injury in 1972 when General Casualty Company of Wisconsin (General Casualty) was the carrier. Surgery was required. The applicant continued to work full time at Sharon until it

went out of business in 1983. The applicant then worked for an Illinois plumbing firm in 1984. This job, while less strenuous than Sharon, still required occasional heavy lifting. The applicant's condition deteriorated in July 1986 whereby additional surgery was required.

LIRC found an occupational injury on December 10, 1979 (first day of missed work at Sharon) and apportioned 81% against Sharon and 19% against the Illinois employment due to an aggravation and acceleration of his condition. Benefits were apportioned accordingly.

General Casualty appealed arguing that the applicant's injury date should be his last day of employment with the Illinois company just prior to his 1986 laminectomy. Moreover, it was alleged that the Commission ignored the "no-apportionment rule" set forth in *McCormick*. The Court disagreed noting that a date of injury occurs when there is a wage loss (December 10, 1979) and commented that *McCormick* was only controlling in situations involving successive Wisconsin employment.

G. *North River Insurance Company v. Manpower Temporary Services*, 212 Wis. 2d 63, 568 N.W.2d 15 (Ct. App. 1997)

The applicant began working for Freedom Plastics, Inc. (Freedom) as a temporary employee via Manpower Temporary Services (Manpower) on November 12, 1992. He performed deburring jobs that caused right wrist pain, however, this was never reported nor did he miss any work time. On December 31, 1992, the applicant terminated his association with Manpower and went full time with Freedom. His first day of work was on January 4, 1993. At the end of the day, he reported numbness in his hands and fingers. Two days later, the applicant missed work due to pain and was diagnosed with carpal tunnel syndrome; surgery was done on January 21, 1993.

The applicant's surgeon, Dr. Huibregtse, initially opined that the applicant's work performed on January 4th was a substantial factor contributing to the disability. However, Dr. Huibregtse later indicated that the applicant's employment with Manpower was the material contributory causative factor and the exposure at Freedom provided a minimal contribution. Dr. Moore, on behalf of Freedom, stated that it was unlikely that work on a single day would have materially aggravated a condition that manifested a week prior.

The ALJ determined that since the applicant did not experience any disability within the meaning of the Act until January 4, 1993, Freedom was the responsible employer. The Commission and Court agreed.

While the medical experts involved in a case may attempt to apportion liability, the date of disability/injury still carries the day.

H. *Kalies v. Brillion Iron Works*, WC Claim No. 98-024333 (LIRC May 22, 2001)

The applicant worked for the employer, Brillion Iron Works (Brillion), from 1953-1997. In 1988, the applicant was diagnosed with bronchitis, but chest x-rays were consistent with silicosis. Brillion sent the applicant for an IME with Dr. Lauderdale on October 6, 1989,

who diagnosed silicosis based on the x-rays and occupational history. Attending the IME was the applicant's first lost work time. The applicant continued working until he retired on December 23, 1997.

Drs. Effros (a second IME physician), Andrews (treating physician) and Lauderdale all agreed that the applicant's silicosis was work related. Dr. Lauderdale apportioned 95% to the applicant's work activities before his 1989 examination, and 5% thereafter due to an acceleration of the applicant's pulmonary problem beyond its normal progression.

LIRC found the date of disability to be the applicant's last day worked, i.e., December 23, 1997. It was noted that Dr. Lauderdale's apportionment opinion did not establish two dates of disability. Indeed, the fact that the applicant missed work solely due to the IME to monitor his medical condition did not establish a date of injury [noting *Rothenberger v. Murray Manufacturing*, WC Claim No. 95-051612 (LIRC June 29, 1999)]. Thus, the applicant first lost time when he retired.

I. *Virginia Surety Co., Inc. v. LIRC*, 2002 WI App, 258 Wis. 2d 665, 654 N.W.2d 306

The applicant continuously worked for Stainless Foundry (Foundry) from 1954-1997, but for two years of military service. As a grinder, he was exposed to sand and dust from stainless steel casings. All parties agree that his exposure resulted in silicosis and ultimate PTD. While he never missed any time from work due to his condition, periodic diagnostic testing (at the direction of Foundry) did reveal pulmonary changes.

LIRC found the applicant to be disabled as of August 25, 1997 (LDW). This was less than two months before Virginia Surety Company, Inc. (Virginia) came on the risk (July 1, 1997). Virginia appealed arguing that the applicant developed disabling silicosis long before July 1997 (indeed, Dr. Rasansky, one of the applicant's treating physicians, noted the applicant to be "extremely ill" and "impaired" before July 1997). Virginia claimed that the applicant's Foundry-initiated medical visits established a date of disability as the applicant experienced a wage loss.

The Court affirmed. In doing so, it felt that wage loss must be due to the symptomatic effects of the work injury, not simply the employer's desire to monitor a nondisabling condition [noting *Adams v. Cub Foods*, WC Claim No. 91-074342 (LIRC Mar. 31, 1993)]. The Court was concerned that if an IME (before a worker's compensation claim is ever made, possibly even contemplated by the employee) that occasioned a wage loss was considered an occupational exposure injury date, that employers would have an incentive not to monitor their employees' health, and that an employer may schedule an IME just to lock in an early date of disability to lessen exposure.

While not an apportionment case, this case solidifies the importance of the establishment of an actual date of injury/disability; the fact that the injured worked may exhibit signs of an occupational injury/exposure is simply not enough.

IV. Work injury/non-work injury

A. *Western Lime & Cement Co. v. Boll*, 194 Wis. 606, 217 N.W. 303 (1928)

On January 15, 1926, the applicant was injured after jumping from a railroad car causing a slight separation (no fracture) of his right sacroiliac joint. He ultimately sought treatment and was placed on crutches. On March 10, 1926, he was at home walking to a shed when his right leg gave out resulting in a fracture of the femur and lesser trochanter. The Commission awarded benefits as the second injury (non-work related) grew out of the work injury.

The Court affirmed as there was no evidence of anything other than the giving way of the applicant's muscles in the injured leg that caused the fall (while there was ice on the ground, the applicant testified that he did not slip; indeed, he had "new rubbers" on at the time of the fall).

B. *Burton v. Industrial Commission*, 43 Wis. 2d 218, 168 N.W.2d 196 (1969)

In May 1964, while the applicant was employed as a fireman with the City of Oshkosh, he injured his back after sliding down a pole and falling 3-4' to the floor. He was diagnosed with a lumbosacral strain and was provided a lumbosacral support. While he did not miss any work, he had continuing pain.

In February 1965, the applicant was home ill with the flu. He had a sneezing attack which caused him to fall to the floor and have severe back pain which radiated down his legs. He was hospitalized for one month.

The applicant's surgeon, Dr. Kennedy, testified that the pole incident weakened his back (annulus and other ligaments) such that there was a disc protrusion after the sneeze. Another of the applicant's physicians, Dr. Scheuermann, also believed the work incident weakened the applicant's disc so that the sneeze caused it to protrude. Dr. Winter, retained by the employer, did not link the two injuries, primarily due to the elapsed time in between (9 months).

The Court ruled that there was no credible evidence to contradict the pole incident weakening the applicant's disc structure such that a simple sneeze at home could bring on the herniation.

C. *Lange v. LIRC*, 215 Wis. 2d 561, 573 N.W.2d 856 (Ct. App. 1997)

The applicant suffered a compensable work injury to his back while working for Ideal Door. Indeed, an MRI revealed degenerative disc disease at L4-5 with a small focal disc herniation and nerve impingement. A year later, while at a friend's house (possibly drinking beer), the applicant slipped on ice causing the disc to protrude and fragment.

LIRC concluded that the non-work injury was not compensable as the appropriate

legal standard was whether the work injury was a substantial factor in the off duty injury; it was felt that the injury would have occurred without regard to the first injury.

The Court reversed noting the following:

> A work-related injury that plays any part in a second non-work-related injury is properly considered a substantial factor in the re-injury. It will not be a substantial factor, however, where the second injury alone would have caused the damages. For LIRC to conclude that a work-related injury is not a substantial factor in a second, related injury, it must find that the claimant would have suffered the same injury, to the same extent, despite the existence of the work-related injury. In all other cases where the two injuries are related, however, the re-injury will be compensable. *Id.* at 568.

Because all healthcare providers, including the IME, opined that the second injury was, in essence, an aggravation, the Court reversed in favor of compensability. Specifically, the Court felt that, by definition, an aggravation linked the two injuries.

D. *ITW Deltar v. LIRC*, 226 Wis. 2d 11, 593 N.W.2d 908 (Ct. App. 1999)

The applicant, who was pregnant, had a knee injury while working for ITW Deltar (ITW) in May 1995. Her physician, Dr. Drawbert, took her off work and recommended surgery. However, the same could not be done until after the birth of her child to ensure the safety of the baby (in the meantime, the applicant was laid off). The baby was born on January 29, 1996. The applicant had knee surgery on April 17, 1996. She reached a healing plateau, per Dr. Drawbert, on August 28, 1996.

The ALJ awarded TTD benefits from June 24, 1995-January 29, 1996, and again from March 27, 1996-August 28, 1996 (in other words, seemingly no TTD benefits were awarded for the time period the applicant was off for post-natal leave) as ITW never offered suitable employment.

ITW appealed arguing that the applicant should only receive TTD benefits while in a three-month healing period, and not during her pregnancy as it was a non-work related condition for which she is not eligible for benefits. Simply stated, ITW contended that it was only the applicant's personal condition (pregnancy) that delayed the knee surgery and it should not have to pay benefits during this time.

LIRC and the Court disagreed with ITW. The employer takes the applicant "as is" (in this case, pregnant). The applicant cannot be penalized for this pre-existing condition, nor for following the advice of her doctor. Specifically, the knee surgery could not be performed while the applicant was pregnant due to anesthesia concerns regarding the unborn. After the birth, but before the surgery, ITW did not have to pay TTD benefits because it was the post-natal "disability" that caused the surgery to be delayed. Benefits were due again after the surgery until she reached an end of healing.

E. *Anderson v. Fabricating Engineers*, WC Claim No. 99-061668 (Jan. 29, 2004)

In January 1998, the applicant had a slip and fall injury (non-work related) resulting in a disc herniation at L5-S1 on the left. Significantly, the applicant worked for over a year without difficulty.

The applicant then felt a pop in his back while pulling a knob in 1999 while employed with Fabricating Engineers. An MRI revealed a disc herniation on the left with compression of the S1 nerve root. Dr. Rieser performed a left-sided discectomy at L5-S1 in November 2000.

The applicant's condition deteriorated resulting in a three level anterior/posterior fusion at L3-S1 in October 2001. Dr. Rieser discharged the applicant with permanent limitations of light duty, no frequent bending/twisting, lifting 10 lbs. maximum (no lifting from the floor) and only working up to 4 hours per day.

Regarding causation, Dr. Rieser opined that 30% of the applicant's problems were pre-existing and 70% was work related. Of the 70% that was work related, 30% was attributable to the 1999 injury and 70% related to the applicant's 25 year history of working with heavy equipment.

Dr. Barron was retained by the respondents. He felt that the November 1999 caused a lumbar strain which was a temporary aggravation of a pre-existing condition. Furthermore, Dr. Barron opined that the applicant returned to his pre-aggravation status and any additional treatment after February 2000 would not be considered work related.

Given Dr. Rieser's stringent work restrictions, both parties' vocational experts believed the applicant was permanently and totally disabled. The presiding ALJ and Commission agreed.

LIRC declined the respondents' argument seeking apportionment, i.e., having to only pay 70% of the PTD award due to Dr. Rieser's opinion that 30% of the applicant's condition was due to his pre-existing condition (non-work related prior slip and fall resulting in a herniation). The Commission indicated that a shift in liability would allow the respondents to evade responsibility for the entire PTD claim, the onset of which occurred only after 1999 accidental injury. Doing so would be inappropriate under the "as is" rule set forth in *Lewellyn v. DILHR*, 38 Wis. 2d 43, 155 N.W.2d 678 (1968). In addition, *Green Bay Soap* held that an employer cannot shift its liability when work activity precipitates, aggravates and accelerates a pre-existing degenerative condition.

F. *Anderson v. Servicemaster Professional*, WC Claim No. 02-025737 (LIRC April 4, 2005)

The applicant was injured at work in May 2002 moving furniture. She noted neck and shoulder discomfort. On October 21, 2002, Dr. Mjos diagnosed a partial rotator cuff tear and possible biceps tendon tear. On November 2, 2002, the applicant broke her foot in a motor

vehicle accident. At that time, the applicant was still off work due to the shoulder injury (work related). On November 11, 2002, Dr. Mjos recommended shoulder surgery, but advised that the applicant fix her foot before proceeding with the same. In the meantime, she was allowed to work light duty. Shoulder surgery did not take place until October 27, 2003.

At issue was TTD benefits from November 12, 2002 through October 26, 2003. The ALJ found that the applicant's delay in proceeding with shoulder surgery was a good faith reliance on her physician's recommendation that she put it off until her foot was fixed (as well as reasonable difficulties in scheduling the surgery). The respondents appealed arguing that the applicant's healing period was suspended due to her failure to treat for the shoulder.

The Commission affirmed. Like the claimant in *ITW Deltar*, the applicant remained in her healing period from November 2002 through October 2003, despite the fact that she was not regularly seeing her (shoulder) doctor during that period. Unlike the post-natal period in *ITW Deltar,* there was no period of time where the foot injury was independently disabling thereby justifying the suspension of TTD benefits.