2014 Case Law Update

by

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Caselaw Update

LIRC

Unexplained Fall – Korrison v. Aurora Medical Center (WC Claim No. 2004-040437, LIRC June 6, 2013)

The applicant, a registered nurse, was attending to a patient in a hospital room when she fell onto the floor. She testified that the floor was clean, dry, level and smooth. She recalled that she was "walking over to pull out some gloves to do my assessment and I just tripped and fell down on my knees and my right hand." She further testified that some of her co-workers had complained of a "sticky" floor due to waxing, but she could not recall whether the floor was sticky or recently waxed on the date of injury. She did not identify anything she tripped over or any hazards on the floor. She also did not identify any hazards, such as a ledge or equipment, where she impacted the floor that might have contributed to the damage to her body.

The Commission held that it was an unexplained fall and not compensable. In a dissent, Robert Glaser wrote that he would have found it to be explained and compensable because the applicant was going to get gloves as part of her job duties, and she was engaged in employment activities at the time of her fall. He also expressed dissatisfaction at Commission decisions regarding unexplained falls, as applicants frequently cannot provide precise explanations for the cause of a fall even though they are engaged in employment activities and, but for being at work at that particular time and place performing job duties, the injury would not have occurred.

Occupational Injury – Multiple Employers – Allocation of Liability – Hollister v. The Samuels Group and The Boldt Company (WC Claim Nos. 2011-017823, 2011-016249, 2011-016252, LIRC June 6, 2013)

The applicant was a carpenter for 30 years with multiple employers. While on layoff in December 2007 from Samuels Group, his doctors determined that his work activities were a material contributory causative factor in the onset or progression of his bilateral knee pain. They assigned temporary restrictions, but he returned to work with Samuels Group in January 2008 full duty and did not inform his supervisors about his restrictions. In February 2008 his doctors assigned PPD and permanent restrictions but they did not entirely restrict him from carpentry work. He continued working full duty with Samuels Group in the spring of 2008 with the permanent restrictions and a 15% PPD rating to both knees, but did not tell his supervisors about his permanent restrictions and did not claim worker's compensation benefits. While on layoff in the fall/winter of 2009 from Samuels Group, his doctors determined that his work activities had progressed his bilateral knee condition but they kept his permanent restrictions and PPD rating intact. He then worked for Boldt for the 2010 construction season as a carpenter full duty, and did not tell his supervisors about his permanent restrictions or claim worker's compensation benefits. After the 2010 season he retired. His doctors increased his PPD rating and opined that he could no longer work as a carpenter.

The applicant claimed 2007 and 2009 occupational dates of injury against Samuels Group, and a 2010 occupational date of injury against Boldt. He sought TTD for the time he was laid off in the fall/winter of 2007-2008, along with past medical expense, 20% PPD and an order for prospective treatment, i.e. bilateral knee replacements. The Commission held that the applicant did not sustain a wage loss due to his knee injuries until he finally retired from the last employer, Boldt, in 2010, and that he therefore did not sustain an occupational injury until 2010. Thus, no TTD was awarded. The Commission awarded 20% PPD and an interlocutory order against Boldt for the total knee replacements. Samuels Group was not ordered to pay any anything, including the medical expense incurred prior to 2010, because "medical expenses in occupational disease cases are not compensable until the date of injury." This decision is currently pending at the Court of Appeals.

Average Weekly Wage – Vacation Pay – Pelnar v. Kohler Co. (WC Claim No. 2006-041650, LIRC June 6, 2013)

The applicant asserted an average weekly wage of $954.43 based upon his earnings in the 52 weeks prior to injury, including vacation pay. The respondents conceded an average weekly wage of $913.81, excluding the vacation pay. The respondents argued that the number of weeks of vacation pay at this particular employer is based upon longevity of employment, so it was "earned" over the course of the applicant's entire employment rather than the 52 weeks prior to injury. The Commission held that vacation pay can be considered as part of wages earned in the 52 weeks prior to injury, regardless of whether the entitlement to that vacation pay is determined on the basis of longevity. It noted that if an applicant took entire calendar weeks of vacation, those weeks could be subtracted from 52 weeks of work. In this case, the applicant only took a day or two of vacation at a time, not entire calendar weeks, so his earnings in the 52 weeks prior to injury should be divided by 52 weeks.

Bad Faith – Wis. Stat. § 102.42(1m) – Coe v. MCC, Inc. (WC Claim No. 2008-018480, LIRC September 30, 2013)

The applicant sustained a non-work-related right knee injury in the 1990s and sought treatment for it periodically. An MRI from eleven months prior to the work injury showed degenerative changes, a partial ACL tear, and a medial meniscus tear. On November 8, 2007, he stepped on a bottle at work and injured his right knee. He then underwent a lateral meniscectomy, medial meniscectomy, ACL repair, and patellar chondroplasty on November 26, 2007. The IME doctor opined that the work injury temporarily aggravated the applicant's pre-existing conditions, and the temporary aggravation would have returned to baseline in two or three months had conservative care been pursued. He further opined that the November 26, 2007, surgery was not related to the work injury. The claim proceeded to a hearing in 2009 after which the ALJ found in favor of the applicant on causation, extent of disability, and liability for medical expense. The applicant then alleged bad faith due to the respondents' failure to pay indemnity benefits under Wis. Stat. § 102.42(1m) following the surgery, arguing that the IME doctor technically conceded causation and the surgery took place within the healing period.

The applicant explained that under *Lewellyn v. DILHR*, 38 Wis. 2d 43 (1968), a work injury that causes a "temporary aggravation" necessarily precipitates, aggravates and accelerates a pre-existing condition

beyond normal progression and any unnecessary medical treatment for that condition, as aggravated, must therefore be related to the work injury. The respondent analogized this case with *City of Wauwatosa v. LIRC*, 110 Wis. 2d 298 (Ct. App. 1992), asserting that there was a legitimate dispute as to whether the "condition for which surgery was performed was even related to the compensable industrial injury," as had been the situation in *City of Wauwatosa* where compensation was denied.

The LIRC found that the applicant's position was "a reasonable and perhaps persuasive analysis of the interaction of the *Spencer* doctrine as codified in Wis. Stat. § 102.42(1m) and the *Lewellyn* rule." However, it held, "the commission cannot conclude that the applicant's position so plainly follows from the statute and case law that the respondent acted in bad faith simply by challenging its liability for the applicant's knee surgery."

Death Benefit – Insurance Coverage – Tribal Immunity – Employment Relationship – Average Weekly Wage – Gilardon v. Native Built Homes (WC Claim No. 2010-023994, LIRC November 29, 2013)

The applicant was a Native American tribal member who moved to a Wisconsin reservation in 2007. Shortly after arriving, he began dating a woman who then moved into his apartment. Meanwhile, his wife and two children remained at their home in Illinois. The applicant and his wife maintained friendly correspondence, he sent her money on occasion, she was aware of the affair, but no divorce was contemplated. In 2010 he contacted the employer – a sole proprietor and also a tribal member – asking for work on an upcoming construction project on the reservation. The employer did not commit to hiring him, but told him to show up on September 7, 2010, which was the first day of work on the project. The employer further informed him that the minimum he paid workers was $8/hr. On September 7, 2010, the applicant showed up and the employer told him to start work on the project along with four other workers. Shortly after beginning work, the applicant fell off a ladder and struck his head on concrete. He died seven days later. One hour after the incident, the employer met his insurance agent and paid a premium for worker's compensation insurance but did not tell the agent about the accident that had just occurred.

The deceased applicant's wife filed a hearing application for death benefits. The employment relationship, tribal immunity, insurance coverage, average weekly wage, and entitlement to death benefits were all in dispute. The LIRC found that tribal immunity did not apply, as the employer's company was not created by the tribe and the employer did not advance the policies behind tribal immunity, which are "tribal self-determination, economic development, and cultural autonomy," as articulated by *McNally CPA's & Consultants v. D.J. Hosts*, 2004 WI App 221, 277 Wis. 2d 801, 692 N.W.2d 247. The LIRC further found that an employment relationship existed because the employer put the applicant to work on the project, and the average weekly wage was $8/hr x 40 hrs. The LIRC further held that there was no insurance coverage under the known loss doctrine, whereby one cannot purchase insurance coverage for a loss that he knows has already occurred. Therefore, the Uninsured Employers Fund was liable. Lastly, the LIRC held that the applicant's wife was entitled to death benefits despite the fact that she was not "living [with him] at the time of his death" (which is the requirement under Wis. Stat. § 102.51(1)). The LIRC rationalized that she was not estranged from him, no divorce was contemplated, and she used money he periodically sent her to support their children.

Divided Insurance – Loss of Earning Capacity – Klockzien v. Hot-Shot Express, Inc. (WC Claim No. 2010-006191, LIRC November 29, 2013)

The applicant was a truck driver for Hot-Shot Express. Prior to the work injury, Hot-Shot entered into an "outsourcing" agreement with Allegiant Professional Business Services whereby Allegiant agreed to do payroll, provide worker's compensation coverage for the truckers, and pay taxes on behalf of Hot-Shot. Hot-Shot retained a worker's compensation policy covering only their office employees. However, the parties did not notify the Department of their intent to divide their employees under Wis. Stat. § 102.315(6). Under Wis. Stat. § 102.31(1)(b), an insurer for a "professional employer organization" (Allegiant) may provide worker's compensation coverage for the employees of a "client" (Hot-Shot), but only if the parties notify the Department of their intent in this regard. After a closed head injury on February 8, 2010, the applicant sought temporary disability and loss of earning capacity benefits against Hot-Shot and its worker's compensation insurer. Hot-Shot then impleaded Allegiant and its worker's compensation insurer.

The LIRC held that because the parties did not inform the Department of their intent to divide their employees, Hot-Shot's worker's compensation insurer was liable. However, the LIRC found there was no loss of earning capacity. The applicant was awarded only temporary total disability for a period of eight months. The applicant's treating doctor had provided him with permanent restrictions but no PPD rating. The applicant had multiple other medical problems, as well.

Employment Relationship – Coverage of Employments – Noyce v. Aggressive Metals, Inc. (WC Claim No. 2011-004383, LIRC February 6, 2014)

The applicant, an unemployed welder, approached the owners of Aggressive Metals looking for a job on December 27, 2010. Aggressive Metals was a sole proprietorship established by Neil Holland in February 2010. He began paying himself wages in October 2010. His brother, Nick Holland, had worked with Neil performing metal fabrication throughout 2010 but was not paid wages until December 2010. On December 30, 2010, Aggressive Metals was incorporated with Neil and Nick as co-owners. On December 30, 2010, they paid the applicant $590 in anticipation of work he was to perform over the following week. He was to install insulation in the building in which Aggressive Metals was housed. He completed this task as assigned, and also assisted with metal fabrication for customers on two occasions. On January 4, 2011, he fell through the ceiling of a storage room and sustained a closed head injury. Aggressive Metals did not have worker's compensation insurance. At issue at the hearing was whether Aggressive Metals was an "employer" subject to Chapter 102.

The LIRC held that Aggressive Metals was not an "employer" subject to the Act on the date of injury. First, although Aggressive Metals paid more than $500 in wages in "any calendar quarter," LIRC found those wages were paid in the last calendar quarter of 2010. Aggressive Metals would have been subject to Chapter 102 on January 10, 2011, because that was "the 10th day of the month next succeeding such quarter," under Wis. Stat. § 102.04(1)(b)2. Furthermore, Aggressive Metals did not "usually employ 3 or more employees for services rendered in this state," so it could not have been subject to the Act under Wis. Stat. § 102.04(1)(b)1. Note that the LIRC overturned two prior LIRC decisions, Olson v. Todd Cassiani and Curtis v. R&M Decorating, which held that an employer becomes subject to the Act at the moment it hires three or more employees.

Non-Traumatic Mental Injury – Legal Standard – Parker v. Dept. of Corrections (WC Claim No. 2011-013989, LIRC February 13, 2014)

The applicant was a security guard at a prison. She witnessed a fight between two inmates which lasted for approximately 1 minute 45 seconds, by the end of which one of the inmates ended up on the ground with the other inmate standing over him kicking him. The fight took place in the lunchroom of the prison. Typically, there would be two officers on the ground in the lunchroom during lunch, with another stationed in an elevated observation room. However, on this day, the applicant was the only officer in the lunch room. Her psychiatrist diagnosed her with "post traumatic stress disorder and major depression single episode," and permanently restricted her from working in correctional institutions.

The LIRC found that the applicant's mental injury did not meet the standard set forth in *School District No. 1 of Brown Deer v. DILHR*, 62 Wis. 2d 370 (1974), and its progeny. The LIRC viewed a video of the fight and found that the applicant was not in any physical danger. In addition, the applicant's supervisor testified that this particular fight was not unusual in intensity or violence. Thus, the LIRC held that the incident did not constitute a situation of greater dimensions than the day-to-day emotional strain and tension experienced by corrections officers.

Nature and Extent of Disability – "Odd-Lot" PTD – Eilers v. Wal-Mart (WC Claim No. 2010-029451, LIRC February 18, 2014)

The applicant sustained a conceded traumatic neck injury while helping her manager lift a box containing a gas grill. She made a claim for permanent total disability due to the permanent restrictions arising out of that injury. The respondents' main defense was that the applicant was already "odd-lot" permanently totally disabled due to permanent restrictions she had received in 1998 for a different injury, before she was hired by the respondents. They pointed out that the applicant only held sporadic jobs for short periods of time between 1998 and her 2010 date of injury. The LIRC rejected this argument, pointing out that the applicant had been able to work for two years full time for Wal-Mart prior to her injury. In addition, the LIRC noted that the length of employment in any one particular job is not necessarily a dispositive factor in determining whether an applicant is "odd-lot." The fact that the applicant never worked in any one job more than nine months, prior to the time she was hired by Wal-Mart in 2008, did not lead to the conclusion that she was already "odd-lot" permanently totally disabled.

Court of Appeals

Safety Violation Penalty – Sohn Manufacturing, Inc. v. LIRC, 2013 WI App 112 (August 7, 2013)

The applicant was injured when her hand was pulled into a machine. A Wisconsin state investigator found that the employer had violated OSHA standards as well as Wis. Stat. § 101.11 (the Safe Place Act). The Department awarded increased compensation pursuant to Wis. Stat. § 102.57, the LIRC affirmed the award, and the circuit court affirmed the LIRC. On appeal to the court of appeals, the employer made two main arguments: 1) Wis. Stat. § 102.57 is an enforcement statute of a federal law, which states are not supposed to issue; and 2) the Department is not authorized to enforce a 101.11 penalty against an employer because Wis. Stat. § 102.57 only allows for penalties after "the failure of the employer to comply with any statute, rule, or order of the department." The employer argued that Wis. Stat. § 101.11 is not "a statute... of the department."

The court of appeals rejected both arguments and affirmed the LIRC. The court held that Wis. Stat. § 102.57 is not a state enforcement statute of federal law; rather it is a worker's compensation statute. It further held that the language of Wis. Stat. § 102.57 does not mean "a statute... of the department." Of course, no statute "belongs" to any state agency. Rather, the modifier "of the department" refers to "order of the department," not any statute.