CASE LAW UPDATE 2013

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2013 CASE LAW UPDATE

COURT OF APPEALS

Grede Foundries, Inc. v. LIRC, 2012 WI App 86 (June 19, 2012) Recommended for publication.

Pay your orders on time, unless you are in bankruptcy. Northcott settled his workers compensation claim with Grede Foundries. The Order approving the settlement was issued June 17, 2009. On June 30, 2009 Grede filed for bankruptcy triggering the automatic bankruptcy stay. Grede didn't pay the Order within 21 days.

Northcott argued that Grede was in bad faith for not timely paying the Order. The Department agreed and issued an Order imposing a bad faith penalty against Grede on February 22, 2010. The Commission affirmed the Department's bad faith award on October 25, 2010. Grede appealed arguing that they couldn't pay the Order because of the bankruptcy stay.

The Court of Appeals agreed with Grede. They found that the automatic stay of the bankruptcy statutes trumped the State's 21 day payment deadline. The court found Grede was not in default on payment of the Order and reversed the bad faith award.

Besse Forest Products, Inc. v. Lopez, 2011 AP 2722 (August 14, 2012) Not recommended for publication.

Remember to name everybody. Lopez claimed permanent total disability benefits against Besse. LIRC awarded permanent total benefits to Lopez and Besse appealed. When Besse filed its Summons and Complaint in Circuit Court, Besse failed to name its workers compensation insurance company, First Liberty Insurance Corporation, as a party in the Circuit Court action. The Circuit Court affirmed LIRC's decision and Besse appealed to the Court of Appeals.

The Commission argued that the circuit court lacked competency to proceed on the claim because Besse failed to name its workers compensation insurer as a party. This was not an argument raised at the Circuit Court level. Instead, the Commission raised it in front of the Court of Appeals arguing the Circuit Court never should have affirmed the decision from LIRC, but rather should have dismissed the Complaint for failure to name the insurance company as a necessary party.

Besse argued the Court of Appeals should reject the Commission's competency argument because it wasn't raised at the Circuit Court level. The Court of Appeals rejected Besse's argument, reversed the judgment of the Circuit Court and remanded the matter with instructions to dismiss the Complaint for failure to name the necessary parties.

Menard, Inc. v. KEENE, 2011 AP 2358 (September 5, 2012) Not recommended for publication.

It is never over until LIRC says it is over. Keene sustained an injury to her back in 1999. She was placed on permanent work restrictions and continued to work at Menards. She made a claim for permanent partial disability benefits in the amount of 2%, and apparently Menards took it to hearing. The 2% award was found most credible by the Department.

In 2005 Keene was terminated by Menards. She "petitioned to reopen" her workers compensation claim seeking loss of earning capacity benefits. Menards disputed the claim for loss of earning capacity arguing Keene had been terminated for cause. The supervisor for Menards and Keene testified at the hearing in a classic "he said, she said" battle. The ALJ eventually determined Keene was terminated due to a personality conflict with her manager and not due to insubordination or violation of Menards' policies. The Commission upheld the decision and allowed Keene to make a claim for loss of earning capacity.

On appeal, Menards argued Keene was terminated for reasonable cause. This was the same argument they made at the Commission level. Since the Commission made a determination as to the factual evidence, the Court of Appeals was "significantly limited" on what it could review. So long as there was credible and substantial evidence to support the Commission's determination, the Court of Appeals was bound to uphold it.

In a very long decision, which included a rather significant rehashing of the facts, the Court of Appeals found there was credible evidence supporting the Commission's determination.

Mofoco Enterprises, Inc. v. LIRC, 2011 AP 2532 (September 18, 2012) Not recommended for publication.

"Get outta heere'." Santos worked as an auto mechanic for Mofoco. He claimed to have injured his wrist on June 16, 2008 when he was lifting a motor. He sought medical treatment the same day and was released with restrictions to return to work on June 17, 2008. He returned to the employer for the next four days, but his employer told him no work was available within his restrictions. He came to work on June 24, 2008 and worked several hours before asking his manager about the wages he lost in the prior week for the work injury. According to Santos, the manager said he'd never paid a workers compensation claim before and he wasn't about to start now. An argument ensued and the manager told Santos "get out of here. You're fired. Go home." In Mofoco's personnel records it was reflected that Santos was "termed".

At hearing, Mofoco argued that Santos had walked off the job. The ALJ found that Santos had been "termed" for making a workers compensation claim. The ALJ awarded benefits under Section 102.35(3), Stats. LIRC upheld the award as did the Circuit Court.

On appeal Mofoco first argued that Santos had not suffered a work-related injury. Since LIRC found that a work-related injury had occurred, the court couldn't do much with that argument. Next, Mofoco argued that the ALJ made no finding that a refusal to rehire had occurred, or that suitable work existed for Santos. The Court of Appeals suggested the fact that Santos actually was put back to work and that the ALJ specifically found Mofoco had violated Section 102.35(3), Stats. negated that argument. Next Mofoco argued that the trial court failed to make a finding that a refusal to rehire had occurred or that suitable work existed. As pointed out by the Court of Appeals, they review LIRC's decision not the Circuit Court's.

Finally, Mofoco argued the record itself supported Mofoco's position that they did not refuse to rehire Santos and that it had no suitable work for him. Mofoco argued that a reasonable person must conclude that Santos voluntarily quit and that no suitable work existed. However, Mofoco failed to provide a legal basis for such an argument and the Court of Appeals rejected it.

As a cautionary note, the Court of Appeals admonished Mofoco for the brief it submitted. "LIRC uses the word "frivolous" to describe that brief. Mofoco Enterprises and its counsel are fortunate indeed that LIRC chose not to file a motion for frivolous costs on appeal. [Citation omitted] Similarly, we have elected not to prolong this litigation or to consume additional judicial resources by considering on our own motion whether the appeal in this matter was frivolous. We are nonetheless compelled to observe that Mofoco Enterprises' submission was woefully inadequate. We expect better from members of the bar."

Hooper Corp. v. LIRC, 2012 AP 973 (November 29, 2012) Not recommended for publication.

History does not always repeat itself. Koerner worked for Hooper for two years. During his employment at Hooper, Koerner worked at seven different welding substations and was exposed to welding fumes. After two years on the job Koerner began to complain that he didn't feel well. Various symptoms manifested themselves and in 2002 he was advised to stop working. In 2005 Koerner was diagnosed with manganese poisoning and in 2008 Koerner filed an application claiming the manganese poisoning was due to prolonged exposure to welding fumes at Hooper.

Multiple hearings were held where live testimony from two medical experts was taken. Eventually the Commission found that Koerner had been exposed to manganese while working at Hooper and that manganese was in Koerner's body. They awarded workers compensation benefits in the amount of 20% permanent partial disability from manganese poisoning. The Commission's award was based on the medical evidence and testimony from the applicant's

treating physician. The Circuit Court upheld the Commission's award and Hooper appealed to the Court of Appeals.

After citing the proper level of review to be afforded the Commission's factual determination on the medical evidence, the Court of Appeals described the medical testimony and the nature of the exposure. The Court of Appeals noted the conflicting testimony of the medical experts was something the Commission was responsible for sorting out. Hooper argued that prior case law from 1930 supported their contention that the manganese poisoning did not arise out exposure to welding fumes. The Court of Appeals was not impressed and affirmed the award by the Commission.

Petrovic v. LIRC, 2012 AP 273 (December 4, 2012) Not recommended for publication.

Was he really an independent contractor? Petrovic was a truck driver who was injured hauling cargo in November of 2009. Petrovic filed an application for workers compensation benefits alleging that DBG Trucking was his employer. DBG Trucking did not carry a policy of workers compensation insurance, and the UEF handled the claim. UEF argued that Petrovic was not an employee of DBG Trucking, but was instead an independent contractor. The ALJ denied benefits to Petrovic finding he was an independent contractor. That determination was upheld by the Commission after applying the 9-point test. Petrovic appealed arguing the Commission's interpretation of the 9-point test was "inconsistent" and therefore the Commission's interpretation of the facts and application to Statutes should be reviewed de novo.

The Court of Appeals affirmed the findings made by the Commission. After stating the Commission had significant expertise in the application of the 9-point test and its decision was entitled to due weight and deference, the Court of Appeals then looked at each argument raised by Petrovic in its application of the 9-point test. The decision is a good roadmap for how to stretch and bend the 9-point test to achieve the desired outcome. Among the many things argued by Petrovic was that he did not have an individual, distinct or disconnected office space as required by the Statute. LIRC got around this by stating that Petrovic's truck was his office, and that his home was his business address. The Court of Appeals concluded its analysis by stating it was not the role of the Court of Appeals to make factual findings on the evidence presented, but rather to affirm the Commission's determination if there was credible and substantial evidence to support it.

Menard, Inc. v. LIRC, 2012 AP 1278 (January 8, 2013) Not recommended for publication.

My profession is being a student. McCullough injured his right knee while working at Menards. Menards later terminated McCullough. McCullough applied for vocational rehabilitation through the DVR in 2005. He was on the waiting list until December of 2006

when an IPE was developed to obtain a bachelor's degree in business administration. The IPE called for schooling from January of 2007 through May of 2011.

The ALJ awarded only 80 weeks of retraining benefits. The ALJ stated, "I reserve jurisdiction on this question because the record does not contain vocational opinions assessing whether four years of retraining is necessary to restore Mr. McCullough's earning capacity. Perhaps a two year associates degree in business is enough, and a bachelor's degree is merely an earning capacity enhancement." McCullough and his DVR counselor went back and amended the IPE changing the course of study to AODA counselor. McCullough sought additional retraining benefits after the change in program.

At a second hearing the ALJ awarded an additional 80 weeks of retraining benefits noting that McCullough's annual earning capacity at Menards was approximately $45,000, and a bachelor's degree as an AODA counselor would get him $43,000. An associate's degree either in business management or for an AODA counselor would not pay the same. LIRC reduced the total number of weeks down from 160 to 120. This award was equal to the seven semesters of retraining McCullough had already completed. LIRC explained its reduction in the benefits was due to the "uncertainty of his future plans to transfer and begin course work at UW-Green Bay." Menards then took the matter to the Court of Appeals.

Menards raised four arguments on appeal. First it argued that the Commission failed to take into consideration McCullough's "leisurely pace" through his retraining program. The Court of Appeals rejected this argument as it was contrary to the factual findings made by the Commission. Second, Menards argued the Commission ignored McCullough's felony history as an obstacle to employment. However, Menards did not point to any specific evidence that criminal history would affect employability.

The third argument raised by Menards was that McCullough would be enhancing his earning capacity. The Commission rejected this argument noting an actual analysis of what McCullough could have earned was done by the Commission, and that the Commission had ordered seven semesters of retraining, which wasn't even sufficient to obtain a bachelor's degree.

Finally, Menards argued the Commission's determination of seven semesters of retraining benefits violated Menards' entitlement to "fundamental fairness." The Court of Appeals rejected that argument without commentary.

<u>County of Washington v. LIRC</u>, 2012 AP 1858 - FT (January 9, 2013)

Even first responders can have compensable psychological claims. Brawn was a deputy sheriff for Washington County. He and another deputy were transporting an individual to a mental health center when the individual attempted suicide in the back seat of the patrol car with a miniature scalpel concealed on his person. Brawn attempted to administer first aid,

but was ultimately unsuccessful and the detainee died. Brawn felt guilty about the event and eventually developed PTSD. He claimed the PTSD arose out of a compensable work-related event.

The ALJ found Brawn experienced stress so out of the ordinary as to be considered unusual stress. The Commission found the event was unexpected and unforeseen and so out of the ordinary from the normal stress that deputy sheriffs encounter daily without serious mental injury, that it constituted unusual stress. The Circuit Court affirmed, and the County appealed.

At the Court of Appeals, the County argued that LIRC erroneously relied on a fact not in evidence. The Commission concluded that Brawn had returned the wallet containing the scalpel to the detainee. While acknowledging the absence of evidence supporting the finding, the Court of Appeals concluded that Brawn's testimony that he "let Rosario's wallet go back in his pants pocket" was enough to support the Commission's conclusion.

Next the County argued that Brawn did not experience an event that would be considered unusual stress for a deputy sheriff. The County relied on Bretl. In Bretl, the police officer shot an armed suspect. Benefits were denied. The Court of Appeals rejected this argument stating that Brawn's involvement in the grizzly suicide of the detainee was so out of the ordinary that it should be categorized as unusual stress. The Court of Appeals specifically relied upon the Commission's application of the facts to the standard in School Dist. No. 1, for non-traumatic mental injury.

Milwaukee Transportation Services, Inc. v. LIRC, 2012 AP 2255 (June 4, 2013) Not recommended for publication.

Spit and run! Bracey was a bus driver for MTS. In 2010 Bracey confronted a man who was attempting to use an expired transfer ticket. He told the man to get off the bus. The man called Bracey names, and spit on him. Bracey jumped off the bus and chased after the man. After a couple of steps, Bracey fell. He crawled back onto the bus and later was taken to the hospital where it was discovered he had a ruptured left Achilles tendon and a ruptured right quadriceps tendon.

Bracey sought benefits claiming he was in the course of his employment at the time of the injury. MTS argued Bracey had violated the Cardinal Rule of being a bus driver - never leave the bus. The ALJ denied the claim, finding Bracey had violated the MTS rules and that he was outside the scope of his employment when he chased after the man. The Commission reversed, finding that if Bracey had deviated from his employment by leaving the bus to chase the passenger, it was only a momentary deviation. It only lasted 30 seconds and he went no more than 3-4 yards from the bus. The Commission, of course, didn't address what would have happened had Bracey run further before he tore his Achilles.

MTS took the matter to the Court of Appeals. The Court of Appeals, reciting every case they could find requiring due deference and great weight to be afforded the Commission's determination, affirmed the findings made by the Commission. As noted by the Court of Appeals, "although Bracey broke rules by chasing the unruly passenger, what Bracey did, as the Commission found, was impulsive, momentary and an insubstantial deviation – it was a fleeting, knee jerk reaction provoked by an unruly passenger. Bracey then returned to his seat and continued to drive the bus." Despite MTS's argument that the deviation was substantial because Bracey broke the Cardinal Rule of getting out of his seat and leaving the bus, the award was upheld.

LIRC DECISIONS

NON-TRAUMATIC MENTAL INJURY

1. **Van Dyke v. Tandem Transport Inc.**, WC Claim No. 2006-010184 (LIRC June 6, 2012).

Van Dyke was a truck driver who sought benefits for a non-traumatic mental disability. She claims that after she was married and lost her ability to drive to Canada, she was terminated on multiple occasions by her employer and had to have her Union intervene to get her job back. She also claimed she was berated by her supervisor, who used profane language. She claimed the reason for the terminations and the supervisor's behavior was the fact that her supervisor was upset because he would have to use American drivers to travel longer distances and pay them in American dollars.

The ALJ found that Van Dyke had been submitted to unusual stress, and that her mental illness arising out of the stress was compensable. He awarded permanent total disability benefits due to her psychological condition. On appeal, the Commission reversed the award, finding that the evidence failed to demonstrate mental stress that was so out of the ordinary from the countless emotional strains and differences employees encounter daily without serious mental illness. The employee failed to satisfy the requirements of School Dist. No. 1. The Commission pointed to the medical records which demonstrated some of the stress came from working long hours and the death of Van Dyke's sister.

PERMANENT DISABILITY

1. **Suing v. Midwest Airlines**, WC Claim No. 2005-032394 (LIRC June 25, 2012).

Suing sustained a compensable work-related injury when he struck his left elbow at work on August 31, 2005. In 2006 he had an olecranon bursectomy at the left elbow. In 2009 he had a left ulnar nerve transposition. The treating physician estimated permanent partial disability after the second surgery of 10% at the wrist. At hearing the employee argued the

permanent disability should be 10% at the elbow, not the wrist. The ALJ awarded 10% at the elbow. The employer wrote the ALJ requesting the order be modified to 10% at the wrist. This letter was treated as a Petition for Review, and the Commission noted as follows, "The applicant currently has symptoms of left hand numbness. Although the injury and surgery were at the elbow, his surgeon, Greg P. Watchmaker, M.D., estimated permanent partial disability at 10% at the wrist... Dr. Watchmaker's estimate is consistent with the rule that disability is assessed at the part of the body that is disabled, which may not always be the same part of the body as that injured." The Commission reduced the award to 10% at the wrist.

2. **McNaughton v. Wal-Mart Associates, Inc.** WC Claim No. 2005-014491 (LIRC July 23, 2012).

McNaughton had a serious injury to her foot and had three foot surgeries. She then claimed she sustained CRPS as a result of the injury and sought benefits for an unscheduled injury. The ALJ rejected the applicant's argument that she had CRPS or an unscheduled injury and McNaughton appealed to the Commission.

The Commission rejected the argument made by McNaughton that her CRPS resulted in an unscheduled injury. As noted by the Commission, even if McNaughton had CRPS, she did not establish that she had more than a scheduled injury to her leg. McNaughton's medical expert assessed permanent disability at 7% to the body as a whole based on the CRPS, but hinged that finding on the injections done into the spinal column by the pain specialists. The Commission rejected McNaughton's unscheduled injury claim stating the medical examiner was clearly referencing the site of the treatment and not the site of disability.

3. **Vreeland v. Wal-Mart Associates, Inc.**, WC Claim No. 2002-050183 (LIRC August 30, 2012).

Vreeland sustained a compensable work-related injury when she fell off a ladder at Wal-Mart. There was a dispute on the nature and extent of that disability, but eventually she was awarded 3% permanent partial disability as the result of the fall. She continued to work at Wal-Mart for seven years after the injury and was eventually terminated. After termination, Vreeland claimed, through a loss of earning capacity assessment, that she was permanently and totally disabled.

Wal-Mart argued that Vreeland had been terminated for causes unrelated to the work injury and therefore no loss of earning capacity should be awarded. The Commission found that Vreeland was not permanently and totally disabled, but did award a 20% loss of earning capacity based on the vocational opinion submitted by Wal-Mart. The Commission found the termination for cause may have included time away from work for the work injury and that there was no support for Wal-Mart's argument that Vreeland was intentionally engaging in misconduct and was deliberately attempting to lose her job.

The more interesting issue in the case was payment of medical expense after February of 2003. Wal-Mart's expert offered the opinion that any treatment after February 7, 2003 was due to Vreeland's obesity, and not for the work injury. Interestingly, both Dr. Chu and Dr. Kelman who treated Vreeland after 2003 emphasized the role of obesity in Vreeland's need for

ongoing treatment. Although concluding that obesity was an "as is" condition, the Commission found that the medical records supported Wal-Mart's argument that the ongoing treatment was actually due to the obesity, and not due to an aggravation of a preexisting condition by the work injury.

4. **Meyers v. Thyssenkrupp Waupaca Inc.**, WC Claim No. 2009-017065 (LIRC September 27, 2012).

Meyers claimed an occupational type injury of the cervical spine resulting in spinal fusion surgery in 2008. Post-surgery he claimed permanent total disability on an odd lot basis. The employer argued the condition in the cervical spine was a mere manifestation of a preexisting condition, and that Meyers was not permanently and totally disabled.

The Commission found Meyers sustained a work-related injury; however, the Commission was skeptical about Meyers testimony that he was unable to work in any capacity. Meyers was unwilling to pursue vocational rehabilitation, claiming he had headaches and that he couldn't ride in bumpy vehicles; yet he mentioned to his doctors that he was riding an ATV and was able to pull start his own lawn mower. He also renewed his CDL license after surgery, but claimed he couldn't use it to drive truck. The Commission noted the burden shifting effect of the "odd lot doctrine". However, LIRC credited the vocational expert for the employer who was able to demonstrate that actual employment existed for Mr. Meyers in the Green Bay area. Meyers lived in Marinette, but he had worked for his brother in Green Bay before. The Commission awarded only a 45% loss of earning capacity.

5. **Blasius v. Central Contractors Corp.**, WC Claim No. 1998-036577 (LIRC February 28, 2013).

Blasius had two arthoplasties, and the ALJ awarded permanent disability for both. The employer argued that the permanent partial disability stacking allowed by Madison Gas & Electric, dealt with surgical procedures, not prosthetic devices. The employer argued that the ALJ was stacking permanent partial disability for prosthetic devices and not procedures.

The Commission rejected this argument stating the focus of the analysis of Daimler Chrysler and Madison Gas & Electric was on the negative effect to the function of the body part of repeat or multiple surgeries. The trigger is the effect of the surgery, rather than the kind of surgery. The Commission conceded the maximum permanent disability that could be awarded for a knee was 100%, no matter how many replacement surgeries occurred.

6. **Gruenberg v. Daniels Joe Construction**, WC Claim No. 2000-022484 (LIRC March 14, 2013).

Gruenberg had multiple hip surgeries, the first occurring in 1996 and the second in 2009. Both hip surgeries involved replacement of the joint. The ALJ awarded 40% for the 1996 hip surgery and 40% for the 2009 hip surgery. On appeal, the employers for both dates of injury argued there was no logic in stacking permanent disability for prosthetic devices. They argued that since the prosthetic device was bound to wear out any way, there was no basis for asserting that the second replacement was compensable over and above what was paid for the

first replacement. The Commission rejected this argument finding stacking of multiple permanency awards for multiple hip replacements was appropriate.

IDIOPATHIC INJURY

1. **Coates v. Milwaukee Transport Services**, WC Claim No. 2010-011431 (LIRC July 20, 2012).

Coates clocked into work at the bus station and then he was supposed to go to a relief point where he would relieve another bus driver. Unfortunately, Coates went to the wrong relief point. When he realized he was at the wrong spot, he started jogging down the sidewalk to the correct relief point. Of course, he fell and injured his left knee. The bus company denied benefits arguing the employee was not in the course of his employment when he was running down the sidewalk and that the fall was idiopathic. The ALJ awarded benefits and the bus company appealed to the Commission.

MTS argued Coates was not in the course of his employment because he went to the wrong relief point. The Commission said because he was trying to get to the right relief point and had clocked in, that he was in the course of his employment. Next, MTS argued it was an idiopathic fall because the employee wasn't really jogging, he was walking briskly and there was no explanation as to why or how he fell. The Commission rejected that argument and stated it matter not whether Coates was jogging, walking briskly or simply walking. The Commission went on to state, "an idiopathic or unexplained fall is different from a situation where an everyday activity performed at work causes injury to a worker. Because the applicant injured his knee due to the activity of ambulating while working – which is the opinion of both parties' medical experts in this case - he sustained a work-related injury even though ambulating is a normal activity."

2. **Pattengale v. West Allis Memorial Hospital**, WC Claim No. 2010-021311 (LIRC July 26, 2012).

Pattengale worked for 33 years as a CNA and was 85 years old working part time at the time of her injury. She was getting off an elevator when she fell injuring her right knee and left shoulder. No one witnessed the event. Pattengale indicated in the incident report that her shoe stuck to the floor while getting off the elevator. Several weeks later she gave a slightly different history stating she felt she had tripped over the lip of the elevator. The employer denied the claim as idiopathic.

At hearing, Pattengale could not remember if it was her right foot or left foot that got caught when she tripped as she started out of the elevator. She could not say if there was anything sticky on the floor, but she did testify that there was a lip at the boundary between the elevator floor and the lobby floor. She couldn't remember how high the lip was and ultimately she could not be sure if she tripped on the lip or whether her foot simply got stuck on the floor.

The ALJ denied the claim finding the different descriptions of how the injury occurred really meant that Pattengale had no idea what happened and that this was an idiopathic fall. The Commission didn't agree and awarded benefits: "The Commission does not find this to be so inconsistent as to find her fall to be unexplained. In fact, the applicant's explanation of a trip, catch or stick is consistent with a "sticking" at the threshold where the applicant necessarily had to step over a gap in flooring and differing surfaces in order to exit the elevator."

3. **<u>Denamur v. Larry's Markets Inc.</u>**, WC Claim No. 2010-028002 (LIRC July 30, 2012).

Denamur claimed an injury occurring while turning toward the time clock at work. She stated her foot must have stuck and that she lost her balance. The employer denied benefits arguing it was the applicant's choice of footwear that caused her fall, and that originally Denamur had stated she tripped over her own feet. The ALJ awarded benefits finding the injury arose out of employment. On appeal the employer argued the choice of footwear was solely up to the employee and it was the employee's footwear that caused the injury. The Commission rejected that argument stating that since the employer had no policies regarding footwear, Denamur's choice of footwear could not be contrary to any policies. When the employer argued this was a purely idiopathic fall, the Commission pointed to prior case law stating that her testimony that her foot stuck and that she fell was consistent with a compensable claim, and not an idiopathic fall.

4. **<u>Korrison v. Aurora Medical Center</u>**, WC Claim No. 2004-040437 (LIRC June 6, 2013).

Korrison fell in a patient's room. She was wearing "nurse mate" shoes. Originally the employer argued that the fall was idiopathic, but at the Commission level that argument was abandoned. The next question addressed by the Commission was whether the fall was "unexplained" and therefore not work-related because Korrison had not been in a zone of special danger.

Korrison really couldn't remember what happened. She stated she just remembered falling. She thought her foot had stuck to the floor, but there was nothing sticky on the floor. She didn't trip over anything, and she didn't hit anything on the way down. There was no indication there was anything on the floor causing the fall.

After citing <u>Pattengale</u> and <u>Denamur</u>, the Commission found the fall was simply unexplained and there was no other way to see the case. They upheld the ALJ's denial of benefits on the basis that she wasn't in a zone of special danger, and that no one could say for certain why she fell.

The case is a nice summary of the idiopathic fall defense as well as the cases addressing unexplained falls.

REASONABLE JOB OFFER

1. **Sims v. Time Warner Cable**, WC Claim No. 2011-010016 (LIRC November 29, 2012).

Sims was a cable installer who fell while on his ladder trying to install cable in a customer's house. Sims sought treatment for his knee and was diagnosed with traumatic prepatellar bursitis. The doctor awarded a 2% permanent disability and stated a permanent restriction of no kneeling on the right knee. The employer while conceding the injury denied the existence of permanent disability or permanent restrictions. The ALJ awarded a 2% permanent disability. The bigger dispute was the job offer that occurred when Sims had been released to light duty work. Time Warner had offered Sims the opportunity to work light duty, but Sims would have to make a 1 hour and 23 minute commute by bus one way. The route required transfers and involved more than 100 stops. Because this would be a 3 hour uncompensated commute to perform light duty, the Commission found that Sims had a reasonable basis to refuse the offer of work and that he was entitled to temporary disability benefits. [For a while, Time Warner had allowed Mr. Sims to use the Company truck to commute to the light duty work. However, they took the truck back when Sims was not doing installation work. And Sims had no vehicle of his own.]

COURSE OF EMPLOYMENT

1. **Gay v. Stove Works Upholstery**, WC Claim No. 2009-014586 (LIRC February 28, 2013).

Gay sustained a back injury in May of 2009 while installing a fireplace and chimney. He was diagnosed with a disk protrusion at the L5-S1 level, but was given no permanent disability. He returned to work in the summer of 2009 and worked through November of 2010 with no incident or problem. He then complained of additional pain in the low back and was taken for an L5-S1 surgery where a large disk fragment was removed. Gay claimed the disk fragment that was removed in December of 2010 was the result of the May 20, 2009 injury. The ALJ awarded benefits. The Commission affirmed.

The employer argued that the work being done by Gay in November of 2010 in his cousin's basement was the real reason the disk had fragmented and herniated. Medical support was offered for this argument. The Commission relied upon Lange, finding that the diagnostic evidence of damage to the disk in 2009 was sufficient to establish the existence of a defect at that disk level. As there was no specific injury occurring while performing the work in the basement in 2010 and as Gay was not paid for the work he did, the Commission determined the same injury to the same extent would not have been suffered by Gay but for the May 2009 work injury.