Wisconsin Association of Worker's Compensation Attorneys Case Law Update

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By
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Wisconsin Court of Appeals

Applicant denied temporary disability compensation when she "retired" during the healing period.

***Mueller v. LIRC*, 2019 WI App 50, 388 Wis. 2d 602, 933 N.W.2d 645**

Applicant Janet Mueller sustained a compensable shoulder injury while employed by Ashley Furniture. Shoulder surgery ensued, after which Ashley put Mueller on light work at a wage loss that resulted in the weekly payment of temporary partial disability compensation. While on light duty, the applicant resigned her employment with Ashley, reporting that he she intended to retire. Ashley stopped paying wages and temporary partial disability compensation. The applicant later re-applied for employment with Ashley but was not rehired. She then had a second shoulder surgery and Ashley paid medical expenses, but not temporary disability compensation. During the healing period from the second shoulder surgery, the applicant found a part-time job at a restaurant. At the end of the healing period, Ashley paid eight percent permanent partial disability compensation.

The applicant claimed entitlement to temporary disability compensation for the period from her retirement date to the end of the healing period following her second shoulder surgery. An administrative law judge and the Labor and Industry Review Commission denied the claim, finding that the applicant retired for reasons unrelated to her work injury. The circuit court affirmed the LIRC's order on the period from the retirement date to the date that the applicant had the second shoulder surgery. It remanded the matter to the LIRC to determine if the applicant re-entered the labor market after retirement and should be entitled to temporary disability compensation. On remand, the LIRC again rejected the applicant's claim, finding that she re-entered the labor market in a limited way, intending only to do part-time work and had not proven that her wage loss was due to her work-related injury.

The appeals court affirmed the LIRC's award. First, it rejected the applicant's claim that Wis. Stat. Sec. 102.43 does not provide for denials of temporary disability for retirements. Despite the absence of any "retirement" exception in Wis. Stat. Sec. 102.43(9), the court determined that to be compensable for worker's compensation purposes, "the wage loss must be attributable to a work-related injury. Simply put, an employee who retires for reasons entirely unrelated to his or her

injury cannot make such a showing because the employee's wage loss was caused by the employee's choice to voluntarily retire, not by his or her work-related injury." *Mueller v. LIRC*, at ¶25. The court cited *Emmpak Foods, Inc. v. LIRC*, 2007 WI App 164, 303 Wis. 2d 771, 737 N.W.2d 60, and *Brakebush Bros. v. LIRC*, 210 Wis. 2d 623, 636, 563 N.W.2d 512 (1997), as support for its holding.

The appeals court also rejected the applicant's claim that she re-entered the labor market when she took part-time work following the second shoulder surgery. She contended that her ability to earn wages was limited by the shoulder injury. The court found no proof that the applicant's wage loss was due to the injury. It noted that the LIRC found, as a matter of fact, that the applicant chose a part-time job and provided no proof that she was denied full-time work because of her shoulder disability. The court noted that at hearing the applicant testified that she did not desire to work more than part-time hours and that nothing had prevented her from doing that, other than her choice to take a post-retirement part-time job.

It is difficult to reconcile this case with the *Brakebush Bros.* holding that seems to create a presumption that the injury causes wage loss and that unless a specific statutory exception applies, temporary disability compensation must be paid. In the *Mueller* matter, what if, after retirement, the applicant's physician had prescribed a period of "no work" during the healing period following the second surgery? By then the applicant had at least tried to work. In that circumstance, would not her injury have caused her wage loss?

Traveling employee ordered to repay health insurer nearly a half-million dollars in improper payments.

***Brown v. Muskego Norway Sch. Dist. Group Health Plan*, 2018 AP1799 (Oct. 16, 2019).**

Employee William Brown sustained injury while riding a motorcycle that collided with another vehicle. He sued the driver of the other vehicle and later settled with her auto insurer. The original pleadings named Muskego Norway school district's health insurance plan as a subrogated party because it paid more than $482,000 in medical expenses for Brown's injury-related treatment. The health insurer pleaded that its contract with Brown -- an insured under the health plan as a spouse of a school district employee -- excluded coverage for work-related injuries. On summary judgment, the circuit court for Waukesha County ruled for the health insurer and awarded more than $514,000 in repayment, costs and interest. Brown appealed, alleging that he did not sustain a work-related injury. The appeals court affirmed the circuit court's decision.

On the date of his injury, Brown worked as a salaried employee of Gardner Pet Group. Gardner had locations in West Bend, where Brown had his office, and in nearby Juneau. Brown rode his motorcycle from home to the Juneau plant on the injury date and finished his business there around 2 p.m. His intentions after the meeting framed the dispute in the case. The accident occurred at 2:47 p.m. on state highway 33, the most direct route from Gardner's Juneau plant to its West Bend location. Five days after the injury, Gardner reported a claim to Travelers, its worker's compensation insurer, and payments commenced. But Brown refused to accept Travelers' checks, contending that he was not performing services growing out of and incidental to his employment

when injured. He told Travelers that he and his attorney intended to take a different tack on the claim.

The health insurer then received claims for Brown's medical expenses. It sent a standard-form questionnaire to Brown, asking if his injury was work related. He answered, "No." During discovery on the personal injury claim, Brown was asked about his intentions on the date of injury. He said he left Juneau, intending to have lunch and to enjoy the beautiful day meandering through the area on his motorcycle. Two days after the accident, while still hospitalized, Brown told an insurance "case manager" that he was traveling from one work site to another. The Gardner co-worker who submitted the worker's compensation claim to Travelers reported that Brown sustained injury "driving from one work location to another." That was confirmed by an an internal company email sent one week after the accident.

The appeals court determined that Brown was a "traveling employee" under Wis. Stat. Sec. 102.03(1)(f) when injured. First, it held that Brown's employment "required him to travel" between Gardner's locations in Juneau and West Bend so the statute applied to his injury. Brown claimed he deviated for a private purpose not reasonably necessary for living when he meandered through the woods. The court noted a strong presumption from prior cases in favor of performing services and against deviations once the employee is on a work trip. The appeals court found "no evidence that overpowers the presumption on continuing employment." *Brown v. Muskego Norway Sch. Dist. Group Health Plan*, at ¶15. Although Brown's route was "circuitous," the court noted that he was injured on the direct route between Gardner's locations. Any deviation ceased once he was on Hwy. 33. *Lager v. ILHR Dept.*, 50 Wis. 2d 651, 661,185 N.W.2d 300 (1971). Lunch was an act reasonably necessary for living so it was not a deviation.

As noted, this case arose in the circuit court on the health insurer's motion for summary judgment. Arguably, the case was not appropriate for summary judgment because there was an issue of fact on Brown's intentions at the time of injury. He made several early admissions against interest when he was quoted as saying he intended to drive back to his West Bend work site, but he refused worker's compensation payments and insisted he was deviating. One might question his credibility, but is not that the province of a fact finder, such as a jury or administrative law judge? The appeals court said no, concluding, "Brown's own testimony [during his deposition] also did not confirm that he was not heading back to his office or that he did not plan to return to work that day." *Brown v. Muskego Norway Sch. Dist. Group Health Plan*, at ¶16. The court never considered remanding the case to the Dept. of Administration's Division of Hearings and Appeals (DHA) to make findings on whether the Worker's Compensation Act of Wisconsin applied.

Having found Brown's injury work related, the court applied an exclusion from the health insurer's policy and found the health insurer's payments improper. The appeals court cited *Employers Health Ins. Co. v. Tesmer*, 161 Wis. 2d 733, 736, 469 N.W.2d 203 (Ct. App. 1991), for the rule that health insurers may recover work-related payments in circuit court because they are not parties to disputes under the Worker's Compensation Act. It did not address Wis. Stat. Sec. 102.30(7), the statute that allows worker's compensation orders to include reimbursements to health insurers for improper payments. The court slightly modified the circuit court's award to exclude about $245 in attorney costs, but otherwise ordered reimbursement to the health insurer.

The court's decision does not preclude Brown from claiming worker's compensation for his injuries and having Travelers repay the health insurer. It might actually be cheaper for Travelers to repay the health insurer than to pay the medical expenses directly to the health-care providers. Travelers, as a non-party to the circuit court case, could ask for a hearing before the DHA on the compensability of Brown's injury but on the facts set forth in the decision that appears to be a losing case.

(Opinion ordered unpublished on Nov. 20, 2019. No party petitioned for review to the supreme court.)

Whose lawyer collects attorney fees in third-party settlements?

***Sinkler v. Amer. Family Mut. Ins. Co.*, 2019 WI App 64, 389 Wis. 2d 273, 936 N.W.2d 186.**

The worker's compensation insurer EMC challenged in circuit court the distribution of settlement funds under Wis. Stat. Sec. 102.29(1), after a work-related auto accident involving Brian Sinkler. The appeals court affirmed the circuit court's refusal to award any attorney fees to EMC's lawyers. The appeals court also refused to hold that in all sec. 102.29(1) settlements, the attorney fees are to be *pro rata* distributed to each party's attorney based on the party's share of the settlement proceeds.

Sinkler retained the Habush law firm to sue American Family's insured, the driver of the vehicle involved in Sinkler's work-related injury. Habush named EMC as a party under sec. 102.29(1) because it paid $51,321.03 in worker's compensation on Sinkler's claim. EMC retained the Harmeyer law firm to represent its interests. At mediation, the parties agreed to a settlement of $175,000, of which $52,500 (30%) went to Mrs. Sinkler for loss of consortium (not subject to sec. 102.29(1) distribution, per *DeMeulenaere v. Transport Ins. Co*., 116 Wis. 2d 322, 325, 342 N.W.2d 56 (Ct. App. 1983)). The parties called on the court to distribute the remaining $122,500.

Lawyers for Sinkler and EMC proposed alternate distributions of one-third of the $122,500 left after Mrs. Sinkler received her settlement. Each proposal distributed the same amount to Mr. Sinkler and EMC, leaving behind a small cushion for future compensation of around $1,600. The Habush firm claimed the entire attorney fee with none to the Harmeyer firm. The Harmeyer firm wanted the fee distributed in proportional relationship to what Mr. Sinkler and EMC received. EMC's share was 65.5% of the party payments and Mr. Sinkler's share was 34.5%, so the Harmeyer firm proposed that it receive 65.5% of the fee and Habush 34.5%. Each law firm was to be fully reimbursed for its respective costs. The circuit court adopted the Habush proposal. The appeals court affirmed.

The appeals court approved the circuit court's distribution because both law firms "prosecuted" the claim on behalf of their respective clients and the parties had not agreed prior to the litigation's conclusion on how to divide the attorney fees. The fee agreement between Sinkler and the Habush firm entitled the latter to one-third of "the recovery from my case as their [sic] fee." EMC argued that meant one-third of Sinkler's 34.5% recovery, not one-third of 100% of the parties' recoveries. The appeals court rejected that interpretation, holding that "my case" meant the entire matter and

"the recovery" is not "my recovery." The appeals court also noted that the Habush firm initiated the lawsuit, obtained the necessary factual and medical evidence to support the case and took the initial risk that the litigation would fail with no attorney fee. Thus, the court found the Habush fee agreement reasonable.

The court found Harmeyer's one-third contingency fee agreement with EMC unreasonable for several reasons. First, EMC hired Harmeyer two years after Sinkler hired Habush and two months after Habush filed the summons and complaint. The court noted that the Harmeyer firm assigned a young associate attorney to do most of the work on the case, while the Habush firm used a more experienced lawyer. Harmeyer's named partner participated only in the mediation, according to the decision. The court also rejected the agreement between EMC and Harmeyer as non-traditional, finding that most worker's compensation insurers pay their attorneys by the hour, not on a contingent fee basis. It held that without contingency fee agreements many workers would not be able to afford attorneys to prosecute their cases, while employers and insurers had greater financial resources to induce lawyers to take risky cases. The court noted that most of the negotiating was done by the Habush firm and that EMC was likely to have recovered its amount by statute, even if it did not have an attorney.

The appeals court also noted that the circuit court refused to award a fee to the Harmeyer firm on an hourly basis because the firm provided no billing records to the court. It did not list the time its attorneys spent on the case or what it considered a reasonable hourly rate.

The court also rejected EMC's request for a rule that attorney fees in sec. 102.29(1) cases be divided in the same proportion as each party's recovery. The court rejected the proposal because it noted that such a distribution would be inconsistent with prior supreme court precedent in *Anderson v. MSI Preferred Insurance Co.*, 2005 WI 62, 281 Wis.2d 66, 697 N.W.2d 73. It would not necessarily reflect the work done on a particular sec. 102.29(1) case. It also held that such a scheme would deter law firms from taking on sec. 102.29(1) cases.

The lesson for contingency fee personal injury lawyers is that it is important to have a clear fee agreement. The agreement ought to make clear how much of the sec. 102.29(1) settlement is subject to a fee, including any consortium claim. It ought to list the tasks the attorney will perform to achieve the result. Consider keeping time records in case a trial court judge wants to compare your work with other lawyers involved in the case. As for counsel representing employers and insurers, the first consideration is whether plaintiffs' counsel is competent and diligent enough to "take the laboring oar" on the case. If so, allow that and protect your client's interests where necessary, such as consortium loss claims and distributions to other third parties. Settlements of sec. 102.29(1) claims often present an opportunity to settle the underlying worker's compensation claim so that must be considered. Counsel for employers and insurers should keep time records, even if paid on a contingency basis. It might be best to bill clients by the hour when taking the monitor role and consider implementing a contingent fee arrangement when having to prosecute the claim.

Another interesting fact is the large amount of loss of consortium paid to Mrs. Sinkler. She received 30% of the total settlement. Consortium claims are not easy to quantify and highly fact dependent, but a 30% share would have attracted some attention in my days as a practicing

insurance attorney. Generally, we did not object to around 20%, but would want to verify the claim by getting some evidence of the spouse's loss. In fact, that would be one of our major roles in the litigation. We recommended to clients that we participate in the spouses' depositions and propound interrogatories to them to explain the details of the consortium claim. Did the spouse care for the injured party? Did the spouse miss work and other important matters? Spend money to assist the plaintiff? The decision (at ¶¶ 36-38) discussed the consortium claim. It noted that a Harmeyer attorney attended Mr. Sinkler's deposition but asked no questions. Interrogatories propounded by EMC were "nearly identical" to those offered by American Family's counsel. At mediation, there was no dispute over Mrs. Sinkler's share and, in fact, the decision suggests (at ¶32) that EMC's counsel proposed it. The appeals court concluded (at ¶38), "The record therefore fails to support an argument that the Harmeyer firm performed any significant work toward resolving the parties' conflict as to the loss of consortium claim." Perhaps the information gathered by the Harmeyer firm during discovery supported a 30% distribution to Mrs. Sinkler. The appeals court's decision explains the process that firm used to gather evidence on a consortium claim (attend depositions, propound interrogatories, review medical records), but does not discuss the evidence. In my view, if the Harmeyer firm assessed evidence gathered during discovery regarding Mrs. Sinkler's claim and used that information to advise EMC of the reasonableness of the 30% distribution – and facilitated settlement at the mediation by proposing that distribution – then it added some value to the ultimate result for its client EMC. After all, EMC was fully repaid with a small cushion. Time records would help a law firm recover a fair payment for added value, if not from the court, then from its client.

(EMC petitioned for review to the supreme court on Nov. 18, 2019.)

Exclusive remedy provision bars civil suit against worker's compensation insurer for alleged negligent claim denial.

***Graef v. Continental Indemnity Co.*, 2018AP1782 (Feb. 4, 2020).**

The appeals court by summary judgment dismissed injured worker Francis Graef's circuit court suit against his employer's worker's compensation insurer Continental Indemnity Co. The court applied "the exclusive remedy provision," Wis. Stat. Sec. 102.03(2):

> Where such conditions [of liability under Wis. Stat. Sec. 102.03(1)] exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier. This section does not limit the right of an employee to bring action against any coemployee for an assault intended to cause bodily harm, or against a coemployee for negligent operation of a motor vehicle not owned or leased by the employer, or against a coemployee of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance.

The dispute arose out of a suicide attempt, causing non-fatal injuries. Graef shot himself in the head four months after sustaining a work-related injury that the court indicated included "depression." Graef's doctor prescribed duloxetine for the depression. The first time Graef refilled the duloxetine prescription at the pharmacy, Continental denied coverage. The pharmacist appealed while Graef was present and prevailed on Continental to accept liability for the refill. The second attempt at refill failed and Graef left the pharmacy without his duloxetine. He shot himself about seven weeks later. In his circuit court complaint, Graef alleged that Continental negligently failed to approve his duloxetine refill; that the drug relieved his depression; that by refusing to approve the refill Graef stopped taking duloxetine; that stopping the duloxetine made the suicide attempt more likely; and that Continental should be liable for the consequences of its negligence.

The court held that Graef's court claim had its "origin in events that occurred because of [an] employment relationship," a term from *Messner v. Briggs & Stratton Corp*.,120 Wis.2d 127, 139, 353 N.W.2d 363(Ct. App. 1984). *See also, Jenkins v. Sabourin,* 104 Wis. 2d 309, 311 N.W.2d 600 (1981). The court applied the *Messner* rule because Graef's negligent claim-handling allegation originated from the employment relationship. Without the employment relationship, there would have been no work injury – and no work-injury claim dispute. The court found that Graef's remedy against Continental for his injuries was under the Worker's Compensation Act.

The court also held that the Act likely covered Graef's gunshot injuries. At ¶16, the court noted that if Graef's allegations in the circuit court pleadings are supported by the proper evidence, he has a valid worker's compensation claim for the gunshot injuries, even though he had not filed a hearing application. Not all suicides (or attempts) are non-compensable "intentionally self-inflicted" injuries under Wis. Stat. Sec. 102.03(1)(d). *Brenne v. ILHR Dept.*, 38 Wis. 2d 84, 92-93, 156 N.W.2d 497 (1968).

At ¶¶24-26, the court wrestled with Graef's assertion that negligent denials of worker's compensation are not covered by the WC Act. The court noted that bad faith denials, which it indicated are "intentional" torts, are covered by Wis. Stat. Sec. 102.18(1)(bp). It reasoned that the Legislature must have intended for negligent denials to be barred as it would make no sense to bar court claims only for intentional torts, a more serious infraction. The court did not consider whether penalties for "inexcusable delay" in payment under Wis. Stat. Sec. 102.22(1) might qualify as compensation for negligent denial. "Inexcusable delay means without a bona fide justification or motivation," held our supreme court in 1970, a definition that does not quite fit all negligence, but certainly some. *Milwaukee Co. v. ILHR Dept.*, 48 Wis. 2d 392, 399, 180 N.W.2d 513.

The court rejected Graef's claim that Continental's drug denial amounted to an in intervening cause that did not have its origin in the employment relationship. He claimed depriving him of compensation in circuit court would "excuse" Continental's negligence. At ¶21 the court found that the Legislature, carefully balancing the interests of employees and employers, limited Graef's remedy to worker's compensation. It was not the court's role to balance those interests.

The decision's caption and text refer to Applied Underwriters as allegedly affiliated with Continental, perhaps as a claim administrator or drug dispensary. Applied also requested dismissal but the court did not address its motion in this decision.

Labor and Industry Review Commission

A rare exception to the normal temporary disability compensation rate is explained.

Moreno v. Zang Pies, L.L.C., WC Claim No. 2018-003973 (Dec. 13, 2019).

The issue was temporary partial disability compensation to an injured employee who, consistent with Wis. Stat. Sec. 102.11(1)(f)2, restricted labor market availability to part time and had no other job at the time of injury. The Dept. of Workforce Development, Worker's Compensation Division contended that the appropriate Wis. Stat. Sec. 102.11(1)(f)2 temporary total disability rate in all cases is two-thirds of the average weekly earnings at the time of injury. The respondents contended that the TTD rate applies only when the average of the employee's actual earnings at the time of injury exceeded the TTD rate. In the case at bar, the TTD rate was $333.87 per week, so the Division multiplied that number by the percentage wage loss sustained by the employee in each week of disability to determine the TPD rate for that week. The respondents contended that the employee could receive no more than $168.32 per week in temporary disability compensation because that was the average of wages earned by the employee in the two weeks worked prior to injury. The LIRC held that sec. 102.11(1)(f)2 does not affect the calculation of the "average weekly earnings" under Wis. Stat. Secs. 102.11(1)(a) through 102.11(1)(d), nor does it affect the TTD rate. Its limited purpose is to "cap" temporary disability compensation payments at the "average weekly wages" of restricted part-time employment on the injury date.

Under sec. 102.11(1)(f)2 "average weekly wages" means something different than "average weekly earnings." Practitioners and judges may use "average weekly wage" as synonymous with "average weekly earnings" but in sec. 102.11(1)(f)2 the plural of the former is not synonymous with the latter. It is the weekly average of wages paid to the part-time employee prior to the injury date. The LIRC defended its interpretation as consistent with the policy of preventing part-time workers who do not have other work and do not accept full-time work from receiving a windfall in TPD that exceeds their actual wages. The LIRC held that the weekly wage loss percentage, as compared to the "average weekly earnings," is multiplied by the TTD rate, not the sec. 102.11(1)(f)2 cap. That sum is compared to the TTD rate and the average weekly wages cap. Weekly TPD payment is the lesser of the two. The cap also applies to TTD compensation as the statute makes no distinction between TTD and TPD.

Note: There are two calculations when arriving at the "average weekly earnings" for temporary total, temporary partial and permanent total disability compensation. One is to multiply the hourly wage by the number of hours worked per week. Wis. Stat. Sec. 102.11(1)(a). The other is to divide the total annual wages (52 weeks prior to the week in the which the injury occurred) by the actual number of weeks worked in that period (fractional weeks count as a week worked). Wis.

Stat. Sec. 102.11(1)(d). The greater of the two is the "average weekly earnings." (There are exceptions for seasonal, commissioned and certain government workers, but the majority fall under the above two tests.) Under the hourly rate test, the law mandates that the hourly wage rate is multiplied by 40 hours per week to calculate one measure of "average weekly earnings." Wis. Stat. Sec. 102.11(1)(a)4. (There are some special exceptions for firefighters, airline flight attendants, and anyone else whose employer can prove by clear and convincing evidence that the normal full-time schedule for that employer is other than 40 hours per week.) There are two ways under the hourly rate test that an employee is considered part time such that the hourly rate is multiplied by the hours of part-time employment, not 40. One is to show the injured employee was part of a class of part-time employees under the strict requirements of Wis. Stat. Sec. 102.11(1)(am). The other is sec. 102.11(1)(f)2, the statute at issue in the above case. To apply the latter exception, the respondents must show that the employee restricted availability to part-time work and was not, at the time of injury, employed in any other job. The key holding in the above case is that, in this rare exception, the temporary disability compensation is not necessarily two-thirds of the employee's net wage loss. It does not affect the average weekly earnings or temporary disability compensation rate calculations. Rather, it caps temporary disability at the "average weekly wages of the part-time employment," a term and concept unique to the Worker's Compensation Act of Wisconsin and, so far as I know, not previously defined. Is it to be calculated under the principles of Wis. Stat. Sec. 102.11(1)(d)?

Employee denied non-traumatic mental injury compensation as near-miss accident was considered ordinary for his job.

***Purdy v. Appleton Coated, L.L.C.*, WC Claim No. 2016-02555 (Oct. 23, 2019).**

The LIRC dismissed a non-traumatic mental injury claim by an indoor overhead crane operator upon a finding of ordinary mental stress. The crane's purpose was to lift rolls of paper. A malfunction occurred, causing the employer to summon a contractor to make repairs. After the contractor developed a solution, the applicant returned to his crane cab to complete the paper lift. Another malfunction occurred, causing the piece being lifted to hit the crane cab and dislodge its safety glass. The applicant was not physically injured and ultimately completed the lift. Several days later, he developed post-traumatic stress disorder symptoms after concluding that he was nearly killed in the crane cab. The LIRC found that the applicant's near-miss stress was not extraordinary based on evidence that similar accidents had occurred with the employer's crane. It was an expected hazard of the job, according to co-workers, who also testified that the applicant did not appear distressed during the lifting process.

Wis. Stat. Sec. 102.58 intoxication compensation ban does not apply to claims by the Work Injury Supplemental Benefit Fund.

***Marsalek v. Dickow Cyzak Tile Co.*, Inc., WC Claim No. 2017-012898 (Dec. 13, 2019).**

Issue was whether Wis. Stat. Sec. 102.58's recent amendment barring compensation to employees whose alcohol and drug intoxication caused death applies to claims by the Work Injury

Supplemental Benefit Fund. Peter Marsalek died when he drove his employer's truck into the rear of a school bus. Marsalek left behind no "dependents" under Wis. Stat. Secs. 102.48(1), 102.49(1) through 102.49(3), and 102.51. The Fund and the respondents stipulated that Marsalek's death was caused by intoxication within the meaning of Wis. Stat. Sec. 102.58: "If an employee violates the employer's policy concerning employee drug or alcohol use and is injured, and if that violation is causal to the employee's injury, no compensation or death benefits shall be payable to the injured employee or a dependent of the injured employee." The Fund asserted its claim for death benefits under Wis. Stat. Sec. 102.49(5), citing these statutory provisions:

> (a) In each case of injury resulting in death, the employer or insurer shall pay into the state treasury the sum of $20,000.
>
> (b) In addition to the payment required under par. (a), in each case of injury resulting in death leaving no person dependent for support, the employer or insurer shall pay into the state treasury the amount of the death benefit otherwise payable, minus any payment made under s. 102.48 (1), in 5 equal annual installments with the first installment due as of the date of death. . . .
>
> (e) The adjustments in liability provided in ss. 102.57, 102.58, and 102.60 do not apply to payments made under this section.

The respondents argued that the Fund's claim derived from the employee's claim in the same manner as a spouse, minor child or other dependent. They asserted that the "otherwise payable" language in sec. 102.49(5)(b) supported their position because, in this case, death benefits would not have been paid to Marsalek's dependents due to his intoxication-caused death. The Fund asserted that it had a separate statutory claim for the death benefits and that the plain language of sec. 102.58 did not preclude that claim because the Fund's claim was not mentioned in the statute. It also challenged the respondents' interpretation of the "otherwise payable" language, citing sec. 102.49(5)(e) for support that sec. 102.58 did not apply in sec. 102.49(5)(b) claims. The LIRC accepted the Fund's arguments and ordered payments to the Fund.

The respondents have appealed to the Sheboygan County Circuit Court.

Proving and contesting medical causation opinions in dental injury claims.

***Emiliano Flores v. Maas Bros. Construction Co.*, LIRC No. 2016-015331 (Sept. 30, 2019).**

The applicant Emiliano Flores fell forward and injured his mouth when he hit some concrete reinforcement bars on the ground. The parties disputed the extent of his dental injuries. Initially, each party obtained expert opinions from dentists – the applicant that the fall fractured all seven teeth, the respondents that the fall fractured one tooth – but realized that Wis. Stat. Sec. 102.17(1)(d) allows dentists to offer expert opinions on treatment of dental injuries, but not the cause:

> "Certified reports of physicians, podiatrists, surgeons, psychologists, and chiropractors are admissible as evidence of the diagnosis, necessity of the treatment, and cause and extent of the disability. Certified reports by doctors of dentistry, physician assistants, and advanced practice nurse prescribers are admissible as evidence of the diagnosis and necessity of treatment but not of the cause and extent of disability."

Each party then had oral surgeons, who are medical doctors, examine the applicant and review records. The applicant's oral surgeon found that four teeth were fractured in the fall, while the respondents' oral surgeon found only one fractured tooth from the fall. The administrative law judge who presided over the hearing also retained a "tiebreaker" oral surgeon's opinion. The tiebreaker sided with the applicant but couched her opinion in terms of possibilities. The LIRC then sided with the applicant's oral surgeon.

This case demonstrates what parties must do to support medical causation claims and defenses in dental injury cases. The cost of duplicating the opinions was high as three dentists and three oral surgeons offered expert opinions. Moreover, before the parties realized that oral surgeon opinions would be most credible, they tried to validate the dentists' opinions by having general medical practitioners ratify the dental opinions. Thus, the case involved no fewer than seven expert medical opinions.

Applicant loses in circuit court, causing his worker's compensation claim to be estopped.

***Boritzke v. Robb Brinkmann Construction, Inc.*, LIRC No. 2012-013180 (Sept. 19, 2019).**

The applicant's right foot was crushed by an antique steam tractor wheel around 5:30 p.m. on a workday. The applicant, a construction laborer for the employer, finished his work chores and signed out on his timecard at 4 p.m. The antique tractor was not used in the employer's business. The employer purchased it for sentimental reasons and several employees stayed after work to watch it run. The applicant had performed some minor "fix-it" tasks on the tractor before the injury. The applicant initially filed a negligence claim against the employer that went to jury in circuit court. The jury found the applicant's negligence caused his injury and awarded no compensation to him. During the circuit court litigation, the applicant's attorney told the judge that the applicant was not injured while working. After losing in circuit court, the applicant filed a worker's compensation claim against the employer, alleging injury on the job. The respondents defended by alleging that the WC claim was barred by judicial, claim and issue preclusion. It also asserted that the facts showed that the applicant was not performing services growing out of and incidental to employment at the time of injury.

The LIRC ruled for the respondents on all but the issue-preclusion defense. It found that by filing a negligence claim in circuit court, the applicant admitted his was not a work injury because worker's compensation is no fault. Statements to the trial judge about the claim not being employment related were considered important admissions against interest by the applicant. The LIRC also found that the jury fully assessed the negligence claim, thus rejecting any notion of

employment. Issue preclusion did not apply, however, because the circuit court never made a specific finding that the applicant was not performing services at the time of injury. On the merits, the LIRC dismissed because of evidence that the applicant had ended his work for the employer 90 minutes prior to the accident, that he volunteered to watch the tractor and help with that, and that the tractor had nothing to do with his job as a construction crew laborer.

The decision is recommended as a good primer on how the LIRC assesses issues of judicial, claim and issue preclusion. The defense in the above *Brown* case might want to use it. However, if the injury was not compensable on the facts -- an appeal-proof determination under Wis. Stat. Sec. 102.23(6) -- why create potential legal issues for appeal by expounding on equitable principles that have no place in a statutory scheme such as Chapter 102, Wis. Stats.?

The obesity defense in occupational disease cases.

***Punzel v. Dave Jones, Inc.*, LIRC No. 2018-004634 (Sept. 5, 2019).**

This is a fairly run-of-the-mill occupational disease case, but the LIRC makes a point that is worth noting to respondents who assert that an applicant's obesity caused disease, but not the heavy lifting required by the job. In this case, the applicant alleged that five years of work as a plumber, a job that required him to "regularly lift" 100 pounds, caused an occupational-disease-type injury to his right knee. The case was complicated by an injury the applicant sustained prior to starting with the employer, causing right knee instability. The respondents contended that further damage to the right knee was a direct result of the non-work condition, not work exposure. The LIRC rejected that defense because the applicant came to the employer without any right knee problems. It took several years of heavy work before treatment resumed. Here is how the LIRC addressed the respondent medical examiner Dr. Kevin Kulwicki's opinion:

> The commission does not credit Dr. Kulwicki in this case because he did not discuss the applicant's work duties with him, *and because it seems inconsistent to say that the applicant's body habitus (weight) affected his knee condition, but the applicant's frequent carrying of an additional 100 pounds of weight would not.* The commission finds it incredible that frequent carrying of 100 pounds on uneven ground would not be of a magnitude or type to cause or aggravate a knee problem; that [it] is a significant magnitude, [i]s evidenced by Dr. Kulwicki's reference to the applicant's body habitus [ ]as having an impact on his knees. Maybe the applicant was bow-legged and that affected the distribution of the weight on his knee joints, but an employer takes an employee 'as is' and this includes susceptibility to injury. [Footnote reference omitted.] Also, although the applicant brought this case as an occupational disease injury, Dr. Kulwicki stated that workplace exposure was "not at play in this case," [Footnote reference omitted.] which was obviously not correct. [Emphasis added.] (LIRC order, p. 12.)

Blaming obesity for an occupational disease but not weightlifting is illogical. Carrying excess weight in one's hands and arms imposes the same excess stress on the knee joint as carrying excess body weight imposes. That makes the work-related carrying a material contributory causative factor in the acceleration of the applicant's knee disease. It might be credible if Dr. Kulwicki had explained that the applicant did not do a sufficient amount of lifting at work to accelerate the disease, while carrying excess body weight whenever on one's feet is sufficient exposure. But Dr. Kulwicki did not show that he understood the job duties and appears to have believed that an occupational-disease injury claim was not involved. It is also possible that obesity is a sign of a personal metabolic disease that accelerates degeneration regardless of the excess weight's force on the knee joint, but that explanation was not offered by Dr. Kulwicki.

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