Case Law Update

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Wisconsin Association of Worker's Compensation Attorneys Case Law Update

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Busche v. Entech Builders, Inc., WC Claim No. 2016-030126 (November 13, 2020)

Respondent's stipulation to the admission of Applicant's WKC-16 was not sufficient for the Commission to rely upon it to make findings of fact.

Applicant Donald Busch slipped at work while doing construction in November of 2016. He was quickly diagnosed with a torn hamstring, and the worker's compensation carrier, Acuity, conceded the claim. The applicant underwent surgery to repair his hamstring in December 2016, and started physical therapy in January 2017.

On July 18, 2017, his treating doctor, Dr. Ross, completed a WKC-16. Dr. Ross assessed end of healing as of that date and gave permanent restrictions, including a lifting restriction and a limitation of only climbing ladders or scaffolding for 2 hours per day. Dr. Ross discussed the fact that it would be difficult for Mr. Busch to go back to his job: "Unfortunately, he has a hard time [carrying] heavy weights, especially up and down a ladder and reach and twist into awkward positions required by his job at this time. With regards to his line of work, I do not know that he will be able to continue full-duty." Dr. Ross assessed 10% PPD to the hip.

Indeed, the time-of-injury employer declined to hire the applicant back after he reached an end of healing. The applicant stopped working in the construction trades entirely, and by the date of the hearing, he had taken a pay cut to work for a blood center.

On October 10, 2017, the carrier obtained a WKC-16-B and IME report from Dr. David Bartlett. Dr. Bartlett assessed 5% PPD, in contrast to the 10% rated by Dr. Ross.

The case went to hearing on the issue of extent of disability: 5% PPD rated by Dr. Bartlett versus 10% rated by Dr. Ross. Both doctors' opinions were admitted into evidence without objection. There was apparently no discussion at hearing of the fact that the applicant had submitted a WKC-16 rather than a WKC-16-B. The ALJ credited the IME opinion, and the applicant appealed.

At the LIRC level, the commission issued a 2-1 decision, with Commissioner Gillick writing a separate dissent.

In part, the dissent and majority disagreed substantively about which medical opinion to credit. The majority credited the IME's opinion that the applicant's continued limping, inability to drive for long periods, inability to swim, and so forth, "could be due to several potential reasons." The majority specifically cited the fact that the applicant experienced a cramp in his non-injured hamstring at the time of the IME evaluation, perhaps indicating that the condition of the injured leg was similarly due to non-work-related causes.

The dissent credited the applicant's account that he had no trouble with the leg before the injury, but afterwards he was seriously limited. Those limitations were demonstrated by the fact that, among other

things, that he took a new job that paid 20% less because his restrictions held him back from doing construction work similar to what he had done in the past.

However, the issue that the commission focused on, both in the majority opinion and the dissent, was what to do with the WKC-16 form submitted by the applicant. Decisions made by the commission, as well as by ALJs, must be supported by "credible and substantial evidence." Under Wis. Stat. § 102.17(1)(d), certified reports by doctors constitute prima facie evidence as to the matter contained in the reports. A WKC-16-B form such as the one submitted by the respondent includes the following language: "I certify . . . that the above report truly and correctly sets forth the history, my findings, diagnosis and opinion." However, a WKC-16 form such as the one submitted by the applicant includes no analogous certification language that would save its contents from being hearsay.

Hearsay is admissible in worker's compensation proceedings, but "uncorroborated hearsay alone does not constitute 'substantial evidence' in administrative hearings." The commission is prohibited "from relying solely on uncorroborated hearsay in reaching its decision." The commission concluded that it could not rely on Dr. Ross's opinion on the extent of the applicant's disability because it was contained in an unauthenticated WKC-16 form, rather than a WKC-16-B form. Notably, this problem was raised *sua sponte* by LIRC, rather than by any party or by the ALJ.

The dissent disagreed. In *Gehin v. Wis. Grp. Ins. Bd.*, a seminal case on the questions at issue, the court held that "[t]he parties may also agree that the agency may base its findings of fact solely on uncorroborated hearsay." *Gehin v. Wis. Grp. Ins. Bd.*, 2005 WI 16, ¶104. In other words, the parties could have stipulated that the factfinder could make their determination based on the uncorroborated hearsay contained in the WKC-16. At hearing, the ALJ asked whether either party objected to the admission of the exhibits submitted, including the WKC-16. There were no objections.

The dissent argued that "[w]hen the respondent stipulated to the admission of the report, the only reasonable conclusion was that it was stipulating to the admission of the document as if certified. To hold otherwise would be to allow the kind of procedural trickery that Wisconsin abjured long ago." The commission found that "there is no evidence that the respondent stipulated that the form could be treated as if it had the proper certification or that it stipulated that the administrative law judge or the commission could base a decision solely on uncorroborated hearsay." Absent such a stipulation, the commission was unable to rely on the report as evidence.

SK Management v. King, No. 2020-CV-004407 (Wis. Cir. Ct. Milwaukee County February 2, 2021)

Applicant was respondent's employee, though respondent's "middleman," a putative independent contractor, primarily supervised applicant.

The issue is whether applicant Donald King, who was severely injured while performing demolition work for SK Management, was an employee of SK Management. SK Management did not have worker's compensation coverage with regard to the applicant, so the applicant filed an Uninsured Employers Fund claim. The wrinkle in this case was the presence of middleman contractor, Brain Schweinert ("Schweinert") between the applicant and the putative employer.

SK Management, a Milwaukee-based real estate and renovation company, began hiring Schweinert to do demolition and renovation projects in approximately 2012. SK Management originally paid Schweinert on a per-job basis, but soon shifted to paying him by the hour. Schweinert created a sole proprietorship ("Mr. Phixitall"), and did similar work for other clients. Schweinert began to bring in additional workers to help out on SK Management projects. If SK Management didn't like a worker, they could tell Schweinert to not bring that worker back. Workers reported their hours to Schweinert, who reported them to SK Management. SK Management would then write a check to Schweinert, who would cash it and distribute the pay to the workers.

The applicant joined Schweinert to do demolition work on an SK Management project in 2015. The evidence indicated that Schweinert had to authorize the applicant's pay with SK Management. An SK Management representative knew that the applicant was doing demolition work on their behalf, and gave him direction on at least one occasion.

In May 2016, the applicant fell off a ladder and was severely injured while doing demolition work at an SK Management property. The Uninsured Employers Fund began paying benefits to the applicant, and sought reimbursement from SK Management. SK Management filed a counter-application, arguing that it had no employment relationship with King. At the hearing level, the ALJ found that SK Management employed both Schweinert and the applicant. LIRC affirmed, and SK Management appealed to the Milwaukee County circuit court. In early February 2001, Judge Martens issued an extensive decision affirming LIRC.

Respondent argued that Schweinert was an independent contractor, not an employee. Under Wis. Stat. § 102.07(8)(b), to qualify as an independent contractor, a worker must "[receive] compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis." The evidence in the case was that SK Management paid Schweinert on a "time and materials," or hourly, basis for some jobs. Therefore, Schweinert was an employee of SK Management, not an independent contractor.

Respondent also argued that applicant was an employee of Schweinert, not of SK Management. However, under Wis. Stat. § 102.04(2), "[A] person under contract of hire ... is not the employer of any other person with respect to that service, and that other person shall, with respect to that service, be an employee only of the employer for whom the service is being performed." Schweinert, as previously established, was an employee of SK Management with respect to the demolition work. Therefore, the applicant was employed by SK Management, not by Schweinert.

Mullikin v. Cisneros WC Claim No. 2017-025663 (Nov. 14, 2019)

LIRC discussed the use of disputed text messages as evidence, discussed the burden of proof in an employment status dispute.

Applicant Terry Mullikin was working for cash on an hourly basis for a construction contractor, James Cisneros ("Cisneros"), who didn't have worker's compensation insurance. The applicant fell off a ladder on a job site and was injured. The applicant filed an Uninsured Employers Fund claim, but was

unsuccessful. Cisneros denied having any employees, including the applicant, and testified that he took only jobs that he could do himself. At hearing, the ALJ dismissed the application for benefits, and the applicant appealed to LIRC, which reversed the ALJ.

The commission addressed two central questions: first, whether the applicant was an employee, and second, whether the putative employer, Cisneros, was an employer subject to the Act.

Applicant submitted into evidence screenshots of what he said was a text message exchange between he and Cisneros following the injury. The text exchange did not paint either party in a favorable light, but did support the applicant's claim of an employment relationship. The applicant seemed to threaten Cisneros with reporting the injury as work-related ("I've already looked into it and I don't think u want me to make that call"), while Cisneros seemingly terminated the applicant by text ("Your done don't call at all") and ordered the applicant to the job site to "at least watch for osha." The applicant was in possession of the screenshots, but not the phone on which the text messages had been stored. Cisneros denied that he had sent the texts in question, and claimed that applicant had fabricated the exchange wholesale.

The ALJ wrote that the text messages "lacked authentication," but the commission disagreed. Relying on *State of Wisconsin v. Giacomantonio*, a criminal case, the Commission indicated that there are two ways to lay the necessary foundation for the use of text messages as evidence. One is through the testimony of a witness with knowledge that a matter is what it claims to be (as with the applicant testifying that he sent and received the texts at issue, and provided them to be screenshotted). The other is "through circumstantial evidence, such as the appearance, content, substance, internal patterns, or other distinctive characteristics taken in conjunction with the other circumstances." The Commission noted that timing would go to the admissibility of evidence as well. Finally, arguments that a text message exchange was fabricated go to the weight of the evidence, not to its admissibility or authentication.

Here, circumstantial evidence included the fact that the author of the texts referred to 1099s as "1090's," just as Cisneros did at hearing, supporting the conclusion that Cisneros was the author. Cisneros testified that he paid the applicant in cash until the applicant threatened to turn him in to worker's compensation, and that threat is contained in the text messages as well, as noted above. The evidence of the text messages supported the commission's conclusion that the applicant worked as an employee for the respondent.

At hearing, Cisneros admitted to having paid his son $12,500 for work in the summer of 2016. The applicant was injured in the summer of 2017. Cisneros did not admit to employing anyone, and argued that he had paid his son as an independent contractor. In support of this claim, he offered a 1099 form listing $12,500 in nonemployee compensation paid to his son.

On appeal, applicant argued that Cisneros was a covered employer under the act under Wis. Stat. § 102.04(1)(b)2. That statute provides that "[e]very person who usually employs less than 3 employees, provided the person has paid wages of $500 or more in any calendar quarter for services performed in this state . . . shall become subject [to the Act, as an employer] on the 10th day of the month next succeeding such quarter." Applicant argued that respondents had not proved that Cisneros's son was an independent contractor under the stringent nine-part test. Respondents argued that applicant had not proved that Cisneros's son was an employee. Presumably, if Cisneros's son had been an

independent contractor, the remuneration he received would not have been "wages" for the purposes of Wis. Stat. § 102.04(1)(b)2, and Cisneros might not have been found to be an employer.

The ALJ wrote in his decision that applicant's argument was speculative and improperly shifted the burden of proof. LIRC disagreed, holding that "[t]he applicant proved that Cisneros paid another worker to provide services and, though Cisneros asserted that he '1090'd' him, Cisneros did not prove that his son provided those services as an independent contractor rather than as an employee." Though the commission did not expand on the issue of burden of proof, it seems that it is the respondent's burden to show that they do not qualify as an employer under Wis. Stat. § 102.04(1)(b)2 where the applicant has shown that the putative employer paid a worker more than $500 in a quarter.

Martinez v. Dufeck MFG Co., WC Claim No. 2017-012336 (August 17, 2020)

No "aggressor defense" where the applicant verbally, but not physically, provoked an injury-causing conflict.

Applicant Maria Martinez was injured when a co-worker, Alta Gracia Sanchez ("Sanchez"), threw her to the ground. Respondent argued that Sanchez had provoked the attack. Respondent submitted evidence (some of which was disputed by the applicant) to the effect that the applicant had acted cruelly to her aggressor colleague, mocking her and making her work more difficult. However, there was no evidence that the applicant physically initiated the altercation that led to her injury.

The commission affirmed that this defense would not avail. There is no aggressor defense for a respondent where the applicant provoked an injurious attack through words alone. The Commission concluded that "neither the commission nor Wisconsin courts have ever invoked the aggressor defense based solely upon verbal rather than physical provocation." However, the commission indicated that the aggressor defense remains available to respondents where the applicant deliberately, and physically, initiates an injury-causing altercation.

Lee v. UW-Stout, WC Claim No. 2017-027447 (February 28, 2020)

A student providing mental health services at a practicum site was not an employee of her university.

The applicant, Tina Lee, was a student pursuing a clinical mental health degree at UW-Stout. As part of her program, she was required to provide mental health services at a practicum site. The applicant did so at Marriage and Family Health Services ("MFHS"). In the course of providing mental health services at MFHS, the applicant sustained a knee injury. She filed a worker's compensation claim alleging that she was an employee of UW-Stout at the time of the injury, and that the injury was compensable under the worker's compensation act.

The ALJ dismissed the applicant's claim on the basis that she had not been an employee of UW-Stout on the date of injury. The applicant appealed, and LIRC affirmed the ALJ's decision.

Under Wis. Stat. § 102.07(12m)(b), an "institution of higher learning" – such as UW-Stout – may choose to cover as its employee a student who is "engaged in performing services as part of a school work training, work experience, or work study program, and who is not on the payroll of an employer

that is providing the work training or work experience." The parties appear to have agreed that the applicant was not on MFHS's payroll, and that UW-Stout had not chosen to provide worker's compensation coverage to her.

However, the applicant argued that the ALJ should not have taken Wis. Stat. § 102.07(12m)(b) into account, and instead determined whether or not she was an employee solely on the basis of Wis. Stat. § 102.07(1). Applicant referred to Wis. Stat. § 102.07(10), which states, in part, that: "any question whether any person is an employee under this chapter shall be governed by and determined under the same standards, considerations, and rules of decision in all cases under subs. (1) to (9). Any statute, ordinance, or rule that may be otherwise applicable to the classes of employees enumerated in sub. (1) shall not be controlling in deciding whether any person is an employee for the purposes of this chapter."

The commission disagreed with the applicant's argument that the language of Wis. Stat. § 102.07(10) would preclude a factfinder from making a determination as to whether or not an applicant was a covered employee under Wis. Stat. § 102.07(12m)(b). To do otherwise, concluded the commission, would be to ignore the intent and plain meaning of § 102.07(12m)(b), which is specifically and "plainly designed to give the university the option to provide worker's compensation coverage to students in cases it deems appropriate; or to reject that option, and thereby avoid paying worker's compensation insurance premiums for those students/programs it deems inappropriate for such coverage."

However, the commission continued, even if it had made a determination as to the applicant's employee status on the basis of Wis. Stat. § 102.07(1), as the applicant suggested, the applicant would not still qualify as an employee. The applicant argued that Wis. Stat. § 102.07(1), which defines the term "employee," does not require that the putative employee be paid by the putative employer. The commission clarified that the § 102.07(1) language stating that a putative employee must have an "appointment or contract of hire, express or implied" with the putative employer includes within the term "contract of hire" a "consideration" requirement. Without consideration, there is no contract for hire, and without a contract for hire – express or implied – an individual cannot meet the § 102.07(1) definition of an employee.

The commission agreed with the ALJ that the applicant "received no remuneration, monetary or otherwise, for her performance of the practicum course duties. Additionally, no funds were exchanged between UW-Stout and MFHS relative to the applicant's performance of those duties." Therefore, the applicant was not a covered employee under the worker's compensation act.

Cody Bunkelman v. McFarland Cascade Holdings, Inc.

Issue: course and scope of employment

Applicant worked as a "treating engineer" at the employer's large, remote facility. He supervised as utility poles were treated with preservatives, and worked alone on rotating 12-hour night shifts. Applicant had a concealed-carry permit, and believed that it allowed him to carry even while working/on employer premises, despite posted firearm prohibitions. Applicant brought his gun to work beginning in November 2017, and accidentally discharged it during his shift on March 24, 2018. The bullet went through his left thigh.

LIRC's decision highlights the inconsistencies in Applicant's story as to how his gun discharged. He testified that he was handling it to put it in his holster before going outside. However, he told several doctors (according to medical records) that he had been cleaning the gun when it accidentally went off. He denied that at the hearing.

The ALJ decided, and LIRC affirmed, that Applicant had not, at the time the gun discharged into his leg, been "performing a service growing out of and incidental to his employment with the employer." Wis. Stat. § 102.03(1)(c)1. Thus, his injury was not compensable.

In its decision, LIRC noted that the Applicant's disobedience of his employer's no-firearms rule does not, in itself, prove that his gunshot injury was not work-related. Rather, it was that Applicant disobeyed the rule *and* that his injury occurred while he was not performing services in the course of his employment. (In other words, Applicant's having a firearm at work, using or holstering the firearm, or cleaning the firearm advanced *no* interest of his employer.)

LIRC contrasted this case to *Grant County Service Bureau, Inc. v. Industrial Commission*, 25 Wis. 2d 579, 583-84, 131 N.W.2d 293 (1964). In that case, a man working for a cable company fell off a roof, to his death, while attempting to repossess an antenna for the company. The company had told the man not to try it, but his resulting death was still compensable. Why? Because repossessing the cable antenna was a service the man performed in the course of his employment.

Here, had Applicant's role involved security or patrolling, then cleaning or holstering a firearm might have been an activity arising out of his employment, making the injury compensable.

Candice Bentley v. Meridian Industries Inc.

Issue: course and scope of employment

Applicant worked for Meridian as a buyer, purchasing raw materials Meridian needed and making sure they arrived in a speedy fashion. On July 6, 2017, shortly before her workday would begin at 8 AM, Applicant parked her car in an employee lot on the Meridian premises and began walking towards the employee entrances. She stepped off the walkway and walked across the grass to get to an entry door. This was a shortcut to the building's east entry door, as the walkway did not lead directly to that door. Once on the grass, Applicant tripped over a tree root and fell, injuring her right thumb and left knee.

Applicant reported the injury right away. The left knee pain, which was new to her, became constant; she saw the doctor who had earlier treated her right knee, and he diagnosed a left knee medial meniscal tear. As for the thumb, it apparently became caught in Applicant's purse strap as she fell. This caused an ulnar collateral ligament tear. Both injuries resulted in permanent partial disability.

The ALJ found in Applicant's favor. Respondents appealed, claiming that Applicant had not been walking into the work premises in a usual and ordinary way. Respondents cited *Oscar Mayer Foods Corp. v. LIRC*, 145 Wis. 2d 552, 135 N.W.2d 304 (1965). There, a woman who was late for work cut across an area of grass blocked by a 32-inch-high cable. She was about 64 inches tall, and she tripped over the cable, resulting in injury. LIRC distinguished that situation from Applicant's, because Applicant's chosen route was *not* obstructed in like fashion and was commonly trod by Applicant and her colleagues.

Respondents also pointed to an internal safety guideline requiring employees like Applicant to use designated walkways. LIRC agreed that this was a rule of which Applicant was aware at the time of her injury. However, LIRC found that the rule was not adequately enforced, and its violation was more or less tolerated. The Applicant also testified that she had never been chided for cutting across the grass. To LIRC, the violation of a "sporadically enforced" safety rule did not render Applicant's path to the entrance a non-"ordinary and usual way."

LIRC affirmed the ALJ's decision, finding again that Applicant's injuries were compensable.

Douglas Purdy v. Appleton Coated LLC

Issue: non-traumatic mental injury

Applicant operated a crane inside the employer's facility. He did this from an operator's booth. The crane hooks lifted 20,000-pound rolls of paper. Before Applicant's shift one day, a cable had snapped, leaving a paper roll hanging precariously. Personnel arrived to address the situation, and Applicant agreed to be hoisted up to the operator's booth so that he could help lower the paper roll. While he was at the controls in the operator's booth, one end of the paper roll swung into a corner of the booth and broke some safety glass. After leaving work that day, Applicant became overcome by what he saw as a very close scrape. This idea – that he came within feet of death or serious injury – left Applicant shaken, and he developed severe psychological distress. He never returned to his position as a crane operator.

Both a rehabilitation psychologist and a psychiatrist diagnosed Applicant with work-related PTSD and major depressive disorder. They stated that Applicant had become suicidal, forgetful, and unable to concentrate. The psychiatrist opined that Applicant was 100% disabled as a result of these conditions, which stemmed from the work incident with the damaged crane and ten-ton roll of paper.

Respondents hired a psychologist to evaluate Applicant and investigate the work incident. This psychologist opined, based on his visit to Applicant's former worksite, that Applicant had overstated the degree of danger he'd been in from the damaged crane and 20,000-pound paper roll. He also concluded that this event had not been an "extreme or unusual stressor" for a crane operator like Applicant, and that Applicant should have accepted a non-crane-related job the employer had offered to him. The same psychologist, in a later report, opined that Applicant's PTSD and depression were preexisting, and that there was no permanent disability from the work incident.

At hearing, evidence was presented to the effect that incidents like Applicant's are not uncommon, and in fact Applicant had been involved in one prior similar incident. The ALJ credited this evidence, as well as testimony from Applicant's former colleagues, one of whom said that Applicant wasn't upset after the incident, and another of whom said that the operator's booth had sustained no interior damage due to the incident.

LIRC reiterated the standard for compensability of non-traumatic mental injuries from *School District No. 1 v. ILHR Dept.*, 62 Wis. 2d 370, 215 N.W.2d 373 (1974):

> Thus it is the opinion of this court that mental injury nontraumatically caused must have resulted from a situation of greater dimensions than

> the day-to-day emotional strain and tension which all employees must experience. Only if the 'fortutitous event unexpected and unforeseen' can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability under ch. 102, Stats., be found.

LIRC then considered whether the "unusual stress" test was passed in Applicant's case, and concluded that it was not. LIRC concluded that Applicant overstated the danger he had been in with the crane and paper roll, and also that the incident was not uncommon or unexpected in workplaces like Applicant's. Like the police officer in *Bretl v. LIRC*, 204 Wis. 2d 93, 533 N.W.2d 550 (Ct. App. 1996), who developed PTSD after being involved in a shooting, Applicant had not experienced an event "so stressful or out of the ordinary as to be likely to cause mental injury to" similarly-situated employees.

Brett Mendola v. City of Oak Creek

Issue: dueling experts (doctors), lead safety

Applicant was a member of the Oak Creek police department's SWAT team. This position required twice as much shooting-range time as police officer positions did. The police department became aware of lead exposure at the shooting range. It tested officers' blood lead levels, and the chief commissioned a test of lead levels in the shooting range air. Applicant began working with a functional medicine doctor (credentialed "D.O., F.A.A.R.M." for "Fellowship in Anti-Aging and Regenerative Medicine"), who tested his lead levels using an older, less-sensitive test system. Applicant's practitioner then opined that Applicant suffered from "Lead exposure? Toxicity," linking it to liver, kidney, and thyroid problems and chest pain.

Respondent's physician asserted that Applicant's physician had used an inaccurate test for the lead levels; and that Applicant had in fact had normal blood lead levels or levels consistent with an unrelated anemia. Respondent's physician also opined that Applicant had no signs of organ damage or thyroid problems of any etiology, or of chest pain linked to lead exposure. The ALJ credited Respondent's physician and dismissed Applicant's claim.

LIRC fully affirmed the ALJ's decision. LIRC also approved of the steps the police department took to investigate the lead contamination, and did not apply a safety penalty.

The main lesson here is probably to be careful in selecting doctors to provide opinions and WKC-16-B forms. Neither the ALJ nor LIRC found Applicant's doctor remotely credible, and without medical evidence of any work-related condition related to lead exposure, Applicant's claim failed.

Logan Wetterling v. Custom Fabricating & Repair

Issue: Wis. Stat. § 102.35(3) (refusal to rehire)

This case, brought to us by my indomitable Hawks Quindel colleague Luke Kingree, finds LIRC upholding an award of the refusal-to-rehire penalty under Wis. Stat. § 102.35(3).

Applicant was injured on February 20-21, 2017, while working for Custom, which makes industrial food-grade tanks. Applicant was using noxious products – without a respirator – to find pits on a metal auger and then to clean welds and remove residue. He commonly did this work inside the tanks themselves. On the 21st, shortly after completing those tasks, Applicant vomited several times and felt short of breath. He went to the local emergency room and then to his primary care provider, who kept Applicant off of work unless Custom provided a respirator.

No respirator being forthcoming, Applicant remained off work through March and into April 2017. C. Timothy Ablett, M.D., released Applicant to return to work on April 11, 2017, as long as he wore "suitable respiratory protection for volatile organic compounds."

Respondent reported this to a supervisor, but was not called on to return to his job. It seemed that management at Custom was not made aware of Applicant's return-to-work release.

Meanwhile, back on March 24, Respondents had obtained an opinion from Alfred Habel, M.D. Habel claimed that Applicant had sustained no work injury or work-related condition. Rather, Habel opined that Applicant's symptoms were consistent with viral illness, exacerbated by marijuana use, tobacco use, and opioid use. Habel further opined that Applicant could immediately return to work without restriction or respirator.

It does not appear that Applicant learned of Habel's opinion until he was terminated on April 25, 2017, effective March 31. The termination letter cited Applicant's failure to show up for work after Habel released him. To LIRC, Custom "acted unreasonably and unfairly by summarily discharging the applicant," and any misunderstanding about medical opinions or work restrictions was not Applicant's fault. LIRC upheld ALJ Shampo's award of a penalty under Wis. Stat. § 102.35(3).

My colleague Luke, who won this one at hearing *and* on appeal, called out the following passages as being among LIRC's clearest statements yet on when refusal to rehire penalties may be appropriate.

- "It is not reasonable for an employer to discharge an injured worker who remains off work in accordance with his physician's directions, even though the employer may have secured a contrary medical opinion. If in subsequent proceedings the fact finder determines that the employer's physician provided the credible opinion, the applicant may as a result be found ineligible for certain compensation. However, such subsequent determination would not excuse an employer who had discharged the worker prior to adjudication of the competing medical opinions. Prior to final adjudication, an employer may withhold compensation in reliance upon its physician's medical opinion. However, the final decisions regarding whose physician gave the credible opinion, and regarding payment or non-payment of compensation, are matters separate from the question of whether a discharge of an injured worker is reasonable under the circumstances."
- "In cases involving the question of unreasonable refusal to rehire, tension frequently arises between the injured worker's duty to keep the employer informed of his medical condition and of his ability for work, and the employer's duty to offer the individual work within his/her medical restrictions. It is not uncommon for misunderstandings to occur with respect to which party should initiate the next contact. It is evident in this case that there was an element of misunderstanding on the employer's part. However, it was a culpable misunderstanding. An

employer must make a reasonable effort to learn all the relevant facts before taking the drastic step of discharging an injured worker, especially during the worker's healing period."