2019 Worker's Compensation Update

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Court of Appeals

1. *Sinkler v. Am. Family Mut. Ins. Co.*, App. No. 2019AP88, 2019 WL 5382705 (Ct. App. 2019) (recommended for publication).

A. Wis. Stat. § 102.29 provides that the Court has the discretion to divide attorney fees allowed as a "reasonable cost of collection."

B. *Anderson* provides a three-step analysis for determining and apportioning the reasonable cost of collection: (1) determine the reasonable value for each party's fees and costs (which is guided by the fee agreement); (2) evaluate the total cost of collection and determine whether that sum is reasonable in light of, among other things, the recovery; (3) determine how the attorney fees are to be divided.

C. Plaintiff's attorney and worker's compensation insurance carrier attorney both retained on one-third contingencies.

D. Circuit court did not erroneously use its discretion in determining that the contingent fee agreement of the worker's compensation insurance carrier's attorney was not reasonable: less time and labor expended, no significant impact on litigation, attorney fee not customary, work was duplicative.

E. Worker's compensation insurance carrier's attorney awarded nothing.

F. Court rejected the carrier's invitation to adopt a rule requiring pro rata distribution of the reasonable cost of collection.

2. *Mueller v. Labor & Indus. Review Comm'n*, 2019 WI App 50, __ N.W.2d __, (Ct. App. 2019).

A. Injured work cannot claim ongoing TTD after retirement unrelated to work injury.

B. Must suffer actual wage loss attributable to work injury.

3. *Brown v. Meskego Norway Sch. Dist. Grp. Health Plan*, App. No. 2018AP1799, 2019 WL 51989946 (Ct. App. 2019) (not recommended for publication).

A. Health plan paid for work-related medical expenses, and plan had an exclusion for medical expenses payable by the worker's compensation insurance company. Health plan sued the injured worker for repayment of the medical expense payments.

B. The plaintiff worked at a plant and decided to take his motorcycle for a ride and for lunch. He was heading toward another plant, but he testified that he was not sure if he was going to continue working.

C. The plaintiff was in an accident and made a third-party claim. Even though worker's compensation was conceded, he tried to deny it and submitted his bills to his health insurer. The health insurer paid over $500,000 in medical bills and then obtained a judgment against the plaintiff for that amount in the third-party claim litigation, because the bills were payable by worker's compensation.

4. *Wise v. Labor & Indus. Review Comm'n*, 2019 WI App 5, 385 Wis. 2d 514, 925 N.W.2d 780, 2018 WL 6787950 (Ct. App. 2018) (unpublished).

A. IME physicians opined, and LIRC found, that the applicant's pre-existing avascular necrosis was aggravated beyond normal progression and healed within two weeks.

B. The court of appeals reversed LIRC under the deferential "any substantial and credible evidence" standard, reasoning, "It defies logic, common sense, and the record for the Commission to determine Wise had 'fully recovered' from the aggravation of her avascular necrosis on the same day she was treated in the emergency room after two days earlier attempting a light-duty shift which she could not finish due to pain in her hip."

C. The court further noted that the applicant had no pre-existing symptoms and an unbroken chain of significant pain and dysfunction from her February 17, 2013, fall until her left hip replacement eight months later.

<u>Labor and Industry Review Commission</u>

1. Due Process

A. *Oja v. M.A.D Ent.*, WC Claim No. 2010-024657, 2019 WL 4645382 (LIRC 9/19/19).

(1) Hearing held on nature and extent of left shoulder injury, and following the hearing, the record was left open for an IME. Presiding judge left, and file was transferred to new judge to write decision, which he did. Writing judge issued decision for respondents and retired.

(2) Writing judge based decision upon the applicant's credibility, finding the applicant's testimony inconsistent with the medical records. However, the writing judge did not hear the applicant testify.

(3) LIRC asked leaving judge about specific testimony demeanor impressions, but she did not remember.

(4) Case remanded to Division for new hearing and decision to ensure due process.

2. "As-Is" Doctrine/Apportionment

A. *Rothe v. Con-Way Freight, Inc.*, WC Claim No. 2017-003735, 2019 WL 2867155 (LIRC 6/28/19) (appeal pending before circuit court).

(1) Applicant sustained work-related occupational back injury, and his permanent restrictions were limiting. However, the most limiting restrictions related to applicant's unrelated high blood pressure.

(2) LIRC affirmed a PTD finding, stating that liability for occupational disease claims are not apportioned, and employers take their workers "as is."

3. Retraining

A. *Stoltz v. Apogee Ent., Inc.*, WC Claim No. 2015-005175, 2019 WL 2867158 (LIRC 6/28/19).

(1) Applicant provides permanent restrictions to employer before DVR approves a retraining program. The employer never provides a job offer. The applicant does not provide his permanent restrictions again after DVR approves retraining. Respondents argue violation of Wis. Stat. § 102.61.

(2) LIRC rejects the argument and concludes that respondent-employer has sixty days from when DVR approved the retraining program to provide employment within permanent restrictions.

B. *Love v. SSM Health Care of Wis., Inc.*, WC Claim No. 2014-025255, 2019 WL 1934572 (LIRC 4/26/19).

(1) Suitable employment offer must be within 90% of average weekly wage, even if it more than the applicant formerly earned.

4. No Attempting to Double-Dip?

A. *Boritzke v. Robb Brinkmann Constr., Inc.*, WC Claim No. 2012-013180, 2019 WL 4645378 (LIRC 9/19/19).

(1) The applicant brought a negligence action in circuit court and lost on cause at a jury trial. Whether the applicant was within the course of his employment at the time of the injury was not an issue.

(2) Subsequently, the applicant brought a worker's compensation claim, claiming he was in the course of his employment at the time of the injury. LIRC denied the claim based upon judicial estoppel, claim preclusion, and issue preclusion. For good measure, it also found that the applicant was not within the course of his employment.

B. *Bostwick v. Watertown Unified Sch. Dist.*, WC Claim No. 2017-005707, 2019 WL 2501852 (LIRC 4/30/19) (aff'd by circuit court).

(1) LIRC has no authority to apply doctrines of equitable or judicial estoppel.

5. Bad Faith

A. *Vanden Heuvel v. James Calmes & Sons*, WC Claim No. 2018-000284 (LIRC 7/26/19).

(1) Respondent-employer was planning to terminate the applicant, a construction jobsite manager. On the date of the injury, the employer-owner had a phone conversation with the applicant, and the conversation was heated, but the applicant was not terminated. Shortly thereafter, after the phone conversation, the applicant fell off of a ladder. A co-owner on the jobsite claimed the applicant said, "Watch this," before falling off the ladder, but he could not say with any certainty.

(2) Respondents claimed the injury was self-inflicted. LIRC found a compensable injury and bad faith, awarding the maximum penalty.

6. Bring Your Witnesses

A. *Henrichs v. Werner Ent.*, WC Claim No. 2016-027971, 2019 WL 4645381 (LIRC 9/19/19).

(1) Respondents claimed that applicant faked a work injury, in part due to not reporting it for three days.

(2) Applicant, a trucker, provided unrebutted testimony that she reported the injury to her night dispatcher on the date of the injury, and then filled out an incident report for her employer three days after the injury.

(3) ALJ found applicant incredible and sided with respondents.

(4) LIRC reversed, finding the applicant credible. It drew a negative inference against respondents due to its failure to bring the night dispatcher to testify.

B. *George v. Sch. Dist. of Rice Lake*, WC Claim No. 2017-026447, 2019 WL 4645379 (LIRC 9/19/19) (appeal pending before circuit court).

(1) Applicant, a teacher's aide, injured knee in incident witnessed by teacher; however, teacher's aide did not report injury until knee symptoms worsened, and teacher's aide could not remember date of injury.

(2) Applicant alleged a date of injury of 5/24/17 date of injury that the adjuster to applicant to "go with."

(3) At hearing, respondents brought witness to verify that injury did not happen on 5/24/17, and applicant admitted injury did not occur on that date. ALJ found injury date of 5/11/17 based upon a medical record.

(4) Respondents argued due process violation for not being aware of 5/11/17 injury being heard at the hearing. They argued they would have brought teacher to testify. LIRC rejected the argument, concluding that

respondents knew that applicant did not know exact date of injury and chose not to bring teacher witness.

C. *Borchardt v. Precision Plastics, Inc.*, WC Claim No. 2017-018987, 2019 WL 2867145 (LIRC 6/28/19) (appeal pending before circuit court).

(1) "Obviously, an applicant is not required to put on witnesses to a work incident, but in this case, where the contemporaneous medical records do not support her claim because they do not reference a work injury, it is hard to credit the applicant without some other corroborating information."

D. *Forrest v. Fincantieri Marine Grp., LLC*, WC Claim No. 2016-019113, 2019 WL 2368649 (LIRC 5/31/19).

(1) Applicant found not credible that work injury occurred, because no other witnesses testified and no contemporaneous records.

7. More Evidence Needed

A. *Gonzalez v. Smithfield Beef Group Green Bay, Inc.*, WC Claim Nos. 2012-008792, 2017-002410, 2018-008679, 2019 WL 2501859 (LIRC 6/11/19).

(1) LIRC remands for more evidence occupational disease date of injury.

B. *Van Remortel v. Big Mike's Home & Barn, LLC*, WC Claim No. 2015-013560, 2019 WL 2368653 (LIRC 5/31/19).

(1) LIRC remands for more evidence as to whether the employer was subject to the WCA.

C. *Moe v. AC Lindley & Sons, Inc.*, WC Claim No. 2017-024282, 2019 WL 2184959 (LIRC 5/16/19).

(1) LIRC remands occupational disease claim for new hearing, which would include other possibly liable employers.

D. *Rowe v. Milwaukee Transp. Serv, Inc.*, WC Claim No. 2015-029225, 2019 WL 1934574 (LIRC 4/26/19).

(1) LIRC remands for testimony of "driver #154."

8. Occupational Disease Standard

A. *Roberts v. Wal-Mart Assoc.*, WC Claim No. 2018-010378, 2019 WL 4184041 (LIRC 8/30/19).

(1) Material contributory causative factor in the onset or progression of the applicant's condition is different than a material

contributory causative factor in the onset or progression of the applicant's symptoms.

(2) Gillick concurrence: doctor does not explain how work was a material factor in needing hip replacement.

(a) "In such close cases, it behooves the applicant to provide as much information as possible to support this kind of claim."

9. Final Orders

A. *Gronostajska v. Eitsert Family Cares, Inc.*, WC Claim No. 2017-021592, 2019 WL 2368650 (LIRC 5/31/19).

(1) LIRC found a compensable work injury but issued a final order because treating doctor did not award permanency or mention future treatment.

10. Medical Opinion Explanation Needed

A. *Gordon v. Tradesmen Int'l*, WC Claim No. 2013-003992, 2019 WL 4267392 (LIRC 9/5/19).

(1) Treating doctor found incredible, because he checked all three WKC-16B causation boxes, and vaguely stated that the applicant "slipped and fell at work hurting his back." No explanation as to why the injury, which had healed four years earlier, caused the need for a fusion surgery.

B. *Collins v. Wheaton Franciscan Serv.*, WC Claim No. 2014-014399, 2019 WL 3456782 (LIRC 7/26/19).

(1) Applicant's doctor, who checked the direct and occupational disease causation boxes on the WKC-16B and did not explain opinion, found not credible.

11. Carpal Tunnel Studies

A. *Urbanek v. Infinity Healthcare, Inc.*, WC Claim No. 2017-011760, 2019 WL 2867160 (LIRC 6/28/19).

(1) LIRC rejected oft-cited carpel tunnel study indicating there is "insufficient evidence" to link carpal tunnel to keyboarding.

B. *Campbell v. TTM Adv. Circuits, Inc.*, WC Claim No. 2016-016620, 2019 WL 2867146 (LIRC 6/28/19).

(1) LIRC rejected the (presumably) same study as *Urbanek* and was "troubled" by the IME's mention of the study but failure to name it and analyze it in connection with the case.