**Worker’s Compensation Update**

**Statutory Changes**

1. Wis. Stat Section 102.04(1)(b)1.: An employer is subject to the WCA “at any time” the employer employs three or more employees. Formerly, only employers that “usually employed three or more employees” were subject to the WCA.
2. Wis. Stat Section 102.11(1): PPD rate beginning April 10, 2022: $415; PPD rate beginning January 1, 2023: $430.
3. Wis. Stat. Section 102.11(1)(ap): Wages for part-time workers calculated by determining the greater of the earnings in the prior 52 weeks of work (not considering weeks not worked) and the hourly earnings as of the date of injury multiplied by the average number of hours worked per week in the 52 weeks prior to injury (not considering days not worked). Wages only expanded if the worker had another job or worked for employer less than twelve months before date of injury.
4. Wis. Stat. Section 102.13(1)(b): IME examinees allowed to have one observer present.

**Federal Cases**

1. Cox v. Med. Coll. Of Wis., \_\_ F.Supp.2d\_\_; 2023 WL 199216 (E.D. Wis. 2023).
   1. Facts
      1. John Cox and Sarah Dobrozsi, two physicians employed by the Children’s Hospital of Wisconsin, wanted to adopt a child named L.G. It would have been their third adopted child.
      2. During the “pre-adopted period,” John Cox fell asleep with L.G. in his arms while reading a book, resulting in skin lesions on L.G.’s arms, as well as a broken clavicle.
      3. The same day as the injury, Dr. Pomeranz-the family’s pediatrician-reached a diagnosis and referred the case to Dr. Petska, who specialized in cases of possible child abuse. This was standard procedure.
      4. Dr. Pomeranz also referred L.G. to a dermatologist and reported the case to Child Protective Services, who interviewed Cox and Dobrozsi, inspected the home, and found no reason for intervention at the time.
      5. Dr. Petska found no definitive evidence of child abuse or intentional harm. Thereafter, Dr. Petska recused herself from further treatment due to a supposed conflict of interest.
      6. Dr. Petska referred care to Nurse Practitioner Ventura, but Cox and Dobrozsi were not told the name of the provider of allowed to attend the appointment with Ventura.
      7. Ventura then concluded that L.G.’s injuries occurred due to abuse without consulting with an orthopedic specialist or the supervising physician. Ventura also described L.G. as covered in bruises and called or directed that the police be called.
      8. An officer evaluated L.G. and noted “three small bruises” and found no evidence of abuse at the time. Nevertheless, CPS instructed that Cox and Dobrozsi needed supervision while around all of their children for an indefinite period. The next day, the adoption service and birth parents went to the home and continued to support L.G.’s adoption by Cox and Dobrozsi.
      9. Dr. Pomeranz supported and advocated for Cox and Dobrozsi, who submitted twelve physician reports in their favor pursuant to the CPS review procedure.
      10. L.G. was taken from them and not returned.
      11. CPS ended up clearing Cox of any wrongdoing, but he pled to negligent failure to provide necessary care to a child in the criminal proceedings pursuant to a Deferred Prosecution Agreement (which Cox compiled with).
   2. Cox and Dobrozsi sued for civil conspiracy, defamation, IIED, NIED, etc.
   3. Exclusive remedy does not apply, because the Plaintiffs’ claimed injuries did not occur in the course of their employment. Rather, the claims relate to how the Plaintiffs were treated as foster parents.
2. *Estate of DeRuiz by Ruiz v. ConAgra Foods Packaged Foods, LLC,* 601 F.Supp.3d 368 (E.D. Wis. 2022).
   1. Worker contracted coronavirus at work and passed it onto his wife. She passed from the virus. Wrongful death and survival actions were brought against the employer for negligence, and the employer brought a motion to dismiss.
   2. Injured worker’s wrongful death claim against the employer was barred by the worker’s compensation exclusive remedy statute. There was an “unbroken chain of events.”
   3. Estate’s survival action was not barred by the exclusive remedy statute, because the wife could not take advantage of “the grand bargain.”

**Court of Appeals**

1. *Rood v. Selective Ins. Co. of S.C.,* 2022 WI App 50, 404 Wis. 2d 512, 980 N.W.2d 282 (petition for review denied).
   1. “Fellow Employee Extension” in CGL policy did not waive exclusive remedy defenses.
   2. A lull is not a “motor vehicle” pursuant to Wis. Stat. Section 102.03(2). Thus, the co-employee negligent use of a motor vehicle not owned or leased by the employer exception to exclusive remedy did not apply.
2. *SK Mgmt., LLC v. King,* 2022 WI App 52, 980 N.W.2d 490 (unpublished).
   1. Independent Contractor case involving the nine-part test per Wis. Stat. Section 102.07(8)(b).
   2. Facts
      1. SK Management hired Schweinert (and his sole proprietorship—Mr. Phixitall) to do demolition work.
      2. Schweinert asked if he could bring helpers, including King, and SK’s property manager responded that he “did not care.”
      3. SK relayed jobs through Schweinert but would occasionally direct workers through SK’s property manager.
      4. SK supplied tools, and King supplied none.
      5. SK paid Schweinert and all workers procured by Schweinert on an hourly rate set by SK. Payment was on one check, and a 1099 was sent to Schweinert but only included Schweinert’s wages.
      6. SK approved merit hourly wage increases and told Schweinert not to bring poor workers back.
      7. If a job was not satisfactory, Schweinert would come back and correct the job and earn additional hourly wages.
      8. King was injured when he fell off a ladder, requiring right shoulder and elbow surgeries.
   3. Schweinert was not an independent contractor of SK.
      1. Schweinert and King were paid hourly rates by SK. Thus, Schweinert:
         1. Did not operate under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the services or work.
         2. Did not incur the main expenses related to the work under the contract.
         3. Did not receive compensation under a contractor on a commission or per job, or competitive bid basis, and not any other basis.
         4. Could not suffer a loss.
      2. SK provided tools.
   4. Schweinert and King were also employees.
3. *Conway Freight, Inc. v. LIRC,* 2022 WI App 7, 970 N.W.2d 581 (unpublished).
   1. Applicant sustained work-related occupational back injury, and his permanent restrictions were limiting. However, the lifting restrictions took into account the applicant’s unrelated high blood pressure.
   2. Permanent total disability claim affirmed even though the work restrictions took into account restrictions relating to high blood pressure, because employers take employees as-is.
4. *Menasha Packing Co., LLC v. LIRC,* Case No.: 2021AP175 (Ct. App. 2022) (summary disposition); *see also Svoboda v. Greenheck Fan Corp.,* WC Claim No. 2007-017037 (ALJ Order 6/13/22).
   1. Statute of Limitations tolled while hearing application is pending.

**Labor and Industry Review Commission**

1. Safety Penalty Claim: *Natera v. City of Madison,* WC Claim No. 2014-0044948, 2022 WL 467960 (LIRC 1/27/2022).
   1. Police officer slipped on ice at work. Fifteen percent safety penalty assessed for a violation of Wisconsin’s safe-place statute.
2. Compromise Agreement Reopen Request: Gattuso v. Premier Engineering & Manuf., WC Claim No. 2015-016517, 2022 WL 802333 (LIRC 2/14/2022).
   1. Applicant compromised his claim and thereafter received a new diagnosis of pelvic floor dysfunction.
   2. New diagnosis did not qualify as important newly discovered evidence, fraud, duress, or mutual mistake.
3. Local Case: *Snodgrass v. Don’s Towing & Repair, Inc.,* WC Claim No. 2018-027744, 2022 WL 467961 (LIRC 1/27/2022).
   1. Applicant auto mechanic hurt his left knee pushing a car into the shop.
   2. Dr. Withers’ direct causation opinion found credible over Dr. Lemon.
   3. Dr. Withers’ checked “no” to the future medical treatment box on the WKC-16-B, but this was inconsistent with his own note, the note of Dr. Villare, and Dr. Lemon’s report. Thus, the Order was left interlocutory.
4. Hunting and Fishing: *Rieder v. Paul v. Farmer, Inc.,* WC Claim No. 2019-013711, 2022 WL 18285045 (LIRC 12/28/22) (appealed to circuit court).
   1. Applicant claimed permanent total disability, but he was able to hunt, fish, and travel.
   2. Hunting: Mercy-killed a five-pointer out of a ground blind, but his son processed it. Archery hunted with a crossbow, requiring him to walk 100 yards and climb a tree stand maintained by his son. No doctor told him he could not hunt.
   3. Fishing: Ice fished but did not drill the hole. Trout fished from a bridge with a worm and a bobber. Fished out of a pontoon operated by his son. No doctor forbade these activities.
   4. Travel: Traveled to Mexico, toured ruins, laid on a beach, and stayed at a resort. He did not handle the luggage. No doctor forbade this.
   5. LIRC indicated that while these activities sounded like they could exceed the applicant’s restrictions, the actual testimony indicated that they did not.
5. IME Criticism: *Mattingly v. Integrated Paper Serv.,* WC Claim No. 2019-015143, 2022 WL 1231987 (LIRC 2/28/2022).
   1. “The commission does not find Dr. Bax’s opinion persuasive since he was careless in his report, he did not provide his opinions in his second WKC-16-B relative to the left upper extremity, and he rattled on about carpal tunnel syndrome, which the applicant was not alleging that he had. Though emergency room doctors and treating physicians may have errors in their records the can be explained or excused due to the fast pace of their work, the commission expects more attention to detail from someone charged with preparing a detailed independent medical evaluation report.”