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Worker's Compensation Case Law Update

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Practice Area: Worker's Compensation

Below is a summary of recent decisions on Wisconsin Worker's Compensation issues. The first section focuses on Court of Appeals decisions and the second section focuses on LIRC Decisions involving both worker's compensation and equal rights decisions.

Court of Appeals

Employers Assurance Corp. and Marketplace Foods Inc. v. Linda Schue-Nilles, et al., 2017AP841 (Jan. 25, 2018)(unpublished).

Facts: The applicant worked at the respondent's deli counter. At the end of her workday, but before she had punched out, she fell and injured her knee while putting on her snow boots in the back room of her workplace. An ALJ and LIRC found her injury to be compensable. According to LIRC, her injury arose out of her employment because she was in the workplace, had not punched out yet and was engaged in an everyday activity when her injury occurred. LIRC also found that her injury was not caused by an idiopathic or unexplained fall. A circuit court judge found that her injury did not arise out of her employment and reversed LIRC's decision. The applicant and LIRC appealed this decision.

Issue: Whether the applicant's injury arose out of her employment as required by Wis. Stat. § 102.03(1)(e).

Holding: Reversed the circuit court decision and reinstated LIRC's finding that the applicant's injury arose out of her employment.

Reasoning: In considering whether the applicant's injury arose out of her employment, the court applied the "great weight deference" standard to LIRC's decision. Under this standard, the court defers to LIRC's interpretation and application of the statute to the facts found unless the interpretation is unreasonable. In this matter, the respondent did not dispute LIRC's factual findings. Instead, the respondent argued that LIRC misapplied the law when it awarded benefits without a finding that the applicant was injured due to a hazard of employment. The respondent contended that an injury arose out of employment "only if workplace conditions subjected the employee to a zone of danger or hazard of employment." The court of appeals rejected this argument and found that her injury arose of her employment because her "employment does not have to proximately cause the injury. Instead, all that is required is that the circumstances of her employment put [the applicant] at the particular place where the injury occurred and it was not an idiopathic injury.

Mathew O'Brien v. LIRC, 2016AP2355 (Feb. 7, 2018).

Facts: The applicant alleged that he injured his neck when he fell after his chair broke at work. To keep himself from hitting his head on the wall behind him, he suddenly jerked his head at which time he experienced immediate and severe neck pain that necessitated emergency treatment that day. Regarding his medical history, he previously injured his neck when he was in the military. For several years thereafter, he sought treatment for neck pain. Several months before his work injury, Dr. Pannu performed a multi-level cervical fusion. Although Dr. Pannu instructed him to stop smoking after his fusion, he was unable to quit. When he was last seen by Dr. Pannu about a week before the work incident, he still complained about neck pain and arm numbness. Following the work incident he had a re-do fusion performed. According to Dr. Pannu, the work related fall contributed to his pseudoarthrosis and necessitated the re-do fusion. Dr. Boco, the respondent's expert, opined that the fall did not cause or aggravate the applicant's neck condition. Instead, he found that the pseudoarthrosis was due to the applicant's continued smoking. An ALJ found that the work related fall aggravated the applicant's neck condition and awarded benefits.

LIRC denied the applicant's claim finding that Dr. Boco's opinions were more persuasive than Dr. Pannu. In support of its decision, LIRC noted that Dr. Pannu did not explain how the work related fall contributed to the pseudoarthrosis. In addition, LIRC reasoned that there was an alternative, non-work related explanation for the pseudoarthrosis. Because a circuit court reversed LIRC, the respondents appealed to the court of appeals.

Issue: Whether there was sufficient evidence to raise in the mind of LIRC a legitimate doubt regarding the applicant's claim.

Holding: Reversed the order of the circuit court.

Reasoning: The court found sufficient credible evidence to support LIRC's decision. The court acknowledged that the case came down to a conflict between medical experts regarding the cause of the disabling condition; however, the court agreed that there was legitimate doubt as to whether the applicant's work incident was the cause of the pseudoarthrosis. The court found that legitimate doubt existed because Dr. Boco provided reasons for his opinion whereas Dr. Pannu did not.

LIRC Decisions

(1) WORKER'S COMPENSATION DECISIONS, February 2018

Dauer v. Grede, LLC, WC Claim No. 2014-003387 (Feb. 8, 2018).

Facts: The applicant worked for employer for about 13 years, the last six years as a molding operator. In 2012, while on vacation, he developed dermatological symptoms, characterized by swelling around the eyes, a rash and flaking skin on the face, neck, hands, arms and chest, and photosensitive skin eruptions. Patch testing revealed the applicant had sensitivity to Bisphenol-A/epichlorohydrin and Bisphenol-F/epichlorohydrin (BPA-epi and BPF-epi), which are compounds found in some epoxy resins, but no sensitivity to the monomer form of BPA. The supplier of a product used in the plant until May 2012, stated that the product contained 2% BPA-epi. It was thought that the applicant's condition was triggered by exposure to this product and he was treated with an immunosuppressant.

In 2013, air samples of various locations of the plant, including the applicant's work station, measured BPA-epi as being below OSHA standards for epoxy exposure. In 2014, the applicant's condition had worsened to the point it was recommended that he no longer work as a molding operator for the employer, or in any environment with a possible exposure to epoxy, that he not work outdoors, and for at least six months that he not work under fluorescent lighting. The employer could not accommodate these restrictions, and the applicant's employment was terminated.

Subsequently, the applicant was tested for a condition called porphyria cutanea tarda (PCT), which is characterized by skin eruptions and photo-sensitivity. PCT is a non-work-related condition, resulting from liver dysfunction. Testing strongly supported a diagnosis of PCT.

Testimony at the hearing revealed that there were three products used at the plant that contained epoxy resins. None of the epoxy resin products were heated or sprayed. It also came into evidence that the applicant had recovered somewhat since leaving employment in 2014. Beginning around May 2014, the applicant had reduced his alcohol intake and cut back on his smoking.

At the hearing two dermatologists, Dr. Rita Lloyd and Dr. Harry Sharata, gave conflicting opinions regarding whether the applicant's condition was a manifestation of PCT or caused by workplace exposure to epoxy resin. Dr. Sharata opined that if epoxy resin had never been hearted or sprayed at the plant, the applicant had little chance of developing his condition from it. Dr. Lloyd argued that allergic contact could develop from an allergen that was not heated and could trigger reactions in parts of the body that were not exposed. Dr. Lloyd stated that hardened epoxy resin could still "off-gas," triggering an allergy, and that "there is no established safe level for those who are sensitized below which they won't react."

Moreover, Dr. Lloyd stated that the applicant's skin condition observed in 2012 was different than the skin condition observed in 2014, and that the applicant's initial test results were inconsistent with PCP. Additionally, the applicant's favorable reaction to the immunosuppressant indicated that the applicant's problem was an allergic condition, not PCT. Dr. Sharata maintained that the applicant's condition in 2012 was not inconsistent with PCT and that an immunosuppressant could have a temporary beneficial effect for one with PCT.

The ALJ concluded that the applicant failed to show that the two chemicals he was allergic to, BPA-epi and BPF-epi, "were airborne or otherwise present in the workplace environment and available in such a form as to cause harm or constitute a potential allergen that might have triggered applicant to develop an allergy if, in fact, exposed thereto."

Issue: Whether the applicant's condition was brought about by a liver disorder or an immunological/allergic process, or both.

Holding: LIRC affirms the ALJ's decision. Accordingly, the application is dismissed.

Reasoning: LIRC found the following four facts to tilt the balance toward a finding of legitimate doubt that the applicant was experiencing an allergic reaction from a workplace exposure. First, there was no marker or symptom that the applicant had that pointed to an allergic reaction to the exclusion of the non-work related PCT. Second, there was no convincing testimony that the applicant was in the vicinity of allergy-causing materials in a heated or airborne form, which were normally the form seen to trigger an allergic reaction. Third, the theory that hardened or cured epoxy resins liberate, or off-gas, allergens was disputed. Finally, the applicant recovery is characteristic of someone following a treatment plan to counter PCT but not to a degree characteristic of someone with allergic dermatitis.

Bergson v. Aurora Health Care of Southern Lakes, WC Claim No. 2016-027590 (Feb. 20, 2018).

Facts: The applicant worked in the employer's emergency room, registering patients and recording information from incoming patients, including their insurance information. He sat at a desk which he described as approximately waist height. On July 6, 2015, he was working alone when a couple came into the emergency room seeking treatment. The couple was traveling from out of state and had only one copy of their insurance card. After completing registration, the applicant left the insurance card on the desk so he would remember to give it back to the couple. The couple departed the emergency room without their insurance card. The applicant crawled over the top of his desk in an attempt to catch up with the couple and return their insurance card. He thought it was very important to get the insurance card to the couple because they were traveling and only had one copy of their insurance card. A video of the incident shows that he fell forward with the weight of his body onto his right foot, but the view of his landing is obstructed. He remembered feeling his jaw slam against his teeth, and he felt a crunch in his ankle.

The applicant suffered an acute pilon fracture of his right distal tibia from his fall. He also claimed the he fractured six teeth that required extraction and replacement. He also claimed that he further injured his right wrist. At the time of the alleged work injury, his right wrist was in a cast because he had surgery two weeks previously. The applicant completed an incident report, but did not mention his teeth or wrist as having been injured.

The applicant was treated by Dr. Mellon who performed surgery on the applicant's ankle. Dr. Mellon submitted a WKC-16B, in which he assessed 30% loss of use of the right ankle "due to pain and limited motion." He also assessed a 2% loss of use of the right wrist. There was no WKC-16B from the applicant's dentist.

The respondent submitted a WKC-16B by Dr. Summerville who concluded that the applicant did not have any functional permanent disability with respect to the ankle but had a 15% loss of motion. The applicant admitted to Dr. Summerville that he was not sure whether he hurt his wrist in the fall and Dr. Summerville found no evidence in the post-injury x-rays that he sustained any additional injury to the right wrist. Dr. Summerville also opined that the video evidence and subsequent records do not support the possibility of injury to the teeth.

Issue: Whether the applicant sustained a compensable work injury to his ankle, wrist, or teeth in the course of his employment; whether the applicant substantially deviated from his employment when he crawled over the desk to return an insurance card to a patient; and, if the applicant sustained a compensable injury, what is the nature and extent of the disability.

Holding: LIRC affirmed the ALJ's decision, holding that the applicant did not deviate from his employment when he unwisely attempted to return the insurance card to the patient by crawling over his desk. LIRC found that the evidence demonstrated that he injured his ankle, but not his wrist or teeth in the fall. LIRC also found that the applicant had 15% PPD to the ankle.

Reasoning: LIRC found that the applicant performed his employment in an unwise manner but did not deviate from his employment. As a result, and since the Worker's Compensation Act must be liberally construed in favor of including all services that can in any sense be said to reasonable come within it, the LIRC affirmed the ALJ's decision and found that the applicant was in the course of his employment when he was injured. The LIRC noted that Dr. Mellon's assessment of 30% PPD for the ankle injury was "unusually high without appropriate support," and that Dr. Summerville's 15% PPD opinion was more reasonable.

Simonich v. SMJB Inc., WC Claim No. 2016-011807 (Feb. 20, 2018).

Facts: An ALJ issued an order dismissing the application without prejudice. The respondent petitioned for LIRC review of the ALJ's order, and requested that LIRC issue a dismissal with prejudice.

Issue: Whether LIRC has jurisdiction of respondent's petition for review of the ALJ's order dismissing the application without prejudice.

Holding: Petition for review is dismissed.

Reasoning: LIRC cites to a line of cases beginning with *Lawrence v. A-1 Cleaning Services,* WC Claim No. 95060456 (LIRC Nov. 19, 1997), in which LIRC announced that it would no longer review orders that dismiss applications without prejudice where no testimony had been taken and the statute of limitations had not run. In *Lawrence,* LIRC reasoned that a dismissal without prejudice prior to the taking of testimony does not deny benefits, but merely postpones a determination of whether an applicant is entitled to benefits, therefore, such a dismissal does not meet the statutory prerequisite for LIRC review. LIRC held that in future cases, it will consider the context of the ALJ's decision, and will not focus only on whether any testimony or evidence was taken.

Yanke v. ATI Ladish, LLC, WC Claim No. 2014-029742 (Feb. 20, 2018).

Facts: The applicant challenges the accuracy of the test results of his date-of resignation or exit audiogram, the results of which were significantly different than subsequent tests, suggesting that the applicant's hearing loss injury was not caused by noise exposure at work. The applicant argues that: (1) the exit audiogram was done only by air conduction audiometry, whereas subsequent tests were by air and bone conduction audiometry; (2) the exit audiogram was administered by a nurse, while the subsequent tests were administered by audiologists; (3) in the exit audiogram, the applicant testified that he could hear noises outside the booth where he took the test, while he could not hear any noises outside the booth in the subsequent tests; (4) the significant disparities between the exit audiogram and the "nearly identical" results from the subsequent tests cast doubt on the accuracy of the exist audiogram; and (5) it was inconsistent with Wis. Stat. § 102.17(1) for a doctor to base his opinion on an audiogram performed by a nurse.

Issue: Whether the applicant is entitled to additional permanent partial disability compensation for occupational hearing loss.

Holding: LIRC affirms the ALJ's decision. Accordingly, the applicant's claim for additional permanent partial disability benefits related to occupational hearing loss is dismissed with prejudice, other claims shall remain open.

Reasoning: A hearing loss injury caused by noise exposure at work does not worsen after the employee is removed from the noisy environment. *Menden v. Master Lock Company,* WC Claim No. 2004-010839. Hearing tests taken at the time of retirement, then, so long as they are done properly provide a good measurement of hearing loss due to work exposure. The applicant has not shown that the test results obtained in the applicant's exit audiogram were an inaccurate measurement of his occupational hearing loss.

As to the first argument, LIRC found Wis. Admin. Code § DWD 80.25(4) specifically addresses the test to be used to determine hearing impairment and does not mention bone conduction audiometry. In addition, LIRC has held that if a hearing loss is purely sensorineural (as opposed to sensorineural and conductive) air conduction audiometry is equally as accurate as bone conduction audiometry. *Albergo v. American Motors Corp.,* WC Claim No. 88-070146 (LIRC June 7, 1991). The applicant's loss was only sensorineural, not mixed. Therefore the fact that the subsequent tests were by air and bone conduction does not makes them more accurate than the exist audiogram.

Rejecting the second argument, LIRC found that nothing in the rules or statutes prohibits the use of hearing test results derived by a nurse with training and certification. Moreover, LIRC found it compelling that the results obtained by the nurse were similar to the result from a test conducted a year earlier by an outside testing service.

LIRC found the applicant's third argument does not help his case as any lack of sound proofing in the exist audiogram would have skewed his test results toward overstating his hearing loss, because the outside noise would have made it harder for the applicant to perform well on the test. *Stanke v. Textron, Inc.,* WC Claim No. 2007-037565 (LIRC Sep. 20, 2010).

The applicant's fourth argument was rejected as one of the two subsequent audiograms were based on a form from Washington State, while the other was based on Wisconsin guidelines. If Wisconsin guidelines were applied to the Washington State test the results are not "nearly identical" as claimed.

Finally, LIRC disagreed with the applicant's argument that it is inappropriate for a doctor to base his opinion as to cause and extent of disability on a test conducted by a nurse. LIRC found nothing in the statutes that prohibits a doctor from using test results from a non-doctor to help the doctor formulate an opinion.

January 2018

Kasarsky v. Aurora Health Care Inc., WC Claim No. 2014-028038 (Jan. 12, 2018).

Facts: The applicant filed a hearing application seeking compensation for multiple injuries attributable to the effects of a work incident. A compensable injury to the applicant's left foot is conceded as having occurred on that date. An ALJ held a hearing in the matter, which was limited to the issue of the applicant's claim for prospective surgery to her right hip, pursuant to Wis. Stat. § 102.18(1)(b)2. The ALJ issued a decision denying prospective reimbursement for surgery, but made no final finding regarding the claim for a compensable right hip injury. The applicant filed a petition for commission review and respondents filed a cross-petition for review.

The applicant argues that because there are no records of her having received right hip treatment prior to the work injury to her left foot the credible inference is that the gait disturbance resulting from her foot injury and resulting from CAM boot usage precipitated, aggravated, and accelerated her preexisting, degenerative right hip condition beyond its normal progression.

Dr. Steven Friedel performed a medical record review and performed an evaluation of the applicant, based on which he opined that the applicant had undergone normal degenerative progression and was not causally related to the work injury.

Issue: Whether the ALJ's decision to dismiss the applicant's claim for prospective surgery reimbursement should be affirmed; whether the prospective claim should be dismissed on a final basis; and whether issue preclusion should apply and block a further right hip injury claim.

Holding: LIRC affirmed the ALJ's decision. Accordingly, the application for prospective surgery was dismissed, and jurisdiction was reserved for such further findings and orders as necessary.

Reasoning: When LIRC weighed the evidence submitted by the applicant in support of her claim for prospective right hip surgery, against the opinion submitted by Dr. Friedel, it found that Dr. Friedel's opinion led to the credible inference that the prospective reimbursement should be denied.

LIRC found it was reasonable that the ALJ did not make a final determination regarding the causation for the applicant's right hip condition, as it was possible that such surgery could uncover medical evidence that would have an impact upon the causation issue.

Additionally, LIRC rejected the argument that issue preclusion should block any further right hip injury. LIRC held that while the issue of whether the applicant was entitled to a prospective order for coverage of her right hip was actually litigated and decided, the issue of whether or not there was a causal connection between the left foot work injury and the applicant's right hip condition was not finally determined, and thus, the doctrine of issue preclusion does not apply.

Chaulkin v. Midwest Airlines, Inc., WC Claim No. 1999-063677 (Jan. 31, 2018).

Facts: The applicant sustained a low back injury in November 1999. In February 2005, applicant had a surgery that was casually related to the 1999 work injury. The applicant had a mixed result from the 2000 surgery and continued to experience low back symptoms and had two additional surgeries in 2014 and 2015. Subsequent to these two surgeries the applicant continued to experience severe low back symptoms. In August 2015, the applicant sought treatment from Dr. Prpa who recommended revision surgery. Dr. Prpa performed two surgical procedures on the applicant in March 2016. After the surgeries the applicant still takes pain medication and cannot work, but is able to sleep for longer periods of time and can perform simple household chores. Dr. Prpa opined that the two March 2016 surgeries were medically necessary to treat the applicant's back condition related to the November 1999 work injury.

Issue: Whether applicant's medical expenses for back surgeries are compensable.

Holding: LIRC reverses the ALJ's decision. Accordingly, the respondents are liable for medical expenses attributable to the applicant's back surgeries, with the exception of the expense attributable to surgery performed on the applicant's SI joints, the liability of which shall be determined at a later date.

Reasoning: LIRC found Dr. Prpa's opinion credible and consistent with the applicant's credible testimony that the March 2016 surgeries improved the applicant's symptoms. Accordingly, respondents are liable for certain medical expenses associated with the March 2016 surgeries.

Cruz v. Five Star Fabricating Inc., WC Claim No. 2015-028405 (Jan. 31, 2018).

Facts: The applicant employed by employer to assist in painting and fabricating materials used in building racing car body shells. Applicant was injured when he slipped off a makeshift platform. After he fell, the applicant experienced immediate low back and bilateral leg pain. The applicant immediately reported the injury and received immediate and thereafter ongoing treatment for low back and right radicular pain. Applicant had no prior history of back pain prior to the work injury. Applicant's physicians found that the work injury accelerated the applicant's preexisting lumbar spine condition beyond its normal progression and recommended surgery. The respondent's physician opined that the applicant sustained a work related strain that had resolved and the ongoing symptoms were attributable to age and genetics.

Issue: Whether the applicant sustained a compensable injury and whether respondents were prospectively liable for applicant's proposed surgery.

Holding: LIRC reverses the ALJ's decision. Respondents are liable for prospective coverage of the proposed surgery, and shall pay reimbursement for out-of-pocket medical expenses, reimbursement for medical mileage expense, compensation for temporary partial disability and attorneys' fees.

Reasoning: The applicant found to have sustained a compensable low back injury. LIRC rejected the respondent's physician's opinion and instead found the applicant's physicians' opinions to be credible. Accordingly the respondents are liable for prospective coverage of the proposed surgery.

Culver v. Francois Oil Co. Inc., WC Claim No. 206-015343 (Jan. 31, 2018).

Facts: The applicant sustained severe injuries to both the back of his head in the occipital region and to the front of his head in the right eye region. Videotape evidence show an individual in an oversized hood to hide his face, lurking suspiciously around applicant's workplace before going off camera near the restroom hallway. The individual emerges from the hallway 53 seconds after the applicant has gone down it, and then goes behind the cashier's counter and stealing what he could before leaving.

Issue: Whether applicant sustained compensable injuries.

Holding: LIRC affirmed the findings and conclusion of the ALJ, as set forth in his March 1, 2017 decision, with the exceptions of three modifications. Accordingly, within 30 days from this date, the respondents shall pay the applicant compensation for temporary total disability in the amount of $1,535.80 and attorneys' fees in the amount of $383.95.

Reasoning: LIRC found the video evidence to be compelling and supporting the inference that the thief attacked the applicant to facilitate his left.

Luksic v. Joy Global Surface Mining, Inc., WC Claim No. 1997-000124 (Jan. 31, 2018).

Facts: The applicant filed several WKC-3 forms and documentation showing his out-of-pock payments for opioid medication prescribed to him. These payments totaled $578.18. The ALJ determined that continued opioid medications were reasonably necessary based on the applicant's testimony that the medications eased his pain and the uncontested assertion of the applicant's treating physician that the medication had been effective, and that the applicant had not exhibited any sign of drug abuse or other aberrant behavior as the result of taking the drugs.

Issue: Whether the applicant's opioid medical expenses were reasonably necessary.

Holding: LIRC affirms the findings and conclusions of the ALJ. Respondents shall reimburse applicant for his documented opioid medical expenses. The insurer shall notify the affected health service provider under Wis. Stat. § 102.16(2m)(b) that the necessity of continued opioid medical treatment is in dispute, but shall pay ongoing medical expenses as prescribed, pending the outcome of the process under that statutory provision.

Reasoning: As a general rule, an employer is liable for all expenses, including the expense of medications, "as may be reasonably required to cure and relieve from the effects of the injury…" Wis. Stat. § 102.42(1). Common knowledge and consensus in the medical community is that after a certain length of time the risks of prescribing opioids outweighs the benefits. The medical opinion aligned against continued opioid treatment for the applicant puts the necessity of ongoing treatment in reasonable dispute. The issue in this case is appropriate for resolution through the process in Wis. Admin. Code § DWD 80.73.

Vosters v. Vosters Custom Brick Paving LLC, WC Claim No. 2015-014969 (Jan. 31, 2018).

Facts: The applicant was employed by his father's business on a part-time basis. When the applicant was working his right thumb got pinched in the tailgate of the dump truck. The injury resulted in the amputation of the tip of the thumb. The employer's insurer paid over $8,000 in indemnity benefits. The applicant was 16 years-old at the time of the injury. The employer did not have a work permit for the applicant. The employer obtained a work permit for the applicant after the injury.

Issue: Whether the employer is liable for a penalty.

Holding: LIRC affirms the decision of the ALJ. Accordingly, the employer is required to pay a penalty in the amount of $7,500.

Reasoning: LIRC rejected the employer's argument that it was not aware that the applicant needed a permit to work holding that ignorance of the law is no excuse. Wisconsin Statute § 103.70 and Wisconsin Administrative Code § DWD 270.05 both state "a minor may not be employed unless the minor first obtain a work permit."

LIRC also rejected the employer's argument that the minor was not engaged in "gainful occupation or employment" as set forth in Wis. Admin Code § DWD 270.05(1). LIRC held the fact that the applicant worked part time, only during the summer, and that he made minimum wage does not mean he was not performing services in a gainful occupation or employment, as these are conditions of work performed by many employees who are both minors and students.

The employer also argued that the applicant was not required to have a permit based on Wis. Stat. § 103.67(2)(g), which states, "[u]nless prohibited under s. 103.65, minors 12 years of age or older may be employed under the direct supervision of the minor's parent or guardian in connection with the parent's business, trade or profession." LIRC held that § 103.67(2)(g) deals with the minimum ages at which minors can engage in various employers, but does not negate the permit requirement. In addition, Wis. Stat. § 103.70 begins with a list of exceptions to the permit requirement and Wis. Stat. § 103.67 is not a listed exception.

Finally, LIRC rejected the employer's argument that the penalty was too steep for the minor injury that was incurred. Wisconsin Statue § 102.60(1m) provides that an employer must pay "an amount equal to the amount recoverable by the injured employee, but not to exceed $7,500, if the injured employee is a minor of permit age and at the time of injury is employed…without a written permit". There is no statutory provision permitting the reduction or forgiveness of the penalty.

Wisniewski v. R R Donnelley & Sons Co., WC Claim No. 2016-025357 (Jan. 31, 2018).

Facts: The applicant worked for the employer as a press operator. When he was performing this job the press stacker jammed. The applicant lifted a stack of print pages approximately 18 inches high off the conveyor. As he turned the stack bumped into a metal bar, which momentarily stopped his left arm movement and caused the stack to slip off his left hand back towards the conveyor. The applicant heard a "crunch" and felt a pain in his left shoulder. The applicant continued to work his regular job, but sought treatment for pain in his left shoulder. Two physicians examined the applicant at the respondent's request and found that the applicant's shoulder condition was not causally related to the work incident and the incident did not cause temporary or permanent aggravation of the preexisting condition.

Issue: Whether the applicant's injury arose out of and in the course of his employment.

Holding: LIRC reverses the ALJ's May 9, 2017 decision. Accordingly, the application is dismissed.

Reasoning: Based on the relevant medical records and the opinions of examining physicians, LIRC found the credible inference is that the applicant suffered from very extensive, preexisting left shoulder injury. LIRC found that it was not credible that the work incident could be responsible for the extent and severity of the injury.

(2) Equal Rights Decisions

Weber v. DWD, ERD Case No. CR201501766 (Jan. 4, 2018).

Facts: The complainant and the respondent entered into a settlement agreement which provided that the complainant could use her accumulated sabbatical, vacation, and personal leave until all leave time was expended, at which point she would retire. The respondent's legal staff interpreted that agreement as preventing the complainant from using accumulated sick leave in order to extend her term of employment. Rather, the respondent concluded that the agreement only permitted the types of leave specified in the agreement.

Issue: Whether the respondent's decision not to permit the complainant to retroactively convert reported vacation leave to sick leave was related to her age, disability, or to the fact that she had engaged in protected conduct under the Fair Employment Act.

Holding: ALJ's decision is affirmed. Accordingly, the complaint of discrimination is dismissed.

Reasoning: LIRC found the respondent's interpretation of the agreement to be reasonable and rejected the complainant's arguments. Specifically, LIRC found no evidence that the individual who made the decision that the settlement agreement precluded allowing the complainant to use her sick leave discriminated against the complainant based upon her age, disability or in retaliation for prior protected conduct.

Young v. City of Eau Claire, ERD Case No. CR201701796 (Jan. 4, 2018).

Facts: Complainant filed a complaint with the Equal Rights Division of the Department of Workforce Development, which he alleged that the respondent discriminated against him by denying him the full and equal enjoyment of a place of public accommodation based upon his race. The complaint was dismissed on the basis of timeliness. In his petition for commission review the complainant argues that it was not quite a year when he filed his complaint. The complainant also contends that the Equal Rights Division would not accept his complaint sooner, as they would not return his complaints and calls to the police.

Issue: Whether the complainant's complaint was filed within the statutory time limits.

Holding: ALJ's decision is affirmed. Accordingly, the complaint of discrimination is dismissed.

Reasoning: By statute the complaint must be filed no more than 300 days after the alleged discrimination. By that measure the complainant's complaint was untimely. LIRC also found nothing in the file to indicate that the complainant attempted to file a timely complaint but was prevented from doing so by the Equal Rights Division.

Additionally, LIRC held that Wis. Stat. § 106.52(4)(a), is a statute of limitations and not a statute concerning subject matter jurisdiction.

Ghanem v. U.W.-Madison Office of Administrative Leave, ERD Case No. CR 201004256 (Jan. 30 2018).

Facts: The ALJ issued a decision and order dismissing some of the complainant's allegations for failure to state a claim for relief under the Wisconsin Fair Employment Action. Thereafter the complainant sent the ALJ several e-mails objecting to the decision and requesting the ALJ remove herself from the case. The ALJ sent an e-mail to all parties stating that she was not removing herself from the case. A hearing notice was issued and the complainant sent the ALJ an e-mail stating he did not accept her as a judge on his case and a second e-mail stating he had reasons not to appear at the hearing. The hearing was convened as scheduled, but the complainant failed to appear. The ALJ issued an order dismissing the complaint based upon the complainant's failure to appear. The complainant filed a timely petition for review arguing that the ALJ was biased against him and requesting a new hearing.

Issue: Whether the complainant's complaint was properly dismissed for failure to appear for a hearing.

Holding: ALJ's decision is affirmed. Accordingly, the complainant's complaint is dismissed.

Reasoning: The rules of the Equal Rights Division clearly provide that "if the complainant fails to appear at the hearing… the administrative law judge shall dismiss the complaint." Wis. Adm. Code § DWD 218.18(4). The only exception to the outcome of dismissal is if the complainant can demonstrate "good cause" for the failure to appear. *Mullins v. Wauwatosa School District,* ERD Case No. CR200800326 (LIRC May 17, 2013). The party's dissatisfaction with the prior ruling by the ALJ does not provide it with good cause for failing to appear at a hearing. The complainant was aware the ALJ had denied his request that she remove herself from his case and knew that the scheduled hearing was set to proceed. By choosing not to appear, the complainant waived his opportunity to object to any rulings made by the ALJ.

Zhengnan Shi v. UW System Board of Regents, ERD Case No. CR201401334 (Jan. 30, 2018)

Facts: The complainant filed a complaint with the Equal Rights Division of the Department of Workforce Development, in which he alleged that the respondent discriminated against him based upon his race, creed, national origin/ancestry, because he filed a previous discrimination complaint and opposed discrimination in the work place, and because he declined to attend a meeting or participate in a communication about religious or political matters. Specifically, the complainant maintained that the respondent failed to finish his contract renewal process, sent out defamatory information regarding his employment separation to a student newspaper, and refused to allow the complainant to insert rebuttals into his personnel file. The latter two allegations refer to events that took place a year or more after the termination of the complainant's employment.

Issue: Whether complainant's complaint was properly dismissed.

Holding: ALJ's decision is affirmed. Accordingly, the complainant's complaint is dismissed.

Reasoning: Found the complainant's allegations were precluded by prior litigation involving the identical claims or issues, and/or were related to actions taken by a former employer that had no connection to a future employment opportunity, and therefore would not amount to a violation of the Wisconsin Fair Employment Act.

Staten v. Holton Manor, ERD Case No. CR201303113 (Jan. 30, 2018).

Facts: The respondent was recruiting for Certified Nursing Assistants (CNAs) to assist with resident care. CNAs working for the respondent were responsible for providing personal assistance and for cleaning and maintaining order in resident's rooms. Some of the respondent's residents are disoriented and may become violent or abusive. The job description stated that CNAs "may be subject to bruises and scratches."

The complainant, a CNA, called the respondent to inquire about a job. The complainant was invited for an in-person interview, during which she filled out a background check form. The complainant disclosed on the form that she had a conviction record. Specifically, the complainant's reported she had an expunged misdemeanor, and a municipal disorderly conduct conviction and disorderly conduct conviction. At the end of the interview the respondent extended a conditional offer of employment, subject to her passing a TB test and a background check. Shortly thereafter the complainant received a voicemail from the respondent stating that she was not being hired because of her arrest and conviction record.

Issue: Whether respondent discriminated against complainant based upon her arrest and conviction record, in violation of the Wisconsin Fair Employment Act.

Holding: ALJ's decision is affirmed. Accordingly, the complainant's complaint is dismissed.

Reasoning: Under the Wisconsin Fair Employment Act, it is an act of employment discrimination for an employer "to refuse to hire…any individual…because of any basis enumerated in s. 111.321." Wis. Stat. § 111.322. An individual's arrest or conviction record are both bases of prohibited discrimination under Wis. Stat. § 111.321. The respondent conceded that its decision not to offer the complainant a job was because of her conviction record, but argues that its decision was not discrimination because the circumstances of the complainant's convictions substantially relate to the circumstances of the job it she applied for.

LIRC held that the affirmative defense of substantial relationship may not be based upon an offense that has been expunged from the complainant's record. LIRC found no relation between the complainant's municipal disorderly conduct conviction, which arose from a situation in which she drove the car with another individual who had stolen a jar of change from a retail store. LIRC found a substantial relationship between the complainant's disorder conduct conviction and the job she applied for. Complainant was convicted for repeatedly striking a male with whom she was in a relationship, after learning that he was involved with another woman. The incident took place in a convenience store. LIRC found the conviction demonstrated the complainant's tendency to lose control and commit physical violence against someone who has angered or displeased her, which made her not well suited for a job caring for elderly or disabled people, some of whom are disoriented and likely to behave violently toward their caregivers.
