Case Law Update 2020

Andi Colker v. Cities & Villages Municipal Mutual (12/14/18)

Extraordinary stress standard for mental injury

The Applicant, Andi Colker filed a Hearing Application claiming she was permanently and totally disabled due to a non-traumatic mental injury that arose in the course and scope of her employment as a Waupun patrol officer. On the claimed date of injury, the Applicant arrived on the scene of a child abuse incident. Upon arrival at the scene, one child, age three, was unresponsive and ultimately passed away. The other child, age two had sustained serious injuries. The ALJ issued a decision dismissing the Hearing Application, citing the extraordinary stress standard.

Following an appeal, the Commission agreed with the ALJ, and dismissed the Hearing Application. In making its decision, the Commission stated the following: "it is an unfortunate fact that children are not uncommonly subject to physical abuse, and that police officers are not uncommonly the first responders to such incidents." The Commission also pointed to the fact that the Applicant "bore no personal responsibility for what happened to these children." The Commission then stated that this was the type of incident that similarly situated police officers can be expected to experience in the course of performing their job duties.

Aside from the extraordinary stress standard, the Commission adopted the opinion of the IME physician in this case.

Anthony Overman v. Sentry Insurance (01/31/2019)

New PPD deduction required after March 2, 2016 under Wis. Stat. Sec. 102.175

The Applicant, Anthony Overman, alleged an injury to his lower back based upon an injury on March 21, 2016 while bending and reaching for a pipe at work. The Applicant had a history of back treatment from a prior work-related injury and a motorcycle accident. He had a prior L4-5 microdiscectomy, but was not assigned any permanent partial disability following that surgery. Then, in January of 2014, he underwent a non-work-related cervical fusion.

Following the March 21, 2016 injury, he underwent hemilaminectomy, foraminotomy, and discectomy at L3-5. He asserted entitlement to 10% permanent partial disability (PPD) to the body as a whole due to his L3-5 surgery. Following a Hearing, the ALJ issued a Decision on January 5, 2018, and awarded the 10% PPD.

On appeal, the Respondents argued that Wis. Stat. 102.175(3)(b) required any physician completing a WKC-16-B to include in the report an opinion as to the percentage of permanent disability that was caused by other factors, which the treating physicians failed to do. The Commission agreed, and found that the code minimum of 10% PPD was the appropriate *starting point* for calculating the Applicant's entitlement to PPD benefits. However, it noted that the code

minimum assumes the spine was previously without disability, and that under Wis. Admin. Code DWD 80.32(11), an "appropriate deduction" *must* be made for any preexisting disability.

The Commission then stated that "the statutes now require that this type of apportionment of liability must be made with reference to specific medical evidence in the WKC-16-Bs." Further, it stated that WKC-16-Bs assessing disability *must* include an opinion as the percentage of permanent disability caused by the accidental injury and the percentage of permanent disability caused by other factors. This was based around Wis. Stat. 102.175, which took effect on March 2, 2016. The Commission remanded the case back for the taking of additional evidence, additional briefing, and for a new ALJ determination of PPD

***William Tomschin v. Sentry Select* (01/31/2019)**

Procedural issue: excusable neglect for failing to appear at Hearing

The Applicant, William Tomschin filed a Hearing Application *pro se* on October 17, 2016. He was claiming an injury to his left wrist/hand. The case was scheduled for a Hearing on August 6, 2018. On August 6, 2018, the Applicant failed to appear at the Hearing, and had not previously requested a postponement. When questioned as to why he did not appear at the Hearing, he stated that he mistakenly recalled the hearing date as being August 9, 2018.

In issue Decision to dismiss the claim without prejudice, the ALJ determined that the Applicant had not met the standard for "excusable neglect," which the ALJs and the Commission utilize when addressing a party's excuse for failure to appear at a hearing. Due to the Applicant's failure to meet the excusable neglect standard, the Respondents argued on appeal that the claim should be dismissed with prejudice, so that the Applicant could not simply refile his Hearing Application.

In the Commission's Decision, they agreed with the ALJ, and found the Applicant had not met the excusable neglect standard. The Commission also agreed that the case should be dismissed without prejudice. In making this decision, the Commission stated that "the Applicant's error was a single instance of everyday carelessness that involved no intent to interfere with the hearing process."

***Eva Solorio v. American Guarantee & Liability* (02/21/2019)**

Prospective surgery award must have sufficient medical support

The Applicant, Eva Solorio, claimed an injury to her shoulder on August 15, 2011. After she reached end-of-healing and was assigned PPD, the parties entered into a Limited Compromise (approved December 16, 2014) in which the Respondents got credit for up to 5% PPD without conceding the underlying injury. In July of 2015, the Applicant returned for additional treatment, but now began treating with a new physician. She was claiming additional surgery, and the prospective surgery was the main issue in her ongoing claim.

Despite her lack of credibility on many fronts, ALJ Martin agreed with the Applicant's new physicians, and awarded future surgery, in part because the IME physician attributed the Applicant's symptoms to an "unknown cause." ALJ Martin felt this was an incredible opinion, stating that the IME physician did not sufficiently explain how such a conclusion could credibly be reached.

On appeal, the Respondents argued that it is not incumbent upon the Respondents to establish a medical cause for the Applicant's current symptoms or conditions. LIRC agreed, and reversed ALJ Martin's decision to award the prospective surgery based upon multiple factors.

***Scott Sibilski v. Zurich Ins. Co.* (03/11/2019)**

Medical credibility: provider reasoning and understanding of facts is still very important

The Applicant, Scott Sibilski, claimed an occupational injury to his back on January 18, 2017 (three months after his employment with the insured began). The Applicant had worked as a mason for seventeen years, and had undergone an L4-5 microdiscectomy in 2008. Three months into his new position, he was terminated before ever reporting an injury. He then began treating, and claimed an occupational injury. A post-injury MRI demonstrated a new disc extrusion when compared against a pre-injury MRI. The treating physicians found a work-related injury based upon his job duties (which were in debate at the Hearing), and he underwent an L2-3 hemilaminectomy with microdiscectomy.

The Respondents obtained an Independent Medical Evaluation from Timothy O'Brien, M.D., who opined that the Applicant's symptoms were due to the natural progression of his multilevel degenerative disc disease. Following a Hearing on the merits, an ALJ adopted the opinions of the treating physicians and awarded benefits, in part due to the new extrusion found on the MRI.

Following an appeal, LIRC outlined the Applicant's lack of credibility due to his significant abuse of opioids, his failure to inform his employer of his history of back treatment, and his inaccurate recitation of his job duties. The Commission then adopted the opinion of Dr. O'Brien, and stated the following: "It is true that [the treating physician] identified the disc extrusion as 'new' in 2017 but that does not mean it was caused by the [A]pplicant's work. It was 'new' since the previous MRI in 2014 and still could have been a part of the natural progression of the [A]pplicant's degenerative disc disease, as opined by Dr. O'Brien."

***Brian Boritzke v. Robb Brinkman Construction.* (09/19/2019)**

Judicial estoppel, claim preclusion, and issue preclusion can bar work comp claims

The doctrines of judicial estoppel, claim preclusion, and issue preclusion are legal remedies that prevent parties from playing "fast and loose with the courts." Essentially, they operate to prevent a party from taking a position in one matter and then asserting the opposite position in the subsequent matter. The claims under the subsequent matter would therefore be barred.

In this case, the Commission was asked to bar the applicant's claim for worker's compensation benefits under these doctrines. The Commission noted that there was some debate as to whether the above-mentioned doctrines even apply to worker's compensation at all. Mindful that barring a worker's compensation claim without even considering the merits is a drastic step, the Commission concluded that these doctrines do apply to worker's compensation in Wisconsin and that they did in fact bar the Applicant's claim in this case.

The Applicant, Brian Boritzke, is a 27-year-old male who was working a summer job at Robb Brinkmann Construction. The owner of the company, Robb Brinkmann, bought an old steam tractor and wanted to play with it after the workday concluded. The Applicant helped Mr. Brinkmann set up the tractor before Mr. Brinkmann started giving rides. While standing next to Mr. Brinkmann's son, the Applicant suddenly yelled, "watch this!" and ran towards the tractor. He then tried to climb the back wheel of the tractor and his foot was crushed, causing severe injuries.

The obvious substantive issue in the case is whether the Applicant was in the course of his employment at the time of the injury (had the workday completed, or was he engaged in non-compensable horseplay?) The administrative law judge found that the Applicant's claims were not barred by estoppel or preclusion and that the Applicant was in the course of his employment. The judge ordered benefits, and the respondent appealed.

The Commission reversed. It found that the Applicant was not in the course of his employment based on the facts in the record. More importantly, it found that the Applicant's claim was barred by the doctrines of judicial estoppel and claim preclusion. The Applicant sued his employer in circuit court for negligence and personal injury before he moved forward with his worker's compensation claim. In Wisconsin, employees cannot sue their employers if they are within the course of employment at the time of the injury. Worker's compensation is the exclusive remedy. The Applicant insinuated (but did not overtly plead) that he was not in the course of his employment so that he could win his injury lawsuit. Once that failed, he then moved forward with his worker's compensation claim by claiming the opposite position—that he was actually in the course of his employment. The Commission's decision shuts this type of double-dipping down in the future.