

FIRST ANNUAL WORKER'S COMPENSATION SEMINAR  
WISCONSIN ASSOCIATION OF WORKER'S COMPENSATION ATTORNEYS

**EVIDENCE STANDARDS AT WORK COMPENSATION HEARINGS**

July 17, 2003

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Administrative Law Judge

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*Some point is made that hearsay evidence was allowed, but the court below in his opinion in the case expressly states that in his determination of the matter all hearsay testimony was excluded and not considered by him in arriving at his decision. It is clear that there is sufficient competent evidence to support the award. Justice James C. Kerwin writing in A. Breslauer Co. v. Industrial Comm., 167 Wis. 202, 205 (1918). (Emphasis added.)*

**Interpretative note by the author of this outline:** The trial court judge admitted the hearsay evidence under the law, but then excluded the hearsay evidence in his own mind in order to make a decision.

- I. **Interpretative note by the author of this outline:** The Wisconsin Rules of Evidence manual published by the State Bar interprets section 901.01 of the Evidence Code as follows and in doing so cites Goranson: “Code need not be applied in worker’s compensation cases.” Section 901.01 reads as follows: “**901.01 Scope.** Chapters 901 to 911 govern proceedings in the courts of the state of Wisconsin except as provided in ss. 911.01 and 972.11.” The Wisconsin Supreme Court stated in Goranson v. ILHR Department, 94 Wis. 2d 537, 546, 547, 551, 289 N.W.2d 270 (1980) as follows: “The statute has been consistently interpreted to require only that the Department make findings of ultimate facts as distinguished from evidentiary facts....An ultimate fact, as that term used in worker’s compensation cases in Wisconsin, is one ‘upon which the plaintiff’s right of recovery necessarily depends.’...The rules of evidence govern proceedings in the courts of the State of Wisconsin. Sec. 901.01, Stats. 1975; See also, sec. 911.01, Stats. 1975. **The Department is not a court.** Employers Mutual L. Ins. Co. v. Industrial Comm., 230 Wis. 374, 376, 284 N.W. 40 (1939). **Proceedings before the Department in worker’s compensation cases do not require strict adherence to the statutory rules of evidence.** See, Lager v. ILHR Dept., 50 Wis. 2d 651, 660-661, 185 N.W.2d 300 (1971); and sec. 227.08, Stats. 1975.

- II. **Interpretative note by the author of this outline: The court in Goranson cites the Lager case but it would appear that there is some conflict between the language of the court in Goranson and the language of the court in Lager.** The Wisconsin Supreme Court stated in Lager v. ILHR Department, 50 Wis. 2d 651, 660, 661, 185 N.W.2d 300 (1971) as follows: “The employer and insurance company strenuously argue on this appeal, as well as in earlier briefs, that the statements of Lager late in the afternoon and early evening of April 4, 1968, were inadmissible as hearsay, claiming they were merely self-serving declarations. We conclude that these statements, although hearsay, were properly admissible and that, as presented in this record, were exceptions to the hearsay rule.... **We do not, in finding the instant declarations of intent admissible, recede from our previously expressed statements in regard to ordinary hearsay evidence not subject to a recognized exception.** Outagamie County v. Brooklyn (1962), 18 Wis. 2d 303, 118 N.W.2d 201.”
- III. **Interpretative note by the author of this outline: The Outagamie County case reminds us all that a particular piece of evidence may or may not be hearsay depending on the exact issue being litigated before a tribunal.** The Wisconsin Supreme Court stated in Outagamie County v. Brooklyn, 18 Wis. 2d 303, 309, 312, 313, 118 N.W.2d 201 (1962) as follows: “**If Washburn county has correctly defined the issues, then Eggert’s testimony is clearly hearsay and this hearsay testimony stands uncorroborated by other competent evidence. If, however, the issue is whether the Outagamie county relief authorities acted in bad faith, or abused their discretion, then Eggert’s testimony with respect to the substance of conversations had with other persons during the course of his investigations is not hearsay....**While we hold that a finding of dependency could not be based upon the hearsay evidence presented at the hearing before the department, this does not mean that the circuit court was correct in reversing the department’s order....We find no reason why Washburn county should be precluded from using the incompetent evidence to rebut the presumption of regularity attending Outagamie county’s determination that the Stephans were dependents.”
- IV. **Interpretative note by the author of this outline: The First Nat. Bank case decided in 1915 sounds a great deal like the court in Goranson.** The Wisconsin Supreme Court stated in First Nat. Bank v. Industrial Commission, 161 Wis. 526, 528 (1915) as follows with Justice Kerwin again writing for the court: “**The *Industrial Commission* acting as an administrative board is not held to the same strict rule with respect to ruling on the admission of evidence as courts of law....The admission of incompetent evidence will not operate to reverse the award if there be any basis in the competent evidence to support it.**”

- V. **Interpretative note by the author of this outline:** A. Breslauer Co. was the appellant before the Wisconsin Supreme Court and lost in *A. Breslauer Co. v. Industrial Comm.*, 167 Wis. 202 (1918). In fact, the court stated at the very end of its opinion in *A. Breslauer Co. v. Industrial Comm.* on page 207 by Justice Kerwin as follows: “Upon the whole record we are convinced that no error was committed upon the trial and that the judgment below is right and should be affirmed.” **Question:** Why is the court in *Lloyd-McAlpine* stating that the hearsay in *A. Breslauer Co.* was “improper and insufficient”? The Wisconsin Supreme Court stated in *Lloyd-McAlpine L. Co. v. Industrial Comm.*, 188 Wis. 642, 645, 647 (1926) as follows: “To support it [an award] in favor of these two children under the statute there must be in the record sufficient legal evidence to warrant the conclusion that they were living with Paul Whitefish at the time of his death, and further that there was no surviving dependent parent....Mere conjecture cannot be the basis of a finding of the *Commission* any more than of a finding by a court...Hearsay was recognized as improper and insufficient in *A. Breslauer Co. v. Industrial Comm.* 167 Wis. 202, 205, 167 N.W. 256.
- VI. **Interpretative note by the author of this outline:** The *West Bend Co.* case sets the standard as to when medical evidence and expert evidence generally to some extent is needed regarding a particular issue. Surprisingly the court in this case held that the lay testimony of a worker is sufficient to prove an occupational disease/gradual injury in an unreasonable refusal to rehire case. Attached to this outline is a copy of an ALJ decision entitled Jeffrey M. Dundon versus The World discussing when medical evidence is required, and also attached is an outline discussing medical causation evidence generally. The Dundon decision explains that some appellate courts around the country have held that lay evidence may be competent prove an accidental injury, but Wisconsin appears to stand lone in holding that lay evidence may be competent to prove a gradual injury. The Wisconsin Supreme Court stated in *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 123, 125, 126, 127, 128, 129, 438 N.W.2d 823 (1989) as follows: “It has been asserted by West Bend, inconsistently it would seem to us, that Muckerheide’s ‘injury’ was not an injury contemplated in sec. 102.35(3), Stats., for it was not an injury for which compensation had been paid. This assertion is incorrect. An injury under the statute is defined in sec. 102.01(2)(c), Stats., as ‘physical harm to an employe caused by accident or disease.’...**We conclude that, where the assertion is that the claimant is physically unfit to return to work, medical proof to a reasonable probability is required to support that assertion. In the instant case, because the claimant’s evidence undisputably shows the medical nature of the physical injuries occasioned by repetitive motions at work, there is no reason to require any medical evidence to make a prima facie case for the prior on-the-job injury to Muckerheide.**... Thus, if West Bend is to assert a reasonable cause for not rehiring that Muckerheide is either permanently disabled by reason of her prior injury or is so likely to be reinjured that it is reasonable not

to rehire at her previous employment, some medical evidence to that effect must be produced....**At the hearing, Muckerheide presented no medical proof at the prima facie stage of her case. She relied upon her description of her signs, symptoms, and a recounting of the in-house treatment afforded by West Bend. There was ample testimonial evidence of physical injury.**

Moreover, the company's initial written response to the complaint acknowledged that 'The accident or occupational exposure alleged in the application actually occurred.' When, however, West Bend attempted, by testimony of its safety manager, Harold Thornberg, to show that the repetitive motion syndrome was likely to recur and prevent work performance, the testimony was excluded by the examiner's ruling that medical evidence was required. A similar ruling excluded the testimony of the company's nurse. West Bend's argument is that is unfair to hold it to a standard of medical proof when the claimant was allowed to prove up her case without it. Thornberg was, however, allowed to testify extensively about his experience with physical problems that grew out of repetitive motion requirements in the West Bend manufacturing process.... Thornberg was allowed to testify why Muckerheide was not rehired....After allowing this testimony into the record, the examiner stated that he would only allow Thornberg to state that Muckerheide had a history of visits to the nurse. Nevertheless, the examiner permitted Thornberg's testimony to continue for the purpose of explaining the nature of repetitive motion injuries, but he stated he would allow a 'diagnosis' of Muckerheide's problems. Nevertheless, Thornberg was allowed to give his opinion about the progressive nature of repetitive motion injuries. He was not allowed to testify – his answer was stricken – that if 'we rehired Shari, her symptoms would have immediately started up, or...they would have progressed...' Yet, he was allowed to state that he believed renewed repetitive motion would have been injurious to Muckerheide. The upshot of the protracted examination of Thornberg and a short examination of a member of the nursing staff was the examiner's ruling that any prognosis of Shari Muckerheide's condition in the absence of competent medical evidence was

excluded....**Sustaining that ruling, we hold that medical evidence is necessary to forecast that a particular person will, for physical and medical reasons, be unable to do a particular job without the likelihood of injury. We conclude that the testimony was insufficient as a matter of law. A lay person cannot be allowed to make a diagnosis or a prognosis of a particular person's present or future condition when to the lay person there are no outward or overt manifestations of present or future disabilities that would be apparent in the general experience of mankind.**" Finally, footnote 9 reads in part as follows: "We do not hold that in all cases a lay person's opinion can have no degree of medical probativeness, but, as we pointed out in Netzel v. State Sand & Gravel Co., 51 Wis. 2d 1, 6, 186 N.W.2d 258 (1971): 'Whether expert testimony is required in a given situation must be answered on a case-by-case basis.'"

- VII. **Interpretative note by the author of this outline:** The very interesting Netzel case discusses the concept of a “lay expert.” Please pay special attention to the footnotes on pages 6 and 7 of volume 51 of the Wisconsin Reporter 2<sup>nd</sup>. Also, Justice Robert W. Hansen wrote the only opinion for the court and filed within this only opinion a partial dissent for himself and “a minority of this court” on page 12 of his opinion! Courts were apparently more efficient 30 years ago. The Wisconsin Supreme Court stated in Netzel v. State Sand & Gravel Co., 51 Wis. 2d 1, 6, 7, 8, 186 N.W.2d 258 (1971) as follows: “The first flaw is that, before expert testimony can be held to be a prerequisite to a trier of fact making a finding of fact as to an issue of fact, it must be found that the matter involved ‘...not within the realm of the ordinary experience of mankind...’ One starts with the recognition that expert testimony is not required for proof of negligence in every situation. Whether expert testimony is required in a given situation must be answered on a case-by-case basis...and whether defendant’s negligence was a substantial factor in injuring plaintiff when defective bleachers collapsed....Appellant appears to view as an expert only a person whose education or near-professional status qualifies him to describe or evaluate a situation...**But we deal with cement, not medical diagnosis or prognosis, here...This court recognizes the role and status of what might be termed a lay expert, meaning a person whose expertise or special competence derives from experience working in a field of endeavor rather than from studies or diplomas.**”
- VIII. **Interpretative note from the author of this outline:** The Hadrian court seems to like moving pictures (videotapes???) more than models/exhibitions or still photographs. The Wisconsin Supreme Court stated in Hadrian v. Milwaukee E. R. & T. Co., 241 Wis. 122, 129, 130 (1942) as follows: “**The court received in evidence a square of beaverboard** practically 3 by 3 feet in dimension in which a narrow slit was cut to represent the center of the southbound car track in making the turn....It also shows a gross exaggeration of the outswing on the ramp. **The prejudicial effect of this exhibit is manifest.** Its receipt would require a new trial of the case if it were not dismissed....**We were not favored on the argument with a presentation of a moving picture of the train** rounding the curve so we cannot precisely evaluate the extent to which the exhibition to the jury may have enlightened or befuddled them....**Photographs do not represent distances; they misrepresent them. These stills grossly distort the extent and contour of the safety zone....Doubtless the show was highly entertaining to the jury, but entertainment of the jury is no function of a trial. And why all this fuss to prove a fact susceptible of easy, exact, and undisputable demonstration by actual measurement?...**It is obvious that much time of the court and jury was consumed in misrepresenting under the guise of proving a simple, undisputable, and readily ascertainable fact.”

