STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

ISAAC BRACEY, Applicant
6124 W HUSTIS ST
MILWAUKEE WI 53223

WORKER'S COMPENSATION DECISION

Claim No. 2010-018481

Dated and mailed:
FEB 28 2012

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MILWAUKEE TRANSPORT SERVICES INC, Employer
1942 N 17TH ST
MILWAUKEE WI 53205

MILWAUKEE TRANSPORT SERVICES INC, Insurer
CLAIM DEPT
1942 N 17TH ST
MILWAUKEE WI 53206-1697

SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

The applicant filed an application for hearing alleging an injury to his left knee and right foot on January 31, 2010. An administrative law judge (ALJ) for the Worker's Compensation Division of the Department of Workforce Development heard the matter on May 17, 2011.

Prior to the hearing, the self-insured employer conceded jurisdictional facts and an average weekly wage at the statutory maximum. The employer did not concede an injury compensable under the Worker's Compensation Act, however. Specifically, the employer contended the applicant was not in the course of employment when injured.

On May 24, 2011, the ALJ issued his decision dismissing the application for hearing. The applicant filed a timely petition for commission review.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission makes the following:

FEB 29 2012

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Facts.

The applicant was born in 1956. He is a bus driver for the employer. He was injured in an incident occurring on January 31, 2010. The incident is recorded in a video compact disc (exhibit 3), beginning at elapsed time 21:41:50.

On January 31, 2010, a passenger in his late teens or early 20's came aboard the applicant's bus with a transfer ticket. The passenger's transfer was expired and the applicant refused to accept it. The applicant asked the passenger to leave the bus, and a verbal discussion ensued in which the passenger called the bus driver a "bald black bitch." The applicant took no action in response to that insult. The passenger then began to leave the bus and threw a fake punch at the applicant, to which the applicant responded by laughing.

Finally, standing on the edge of the doorway to the bus, the passenger spit on the applicant. The passenger did not just spit in the direction of the applicant, nor did he just spit on the floor of the bus to indicate disgust. After spitting on the applicant, the passenger turned and ran away from the bus. The applicant got up from his driver's seat, left the bus, and attempted to chase the passenger.

However, almost immediately upon leaving the bus, indeed within three or four yards of the bus, the applicant slipped on ice and fell. He crawled back aboard the bus within 25 seconds of leaving it. He was driving the bus again within two minutes. There was one other passenger in the bus at the time.

The applicant suffered an acute left Achilles tendon rupture and an acute right quadriceps tendon rupture in the fall. Both were surgically repaired on February 5, 2010.

The applicant's treating surgeon Stephen Kurtin, M.D., issued a practitioner's report (exhibit B), indicating that the applicant could return to work without limitations as of May 6, 2010, but that he was left with permanent partial disability at five percent for the left Achilles tendon rupture and repair and five percent for the right quadriceps tendon rupture. The doctor identified disabling elements as pain, stiffness and decreased range of motion to the left Achilles and right quadriceps. Consistent with applicant's claim, the commission concludes Dr. Kurtin's ratings are five percent compared to loss of the left foot at the ankle, and five percent compared to loss of the right leg at the knee.

The employer has a policy regarding altercations and disturbances on buses set out in its code of conduct. It states as follows:

> **3.31 Altercations and Disturbances**
>
> Operators must not engage in a physical encounter with anyone except to defend themselves from physical harm or serious injury.
>
> In the event of an altercation or disturbance, employees should maintain calmness and obtain a description of the person(s) perpetrating the incident.
>
> Operators are not to get out of their seat for any reason other than to defend themselves from physical harm or serious injury.

Exhibit 4. The applicant admitted that he was aware of the rule. Transcript, page 20. Indeed, pursuant to this policy, the employer disciplined the applicant. Exhibit 5.

2. Discussion.

a. Course of employment.

To be liable for disability from an injury, an injured worker must establish both that the accident or disease causing injury arose out of the applicant's employment and that, at the time of the injury, the worker was performing services growing out of and incidental to his or her employment. See Wis. Stats. § 102.03(1)(c)1 and (e).

The supreme court has noted that "[t]he phrase 'arising out of' refers to the causal origin of the injury...." *Goranson v. ILHR Department*, 94 Wis. 2d, 537, 549 (1980). The "growing out of and incidental to employment test" is sometimes referred to as the "course of employment test." *Ide v. LIRC*, 224 Wis. 2d 159, ¶ 17 (1999). It refers to the time, place, and circumstances of the accident in relation to the employment. *Goranson*, 94 Wis. 2d at 549; *Ide v. LIRC*, 224 Wis. 2d 159, ¶ 17. It is this later test that is at issue here.

The supreme court has expressly held that the Worker's Compensation Act must be liberally construed in favor of including all services that can in any sense be said to reasonably come within it.[1] Upon entering the employer's premises and beginning work, an employee is presumed to be continuing to work as long as he or she is on the employer's premises, absent evidence to the contrary. Once an employee has entered into the course of employment,

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[1] *Severson v. Industrial Commission*, 194 Wis. 489, 494 (1936). *See also Wisconsin Elec. Power Co. v. LIRC*, 226 Wis. 2d 778, 796 (1999) (where an inference may be drawn one way as easily as another, the scale should be turned in favor of the applicant as it is the intent and purpose of the act to bring borderline cases under it.)

> the test to be applied in determining whether he has removed himself therefrom is one of deviation. In other words, has the employee engaged in some activity of his own which has no relation to his employer's business?

In re the Estate of Fry v. LIRC, 2000 Wis. App. 239, ¶10, 239 Wis. 2d 574 (Ct. App. 2000), citing *Van Roy v. Industrial Commission*, 5 Wis. 2d 416, 422 (1958). However, an act is not a deviation, even if in violation of the employer's directives, if it furthers the employer's interests and not merely the employee's own personal ends. *Grant County Serv. Bureau v. Industrial Commission*, 25 Wis. 2d 579, 584 (1964).

Moreover, the supreme court has

> moved away from the harsh rule that any deviation from employment would prevent an award of benefits and adopted the rule that an impulsive, momentary, and insubstantial deviation will not bar recovery.

Nigbor v. DILHR, 120 Wis. 2d 375, 384 (1984). For example, minor acts of horseplay do not automatically constitute departures from employment, but may be found insubstantial, and a supervisor injured while wrestling with a coworker has been found not to have engaged in a substantial deviation. *Bruns Volkswagen, Inc. v. DILHR*, 110 Wis. 2d 319, 324-25 (Ct. App., 1982).

Similarly, the commission has found a momentary deviation in the case of a factory worker who injured his hand when he struck a steel locker in an angry response to mocking over the employer's loudspeaker. *Thomas G. Patek v. Ameriquip Corp.*, WC claim no. 95-025941 (LIRC Sept. 4, 1997). In *Patek*, the commission found that the employee's actions constituted an impulsive and momentary deviation from his normal work duties. In making that finding, the commission found that the employee's immediate reaction to being mocked "by punching the locker does not seem to be so unreasonable or unexpected to take his actions out of the course of employment."

In this case, the employer's written policy required the applicant to remain in his seat. As set out above, an act is not a deviation, even if in violation of the employer's directives, if it furthers the employer's interests and not merely the employee's own personal ends. Still, the commission shall assume that the applicant deviated from his employment by leaving the bus to chase the passenger who spat on him.

However, the applicant's response to being spat upon was unquestionably impulsive. Further, the deviation did not last more than 30 seconds according to the elapsed time on the CD video, and again, he went no further than three or four yards from the bus. The applicant's actions at most constituted an impulsive,

momentary, and insubstantial deviation that does not bar recovery.[2] The commission therefore finds the applicant sustained a compensable injury, that is, one arising out of his employment with the employer while performing services growing out of and incidental to that employment.

b. Award

Following his injury, the applicant was off until May 6, 2010, when he was released to full duty. Consequently, he is entitled to compensation for temporary total disability for the period from January 31 to May 6, 2010, a period of 13 weeks and 4 days. At the weekly rate of $815 (the statutory maximum for injuries occurring in 2010), the amount due in temporary total disability is $11,138.33.

Dr. Kurtin's permanent disability estimates have gone unrebutted, and they are reasonable on this record. Consequently, the applicant is entitled to compensation for permanent partial disability at five percent compared to loss of the left foot at the ankle, and five percent compared to loss of the right leg at the knee.

Five percent compared to loss of the leg at the knee results in 21.25 weeks of permanent partial disability compensation. Five percent compared to loss of the foot at the ankle results in 12.5 weeks of permanent partial disability compensation. Under Wis. Stat. § 102.53(4), the 12.5-week compensation for the loss at the ankle is increased by 20 percent to 15 weeks. Altogether, the compensation for permanent partial disability is 36.25 weeks, which at the weekly rate of $282 (statutory maximum for injuries occurring in 2010) amounts to $10,222.50.

In all, the amount of disability compensation under this order is $21,360.83. However, the self-insured employer claimed a 15 percent reduction in compensation under Wis. Stat. § 102.58. Because that issue was not noticed for hearing, the parties and the ALJ agreed that there would be a separate hearing on the issue and that--if he awarded compensation--the ALJ would provisionally withhold 15 percent of it pending further hearing. Transcript, page 6.

Based on this agreement, the commission shall provisionally withhold 15 percent of the disability award pending resolution of the Wis. Stat. § 102.58 claim. This matter shall also be remanded for further appropriate action by the department on the Wis. Stat. § 102.58 claim.

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[2] There was testimony about the applicant's failure to use a safety shield. Given that the self-insured employer's defense under Wis. Stat. § 102.58 remains pending, the commission makes no findings on that point, other than to note that a failure by the applicant to use the shield while operating the bus would not itself constitute a deviation, that is, an "activity of his own which has no relation to his employer's business."

After the provisional reduction for the pending Wis. Stat. § 102.58 claim, the total amount due is $18,156.71. The applicant has agreed to have a fee of 18 percent of the amounts payable under this order withheld for direct payment to his attorney under Wis. Stat. § 102.26; the provisionally-reduced fee is thus $3,268.21 (0.18 times $18,156.71). That amount, plus costs of $63.16, shall be deducted from the provisionally-reduced amount and paid the applicant's attorney within 30 days, leaving the provisionally-reduced amount due the applicant within 30 days of $14,825.34.

The applicant sustained reasonable and necessary medical expense[3] to cure and relieve the effect of the work injury as follows: from Bell Ambulance, $589.10, of which Humana paid $547.86, with an adjustment of $41.24; from Blount Orthopaedic Clinic, $5,470.00, of which the applicant paid $25.00, Humana paid $3,108.13, with an adjustment of $2,336.87; from Columbia/St. Mary's Hospital $2,645.52, of which the applicant paid $75.00, Humana paid $1,107.54, with an adjustment of $1,462.98; from Infinity Health c/o Nationwide Credit Corp., $215.00, of which the applicant paid $175.00, and $40.00 remains outstanding; from WI Radiologist Specialists, $444.00, of which Humana paid $333.00, with an adjustment of $111.00; from Orthopaedic Hospital of WI (at collection), $26,884.34, of which Humana paid $9,763.35 with an adjustment of $12,040.99, and $5,080.00 remains outstanding; from Glendale Anesthesia Associates, $2,364.00, of which Humana paid $1,891.20, with an adjustment of $472.80; from Aurora Health Care Physicians, $85.00, of which the applicant paid $72.00, with an adjustment of $13.00; and in prescriptions $30.00, all of which were paid by the applicant. In addition, the applicant incurred $180.42 in medical mileage expense.

Dr. Kurtin has opined that the applicant's prognosis is fair and that further treatment may be necessary. In addition, the applicant has undergone significant surgical treatment. This order shall therefore be left interlocutory to permit further awards for disability and medical expense that may arise in the future. As indicated above, in addition, this order is left interlocutory with respect to the claim under Wis. Stat. § 102.58.

NOW, THEREFORE, the Labor and Industry Review Commission makes this

INTERLOCUTORY ORDER

The findings and order of the administrative law judge are reversed.

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[3] Medical expenses are not subject to the 15 percent reduction under Wis. Stat. § 102.58. *Mohr v. Claude W. Loppnow Builders*, WC claim no. 88-0067199 (LIRC Oct. 29, 1990). The supreme court has held that to interpret the parallel statute allowing for increased compensation to apply to medical expenses would be an unintended and unreasonable result, *Schwartz v. DILHR*, 72 Wis. 2d 217, 222 (1976). See also: *Grover v. Maynard Steel*, WC claim no. 2007-012095 (LIRC Aug. 18, 2009).

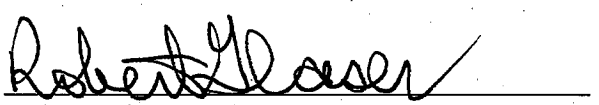
Within 30 days, the employer and its insurer shall pay all of the following:

1. To the applicant, Issac Bracey, the sum of Fourteen thousand eight hundred twenty-five dollars and thirty-four cents ($14,825.34) in disability compensation and Three hundred seventy-seven dollars and no cents ($377.00) in medical expense, and One hundred eighty dollars and forty-two cents ($180.42) in medical mileage.
2. To the applicant's attorney, Daniel R. Schoshinski, the sum of Three thousand two hundred sixty-eight dollars and twenty-one cents ($3,268.21) in fees and Sixty-three dollars and sixteen cents ($63.16) in costs.
3. To Infinity Health c/o Nationwide Credit Corp., Forty dollars and no cents ($40.00) in medical treatment expense.
4. To Orthopaedic Hospital of WI (at collection), Five thousand eighty dollars and no cents ($5,080.00) in medical treatment expense.
5. To Humana, Sixteen thousand seven hundred fifty-one dollars and eight cents ($16,751.08) in reimbursement of medical expense paid under Wis. Stat. § 102.30(7).

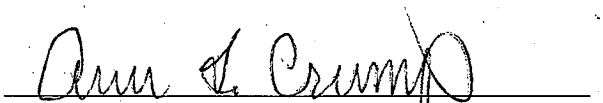
This matter is remanded to the department for further action on the Wis. Stat. § 102.58 claim as described in the body of this decision.

Jurisdiction is reserved for further orders and awards as are appropriate and consistent with this decision.

BY THE COMMISSION:



Robert Glaser, Chairperson



Ann L. Crump, Commissioner

MEMORANDUM OPINION

The commission did not discuss witness credibility with the presiding ALJ. The applicant's testimony about his encounter with the passenger who spit on him is largely corroborated by the videotape exhibit. The ALJ quite evidently believed the applicant's version of events. The ALJ found that he himself

> probably would have acted in the same way the applicant did. When someone spits on you, that is an insult. I probably would have chased after the individual...

Thus, the commission did not reverse the ALJ's decision because it overruled the ALJ's credibility determination, but because it reached a different conclusion as to whether the applicant's undisputed actions met the standard of an impulsive, momentary, and insubstantial deviation from employment. That is a question of law, not of witness credibility, and the requirement of a credibility conference does not arise. See *Hermax v. LIRC*, 220 Wis. 2d 611, 617 (Ct. App. 1998).

cc: Attorney Daniel R. Schoshinski
Attorney David J. Kania

LAURIE R. McCALLUM, COMMISSIONER Dissenting

I respectfully dissent from the majority decision.

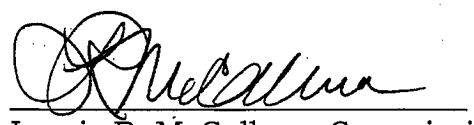
Although certain deviations from a worker's duties and responsibilities have been held not to be disqualifying, those deviations, as relevant here, must be shown to have been impulsive, momentary, and insubstantial. *Nigbor v. DILHR*, 120 Wis.2d 375 91984).

In my opinion, the claimant's actions here fall far outside that standard.

The claimant not only engaged in a substantial abandonment of his responsibilities to the employer and its property, and violation of its policies, by exiting the bus, but he also abandoned his responsibility to the rider who remained on the bus. The claimant's actions were not necessary to protect the employer's interests, or his own safety or that of the passenger, since the individual was already running away from the bus, but instead, placed those interests in jeopardy. The claimant's actions served to exacerbate an already contentious and violent situation rather than to ameliorate it. The only justification for his actions, since they were not to protect the interests of the employer or his own safety, were, as he admits, to avenge what he perceived to be a personal affront. In my opinion, this constitutes a deviation within the meaning of *In re: the Estate of Fry v. LIRC,* 200 Wis. App. 239, 239 Wis.2d 574 (Ct. App. 2000)(deviation is an activity unrelated to the employer's business); and *Grant County Serv. Bureau v. Industrial Commission,* 25 Wis.2d 579 (1964)(an act is a deviation if intended merely to further the employee's own personal ends).

Not only were the applicant's actions not insubstantial but, in addition, they were not intended to be momentary. His intention was not to step away for a moment, but instead to pursue this individual until he caught him.

As a result, I would affirm the administrative law judge's decision that the application be dismissed.



Laurie R. McCallum, Commissioner