State of Wisconsin

Labor and Industry Review Commission

Matthew J. Ewerdt Complainant **Brunswick Corporation** Respondent ERD Case No. CR201503045 EEOC Case No. 26G201600133C	**Fair Employment Decision**[1] **Dated and Mailed:** April 29, 2020 ewerdma_rsd.doc:107

The decision of the administrative law judge is **affirmed, subject to the following modifications**. Accordingly, the complaint is dismissed.

By the Commission:

/s/

Michael H. Gillick, Chairperson

/s/

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the Labor and Industry Review Commission as a respondent in the petition for judicial review.

Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider the complainant's allegation that the respondent discriminated against him by refusing to reasonably accommodate his disability and by terminating his employment because of disability, in violation of the Wisconsin Fair Employment Act (WFEA). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision. The complainant 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 at the hearing. Based on its review, the commission agrees with the decision of the administrative law judge, and it adopts the findings and conclusions in that decision as its own, except that it makes the following:

Modifications

1. Delete footnote 6 in Finding of Fact No. 18, and replace it with the following:

> In 2012 officials of Brunswick brought up to Ewerdt, his mother, his union representative, and one of his health providers, the possibility of Ewerdt's wearing a helmet on the job to prevent or reduce head injuries, but none of them suggested to Brunswick that Ewerdt ought to wear a helmet or that Ewerdt wanted to wear a helmet on the job.

2. In Finding of Fact No. 43, delete the phrase "he would sometimes need to cross the vehicle loop" and replace it with the following:

> "he sometimes needed to walk along the main vehicle loop, and sometimes needed to walk by the vehicle drop-off point for his work area"

3. In Finding of Fact No. 48, delete the phrase "there were still some risks in other areas of the plant" and replace it with the following:

> "there were greater risks of harm in other areas of the plant"

4. In the Memorandum of Law, at page 24 of the decision, delete the phrase "that would have protected him from serious injury" and replace it with the following:

> "that would have avoided a reasonable probability of substantial harm to the Complainant"

Memorandum Opinion

Summary

Matthew Ewerdt worked at a boat engine factory, Mercury Marine, a division of Brunswick Corporation, from 2011 to 2015. From the age of 12, Ewerdt suffered from a form of epilepsy characterized by unpredictable seizure episodes lasting one or two minutes during which he generally would lose consciousness and fall over. The frequency of these episodes varied, but during his period of employment they occurred once every two or three months on average. In June 2012, following one of Ewerdt's seizures at work, Brunswick kept Ewerdt off work pending a fitness for duty exam by a consulting physician, Dr. Edward Cooney. Dr. Cooney released Ewerdt for work, but a few weeks later issued a formal opinion stating that "he should not return to work for this company given the inherent risk in the workplace and the fact that he will likely have more seizures in the future." Ewerdt filed an ERD complaint against Brunswick (ERD Case No. CR201300676) based on its refusal to allow him to return to work. In connection with a settlement of that complaint, Ewerdt returned to work in July 2014, in a job that was deemed to be safer for him than his previous position.

Ewerdt's second period of work for Brunswick lasted until October 2015. In his entire work experience for Brunswick, Ewerdt had a total of 15 seizures on the job. Prior to his last seizure at work, on September 8, 2015, he had several scrapes and bruises from these seizures, and once suffered a more serious injury, a broken nose, on June 28, 2012. Over the years Brunswick took several measures to reduce the risk of harm to Ewerdt, including transferring him to jobs that did not involve working on an assembly line or working with machinery, and increasing the padding around his workspace to possibly cushion his falls.

The seizure of September 8, 2015, which led to Brunswick's decision to terminate Ewerdt's employment, happened away from his workstation. Ewerdt walked to a vending area to get ice for his drinking water. On his return from the vending area he walked along a forklift path, and had a sudden-onset seizure, causing him to fall into the forklift path. He broke his nose again in the fall. Co-workers moved him from the forklift path (there was no forklift in the vicinity at the time) and he received medical attention. He returned to work with a medical release on September 10th. On October 15th Brunswick terminated his employment because it deemed his continued employment too dangerous to his health.

This case turns on two issues. The first is whether Brunswick has established what is known as a "job-relatedness" defense. (Brunswick conceded that Ewerdt made a *prima facie* case of discrimination by proving two elements – that he had a disability under the Act, and that Brunswick terminated his employment because of his disability. *See La Crosse Police and Fire Commission v. LIRC,* 139 Wis. 2d 740, 407 N.W.2d 510 (1987)). The "job-relatedness" defense is a showing by the respondent that the complainant's disability is reasonably related to his ability to adequately

undertake the job-related responsibilities of his employment. Wis. Stat. § 111.34(2)(a). In this case, Brunswick's concern was primarily for the safety of Ewerdt, not his ability to carry out his duties adequately, but the statute specifically incorporates considerations of safety into the job-relatedness defense:

> In evaluating whether an individual with a disability can adequately undertake the job-related responsibilities of a particular job...the present and future safety of the individual, of the individual's co-workers, and if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made by a general rule which prohibits the employment...of individuals with disabilities in general or a particular class of individuals with disabilities.

Wis. Stat. § 111.34(2)(b).

The second issue, reasonable accommodation, has two parts: first, whether the complainant met his initial burden of showing that a reasonable accommodation was available that would have enabled him to perform his job adequately (and without a reasonable probability of substantial harm to himself); and second, if he met that burden, whether the respondent met its burden to show that it either did not refuse a reasonable accommodation, or that making such an accommodation would have imposed a hardship on it. Wis. Stat. § 111.34(1)(b).

The Job-Relatedness Defense

Legal standard

The Wisconsin Supreme Court first considered an employer's argument that safety concerns were sufficient to establish a job-relatedness defense in *Chicago M. St. P. & P. RR. Co. v. ILHR Dept,* 62 Wis. 2d 392, 215 N.W.2d 443 (1974), The Court emphasized the need for the employer to produce medical opinion evidence to prove its defense. The employee had a history of asthma, but the employer failed to show that he suffered any ill effects from the performance of his job, and offered no medical testimony to a reasonable degree of medical certainty that the employee's working conditions were or would be in the future hazardous to his health. The Court rejected the employer's defense.

Next, in *Bucyrus-Erie Co. v. State, DILHR*, 280 N.W.2d 142, 90 Wis.2d 408 (Wis. 1979), the Court considered the case of an employer that refused to hire an applicant as a welder because it believed that his back condition (which included an incomplete fusion of first sacral vertebra and possible spondylolisthesis of the fifth lumbar vertebra) would cause further damage to his back, particularly because the job required regular lifting and carrying of 60 pounds of material. The Court recognized

that an employer had a legitimate interest in the safety of its workforce that may, in certain cases, insulate it from liability under the WFEA:

> We do not believe that the legislature when proscribing discrimination against those physically handicapped intended to force an employer into the position of aiding a handicapped person to further injury, aggravating the intensity of the handicap or creating a situation injurious to others. Such an interpretation would compromise not only the best interests of the handicapped but all concerned.

Id. at 423.

The Court, however, expressed caution in balancing the interests of the individual and the employer:

> It is important that each case be individually evaluated and decided upon the evidence presented by both parties. Further, we do not believe that it can reasonably be held that an employer has not discriminated because it categorically relies upon the opinion of the company doctor, important as his expert and medical opinion may be.

Id. at 424.

The test set out by the Court was whether the evidence showed a reasonable probability of hazard to the employee:

> If the evidence shows that the applicant has a present ability to physically accomplish the tasks which make up the job duties, the employer must establish to a reasonable probability that because of the complainant's physical condition, employment in the position sought would be hazardous to the health or safety of the complainant or to other employees or frequenters of the place of employment.

Id. at 424.

The Court also considered the question of disability discrimination in relation to safety in two cases involving a complainant with epilepsy. *Chicago and N.W. R.R. v. LIRC,* 98 Wis. 2d 592, 297 N.W.2d 819 (1980), and *Samens v. Labor and Industry Review Com'n*, 117 Wis. 2d 646, 345 N.W.2d 432 (1984). In *Chicago and N.W. R.R.,* the complainant, Pritzl, was employed as a welder. His epilepsy was fairly well controlled; he was seizure-free the last six months of his employment. Nevertheless, he was fired for an asserted inability to work safely on the job because of his epilepsy. The court applied the reasonable probability test of *Bucyrus-Erie* and affirmed the commission's finding that the employer failed to show a risk of hazard:

> The relevant and undisputed testimony in this case demonstrates that 70 to 90 percent of the epileptics under control medication never suffer recurrent seizures and that Pritzl, as of April 24, 1972, the date the petitioner terminated his employment, had not experienced a seizure since after his second epileptic convulsion on October 24, 1971, when he began taking anticonvulsive drugs. Thus, there was considerable evidence that Pritzl's seizure disorder was under control as of the date he was disqualified for further employment as a welder and therefore it was unlikely that he would experience another seizure episode during the course of his employment. Hence, we conclude that reasonable men could accept the Commission's finding that the railroad failed to establish that Pritzl's employment as a welder would be hazardous to Pritzl's health or safety or the health and safety of others, solely because of his handicap. We therefore hold that there was substantial evidence in the record to support the Commission's finding that Pritzl's seizure disorder did not present a reasonable probability of hazard on the date of his disqualification, April 24, 1972.

Id. at 609.

The complainant in *Samens* had a seizure disorder that was at least partially controlled. He applied for a position as a groundsman/driver for an electric company. The court distinguished *Samens* from *Bucyrus-Erie* on the grounds that the safety of not only the complainant and his co-workers, but the safety of the general public, would be put at risk if the complainant were hired. The Court applied a lesser standard for the employer to meet – that its refusal to hire the individual "bore a rational relationship" to its safety obligations to the public and to its own employees. The Court's adoption of a lesser standard in view of safety risks to the general public was consistent with a special provision in the WFEA allowing the employer to consider a particular job's "special duty of care to the public" when evaluating whether a disabled individual can adequately perform a job. Wis. Stat. § 111.34(2)(c). Brunswick did not argue that the safety of the general public was at risk here, and the commission does not find the rational relationship standard to be applicable.

Subsequent to these decisions, the commission decided *Alt v. Meriter Hospital*, ERD Case No. 920294 (LIRC Mar. 27, 1996), which involved the termination of an employee who had epilepsy. The complainant, Mary Alt, was a food service worker at the hospital. The commission described her experience of seizures at work as follows:

> During the course of the complainant's employment at Methodist Hospital and at Meriter, she experienced numerous seizures, sometimes several in a single day. Most of the complainant's seizures lasted between 30 seconds and a minute and, although the complainant

> sometimes sustained bumps and bruises from falling down during a seizure, none of her seizures ever resulted in any significant injury to herself or others. After a seizure the respondent would usually have one of the complainant's co- workers sit with her until she recovered sufficiently to return to work or would take the complainant to its Employee Health Services, which was located at the Park Street site. The respondent also instituted a practice of maintaining "seizure logs," in which it attempted to document the complainant's seizures.

The commission cited the test of *Bucyrus-Erie,* that the respondent must establish to a reasonable probability that, because of Alt's physical condition, employment in her position would be hazardous to the health and safety of herself or to others. But it elaborated on that standard by reciting the test enunciated in *Jansen v. Food Circus Supermarkets*, 110 N.J. 363, 541 A.2d 682 (1998), that the question is whether continued employment of the employee in her present position poses "a reasonable probability of substantial harm." The commission also adopted the directive in *Jansen* that the employer must rely on "adequate medical reports and relevant records, such as the employee's work and medical histories." *Jansen,* 110 N.J. at 379. The commission stated that the employer must reach an "objectively reasonable decision" about the probability that the employee will cause harm to himself or others. *Id.* The *Jansen* analysis has been picked up by other jurisdictions. *See, e.g. Davidson v. Shoney's Big Boy Restaurant,* 181 W. Va. 65, 380 S.E.2d 232 (1989); *Hafner v. Conoco, Inc.,* 1999 MT 68, 977 P.2d 330 (1999).

The commission concluded in *Alt* that the employer failed to meet its burden. While there was no question that Alt experienced, and was likely to continue experiencing, seizures at work, there was little evidence that her seizures posed a risk of injury to her. The shortcomings in the respondent's proof included its misrepresentation of the hazards that Alt was likely to encounter. The employer asserted that Alt had to use a food slicer and deliver carts of food – actually she did not have to use the food slicer and did not regularly deliver carts. The employer overstated the danger of Alt's using the garbage disposal – it had a safety device on it making the chance of injury very remote. And the employer argued that Alt's use of the dishwasher exposed her to 180-degree water temperatures – but that was the temperature inside the dishwasher, not the temperature to which Alt was exposed. The employer's position was also undercut by the fact that Alt performed her duties for 14 years without significant injury. In addition, although the employer presented the opinion of a doctor in support of its argument, that doctor's opinion was based on the misinformation the employer provided to him about the hazards that Alt encountered, and the doctor was unaware of Alt's 14 years of job performance without significant injury. Finally, as discussed below, the doctor never actually opined that Alt was likely to sustain an injury due to her seizures.

<u>Application of the standard to this case.</u>

Applying the standard identified in *Alt* and *Jansen*, namely, whether objective evidence showed a reasonable probability of substantial harm to Ewerdt based on medical reports, medical history and work history, the commission agrees with the ALJ that Brunswick met its burden to prove that Ewerdt faced a reasonable probability of substantial harm at work.

As in all the cases cited above, medical opinion is crucial. The ALJ, while acknowledging that Dr. Morris, Ewerdt's treating physician, was widely considered an expert in the treatment of epilepsy, found the consulting physician, Dr. Cooney, to be in a better position to render an opinion pertinent to the dangers Ewerdt faced on the job:

> Dr. Morris, who testified that the risk of serious injury was minimal, never visited the plant where the Complainant worked and had a limited knowledge of the plant environment and the risks it posed for the Complainant when he fell during a seizure; by contrast, Dr. Cooney toured the Respondent's plant twice, which gave him a fuller understanding of the dangers found throughout the plant for someone who has seizures of the type experienced by the Complainant.

(ALJ Decision, p. 17).

Ewerdt argued that Dr. Cooney's visits to the plant did not give him an advantage in assessing the risk of substantial harm because on neither occasion did he visit the actual workplace in Accessories as it existed at the time Ewerdt worked there. While that is true, it is also true that Dr. Cooney saw the location where the actual workplace used to be, which is better than not seeing the area at all. More importantly, the complainant's argument overlooks the fact that to a large degree Dr. Cooney's opinion of the risks Ewerdt faced was based on the dangers he saw in the work environment outside Ewerdt's work area, and Dr. Cooney had a clear advantage over Dr. Morris in understanding what those dangers were. When Dr. Morris was asked about dangers in the work environment outside Ewerdt's immediate work area, he gave answers that seemed based on speculation:

> Q. Now, in the work environment, on occasion, Mr. Ewerdt may need to leave his particular workspace and, you know, walk in other – walk through the plant to go to the bathroom or to the vending machine. And it has been stated that at times he needs to walk along next to where there are forklifts and other vehicles that would be driving in this plant. Does that present any safety concerns to you?
> A. Yes. Certainly it's a consideration that if he's in proximity to heavy equipment, that I would consider hopefully good practice safety there's a space allotted for the people who are the – for the

pedestrians. But if heavy equipment is being used, the heavy equipment operators are obviously monitoring that equipment, including forklifts or whatever, so that if someone or something were to be in the way of those operations, they would be aware of it.

Q. Does the fact that Mr. Ewerdt may need to walk through such an environment cause you to believe that there's a reasonable probability of substantial harm to Mr. Ewerdt for working there?

A. No. I don't think that there's a fair line that can be drawn between a risk and a probability – a likely probability.

(Morris Deposition, pp. 24-25).

Although in answer to the last question above Dr. Morris indicated that he did not believe there was a reasonable probability of substantial harm, he seemed to object to the idea that there could be a distinction between a risk and a probability, which weakens his opinion that substantial harm was not a reasonable probability.

Dr. Cooney testified that he reviewed Ewerdt's medical records and reviewed the depositions of Dr. Morris, Ewerdt, Brunswick's plant manager, its safety director and its human resources director. He correctly understood that Ewerdt's seizures were uncontrollable and unpredictable, that he fell down nearly every time he had a seizure at work, that he had no control over which way he fell when he had a seizure, that he suffered scrapes and cuts in past falls at work and broke his nose twice, that the environment where he worked, despite the fact that there was matting on the floor and padding on various hard surfaces in his immediate work area, had concrete flooring and sharp/hard edges against which he might fall if he were to have a seizure, and that in the course of his daily routine Ewerdt regularly walked out into the plant away from the relative safety of his work area. Dr. Cooney believed that Ewerdt crossed a forklift path occasionally in his daily experience, an act that was seen as particularly hazardous because of the possibility that he would collapse in a forklift path in front of a moving forklift (he was aware, of course, that Ewerdt's last fall on the job occurred in a forklift path). It appears that Ewerdt did not have to cross a forklift path, but he did walk along or near forklift paths regularly (at least four times per day), and there were no barriers along the paths that would keep him from falling into the paths. Dr. Cooney had an understanding of Ewerdt's work experience and medical condition that was sufficient to allow him to offer a sound opinion of the probability of substantial harm to Ewerdt.

Dr. Cooney expressed his opinion as follows:

Q. Okay. Based on what you've reviewed, your experience, medical training, do you have an opinion as to whether Mr. Ewerdt posed a risk to himself and/or others in continued employment with Brunswick --

A. I do.
Q. -- with a degree of reasonable medical certainty?
A. I do.
Q. And what is that opinion?
A. My opinion having reviewed all – everything we mentioned is the same as it was several years ago, and that is in this particular case in a gentleman who unfortunately has uncontrollable seizures, they are uncontrollable and unpredictable, that he is clearly a risk to himself and potentially a risk to others.

In this particular case – that is not within a reasonable degree of medical probability. It's happened, you know, it's a hundred percent. He has fallen, broken his nose. It's been very unfortunate. And clearly if you just don't go by the job description as Dr. Morris did who is an outstanding physician, if you go on site you realize that this is a dangerous environment for someone who can unexpectedly lose consciousness.

Q. Okay. So is the key factor here the lack of predictability, the unexpectedness that you're referencing?
A. Yes.
Q. Okay. And what are those risks, safety risks, that you're mentioning?
A. There are many in this particular case at many different levels. The obvious being I believe is this final incident where he left the workspace where he, you know, sorts parts into bags, went to I believe it was the vending area or bathroom area, came back and collapsed in a forklift path. He was injured, and clearly if a forklift was coming with a load could have run him over. This – this is serious.

…

Q. -- but the actual harms that could befall Mr. Ewerdt, what do they look like?
A. The main risk would be head trauma. You know, he had an incident where, you know, he broke his nose. You can fall and get a concussion. He could develop, you know, a bleed on his brain which could be very dangerous, potentially fatal. When you fall like that you can get a whiplash-type injury. If that's severe enough it can cut off your breathing. And then there's the simple risks of breaking a wrist or, you know, a knee depending on how you hit. These are of course unpredictable.

And when people lose consciousness they don't fall as someone would normally if they slip on the ice where you can brace yourself, put your arms out and things and reflexively protect yourself. They – they go down quickly and it's unpredictable how they hit and exactly what the injuries could be.

(Cooney Deposition, pp. 12-15).

In *Alt,* the commission concluded that the respondent failed to show a reasonable probability of substantial harm partly because the respondent's doctor never provided a clear opinion as to whether it was reasonably probable that the employee would suffer a substantial injury on the job. At most, the doctor cited a "small but definite" risk that the employee could hurt herself if she had another seizure, and expressed "concern" about certain aspects of her job, without stating whether it was reasonably probable that she would be injured if she continued working.

Here, even though the deposition question to Dr. Cooney was not framed according to the legal standard, whether there was a "reasonable probability of substantial harm," Dr. Cooney's answer conveys the opinion that he believes there is. He describes a number of potential injuries which would be considered serious or substantial (the most significant of which is head trauma), and offers the opinion that, based on the unpredictable and sudden nature of Ewerdt's seizures and his history of having fallen a number of times and broken his nose twice, there is more than a probability, there is a certainty, that he would incur such injuries at work in the future, assuming things continued as is.

The complainant offers another reason that Dr. Cooney's opinion should be rejected -- the claim that Dr. Cooney changed his opinion in 2012 when he was first consulted by Brunswick (as noted above, Dr. Cooney signed a release for work form after examining Ewerdt, then wrote a report opining that the workplace was too dangerous). Dr. Cooney credibly explained, however, that he did not change his opinion, but rather signed the release as an interim measure, intending at the same time to write a report stating that he believed the work environment was too dangerous.

Unlike *Alt,* the expert opinion offered by Brunswick expresses a persuasive opinion that Ewerdt faced a reasonable probability of substantial harm, based on accurate information about Ewerdt's medical condition and daily activities. The commission concludes that Brunswick established its job-relatedness defense.

Reasonable accommodation

The WFEA places a duty of reasonable accommodation on an employer who has been found to have made an employment decision based on an individual's disability. Wis. Stat. § 111.34(1)(b) states that employment discrimination because of disability includes:

> Refusing to reasonably accommodate an employee's or prospective employee's disability unless the employer can demonstrate that the accommodation would pose a hardship on the employer's...business.

In the order of proof at hearing, the complainant has an initial burden of showing that a reasonable accommodation is available. *Hutchinson Technology, Inc. v. LIRC,* 2004 WI 90, para. 35, 273 Wis. 2d 394, 682 N.W.2d 343. If the complainant meets that burden, the respondent has the burden to prove that:

> ...even with reasonable accommodations, the employee [still] would not be able to perform his or her job responsibilities adequately, or that, where reasonable accommodations would enable the employee to do the job, hardship would be placed on the employer.

Crystal Lake Cheese Factory v. LIRC, 2003 WI 106, para. 32, 264 Wis. 2d 200, 664 N.W.2d 65.

The complainant can meet his or her initial burden of showing the availability of a reasonable accommodation in at least two ways. It can show that a particular reasonable accommodation was available in the sense that it was apparent or should have been apparent to the respondent during the complainant's employment. This is the lesson of *Target Stores, Inc. v, LIRC*, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998), where the employer was faulted for not offering clemency and forbearance from enforcement of its rule against sleeping on the job as a temporary accommodation to an employee who was falling asleep on the job as a result of her sleep apnea and the medication she used to treat it:

> Evidence that Crivello went to the doctor immediately upon Target's suggestion to learn the cause of her falling asleep at work; that she promptly informed Target of the diagnosis when she learned of it; and that she promptly provided Target with Dr. Schachter's letter upon request and told Target that it could contact her doctor for more information, reasonably support a determination that Crivello did this to avoid further disciplinary action for dozing off *and that this was or should have been apparent to Target.*

Target Stores, supra, at 12. (Emphasis added).

In this case, Ewerdt made no showing that Brunswick, prior to terminating Ewerdt's employment, was aware, or should have been aware, of further accommodations, above and beyond the several accommodations it had already made, such as transferring him to safer jobs, putting rubber matting on the floor, and padding hard surfaces in his work area. He was already in what was considered the safest job in the plant.

Second, an employee can show that a reasonable accommodation *would have* become known to the respondent and complainant if the parties had engaged in an interactive process to discuss possible accommodations before the respondent terminated the complainant's employment. The employer has a duty to engage in an interactive process. It is undisputed that in the five weeks following Ewerdt's last seizure at work Brunswick had no communication with Ewerdt about possible accommodations. Since the duty to reasonably accommodate is not a static one, but is affected by the changing information (see *Target Stores, supra,* at 15), it is correct to say that, even though historically Brunswick engaged in an interactive process with Ewerdt, it failed to do so after his last seizure. However, an employer's failure to engage in the interactive process does not constitute a violation of the WFEA on its own; it only violates the WFEA if the complainant can show that if the employer had engaged in the interactive process it would have led to the identification of a reasonable accommodation. *Gamroth v. Department of Corrections,* ERD Case Nos. CR200303157, CR200303158, CR200303159 (LIRC Oct. 20, 2006); *Schultz v. Wausau School District,* ERD Case No. CR200703495 (LIRC Apr. 4, 2012).

Ewerdt raised two such accommodations at hearing, but the ALJ found them not to be reasonable. The first proposed accommodation was for the employer to limit the times that Ewerdt would leave the relative safety of his work area. Ewerdt argued that the ALJ incorrectly assumed that even if limitations were imposed he would still need to leave his work area to obtain component parts, ask questions about his work, socialize, or go to vending machines. But to the contrary, the ALJ specifically granted Ewerdt's arguments that these trips outside his work area could be reduced or eliminated:

> The complainant did show that the number of times that he would need to leave his work area could be reduced, and some of the reasons for leaving his work area could be eliminated altogether. For example, he could refrain from ever going to the vending area; on that point, he testified that he could bring his own snacks to work and could ask co-workers to get ice for him. He also testified that he could refrain from ever socializing with coworkers in other areas, an activity that he rarely if ever engaged in anyway. As to meetings, he rarely had to leave his area to go to meetings, as most of them (i.e., his departmental meeting) were held at a picnic table in his own work area; and the few meetings that required him to leave his area were plant-wide meetings that only occurred once or twice a year. As for questions about his work, he could either get the information from the lead workers in his own area, or he could use his cell phone to call supervisors who worked in other areas.

(ALJ Decision, p. 22). The ALJ's reasoning was that even if these trips outside the work area were reduced or eliminated, there would still be four to six times per day

that Ewerdt would continue to be out in the plant away from his work area – when he entered and exited the plant, when he clocked in and clocked out, and when he went to the bathroom. This was sufficient for the ALJ to conclude that there would still exist a reasonable probability of substantial harm. The commission agrees with that conclusion.

The second accommodation idea floated by Ewerdt at hearing was having an escort every time he left his work area, so as to guide him away from hazards, to attempt to stop any seizure, to break his fall, and to call for help and direct motorized traffic away from him. Even though two co-workers testified that they would be happy to serve as escorts, the ALJ found the idea to be unreasonable, primarily on the grounds that it would put the escorts in danger if they were to attempt to stop Ewerdt from falling during a seizure. The commission agrees with the ALJ's conclusion that an employer should not be obligated to accept an accommodation that places other employees at risk, and that the proposed accommodation did so.

Ewerdt added one more potential accommodation for the first time in briefing before the commission, which was that Brunswick could have required Ewerdt to wear a helmet at work. The time to have raised this potential accommodation was at hearing, when evidence could have been presented on it. On the evidentiary record before the commission Ewerdt failed its initial burden of proof under *Hutchinson Technology, supra,* as to this potential accommodation. There was some evidence in the record suggesting that the idea of wearing a helmet might have occurred to the parties if they had engaged in an interactive process, since Brunswick brought up the idea in 2012 (see modified footnote 6, p. 2 above). But there is no competent evidence addressing the reasonableness of that accommodation in the sense that it would have avoided a reasonable probability of substantial harm. The reasonableness of a proposed accommodation does not always require expert opinion, but in this case, since reasonableness depends on an assessment of the likelihood of substantial head injury, expert opinion would have been required. The commission cannot step in and find the wearing of a helmet to be a reasonable accommodation in the absence of competent evidence in the record.

The decision of the ALJ is affirmed.

cc: Rebecca L. Salawdeh
Bruce A. Frederickson
David C. Vogel
R. Evan Jarold