

State of Wisconsin



Labor and Industry Review Commission

**MORRIS ROWE**

Applicant

**MILWAUKEE TRANSPORT SERVICES  
INC**

Employer

**MILWAUKEE TRANSPORT SERVICES  
INC C/O WIS COUNTY MUTUAL INS  
CORP**

Insurer

Claim No. 2015-029225

**Worker's Compensation Decision<sup>1</sup>**

**Dated and Mailed:**

April 16, 2020

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**Interlocutory Order**

The commission **affirms** the ultimate finding of a compensable work injury made by Administrative Law Judge (ALJ) William Phillips, Jr., in his decision issued in this matter on March 20, 2018. However, the commission **sets aside** ALJ Phillips' Findings of Fact and Conclusions of Law and **substitutes** therefor the commission's Findings of Fact and Conclusions of Law as set forth below.

Accordingly, within 30 days from this date Milwaukee Transport Services, Inc. and Wisconsin County Mutual Insurance Corporation (respondents) shall make the following payments: to the applicant, Morris Rowe, compensation for temporary total disability in the amount of Forty-Four Thousand Six Hundred Eighty-Three dollars and Seventy-Nine cents (\$44,683.79); to Attorney Daniel R. Schoshinski, fees in the amount of Eleven Thousand Eight Hundred Twelve dollars and Sixty-Three cents (\$11,812.63), and costs in the amount of Two Thousand Five Hundred Sixty-Six dollars and Seventy-Five cents (\$2,566.75); to the applicant as reimbursement for out-of-pocket medical expenses the sum of One Thousand Five Hundred Thirty dollars and Sixty-Nine cents (\$1,530.69); to Aurora Healthcare Physicians the sum of One Hundred Seventy-Four dollars (\$174.00); and to United Healthcare reimbursement in the amount of Sixty-Four Thousand Five Hundred Eighty dollars and Eighty cents (\$64,580.80).

Jurisdiction is reserved for such further findings and orders as may be necessary.

<sup>1</sup> **Appeal Rights:** See the yellow enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: Labor and Industry Review Commission, and all other parties in the caption of this decision or order (the boxed section above). Appeal rights and answers to frequently asked questions about appealing a worker's compensation decision to circuit court are also available on the commission's website, <http://lirc.wisconsin.gov>.

By the Commission:

/s/  
Michael H. Gillick, Chairperson

/s/  
David B. Falstad, Commissioner

/s/  
Georgia E. Maxwell, Commissioner

### **Procedural Posture**

On December 7, 2015, the applicant filed an application for hearing alleging that on June 24, 2015, he sustained an injury arising out of and in the course of his employment with Milwaukee Transportation Services, Inc. (employer). Respondents disputed the claim and on September 13, 2017, ALJ William Phillips of the Department of Administration, Division of Hearings and Appeals, Office of Worker's Compensation Hearings held a hearing in the matter. Respondents conceded maximum average weekly earnings. On March 20, 2018, ALJ Phillips issued a decision finding the claimed injury compensable and ordering payment/reimbursement of disability compensation, medical expenses, and attorney fees and costs. Respondents timely submitted a petition for commission review, alleging error in ALJ Phillips' decision.

On April 26, 2019, the commission issued a Remand Order for the taking of additional evidence as detailed in that Order. On February 10, 2020, ALJ Donald Doody held a hearing and received the additional evidence ordered by the commission.<sup>2</sup> The matter was thereupon returned to the commission for additional review and decision.

The commission has reviewed the evidence submitted at both hearings. The commission has also considered the petition and the positions of the parties as set forth in their briefs. As set forth in the above Interlocutory Order, the commission affirms the ultimate finding of a compensable work injury, but sets aside ALJ Phillips' Findings of Fact and Conclusions of Law, and substitutes therefor the following:

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<sup>2</sup> Subsequent to issuing his decision on March 20, 2018, ALJ William Phillips, Jr. passed away due to illness.

## Findings of Fact and Conclusions of Law

1. The applicant was employed by the employer as a bus driver. At an unspecified time shortly before 3 p.m. the afternoon of June 24, 2015,<sup>3</sup> he parked his empty bus at a layover area which was part of the Milwaukee Transit Center located in downtown Milwaukee. He exited the bus and used the restroom located in the Center. After the applicant exited the restroom, he walked through a waiting area, and then passed through automatic glass doors into a closed street area where passengers normally waited for buses to pick them up. He was on his way back to his bus, which was still parked in the layover area located on the other side of the closed street area. There was a concrete wall separating the closed street and the layover areas, and the applicant was headed towards a door in this concrete wall that would allow him to pass into the layover area.

2. An unidentified male was standing in the street area outside the automatic glass doors, and after passing through those doors and entering the street the applicant heard that individual say something to him. The applicant stopped, turned and waited for the man to walk towards him. As the man approached, he continued talking, but what he said made no sense to the applicant. The applicant therefore made no reply to him. When the man came to within three or four feet of the applicant, the applicant turned to continue walking towards the door, and that is the last thing he remembers.<sup>4</sup>

3. Another bus driver, Jaquayo Spears, testified at the remand hearing held on February 10, 2020, that he too was on his way to his parked bus when he entered the closed street area and saw the applicant lying unconscious on his back. Spears observed blood on the applicant's head and "somewhere on his --- maybe his face, nose or mouth or something."<sup>5</sup> He did not recall the exact spot of the applicant's head wound. Spears managed to wake up the applicant and testified: "He seemed belligerent, kind of just, like, kind of, like, I don't remember what happened."<sup>6</sup> Spears asked the applicant several times if he could recall what had happened, but the applicant did not offer any explanation. He eventually said to Spears, "I gotta go,"<sup>7</sup> but Spears dissuaded him from leaving and telephoned the employer's dispatch. Spears was advised to stay with the applicant until the dispatch supervisor could arrive and investigate.

4. The applicant stood up on his own and Spears walked with him to the applicant's bus, where both individuals sat and waited approximately 15 minutes until the district supervisor arrived. While they were waiting, Spears continued to ask the applicant if he could recall what had happened, but the applicant gave no

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<sup>3</sup> Hearing transcript of September 13, 2017, page 54.

<sup>4</sup> See the applicant's testimony on pages 24-25, and 47, of the of the September 2017 hearing transcript.

<sup>5</sup> February 2020 hearing transcript, page 10.

<sup>6</sup> Id at page 7.

<sup>7</sup> Id.

explanation. Spears noted that people occasionally loitered in the Transit Center, but he did not observe anyone in the area at the time he found the applicant. Neither did he see anything that resembled a weapon.

5. The dispatch supervisor, Beverly Wilson, testified at the original hearing held on September 13, 2017. She arrived at the applicant's bus at approximately 3:05 p.m.,<sup>8</sup> and found the applicant seated in the driver's seat of the bus, with Spears next to him. She observed that the applicant was holding a paper towel to "the back left side of his head," and that, "there was blood right in the [left] corner of his mouth."<sup>9</sup> She noted that there was a "large bump" where the head wound was located, and that the wound was still bleeding. She also noted that the wound seemed to be above his left ear "kind of in the rear" of his head.<sup>10</sup> Wilson asked the applicant if he knew what had happened to him, and he replied that he did not know.<sup>11</sup> The applicant told Wilson that he did not want medical attention, but Wilson directed him to accompany her to the emergency room.

6. The applicant and Wilson arrived at the Columbia St. Mary's emergency room shortly after 3:30 p.m., and the intake nurse took a history of the applicant experiencing a "syncopal episode" while walking back to his bus after using the bathroom. He was next seen by Christopher J. Withers, D.O., who recorded the same history and noted that the applicant denied any prodrome at the time of the incident. Dr. Withers performed a thorough physical examination and noted that the applicant was mildly dehydrated. He ordered a head CT scan, lab tests, and other tests that included a drug screen. All these were negative except for evidence of a left kidney stone four millimeters in size. The applicant testified at the hearing that he told "them" at the emergency room that he had experienced burning with urination at the Transit Center bathroom, but there is no record of this in the emergency room notes. Dr. Withers noted that the applicant had diabetes mellitus type II, but at that time he was not taking medication for it. He admitted the applicant to the hospital for further testing and evaluation, and his final diagnosis was "apparent syncopal episode."<sup>12</sup>

7. On June 25, 2015, hospital physicians Sharon Sneed, M.D., and Nadia Redmann, M.D., evaluated the applicant and performed additional testing, which included a full cardiac workup. All the results of this workup were normal. Dr. Redmann discharged the applicant from the hospital on June 26, 2015, with diagnoses of vasovagal syncope and diabetes mellitus type II. He was given prescriptions for atorvastatin (a statin), loratadine (an antihistamine), and metformin (a drug for controlling blood sugar levels).<sup>13</sup> Subsequently, the applicant

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<sup>8</sup> September 2017 hearing transcript, page 54.

<sup>9</sup> Id. at pages 52, 53.

<sup>10</sup> Id. at page 52.

<sup>11</sup> Id. at pages 53, 58. Later that same day, Wilson completed an Employee Workplace Injury Report indicating that when she arrived at the scene the applicant was able to state his name and badge number, but that he could not remember how he had been injured.

<sup>12</sup> Appl.'s Ex. E.

<sup>13</sup> Id.

developed a subdural hematoma that eventually required surgery on August 20, 2015. On September 20, 2016, the applicant's treating physician, Kathryn Gaines, M.D., released the applicant to return to employment with the employer. He did not return to his bus driving position but to bus fueling and cleaning duties. Prior to September 20, 2016, Dr. Gaines did not release the applicant for work.

8. The applicant believes that the blood observed by Spears and Wilson on the left side of his upper lip came from a small cut on that lip, and that a corresponding area on the inside of his lip was also cut.<sup>14</sup> However, he treated these cuts himself and the hospital physicians did not concern themselves with them. The emergency room and hospital notes do not mention the applicant's lip or any wound other than the one on the left side of his head.

9. The evidence of record leads to the credible inference that while in the course of his employment with the employer on June 24, 2015, the applicant was struck on the back of his head and knocked unconscious by an unknown assailant. The presence of this unknown assailant, who together with the applicant was in a location unoccupied by anyone else at the time, constituted a zone of special danger. No idiopathic cause for the applicant's injury was established. These circumstances establish that the applicant's head injury arose out of his employment with the employer. The applicant's bleeding head wound was caused by the assailant's blow, or by his fall to the hard street surface caused by the blow, or by a combination of both the blow and the fall.

10. As a result of the applicant's injury he was temporarily totally disabled from June 25, 2015, to September 20, 2016, a period of 64 weeks and 5 days, at the applicable rate of \$911.00 per week, for a total of \$59,063.17. Attorney fees and costs will be subtracted from this amount.

11. The applicant's attorney, Daniel R. Schoshinski, is entitled to a 20% fee in the amount of \$11,812.63, as well as costs in the amount of \$2,566.75.

12. The applicant is also entitled to reimbursement for out-of-pocket medical expenses in the amount of \$1,530.69.

13. Aurora Healthcare Physicians is entitled to payment in the amount of \$174.00 for reasonably required medical expense.

14. Pursuant to the provisions of Wis. Stat. § 102.30(7), reimbursement in the amount of \$64,580.80 is due to United Healthcare for reasonably required medical expenses.

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<sup>14</sup> Tr. 42.

15. Dr. Gaines credibly opined that additional medical treatment attributable to the work injury may be necessary, and therefore jurisdiction is reserved for such further findings and orders as may be necessary.

### **Memorandum Opinion**

The evidence in this case plainly calls for the fact finder to accept one of two possible factual inferences. Either the applicant was physically assaulted by the unidentified individual that he encountered in the closed street area of the Transit Center on June 24, 2015, or he lost consciousness and fell on the street due to an idiopathic cause. Both ALJ Phillips and the commission carefully reviewed the evidence, and both concluded that the credible inference is that the applicant was assaulted.

Respondents express skepticism with respect to whether the unidentified "younger"<sup>15</sup> man assaulted the applicant. They argue that no clear motive was shown for such an individual to have struck the applicant over the head, including the fact that the applicant's wallet was not stolen, and that the applicant did not give a consistent description of exactly where the man was located at the moment the alleged assault occurred.

The applicant credibly testified that the man was not making sense as he spoke and walked towards him. The applicant thereupon "turned to walk away" and was "moving towards the door" when his memory goes blank.<sup>16</sup> This testimony, together with how the applicant was found wounded and lying on the street, lead to the credible inference that he had turned his back on the man and was walking away from him when the man hit him over the head. The assailant may have struck the blow using his fist or some other object, but in either case, this was the cause of his head injury. Respondents' argument that the evidence is unclear with respect to whether the assailant was behind the applicant when he struck the blow is rejected in favor of the applicant's straightforward testimony that he had turned and was walking away from the man.

With respect to motive, there could have been any number of reasons why the man assaulted the applicant. He could have taken offense because the applicant did not answer him and turned away, he could have been on drugs, he could have been mentally disturbed, etc. The fact that the applicant's wallet was not stolen merely demonstrates that theft was not the motive, or that the individual saw Spears coming before he had time to steal the applicant's wallet. Respondents' assumption that the individual did not attack the applicant is also inconsistent with the fact that the applicant was found alone and bleeding, because the reaction of a normal person to seeing the applicant fall to the street and open a wound on his head would be to stop and render assistance.

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<sup>15</sup> The applicant described the man as a "younger African American." (Tr. 24).

<sup>16</sup> Tr. 25.

Respondents' factual assertion that the applicant's fall and injury were due to an idiopathic cause is based upon the medical reports submitted from Charles V. Burton, M.D., dated January 16, 2017, and August 16, 2017.<sup>17</sup> In his January 2017 report Dr. Burton wrote:

Mr. Rowe is a 54 year old whose past medical history has been positive for diabetes and hypertension in the past. He was, however, in good health until he appears to have experienced a spontaneous syncopal episode on June 24, 2015, at which time he struck the right side of his skull, incurred local trauma and subsequent subdural blood/fluid collections which required burr holes by Neurosurgeon Heffez on August 20, 2015...

Yes, I believe that the fall on June 24, 2015, directly caused Mr. Rowe's traumatic brain injury and cervical spine complaints...

It is my belief that Mr. Rowe suffered from a fainting/syncopal episode, causing him to fall on June 24, 2015. The medical records do not contain specific information which allows a specific diagnosis in regard to what may have caused such a fainting/syncopal episode.

It appears unlikely, from the medical records, that Mr. Rowe was assaulted.<sup>18</sup>

In his August 2017 report, Dr. Burton essentially repeated his earlier opinion:

Mr. Rowe's past medical history had been positive for diabetes and hypertension in the past. He was, however, in good health until he appears to have experienced a spontaneous syncopal episode which occurred on June 24, 2015, at which time he struck the right [sic] side of his skull, incurred local trauma and subsequent subdural blood/fluid collections which required burr holes by Neurosurgeon Dan Heffez on August 20, 2015. Following this, Mr. Rowe continued to have complaints of headache, dizziness, and vertigo which responded well to conservative therapy...

Mr. Rowe's current diagnosis is that of a minor and temporary post-concussion syndrome superimposed over a previously resolved traumatic head injury complicated by subdural hygroma/hematoma...

No, the workplace exposure was neither the sole cause of the condition or even a material contributory causative factor in the condition's onset or progression.<sup>19</sup>

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<sup>17</sup> Resp.'s Exs. 1 and 2.

<sup>18</sup> Resp.'s Ex. 1, pp. 8, 9.

<sup>19</sup> Resp.'s Ex. 2, pp. 1, 7.

Dr. Burton did not provide any medical explanation identifying to a reasonable degree of medical probability an idiopathic cause for the alleged "spontaneous syncopal episode" or "fainting syncopal episode" that he surmises caused the applicant's injury. Dr. Burton briefly mentions the applicant's history of diabetes and hypertension, but he offers no opinion that either of these conditions was causative of what occurred on June 24, 2015. In fact, in his January 2017 report, Dr. Burton conceded, "...the medical records do not contain specific information which allows a specific diagnosis in regard to what may have caused such a fainting/syncopal episode." Dr. Burton goes on to provide a speculative opinion that it is unlikely that the applicant was assaulted, but he utterly fails to identify an idiopathic cause for the applicant's supposed idiopathic fall.

Dr. Gaines checked the WKC-16-B box indicating the incident directly caused the applicant's "traumatic brain injury,"<sup>20</sup> but she did not attempt to provide a definite opinion with respect to what caused that injury. She did comment in her clinic note dated January 14, 2016, that: "Although it does sound as if the patient may have been assaulted, actually, I am ordering an EEG for further evaluation to look for any potential seizure cause." The EEG had normal results and there is no evidence of seizures in the applicant's medical history.

The parties also submitted arguments addressing the applicability of the positional risk doctrine to the applicant's case. The positional risk doctrine may assist the fact finder in determining whether the evidence supports a work-related cause for the injury in question. It is normally useful in circumstances in which the cause of the injury is unclear or unexplained. In the case at hand, the commission found that the evidence leads to the credible factual inference that the cause of the applicant's injury was an assault. Application of the positional risk doctrine assisted the commission in reaching this conclusion.

Wisconsin courts long ago adopted the positional risk doctrine, and the commission and the courts have since applied the doctrine in numerous cases. In *Allied Manufacturing, Inc. v. ILHR Dept.*, 45 Wis. 2d 563, 567, 173 N.W.2d 690 (1970), the court applied this doctrine and reiterated its definition as set forth in *Cutler-Hammer v. Industrial Commission*, 5 Wis. 2d 247, 253, 92 N.W.2d 824 (1958):

The core of the idea is that an accident arises out of the employment when the connection between the employment and the accident is such that the obligation or particular place at the particular time when he is injured by a force which is not solely personal to him.

The *Allied Manufacturing* court added the following gloss to the definition of positional risk:

Stated another way, an accident arises out of employment when by reason of employment the employee is present at a place where he is injured through the agency of a third person, an outside force, or the

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<sup>20</sup> Appl.'s Ex. A.



conditions of the location constituting a zone of special danger. (*Allied Manufacturing* at p. 254).

In *Allied Manufacturing*, the court affirmed the commission's finding of a compensable injury in the circumstance of a female office worker, who at the end of the workday was working alone in the office of the employer's small company, and was found stabbed to death with 98 stab wounds and no evidence of sexual assault. The employer in that case asserted that the assault was unexplained, and that it was therefore impossible to establish that it was not the result of a cause solely personal to the employee. The court applied the positional risk doctrine. It held that the unexplained motive of the assault was not determinative, because the isolated work environment constituted a zone of special danger making the office worker's death compensable. (*Id.* at p. 569).

In *Cutler-Hammer*, the applicant was on his way to punch out at the end of the day and was descending a concrete stairway. He fell on the stairway and injured his shoulder. He testified that he did not faint or black out when he fell, and that despite having a preexisting knee condition his knee did not give out. The court paraphrased his testimony: "...when he started down the steps he keeled over, or slipped, and fell."<sup>21</sup> The court affirmed the commission's findings that the applicant's testimony was credible, that the concrete stairway constituted a zone of special danger consistent with the positional risk doctrine, and that the applicant's injury was therefore compensable.

In their brief to the commission, respondents cite the case of *Bumpas v. ILHR Dept.*, 95 Wis. 2d 334, 290 N.W.2d 504 (1980), in which the court affirmed the commission's denial of compensability. Bumpas alleged that he sustained a knee injury when he was on his way to lunch and was getting into his car in the employer's parking lot. He alleged that as he was entering the car, he twisted his knee and experienced immediate, sharp pain. However, he did not report an injury that day. He came back from lunch and completed his shift. The next day he took an unscheduled, two-week vacation, allegedly to rest his knee, and testified that he did not seek any medical treatment until after he had returned to work. A physician's report was entered into evidence revealing that on the day after the alleged work incident, Bumpas had in fact seen a physician for bilateral examination of his knees. It was also revealed that he had flown an airplane during his vacation, and that medical records documented an increase in bilateral knee pain over several months prior to the work incident.

There was no discussion of the positional risk doctrine in *Bumpas*. The court explained that the case presented an issue of fact, namely: "Is there sufficient credible evidence to support the department's findings that the petitioner, Curtis Bumpas, did not sustain an injury to his left knee on January 28, 1974 as

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<sup>21</sup> Cutler Hammer at p. 249.

alleged?"<sup>22</sup> The court held that there was credible evidence to support the commission's factual finding that Bumpas did not injure his knee as alleged.

*Kraynick v. Industrial Commission*, 34 Wis. 2d 107, 148 N.W.2d 668 (1967), is another case that was decided based upon a factual determination, but which implicated the positional risk doctrine. Stephan Kraynick had a history of alcoholism that included passing out at home and striking his head on the floor. He had also suffered a head contusion after falling off a barstool. His worker's compensation claim was based upon an incident in which he fell while at the top of a stairway at work. Witnesses indicated that he was standing at the top of the stairway when he gasped for air, and then fell backward with his body appearing rigid as he fell. As he lay on the floor he was observed as being convulsive, and his eyes were seen to roll. The commission and the court denied the claim based upon the credible evidence that the cause of the fall was idiopathic. Kaynick claimed that the concrete floor on which he fell constituted a zone of special danger because it impacted the severity of his injury. The court rejected this argument and held that as a rule, a level floor does not in itself constitute a zone of special danger.<sup>23</sup>

These cases support the fact that the positional risk doctrine is useful when the facts surrounding the cause of the worker's injury are not readily determinable, but the conditions of the employment environment place the worker in circumstances that constitute a zone of special danger. Morris Rowe's case involves such circumstances, and in conjunction with application of the positional risk doctrine, the credible inference is that his injury arose out of his employment through the agency of a third person. The third person was the unidentified male the applicant encountered while walking back to his bus after using the restroom. The applicant could not understand what this man said to him and therefore ignored him. When the applicant turned his back on the man and attempted to walk away from him that individual struck him on the head. The blow knocked the applicant unconscious and caused him to fall on the street. His injury therefore arose out of and in the course of his employment with the employer.

cc: Attorney Jennifer L. Barwinski  
Attorney Daniel R. Schoshinski

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<sup>22</sup> *Bumpas v. ILHR Dept.* at p. 342.

<sup>23</sup> *Kraynick v. Industrial Commission* at p. 113.