

# State of Wisconsin



## Labor and Industry Review Commission

**ANGELA ELLISON**

Applicant

**OAKLEAF SURGICAL HOSPITAL**

Employer

**ZURICH AMERICAN INS CO**

**C/O MARYLAND INS CO**

Insurer

Claim No. 2020-002790

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

**Dated and Mailed:**

May 14, 2024

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### Interlocutory Order

The commission **reverses** the decision of the administrative law judge (ALJ) issued in this matter on July 31, 2023. As set forth in the findings made below, the applicant is entitled to additional compensation for temporary total disability, and she is found to be permanently and totally disabled as of August 23, 2022.

The applicant is entitled compensation for additional temporary total disability for the period between July 23, 2020, and August 7, 2020; and for the period between June 8, 2021, and August 23, 2022.

The applicant is entitled to compensation for permanent total disability beginning with the date of August 23, 2022, and continuing for the remainder of her life.

Applicant's attorney, Samuel Schlewitz, is entitled to a twenty percent (20%) attorney's fee against the awards for additional temporary total disability, and a twenty percent (20%) fee against the first 500 weeks of compensation paid for permanent total disability.<sup>2</sup> Attorney Schlewitz is additionally entitled to reimbursement for reasonable costs. The applicant has also acknowledged that the law firm of Hawks Quindel, S.C., is due reimbursement of certain costs that will be subtracted from the compensation awarded to her.

<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>.

<sup>2</sup> See Wis. Admin. Code DWD § 80.43 (3).

Computation of the exact amounts due the applicant, Attorney Schlewitz, and Hawks Quindel, is complicated by disparities and/or uncertainties between department records and evidence submitted concerning the amounts of prior payments made, as well as the amounts of attorney costs claimed. Additionally, at some point the applicant began receiving payments for Social Security Disability Insurance (SSDI). The department has indicated to the commission that it has not been provided the information needed for calculating the SSDI offset amounts required pursuant to Wis. Stat. § 102.44 (5). Additionally, the department has indicated to the commission that there has been a concession of an award for permanent partial disability that remains unpaid. However, there is no evidence of such concession in the record before the commission, and therefore that issue must be resolved.

Rather than order payments of compensation and attorney fees/costs that may ultimately be found to be inaccurate, the commission will order payment of a dollar amount (\$50,000) to be offset against the total compensation due the applicant. The order for this payment will make the commission's decision appealable. However, this payment represents only a portion of the compensation currently and prospectively due the applicant, and the fees/costs due Attorney Schlewitz. It does not address the amount due Hawks Quindel, nor does it address the issue of whether an additional amount is due for permanent partial disability. If no court appeal is made to the commission's decision within 30 days from this date, the matter shall be remanded to the Department of Workforce Development, Worker's Compensation Division (Computations), for immediate calculation of the full amounts due the applicant, Attorney Schlewitz, and Hawks Quindel. The final calculations shall be made in accordance with the commission's findings. The parties shall attempt to resolve between themselves the issue regarding compensation that may possibly be due for permanent partial disability. Failing agreement on that issue, opportunity for new hearing to address it shall be granted.

Jurisdiction is reserved to address any disputes that may arise with respect to the department's calculations. Jurisdiction is also reserved with respect to the issue of whether any compensation for permanent partial disability is due. As with all orders for permanent total disability, jurisdiction is reserved with respect to any further findings and orders that may be necessary.

Now, therefore, within 30 days from this date, Oakleaf Surgical Hospital and its insurer, Zurich American Insurance Company, shall pay to the applicant the sum of Forty Thousand dollars (\$40,000.00); and to Attorney Samuel Schlewitz, fees in the amount of Ten Thousand dollars (\$10,000.00). These payments shall be made in accordance with the explanation given in the preceding paragraphs.

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

By the Commission:

/s/

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Michael H. Gillick, Chairperson

/s/

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Georgia E. Maxwell, Commissioner

/s/

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Marilyn Townsend, Commissioner

### **Procedural Posture**

The applicant filed a hearing application claiming a low back injury sustained on January 3, 2020, arising out of and in the course of her employment with the employer, Oakleaf Surgical Hospital. Oakleaf and its insurer, Zurich American Insurance Company, (respondents) disputed the applicant's claim. On April 11, 2023, a hearing was held before an ALJ of the Department of Administration, Division of Hearings and Appeals, Office of Worker's Compensation Hearings. After the ALJ had allowed post-hearing submission of additional exhibits, the record was closed on June 19, 2023. On July 31, 2023, the ALJ issued a decision that dismissed the application with prejudice. The applicant timely filed a petition for commission review alleging error in the ALJ's findings.

The commission has reviewed the evidence of record, and it has considered the arguments made in the parties' respective briefs. The commission has also consulted with the ALJ to obtain her credibility and demeanor impressions of the witnesses who testified at the hearing. Based upon its review and analysis, the commission herein reverses the ALJ's decision. The commission makes the following:

### **Findings of Fact and Conclusions of Law**

1. The applicant was born in October of 1967, and she has worked for 32 years as a registered nurse. She had been employed as a recovery room nurse for the employer for 17 years when she sustained a work-related injury on January 3, 2020. On that date, she lifted a chair at work and immediately experienced severe low back pain

that also radiated into her left leg. Prior to this incident, the applicant had experienced occasional, temporary bouts of low back pain. However, except for one incident, she had not sought medical treatment for her back symptoms.<sup>3</sup> On February 6, 2020, she told a treating nurse that prior to the work incident, she had missed one day of work due to back pain.<sup>4</sup> After the work incident of January 3, 2020, the applicant's back pain was severe and persistent. It continued to cause left-leg weakness, numbness, and tingling that never resolved.

2. The applicant completed an incident report before leaving work on January 3, 2020, but she hoped that over the weekend she would get better. Unfortunately, her symptoms remained severe and incapacitating, precluding a return to work. On January 8, 2020, she telephoned a nurse at Northwoods Therapy Associates, and they discussed her ongoing symptoms.<sup>5</sup> The nurse referred her to a physical therapist, who treated her that same day with therapeutic exercise and massage. She received additional physical therapy treatment, and later in the month also began chiropractic treatment.

3. A lumbar MRI was performed on January 21 or 22, 2020, and there is substantial argument concerning the interpretation of its results, as well as the results of other MRI's.<sup>6</sup>

4. The physician whose opinion was secured by the respondents, Paul A. Cederberg, M.D., indicated in his written medical evaluation dated April 3, 2020, that the January 2020 MRI showed: "...mild degenerative disc disease, worst at L5-S1, without disc herniation...mild lateral recess stenosis with bilateral recess stenosis, more on the right than on the left, though she was having left leg symptoms only."<sup>7</sup> In a supplemental report dated June 1, 2020, Dr. Cederberg described the January 2020 MRI as: "...showing diminished height of the L5-S1 disc level, facet degeneration, bilateral recess stenosis right greater than left, and L4-5 facet degenerative changes."

5. Joseph T. Hebl, M.D., began treating the applicant on January 29, 2020. In his medical records summary dated February 20, 2023, Dr. Hebl wrote regarding the January 2020 MRI: "L4-5 level showed facet degenerative changes without stenosis;

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<sup>3</sup> The applicant acknowledged that in 2018, a neurosurgeon with whom she worked, Dr. Kamal Thapar, noticed her walking with an altered gait. Dr. Thapar advised her to undergo a lumbar MRI which he authorized. The clinical record of that December 2018 MRI was not submitted, but as will be noted *infra*, the physicians of record comment on it. Dr. Thapar concluded that the applicant did not require treatment at that time.

<sup>4</sup> Ex. H, p. 4

<sup>5</sup> *Id.*, p. 1

<sup>6</sup> The clinical record of this MRI also was not submitted, and different physicians of record refer to it as having been administered on the two different dates. Dr. Cederberg indicated it had been done on January 21, 2020, while Dr. Hebl indicated it had been done on January 22, 2020. In a clinic note dated December 14, 2021, Nurse Practitioner Debra Callow appears to quote the radiologist's findings of the lumbar MRI performed on "1/21/20." (Appl. Ex. I, p. 187).

<sup>7</sup> Ex. 1, p. 2

L5-S1 showed facet degenerative changes and posterior disc bulging with bilateral lateral recess stenosis, right greater than left. There was dehydration and narrowing of the disc height at L5-S1." <sup>8</sup>

6. Dr. Hebl also wrote in his February 2023 injury report that the lumbar MRI performed in December 2018, "...demonstrated some mild central canal stenosis at L4-L5, as well as mild to moderate left neuroforaminal stenosis at L5-S1, with a minimal disc bulge at L4-L5."<sup>9</sup> Dr. Cederberg described the MRI performed in December 2018 as: "...showing degenerative disc disease at L5-S1 without evidence of nerve root compression or central stenosis."<sup>10</sup>

7. In his report dated February 20, 2023, Dr. Hebl wrote that Dr. Thapar's review of the January 2020 MRI was: "At L5-S1 there was a substantially collapsed disc space, with Modic end-plate changes and small central disc bulge."<sup>11</sup> A review of Dr. Thapar's clinic note of February 6, 2020, from which this quote is taken, indicates that Dr. Thapar related this description to an alleged MRI performed on "1/20/19." There is no other reference in the record to an MRI having been performed on "1/20/19." The commission infers that Dr. Thapar was describing his reading of the January 2020 MRI, but mistakenly referred to it as having been performed on "1/20/19."

8. In his report of February 20, 2023, Dr. Hebl also wrote: "Dr. Thapar indicated that the patient's MRI had not changed significantly from her previous MRI of 2018."<sup>12</sup> This was again in reference to Dr. Thapar's clinic note of February 6, 2020, in which he wrote: "Her MRI scan is stable. It is really not changed much from her last study."<sup>13</sup> Presumably, the "last study" Dr. Thapar was referring to was the December 2018 MRI.

9. When the applicant saw Dr. Hebl on February 19, 2020, that physician noted: "...severe thoracolumbar pain, extreme spasm and tightness, and difficulty with any range of motion of her back..."<sup>14</sup> On February 13, 2020, Stephen M. Endres, M.D., saw the applicant and diagnosed: "lumbar radiculitis, radiculopathy, L5-S1, severe thoracic pain, etiology possibly musculoskeletal, possibly factogenic or costovertebral pain generators."<sup>15</sup> Dr. Endres began a series of injections that provided temporary improvement and the applicant returned to sedentary work with the employer. She thereafter continued to receive injections and chiropractic care. She returned to full-time work after Dr. Cederberg opined that she should, but this worsened her condition. When she saw Dr. Hebl on July 23, and July 29,

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<sup>8</sup> Ex. D, p. 2

<sup>9</sup> *Id.*, p. 2

<sup>10</sup> Ex. 2, p. 14

<sup>11</sup> Ex. D, p. 3

<sup>12</sup> Ex. D, p. 3

<sup>13</sup> Ex. H, p. 4

<sup>14</sup> Ex. D, p. 6

<sup>15</sup> Ex. I, p. 321

2020, she was again in severe pain.<sup>16</sup>, and subsequently the employer assigned her to a sedentary position screening Covid patients. That position paid approximately 25% of her regular nursing position wage. She continued working at that position for approximately ten months.<sup>17</sup> She also continued to struggle with back pain, spasms, and reduced range of motion.

10. In March of 2021, the applicant was referred for consultation to Hamid R. Abassi, M.D., a neurosurgeon. Conservative treatment continued until Dr. Abassi performed surgery on June 9, 2021. The surgery consisted of a fusion at L5-S1 with insertion of hardware, as well as a minimally invasive pedicle screw placement with LNK system at L4-5.<sup>18</sup> The surgery initially provided good relief of the applicant's symptoms. However, those symptoms began returning in August of 2021, and again became severe and persistent. On September 23, 2021, Dr. Abassi ordered a lumbar myelogram and a post-myelogram lumbar CT scan.<sup>19</sup> John Eklund, M.D., a radiologist, read the myelogram as showing a non-union at the L5-S1 fusion site, and a slight disc bulge with left recess stenosis at L4-5.<sup>20</sup> Dr. Eklund read the lumbar CT scan as also showing no interbody bony union at L5-S1, together with a bulging disc and stenosis "similar to prior imaging."<sup>21</sup> Dr. Eklund additionally described a posterior disc bulge, mild right foraminal stenosis, and bilateral facet arthrosis at L4-5.<sup>22</sup>

11. On October 20, 2021, the applicant saw Dr. Hebl and he indicated her symptoms had "gone from bad to worse."<sup>23</sup> The employer had discharged her that month because they could no longer accommodate her restrictions. Dr. Abassi thereafter treated the applicant with SI joint injections, believing that the SI joint might be causing her pain. However, this treatment was unsuccessful. The applicant was approved for SSDI in December of 2021. She continued to treat with Dr. Hebl but her symptoms have not improved. She struggles to sit or stand for more than one hour at a time, can manage to walk slowly for about half of a mile, and has "intolerable" pain days two or three times per week.<sup>24</sup> She is unable to perform even sedentary work, and has given up all hobbies that require physical activity. She is struggling financially.

12. Dr. Hebl completed a WKC-16-B dated August 4, 2022, in which he found direct work causation.<sup>25</sup> He referred the reader to his copious medical notes, which are found at Applicant's Exhibit D. He assessed 15% permanent functional disability attributable to the applicant's L5-S1 pathology, and indicated that she will continue

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<sup>16</sup> Ex. D, p.10

<sup>17</sup> Transcript, p. 27

<sup>18</sup> Ex. E, p. 3

<sup>19</sup> Ex. G, p.2

<sup>20</sup> Ex. G., p. 6

<sup>21</sup> *Id.* at p. 2

<sup>22</sup> *Id.* at pp. 2-3

<sup>23</sup> Ex. D, p. 19

<sup>24</sup> Transcript p. 33

<sup>25</sup> Ex. B

to experience pain, weakness, and loss of range of motion to her low back and left leg. In his February 2023 medical report, Dr. Hebl limited the applicant to sedentary work with 10-lb. lifting, only rare bending, kneeling, squatting, or crouching, and occasional ability to twist or climb.<sup>26</sup> He additionally restricted the applicant to work that would allow position changes every 10-15 minutes, and noted that all these restrictions were permanent.

13. Dr. Cederberg completed several written reports. He examined the applicant on March 19, 2020, and submitted his first report dated April 3, 2020. As noted above, he described the January 2020 MRI as, "...showing mild degenerative disc disease, worst at L5-S1, without disc herniation."<sup>27</sup> He also wrote: "I believe she has a left leg radiculopathy, not confirmed on MRI scan findings. She may have an occultic extruded disc not visible on the MRI scan."<sup>28</sup> Dr. Cederberg indicated that he believed the applicant had sustained a lumbar strain with L5-S1 radiculitis. He expected her symptoms to be temporary, but he noted that her recovery from the work incident had been slow.

14. Dr. Cederberg submitted a supplemental report dated June 1, 2020, in which he indicated he had reviewed the December 2018 MRI and believed it showed degenerative disc disease at L5-S1 without evidence of nerve root compression or central stenosis. In this supplemental report, he described the January 2020 lumbar MRI as: "...showing diminished height of the L5-S1 disc level, facet degeneration, bilateral recess stenosis right greater than left, and L4-5 facet degenerative changes."<sup>29</sup> He opined that the MRI scans confirmed his conclusion that there had been no acute change or worsening of the applicant's lumbar condition, and that the work incident had caused at most a temporary aggravation with no permanent injury. He opined that a healing plateau had been reached as of April 3, 2020, three months after the work incident.

15. Dr. Cederberg completed another supplemental report dated August 9, 2021.<sup>30</sup> He recounted the fact that Dr. Abassi had performed the L5-S1 fusion on January 3, 2020. He reiterated his opinion of a temporary work injury with healing reached by April 3, 2020. He specifically opined that the fusion surgery had not been causally related to the work incident.

16. Dr. Cederberg examined the applicant a second time on August 18, 2022, and submitted a fourth written report dated September 7, 2022.<sup>31</sup> Dr. Cederberg described a lumbar CT myelogram he indicated was performed on January 18, 2021, as showing: "...degenerative changes most prominent at L5-S1 with moderate bilateral foraminal stenosis, old ununited right L5 transverse process fracture.

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<sup>26</sup> Ex. D p. 36

<sup>27</sup> Ex. 1., p. 2

<sup>28</sup> *Id.* at p. 4

<sup>29</sup> Ex. 2, p. 14

<sup>30</sup> Ex. 4

<sup>31</sup> Ex. 3

There was no evidence of large disc extrusion or critical canal stenosis."<sup>32</sup> He described a lumbar CT scan performed on July 20, 2021, as showing the post-operative fusion in alignment with minor disc bulges at L3-4 and L4-5.<sup>33</sup> Finally, he described the lumbar myelogram performed on September 23, 2021, as showing: "...L5-S1 discectomy with inter body implant and L4-5 slight disc bulge and left recess stenosis."<sup>34</sup> Dr. Cederberg reiterated his diagnosis of a work-related lumbar strain causing only a temporary aggravation of the applicant's L5-S1 degenerative disc disease. Regardless of causation, he assessed 10% permanent partial disability for the lumbar fusion. Also regardless of causation, he opined that the applicant could return to full-time work with no lifting over 20 pounds occasionally, and 10 pounds frequently.

17. Dr. Cederberg submitted another supplemental report dated June 5, 2023.<sup>35</sup> His opinions were unchanged.

18. The applicant's vocational expert, Richard G. Armstrong, submitted a report dated October 11, 2022.<sup>36</sup> Armstrong recounted the applicant's medical history, the fact that she has a bachelor's degree in nursing, and her work history as a registered nurse. Armstrong also noted that from 1998 through 2004, the applicant periodically assisted her husband with his water and smoke damage restoration business. He indicated that at the time of the work injury the applicant was working three 12-hour shifts per week at the hourly rate of \$48.00. While working for the employer, she also worked as an on-call recovery nurse for a private physician. She additionally held a part-time job as a bartender to help with private-school tuition for her son. Armstrong opined that accepting Dr. Hebl's restrictions the applicant was permanently and totally disabled. Accepting Dr. Cederberg's causation opinion, the applicant would not have sustained any loss of earning capacity. Regardless of causation, Armstrong opined that accepting Dr. Cederberg's restrictions he would assess the applicant's loss of earning capacity at 35% to 40%.

19. Respondents' vocational expert, Karrie A. Grady, submitted a report dated November 15, 2022.<sup>37</sup> Grady, as well as Armstrong, noted that the applicant had planned to work as a traveling nurse once her last child was out of the house. Nevertheless, Grady opined that the applicant's pre-injury earning capacity was approximately 1,516 dollars per week. She based this upon the applicant's December 2019 paycheck stub. Grady opined that accepting Dr. Hebl's restrictions the applicant is permanently and totally disabled. She opined that accepting Dr. Cederberg's causation opinion there was no loss of earning capacity. Accepting Dr. Cederberg's restrictions given regardless of causation, Grady opined that the applicant has sustained a 10% to 20% loss of earning capacity.

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<sup>32</sup> *Id.* at p. 21

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Ex. 13

<sup>36</sup> Ex. C

<sup>37</sup> Ex. 5



20. Grady submitted an addendum report dated June 9, 2023.<sup>38</sup> She wrote this after reviewing Dr. Hebl's injury report of February 20, 2023 (Appl.'s Ex. D). She took issue with the fact that Dr. Hebl opined that the applicant is permanently disabled and unable to return to, "...any type of predictable or sustained employment." She objected to Dr. Hebl's statement because he is not a vocational expert. She reiterated her opinions from her first report.

21. The commission finds the opinions submitted by Dr. Hebl to be credible. The work incident of January 3, 2020, directly caused a permanent injury at the applicant's L5-S1 lumbar spine level. The unsuccessful lumbar spine surgery of June 9, 2021, was a compensable consequence of that work injury. Dr. Hebl's assessment of 15% permanent functional disability, as well as his assessments of permanent physical restrictions, are also credible. In accordance with the opinions of both vocational experts, acceptance of Dr. Hebl's permanent restrictions translates to a finding that the applicant is permanently and totally disabled. In accordance with Dr. Hebl's medical opinions set forth in Applicant's Exhibit D, the applicant reached maximum medical improvement and thereupon became permanently and totally disabled on August 23, 2022.

22. In accordance with Dr. Hebl's opinion, the applicant is due additional temporary total disability for the period between July 23, 2020, and August 7, 2020; and for the period between June 8, 2021, and August 23, 2022.

23. Based upon the evidence submitted to the ALJ and the Department of Workforce Development's records, the applicant's average weekly wage is found to be \$1,739.60.

24. The dollar amounts due for compensation and attorney fees/costs shall be calculated by the Department of Workforce Development, Worker's Compensation Division (Computations). Those calculations shall be made in accordance with the commission's findings, including the order made herein for immediate payment of \$40,000.00 to the applicant, and \$10,000.00 to Attorney Schlewitz.

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

### **Memorandum Opinion**

Respondents argue for acceptance of Dr. Cederberg's opinion that the applicant sustained a temporary lumbar strain with no permanent injury. The ALJ accepted that opinion, relying primarily upon Dr. Cederberg's written statement made in his supplemental report dated June 1, 2020. There, Dr. Cederberg wrote: "...the MRI scans confirm there has been no acute structural change or worsening of the

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<sup>38</sup> Ex. 14

discogenic changes, consistent with at most a temporary aggravation."<sup>39</sup> The ALJ also referred to Dr. Thapar's statement written in his clinic note of February 6, 2020, where he indicated: "Her MRI scan is stable. It is really not changed much from her last study."<sup>40</sup> Additionally, the ALJ found it significant that after Dr. Thapar noticed the applicant's altered gait he authorized the 2018 lumbar MRI.

Assuming that in his clinic note of February 6, 2020, Dr. Thapar meant to compare the January 2020 MRI with the December 2018 MRI, the commission concluded that his statement that the latter MRI had "really not changed much" was vague and not particularly helpful.<sup>41</sup> In his supplemental report dated June 1, 2020, Dr. Cederberg's full description of the 2018 MRI was: "...showing degenerative disc disease at L5-S1 without evidence of nerve root compression or central stenosis."<sup>42</sup> In that same supplemental report, Dr. Cederberg described the January 2020 MRI as: "...showing diminished height of the L5-S1 disc level, facet degeneration, bilateral recess stenosis right greater than left, and L4-5 facet degenerative changes." In his injury report of February 20, 2023, Dr. Hebl described the January 2020 MRI as: "...L4-5 level facet degenerative changes without stenosis; L5-S1 showed facet degenerative changes and posterior disc bulging with bilateral lateral recess stenosis, right greater than left. There was dehydration and narrowing of the disc height at L5-S1."<sup>43</sup>

Both physicians' descriptions identified a significant difference between the 2018 and the 2020 MRI's, i.e., both described the 2020 MRI as showing a narrowed or diminished L5-S1 disc height. No physician of record ever describes this pathology in reviewing the 2018 MRI. The diminished L5-S1 disc height shown to be present in the post-incident MRI, but not shown to have been present in the pre-incident MRI, supports Dr. Hebl's opinion while diminishing the credibility of Dr. Cederberg's opinion. Dr. Hebl also identified L5-S1 disc bulging in the 2020 MRI, again something that was not shown to have been present in the 2018 MRI.<sup>44</sup>

Aside from the MRI evidence, the commission found the applicant's testimony of a profound and persistent symptom change dating from the work incident of January 3, 2020, to be credible. Her testimony describing new, debilitating low back and radiating left leg pain is supported by the medical treatment records that recount these symptoms, and the absence of any credible indication that these new symptoms were exaggerated. In his supplemental report dated April 3, 2020, Dr. Cederberg commented: " I note that when I examined her, she had some

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<sup>39</sup> Ex. 2, p.14

<sup>40</sup> Ex. H, p. 4

<sup>41</sup> In his clinic note of February 6, 2020, Dr. Thapar never identified an MRI as having been performed in 2018.

<sup>42</sup> Ex. 2, p. 14

<sup>43</sup> Ed. D, p. 2

<sup>44</sup> Dr. Hebl did describe L4-5 disc bulging in his reading of the 2018 MRI. The applicant has made no claim with respect to that bulge, or with respect to that disc level.

inconsistencies on examination."<sup>45</sup> However, neither in this supplemental report, nor in any other report he submitted, did Dr. Cederberg detail any such alleged "inconsistencies." In his written description of the physical examination he performed on March 19, 2020, Dr. Cederberg documented the applicant's diminished ranges of motion, limp, and weakness in toe extensors and flexors.<sup>46</sup> He did not describe any "inconsistent" or anomalous responses by the applicant.

The commission considered the fact that the applicant had preexisting degenerative lumbar spine disease, and the fact that Dr. Thapar was concerned enough to order a lumbar MRI in 2018. Nevertheless, prior to January 3, 2020, the applicant was able to work on a regular basis, missing perhaps one day of work due to back symptoms in her long tenure with the employer. There is no indication that Dr. Thapar ordered any treatment after he viewed the results of the 2018 MRI. The applicant's attempts to return to work, and acceptance of a low-paying, light-duty job for 10 months, also speak to her credibility and work ethic. The law is well settled that a preexisting condition is not a bar to recovery when a new work incident causes a new injury and disability.<sup>47</sup> The sea change in the applicant's symptoms, disability, and medical treatment beginning with the work incident of January 3, 2020, supports the conclusion that this work incident caused a new, permanent injury.

Respondents included a very brief argument concerning loss of earning capacity: "Applicant failed to make a prima facie case for permanent total disability."<sup>48</sup> This is incorrect. The applicant submitted credible evidence of a work-related injury that resulted in permanent disability and permanent work restrictions. The commission found Dr. Hebl's causation opinion and assessment of permanent work restrictions to be credible. The vocational experts agreed that accepting Dr. Hebl's opinions, the applicant is permanently and totally disabled. In a re-evaluation performed on August 23, 2022, Dr. Hebl noted that the applicant's condition was, "...as bad as I have ever seen her."<sup>49</sup> He further opined that the applicant was permanently and totally disabled. Accordingly, August 23, 2022, is found to be the date of permanent total disability.

In consultation with the commission, the ALJ did not describe any specific demeanor impressions of the applicant's testimony. She indicated that she found the applicant's description of the work incident to be lacking in sufficient detail to credibly support the severity of the injury claimed. The ALJ also reiterated her concern with the fact that Dr. Thapar had ordered an MRI after seeing the applicant limp in 2018.

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<sup>45</sup> Ex. 2, p. 14. This would have to be in reference to Dr. Cederberg's physical examination of the applicant performed on March 19, 2020.

<sup>46</sup> Ex. 1, p.4

<sup>47</sup> *Semons Dept. Store v. DILHR*, 50 Wis. 2d 518, 522, 184 N.W.2d 871 (1971); *Lewellyn v. DILHR*, 38 Wis. 2d 43, 58-59, 155 N.W.2d 678 (1968).

<sup>48</sup> Respondents' brief, p. 4

<sup>49</sup> Ex. D., p. 27

The commission agreed that a more detailed description of the chair lifting incident of January 3, 2020, would have been helpful. There was no discussion of the weight of the chair, or of the applicant's posture as she lifted the chair and experienced the onset of back pain. However, the applicant was not asked by anyone at the hearing to go into greater detail concerning the incident. There was no assertion that the incident did not occur, and it is credible that lifting a chair being used in a recovery room setting could cause injury to the lumbar spine. Again, the applicant's testimony concerning the onset of her symptoms was forthright and credible, and it was supported by the notes of the medical professionals who treated her. As noted above, the results of the 2018 MRI were not considered of such significance as to require treatment. The post-incident, January 2020 MRI did show a reduction in the L5-S1 disc space that had not been noted in 2018.

cc: Attorney Samuel P. Schlewitz  
Attorney Martin D. Stein