

State of Wisconsin



Labor and Industry Review Commission

Joel Estevez Applicant	Worker's Compensation Decision¹
Timber Creek Resource, LLC Employer	Dated and Mailed:
Acuity Insurance Co. Insurer	August 30, 2024 estevjo_wsd.docx:190
Claim No. 2021-024349	

Interlocutory Order

The commission **affirms** the decision of the administrative law judge. Accordingly, within thirty (30) days, the respondent shall pay:

1. To the applicant, the sum of sixty-five dollars and seventy-nine cents (\$65.79) as reimbursement for mileage expenses.
2. To the applicant's attorney, Dominic L. Clark, the sum of two thousand, eight hundred eighty-nine dollars and thirty-three cents (\$2,889.33) as attorney fees.
3. To Network Health (Medicaid), c/o The Rawlings Company, LLC, as reimbursement for work-related medical expenses, the sum of three thousand, eight hundred ninety-eight dollars and forty cents (\$3,898.40).
4. To Milwaukee County Child Support, as reimbursement for an outstanding child support lien, the sum of eleven thousand, five hundred fifty-seven dollars and thirty-four cents (\$11,557.34).

Jurisdiction is reserved to confirm the amount of the Medicaid lien, and to allow the applicant to submit an additional WKC-16-B from Dr. Luy and/or Dr. Murphy to address future medical care and any permanency, and for such further findings, orders, and awards as may be necessary consistent with this order. The order is final as to all other issues.

¹ **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: the 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/

Georgia E. Maxwell, Commissioner

/s/

Marilyn Townsend, Commissioner

Procedural Posture

This case is before the commission to consider the applicant's eligibility for worker's compensation benefits. The applicant filed a hearing application dated October 26, 2021, alleging that he sustained an injury to his stomach from a single event of an umbilical hernia from heavy lifting, with a date of injury of June 14, 2021. At that time, he claimed that his temporary disability was ongoing. He filed an amended hearing application dated February 7, 2022, in which he added "groin" to the list of injured body parts affected, and indicated that his temporary disability ended January 31, 2022. The employer and insurer (collectively, the respondent) conceded jurisdictional facts and an average weekly wage of \$660.00. The respondent also provided documentation of a child support lien with Milwaukee County, which indicated that as of August 14, 2023, the applicant owed \$20,662.10.

An administrative law judge for the Department of Administration, Division of Hearings and Appeals (Division), Office of Worker's Compensation Hearings, held a hearing on the matter on August 30, 2023, and issued a decision dated November 20, 2023, finding that the applicant had met his burden to prove that his work exposure was at least a material contributory causative factor in the onset or progression of his hernia. The administrative law judge awarded temporary total disability benefits, which were subject to the child support lien and ordered paid to Milwaukee County Child Support. She also found the respondent liable for the medical treatment expenses, but she noted the amount paid to Medicaid and the lien amount were inconsistent. The administrative law judge ordered the respondent to pay the lower amount and left the order interlocutory to confirm the final amount of the lien. Finally, the administrative law judge left the order interlocutory to allow the applicant time to submit an additional WKC-16-B to address the need for further treatment and permanency, since the applicant's doctors' reports were completed before the applicant's surgery. The respondent then filed a timely petition for commission review.

The issues are whether the applicant's incisional hernia arose out of his employment while performing services for the employer, and if so, the nature and extent of the applicant's disability from the work injury and respondent's liability for the medical treatment expenses. The commission has considered the petition and the positions of the parties and has independently reviewed the evidence submitted at the hearing.

Based on its *de novo* review, the commission affirms the decision of the administrative law judge and makes the following:

Findings of Fact and Conclusions of Law

As supplemented by the commission's memorandum opinion,² the commission makes the same findings of fact and conclusions of law as stated in the decision of the administrative law judge and incorporates them by reference.

Memorandum Opinion

The applicant, who was born in 1990, worked as an assembler for the employer, a maker of custom pallets and skids.³ He alleged that the heavy lifting that he did in his work activities was at least a material contributory causative factor in the onset or progression of his incisional hernias that occurred along a prior incision from surgery following a motorcycle accident. He asserts that his hernias arose out of his employment, and the respondent is liable for temporary disability benefits and the medical treatment expenses. The respondent denies a work injury and asserts that the applicant's incisional hernias were the natural progression of his preexisting condition. The administrative law judge found in favor of the applicant, and the respondent filed a timely petition for commission review.

The Applicant's Prior Medical Treatment

The applicant was in a serious motorcycle accident on June 29, 2020, when he was found unresponsive and had sustained a serious liver laceration and a fracture of the clavicle. He required two abdominal surgeries for the liver laceration, the first surgery was a laparotomy to examine the organs and pack the area around the liver to stem the bleeding, and a second surgery was to remove the packing and close the abdomen. On July 13, 2020, the applicant followed up with his primary care doctor, Dr. Neil K. Luy, M.D., and on July 14, 2020, he was given lifting restrictions of no more than 10 pounds for 6 weeks after the surgery.⁴

The applicant described the injury as "I almost lost my life. I had a very severe motorcycle accident. The day before I buried my favorite cousin, he died of cancer, and I didn't grieve with anybody. I was on my motorcycle. I was drinking, and I ended up in the hospital. I went through 16 pints of blood. I broke my liver in half and fractured my clavicle bone." As a result of the surgeries, the applicant has a scar that runs down his abdomen roughly to his bellybutton. According to the applicant, his doctor told him of risks after the surgery, including that a repair could occur again if he did heavy lifting or straining. He was told not to lift over 10 pounds or push or pull and to rest for 6 weeks, but he was not given any ongoing restrictions after the 6 weeks.⁵

The Applicant's Work History, Injury, and Medical Treatment

The applicant was hired as an assembler, initially as a temporary employee, in December 2020, and then became a full-time employee of the employer as of March 15,

² The commission's memorandum opinion may be the basis for more formal findings of fact. *Manitowoc Boiler Works v. Indus. Comm'n*, 165 Wis. 592, 594-95, 163 N.W. 172 (1917).

³ Transcript of Proceedings dated August 30, 2023 (Tr.), p. 14.

⁴ Exhibits (Exs.) D, 11, 14.

⁵ Tr., pp. 11-13, 30-31.

2021. He took and passed a preemployment physical before becoming a full-time employee. The applicant's job was to build and assemble wooden pallets. According to the applicant, to build and assemble the pallets, he used "tons and tons of wood all day." He had a time schedule to complete tasks, and he had to stack and bend and pull and push wood all day long. The job involved standing and walking all day. The job required him to kneel, grab materials, crouch, crawl, reach out, frequently move, and lift. The heaviest items he would have to lift would be about 200 pounds. The applicant described that a pallet or skid would be done in 3 to 4 minutes, so every 2 to 3 minutes he would have to lift it, move it, and grab more material. If 4 x 4 wood was used, jobs sometimes required 2 people. According to the applicant, every day he was working very hard and very fast.⁶

In late February or early March 2021, the applicant was working on a job. They had just gotten yelled at because of the quality and timing, so they had to make sure it was perfect. While he was stacking a pallet, and lifting it over his head, he "felt like, kind of a like a pop or like a tear" in his right abdominal area, and he cringed. The person he was with told him to take a break, and he did. He then got back to work because they had been yelled at, and he finished his shift. He did not notice a bulge at this time, and he did not report an injury. The applicant continued to work for the employer with the same job duties, including the heavy lifting, for the next month or two. At some point in late April or early May, the applicant felt a bulge that was filled with air, and it started growing. He decided that something was not right and he needed to see a doctor.⁷

On May 18, 2021, the applicant treated with his primary care doctor, Dr. Luy, for "concern of abdominal pain over the past 3 weeks." The applicant had pain around the umbilicus around the surgical scar. The pain was intermittent and sharp and could be as high as 7/10. It was typically 5/10. In his exam, Dr. Luy noted a right reducible periumbilical hernia near the surgical site, with some herniation into the umbilicus and mild tenderness. He noted bulging near and into the umbilicus and determined it was a likely hernia, and he ordered an ultrasound to confirm the hernia. The applicant indicated that he told Dr. Luy that he felt a pull and a stretch like a tear, and that he thought it was caused by heavy lifting at work. He did not know why this would not have been in the record. Dr. Luy did not give him any work restrictions at this time.⁸

The applicant did not report an injury to his employer right away because he did not know what was going on. He did not know that he had a hernia. He had to wait for the results of the ultrasound. He did not tell the employer something that he had no evidence or proof of. He knew he had pain, and was not sure if he had torn or pulled something.⁹ The ultrasound showed a ventral abdominal wall/incisional hernia superior to the umbilicus and the right of the midline near the surgical scar. On June 1, 2021, when Dr. Luy reviewed the ultrasound, he determined the applicant should proceed with a trauma surgery referral. He sent a letter to the applicant notifying him of the hernia and indicating he should proceed with the referral for

⁶ Tr., pp. 13-17, 30, 32, 65.

⁷ Tr., pp. 17-20, 32-33, 37-39, 62.

⁸ Tr., pp. 43-44, 49, 64.

⁹ Tr., p. 44.

surgery. On June 14, 2021, Dr. Luy addressed a letter “to whom it may concern,” indicating that the applicant could return to work with restrictions of no pushing or pulling and no lifting over 10 pounds. The restrictions were in place until he could see a surgeon.¹⁰

The applicant had returned to work doing his normal duties until he was given the work restrictions on June 14th. He felt that working during this period of time make his condition worse. He had been doing the heavy lifting from December 2020 until June 2021, though some days were lighter. He had continued to work, taking Tylenol before his shift, until he was given the work restrictions. As soon as he got the letter notifying him that he had a hernia, he gave that to his employer. When the applicant presented his work restrictions to the employer and reported a work injury, he was sent home and told that he could not return until the restriction was lifted or the surgery was done. June 14th was the applicant’s last day of work.¹¹

The applicant gave a recorded statement to the insurance carrier on June 28, 2021.¹² He indicated that he smokes about 5 cigarettes a month. He described the work he did using all different sizes of wood and putting packaging boxes together and assembling them and carrying them. When asked when this first happened and who he reported it to, the applicant indicated, “when the incident happened it was more so ah, pain I was having every day. And I didn’t think much of it because it was, it was every day’s work ah--. And then ah, I noticed …” When asked if there was a specific incident, the applicant replied that he reported it to Alissa in HR 2 or 3 weeks ago. He thought it had started about a month ago:

Ah, I do-, honestly, I, I don’t know. I just, I would just always go work, and I’d always be tired, hu-, I’d be feeling hurt, or some days I wouldn’t feel it be-, because we, it wasn’t heavy wood. It would just be when I get heavy wood I’ll be hurt, I’ll be feeling pain but, I’ll still work through it and the I f-, go back to work and ah, in the morning I wouldn’t be feeling anything until later on in the day maybe. I’ll be hurt a little bit but, I wasn’t really thinking it was nothing until I went to my doctor.¹³

When asked if he felt any bulges, pops, or anything like that in his stomach area, the applicant responded that he had a bulge in his stomach area that he noticed when he went to the doctor. At the end of the interview, when asked if he had anything to add, the applicant stated:

...basically I would just like to add that ah, ah, ah, ah, at my job that’s – we, we work with heavy stuff and I, I, I know for a fact it was, it had to be at, at work because I don’t lift heavy stuff. I don’t do nothing when, when I’m off I’m with my kids and I just take them to the park. I don’t carry them or nothing like that. Or we ... kick the soccer ball but, I know

¹⁰ Exs. D, G, H, 11, 14.

¹¹ Tr., pp. 21-23, 50, 59-60, 63, 71.

¹² Ex. 1; Exhibit 20 is a recording of the interview; the applicant acknowledged that he was the one speaking on the recording, and that it was accurate for their conversation. Tr., pp. 80-82.

¹³ Ex. 1.

for a fact it happened at work...and I reported it to my job as soon ah, I was informed and um, and, and they ah, send me home with ah, before you were informed.¹⁴

The applicant also spoke with the insurance representative off the record for about 20 minutes, and he basically told her everything off the record. He did discuss the heavy lifting as the possible cause when he did speak on the record. He did not remember a specific date, just the pain and going through the pain at work.¹⁵

Nurse notes on June 29, 2021, show the applicant reported he was out of work and not able to make money for his family. He also wanted to know whether it was work-related or not. "Reports he thinks the hernia happened because of lifting heavy things at work." In a follow-up note, Dr. Luy noted, "Do not feel hernia is work related but rather due to surgery following motorcycle accident-hospitalized 6/29/20-had liver laceration underwent exploratory lap at that time-site of hernia around surgical scar near the umbilicus."¹⁶ The applicant knew that Dr. Luy was his family doctor who was giving him this opinion that the injury was not work-related. He did not call the insurer to let them know that Dr. Luy told him that he did not think it was work-related.¹⁷

On July 1, 2021, the applicant saw the surgeon, Dr. Lewis B. Somberg, M.D., who noted that the symptoms did occur at work. The pain was dull and intermittent. Dr. Somberg ordered a CT scan of the abdomen and pelvis, and restricted the applicant to no lifting above 10 pounds by letter dated July 6, 2021. The CT scan was done on August 9, 2021, and showed an interval development of a mildly complex periumbilical hernia containing fat and a knuckle of nondilated small bowel. Dr. Somberg indicated by letter that the applicant was limited to light duty (no lifting above 10 pounds) until further assessment. In September, the restrictions were continued until further assessment on October 18, 2021.¹⁸

On October 18, 2021, the applicant treated with a different surgeon, Dr. Patrick B. Murphy, M.D., because Dr. Somberg had an emergency and was unable to perform the surgery.¹⁹ Dr. Murphy noted the applicant "felt a 'pop' at work while doing heavy lifting." Dr. Murphy determined the applicant would benefit from a hernia repair. In the pre-op exam, the history noted the applicant's symptoms began after engaging in heavy lifting while at work. The applicant felt the bulge was enlarging. Dr. Murphy performed the incisional hernia repair on December 14, 2021. In the surgical report, he noted that he found 3 incisional hernias, including one larger hernia (3x3 cm) and two smaller (1x1 cm), all close to each other. He also performed a lysis of adhesions to remove scar tissue in the abdomen.²⁰

¹⁴ Ex. 1.

¹⁵ Tr., pp. 41-43, 69, 83.

¹⁶ Exs. D, 11.

¹⁷ Tr., pp. 52, 65.

¹⁸ Exs. D, H, 10, 14.

¹⁹ Tr., pp. 24-25.

²⁰ Exs. D, 10, 11, 14.

At his post-operative follow-up on January 6, 2022, the applicant was returned to work with no restrictions.²¹ One week prior to being returned to work with no restrictions, the applicant had called the employer to let them know he was able to come back to work with no restrictions. He was told to bring in the paperwork, which he did on January 31st. He was then told that his employment had been terminated the prior September and shown a letter to that effect. The applicant had not received the letter. Exhibit H, the employment file, contains the unsigned letter.²² Though the employment file contained disciplinary forms for the applicant being late, the discharge letter indicated that the applicant was being terminated for failure to provide proper documentation for a worker's compensation case, and noting the applicant had not been to work since June 14th.²³

The Applicant's Medical Opinions

The applicant submitted two WKC-16-Bs in support of his claim. First, he submitted a WKC-16-B from Dr. Murphy, the surgeon, dated October 18, 2021.²⁴ Dr. Murphy indicated that the work incident was described by the applicant as stacking heavy pallets and felt a shot of pain over incision and felt a pop. He diagnosed an incisional hernia, "symptomatic (pain with lifting)." He indicated the applicant had temporary work restrictions not to lift over 10 pounds, and noted that they were working to schedule the surgical repair. Dr. Murphy opined that the work incident directly caused the disability, that it aggravated a preexisting degenerative condition beyond its normal progression, and also that the work exposure was at least a material contributory causative factor in the condition's onset or progression. He gave the date of the work injury and the date the disability began as June 14, 2021. Dr. Murphy assessed no permanent disability, but he indicated that the applicant would need surgery and that he would be disabled until surgical repair and recovery.

The applicant also submitted a WKC-16-B from Dr. Luy dated December 14, 2021.²⁵ Dr. Luy indicated the applicant was seen on May 18, 2021, with reports of recurrent abdominal pain around the umbilicus around the surgical scar over a 3-week period. He had a history of abdominal surgery for liver lacerations in June 2020 from a motorcycle accident. "Reports recurrent lifting at work with lifting of 80 to 100 pounds." Dr. Luy also indicated that he had noted a small bulge on exam on May 18th, and a ventral incisional hernia was confirmed by ultrasound. The applicant was then referred to surgery. The applicant had been placed on light duty, no pushing or pulling or lifting more than 10 pounds. In box 12 of the WKC-16-B form, Dr. Luy opined that the work incident precipitated, aggravated, and accelerated the applicant's preexisting condition beyond its normal progression, noting the applicant had weakness of his abdominal wall due to the previous surgery, which was exacerbated by heavy lifting while at work. No permanent disability was assigned, but Dr. Luy noted the applicant was scheduled for surgery. In answer to additional questions, Dr. Luy checked "no," indicating that the work incident did not aggravate a preexisting condition and "no" that the condition was not the manifestation of a

²¹ Ex. D.

²² Tr., pp. 25-27.

²³ Ex. H.

²⁴ Ex. B.

²⁵ Ex. C.

preexisting condition. He opined by checking “yes” that there was a definite “breakage” or structural change while the applicant was engaged in normal activities on the job.

The Respondent's Medical Opinions

The respondent submitted two Medical Record Reviews and WKC-16-Bs from Dr. J. Jay Goodman, M.D., with specialties in general and vascular surgery.²⁶ The first medical record review was dated December 28, 2021, and was done before the applicant's hernia repair surgery. Dr. Goodman reviewed the applicant's prior medical records, including the records for the treatment for the motorcycle accident. He described the applicant's work duties as, “being an assembler and has job responsibilities of packaging boxes and more specifically assembly of wood products and then packaging and carrying those products and wrapping those products just prior to shipping.” He noted that the applicant did not specify an abdominal trauma or specific work incident in the recorded statement, but just indicated that he developed discomfort in his previous incision, associated with malaise and fatigue. Dr. Goodman had also reviewed the WKC-16-Bs of Dr. Murphy and Dr. Luy. Based on his review of the records, Dr. Goodman opined that the general lifting activities at work with the date of injury reported to be June 14, 2021, were not causally related to the onset or progression of the current diagnosis of incisional hernia. He opined that the hernia was preexisting and progressively deteriorating in nature and the symptoms experienced by the applicant represented intermittent entrance of intra-abdominal contents into the preexisting hernia. The hernia did not represent any relationship to work activities with no specific trauma. Dr. Goodman noted that an incisional hernia is a protrusion beneath the skin of intra-abdominal viscera through a postoperative defect to the abdominal wall. He stated that they result from inadequate collagen bridging and most often occur in the early perioperative period. He opined that the applicant had risk factors for an incisional hernia based on his 2 prior abdominal surgeries and his history of smoking. Dr. Goodman found no work activities that directly caused the hernia condition, or that precipitated, aggravated, and accelerated the preexisting condition beyond its normal progression. He opined that the incisional hernia would have required surgical repair regardless of any work activity. He also opined that there was no work activity or work exposure that was the sole cause or a material contributory causative factor in the condition's onset or progression. He attributed the hernia to significant preexisting comorbidities.

Dr. Goodman prepared a second Medical Record Review and WKC-16-B dated April 12, 2022, following the hernia repair surgery.²⁷ Dr. Goodman again opined that the applicant's work activities were not causally related to the onset or progression of the 3 midline incisional hernia defects. He noted that the applicant had complained of pain before the June 14, 2021, date of injury. He opined that the work activity as described would not result in 3 separate incisional hernias all within the exact location of the multiple laparotomies after the motorcycle accident. In his opinion, the hernias would have become symptomatic regardless of any work activity, and the hernias were present prior to any employment with the employer. In addition to the prior surgeries and smoking, Dr. Goodman also noted the applicant had the comorbidity of obesity.

²⁶ Ex. 12.

²⁷ Ex. 13.

The respondent also submitted 4 articles/websites regarding incisional hernias and indications for repair.²⁸ Of note, the articles indicate that incisional hernias are frequently observed complications after abdominal surgery, with an incidence after midline laparotomy varying between 2 and 20%, or up to 33%. An incisional hernia can occur for a number of reasons, including for individuals who participate in excessive or premature physical activity after surgery. Incisional hernias are most likely to occur within 3 to 6 months post-surgery, but can happen at any time. Systemic chronic diseases like diabetes, renal failure, obesity, smoking, and malnutrition, or systemic long-term medications like steroids, increase the likelihood of developing an incisional hernia; morbid obesity is a common associated risk factor. Risk factors also include advanced age, lung problems, having had more than one surgery that uses the same incision, and a history of multiple abdominal surgeries. The exact pathophysiologic mechanism for development of an incisional hernia is not clearly known, and it is believed to be multifactorial. Chronically increased intraabdominal pressure predisposes more weak areas to develop hernias. Symptoms can range from no symptoms to discomfort, pain, or bowel obstruction or strangulation.

Analysis

The issues are whether the applicant's incisional hernia arose out of his employment while performing services for the employer, and if so, the nature and extent of the applicant's disability from the work injury and respondent's liability for the medical treatment expenses. The applicant has the burden of proving beyond a legitimate doubt all the facts necessary to establish a claim for compensation.²⁹ The commission must deny compensation if it has a legitimate doubt regarding the facts necessary to establish a claim, but not every doubt is automatically legitimate or sufficient to deny compensation.³⁰ Legitimate doubt must arise from contradictions and inconsistencies in the evidence, not simply from intuition.³¹

The Parties' Arguments

The respondent argues that the commission should look at the four guidelines for determining causation for an inguinal hernia from *E.F. Brewer Co. v. DILHR*³² and the *Meade* and *McCarthy* cases³³, and find that the facts fail to support compensability in this case. For the first guideline, i.e., was the accident sufficient to produce a hernia, the respondent argues that the applicant never asserted a traumatic event until October of 2021, noting only waxing and waning pain with lifting. The pain would completely resolve by morning and only manifest again with heavy lifting. For the

²⁸ Exs. 16-19. Nieuwenhuizen, et al., *Natural Course of Incisional Hernia and Indications for Repair*, *Scand. J. of Surg.* 96:293-296 (2007); John Hopkins Medicine, www.hopkinsmedicine.org/health, *What is an incisional hernia?*; Hope, William W., and Tuma, Faiz, *Incisional Hernia*, StatPearls Pub., 2022 Jan.; and The Surgery Group, www.thesurgerygroup.com/conditions/incisional-hernia, *Incisional Hernia*.

²⁹ *Leist v. LIRC*, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994); *Erickson v. DILHR*, 49 Wis. 2d 114, 118, 181 N.W.2d 495 (1970).

³⁰ *Erickson, supra*, at 119; *Leist, supra*, at 457.

³¹ *Erickson, supra*; *Richardson v. Indus. Comm'n*, 1 Wis. 2d 393, 396-97, 84 N.W.2d 98 (1957).

³² *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 264 N.W.2d 222 (1978).

³³ *Meade v. Wisconsin Motor Mfg. Co.*, 164 Wis. 250, 169 N.W. 619 (1918), and *McCarthy v. Sawyer-Goodman Co.*, 194 Wis. 198, 215 N.W. 824 (1927).

second guideline, i.e., did the hernia appear immediately, the respondent argues that the applicant did not report a traumatic event until six months after he initially reported abdominal pain to his doctor. The event he referenced occurred in late February or early March, and he had no abdominal pain until late April or early May. For the third guideline, i.e., was the applicant disabled by pain immediately after the hernia was discovered, the respondent argues that the applicant reported in May 2021 a 4-week history of intermittent abdominal pain, but he missed no work time during that period. He missed no work time until temporary work restrictions were assigned. For the fourth guideline, i.e., did the applicant give immediate notice of his injury, the respondent argues that it was not until weeks after the applicant saw Dr. Luy in May and was diagnosed with a hernia that he gave any notice of an injury.

According to the respondent, it is not surprising that the applicant failed to meet the guidelines for determining causation for an inguinal hernia, given the etiology of incisional hernias explained by Dr. Goodman and as noted in the learned treatises that incisional hernias are common after abdominal surgery and result from a weakening of the abdominal muscle due to the surgical incision. The respondent asserts that the applicant was a “poster child” for an incisional hernia since he was morbidly obese, a former smoker, and had 2 surgeries in short-order in the same location as his 3 incisional hernias. The fact that 3 incisional hernias were found confirmed that those hernias simply manifested themselves when the applicant returned to work after the motorcycle accident. No doctor, other than Dr. Goodman, had that information or the surgical notes, or the applicant’s complete medical history, and therefore, according to the respondent, the commission should credit Dr. Goodman and find the applicant’s hernia was not work-related. The commission should not credit the applicant’s doctors as to causation, according to the respondent, because they found causation only after the applicant changed his story with a new history of a traumatic event causing a “pop” or “tear” after he was diagnosed with a hernia; and they did so before knowing the applicant actually had 3 separate incisional hernias.³⁴ Dr. Luy changed his initial causation opinion without explanation, and Dr. Murphy based his opinion upon a history of an accidental injury provided 6 months after the applicant first presented for treatment. According to the respondent, the applicant vacillates between claiming an accidental hernia and an occupational hernia from repetitive lifting, and his doctors’ opinions lack direction, definition, and consistency. The respondent asserts that Dr. Goodman’s opinion provides legitimate doubt as to causation, and therefore, the commission should reverse the administrative law judge’s decision.

The applicant responds and argues that he met his burden that his work exposure was at least a material contributory causative factor in the onset or progression of his hernia. First, the applicant argues that his testimony was credible that he did repeated heavy lifting at work and was required to lift materials weighing up to 200 pounds. His lifting was frequent, every 2 to 3 minutes, and his jobs were timed. This testimony was unrebutted. His hearing testimony about the heavy lifting was

³⁴ *Pressed Steel Tank v. Indus. Comm’n*, 255 Wis. 333, 335, 38 N.W.2d 354 (1949)(When a worker’s physician bases his or her opinion on an inaccurate history of events, that opinion cannot credibly carry the worker’s evidentiary burden).

consistent with his recorded call with the insurance carrier, and his credible testimony was consistent with the learned treatise filed by the respondents that symptoms of an incisional hernia include pain that gets worse when you stand for long periods of time or lift heavy objects.³⁵ Though the respondent argues that the accident or work was not sufficient to cause the hernia, the applicant argues that their own learned treatise supports his testimony about the heavy lifting.

The applicant also argues that the credible medical evidence supports his claim. Dr. Luy initially noted in his medical notes that he did not think the hernia was work-related due to the applicant's prior surgery, and this was correct, according to the applicant, because it necessarily follows that any incisional hernia is a preexisting incision. However, the law does not require that the work activity be the *only* cause of the condition, only that it be at least a material contributory causation factor in the condition's onset or progression. The applicant's preexisting condition is not a bar to the compensability of his claim, and employers take employees "as is." Even in the *E.F. Brewer Co.* case, the supreme court stated that hernia claims "usually, if not invariably," involve a preexisting condition. The applicant admits that Dr. Luy's report is "messy," but he argues that Dr. Luy's opinion must be viewed in its full context, and Dr. Luy clarified his opinion in his WKC-16-B to state that the applicant's condition was caused by a weakening of the abdominal wall exacerbated by heavy lifting. Dr. Luy did understand the applicant had a preexisting condition, but he opined that it was made worse by the work activity. The applicant also rests his case on the medical opinion of the surgeon, Dr. Murphy, who opined that the work activity was at least a material contributory causative factor in the condition's onset or progression. The applicant argues that the commission should credit the opinions of Dr. Luy and Dr. Murphy as to causation.

The commission should not credit Dr. Goodman, according to the applicant, because he did not have a complete history of the applicant's work activity and his reports are inconsistent. Dr. Goodman did not examine the applicant or speak with him about his work duties. The applicant asserts that Dr. Goodman's review of his work was "scant," and there was no discussion about the amount or frequency of heavy lifting that the applicant had to do. Without a complete understanding of the applicant's work duties, the applicant argues that Dr. Goodman's opinion is not credible as to causation. Dr. Goodman's opinion is also contradictory, according to the applicant, because he opined that the hernias would have become symptomatic regardless of any work activity, but the applicant did not have any symptoms, and there is nothing to support the incisional hernias were present prior to the applicant's work. Indeed, the applicant notes that he passed a preemployment physical. The applicant points out that the learned treatise notes that people may feel pain that gets worse with heavy lifting. These are competing explanations for what makes an incisional hernia symptomatic. Therefore, according to the applicant, the commission should not credit Dr. Goodman, but should affirm the administrative law judge's decision.

Regarding the application of the *Meade/McCarthy* guidelines, the applicant asserts that the commission need not rely on those because they deal with traumatic hernia

³⁵ Ex. 19.

cases, and in this case, there are medical opinions supporting the traditional causation test that the occupational exposure was at least a material contributory causative factor in the hernia's onset or progression. Because he met his burden to prove occupational exposure, the applicant argues that the commission may ignore *E.F. Brewer* and the *Meade/McCarthy* framework and use the traditional test of causation.

Did the applicant's incisional hernia arise out of his employment while performing services for the employer?

Resolution of the issues in this case depend on determinations of credibility of the applicant as to the nature of the heavy lifting in his work duties and when he noticed the change in his condition, and the credibility of the medical experts as to causation. For the applicant's condition and work duties, though the applicant had a significant injury and previous incision and scar, there was no evidence that he was symptomatic for a hernia prior to working for the employer, and he had passed the preemployment physical. The applicant's testimony as to the amount of work he did and the heavy nature of the work was credible and unrebutted. He testified that he repetitively lifted heavy items, up to 200 pounds, sometimes with the assistance of a coworker, and he had to do so frequently and quickly. The commission finds the applicant credible that he did this heavy work repeatedly over time, and that he noticed pain when he did so. He knew he had pain, and was not sure if he had torn or pulled something. He saw his doctor because something was "not right," but he did not know that he had a hernia until he found this out from his doctor, and then he reported the work injury and limitations to his employer.

The next issue is which medical opinion is most credible. While there are some problems with the applicant's doctors' opinions, on balance, the commission finds them more credible and persuasive than the respondent's medical expert. Dr. Murphy opined that the applicant's work aggravated his preexisting condition and also that his work exposure was at least a material contributory causative factor in the onset or progression of his condition. He diagnosed the incisional hernia, which was symptomatic with heavy lifting, so he understood that the applicant had to do heavy lifting in his job. Dr. Luy's opinion is, as the applicant describes, "messy," because he checked the box 12 for an aggravation-type injury, but in response to additional questions checked "no" that the work incident did not aggravate a preexisting condition, but "yes" that there was breakage or a structural change. However, Dr. Luy did state that the applicant's condition was caused by a weakening of the abdominal wall exacerbated by heavy lifting. The commission has long held that a physician's checking of a box on a WKC-16-B that identifies the incorrect legal theory of causation, or checking multiple boxes on the form, is not necessarily fatal to an applicant's claim. The commission looks to the entire body of medical evidence to determine what the physician believed with respect to the question of causation.³⁶

Given the applicant's credible description of his work duties, the commission finds Dr. Murphy and Dr. Luy credible that the applicant's work caused his incisional hernias. Dr. Luy's opinion that the applicant's condition was caused by a weakening

³⁶ See, e.g., *Sorenson v. Wal-Mart*, WC Claim No. 2015-017216 (LIRC Oct. 24, 2016); *Burks v. Aurora Health Care, Inc., and Sentry Ins. Co.*, WC Claim No. 2010-020976 (LIRC Mar. 28, 2010); and *LaBonte v. Maysteel Corp. and Connecticut Indemnity Co.*, WC Claim No. 1999-006958 (LIRC Feb. 10, 2000).

of the abdominal wall exacerbated by heavy lifting is the most credible. This is consistent with the applicant's pre-employment condition, his subsequent repetitive heavy lifting, and the respondent's medical treatises. The medical treatises provided by the respondent, for instance, indicate that intraabdominal pressure predisposes more weak areas to develop hernias, and abdominal pressure may increase naturally when exerting or lifting heavy objects, such as the applicant did in his work duties. As a result, the commission finds that the applicant met his burden to establish that he sustained an occupational injury to his abdomen arising out of and incidental to his employment, which necessitated the surgical repair. The date of injury is June 14, 2021, the applicant's last day of work attributable to the effects of the occupational injury.

The commission does not credit Dr. Goodman, and finds his opinions less persuasive, because he did only a medical record review and did not interview or examine the applicant about his work duties. As a result, the commission finds that he did not have as good an understanding of the applicant's work exposure as Dr. Luy or Dr. Murphy. Dr. Goodman did note that incisional hernias are common after surgery because of the weakening of the abdominal muscle due to the surgical incision, but employers take employees "as is," and just because the applicant may have been susceptible to incisional hernias does not mean that the work exposure of heavy lifting was not at least a material contributory causative factor in the onset or progression of the hernia.

Finally, the commission notes that while the respondent argues that the commission should refer to the *Meade/McCarthy* guidelines for inguinal hernias to assess causation in this case, those guidelines are not relevant to this incisional hernia case.³⁷

³⁷ The *Meade/McCarthy* standards were summarized in *Meade*, as follows:

Inguinal hernias rarely result from accident. They come from inherited or acquired weakness and develop gradually. Because of this, it has been necessary for the Commission to require definite proof that the hernia was produced by accident. The applicant must prove that the accident was such as could produce a hernia; that the hernia appeared immediately after the accident; that it was followed by pain immediately disabling the applicant; and that the applicant gave immediate notice of the injury to the respondent.

Meade, supra, 168 Wis. at 250. In the later *McCarthy* case, the Supreme Court explained further:

The conclusion of the Industrial Commission is supported at least by the following considerations: (1) Inguinal hernia is rarely of traumatic origin; (2) it is generally of traumatic culmination; (3) when of traumatic origin the pain is so severe as to disable the subject from work; (4) the applicant continued his work with but a few minutes respite, contrary to the general history of traumatic hernia; (5) he did not notify his employer for two weeks after the accident. In view of these considerations, we think a court possessing a knowledge of and experience with the subject inferior to that of the Industrial Commission is not justified in saying that the Commission acted without or in excess of its powers in denying compensation to the plaintiff.

McCarthy, supra, 194 Wis. at 205. More recently, the court explained the rationale for the standards:

The basic philosophy of the guidelines is that indirect inguinal hernias are highly unlikely to occur during the course of employment, and when they do occur, the trauma

The evidence shows that the applicant's occupational exposure was at least a material contributory causative factor in the condition's onset or progression, and therefore, the commission need not look at guidelines for determining whether a traumatic incident led to an inguinal hernia. The commission has found, for instance, that an incisional hernia has been caused by heavy lifting in employment in a prior case that did not refer to those guidelines.³⁸

cc: Atty. Dominic L. Clark
Atty. Jeffrey J. Strande

and the subsequent pain are so acute that predictable types of conduct by the injured claimant almost inevitably and immediately ensue. When such conduct does not occur, the existence of work-caused inguinal hernia is highly suspect.

E.F. Brewer Co., supra, 82 Wis. at 640. In *E.F. Brewer*, the court also stated that it regards the guidelines as "standards only for the internal use of the commission . . . by which the credibility or the probativeness of testimony could be tested." *Id.*, at 642-43. The court also indicated it would not reverse the commission—even if the commission completely ignores the *Meade/McCarthy* guidelines in finding an inguinal hernia compensable—so long as there is substantial and credible evidence to support the commission's decision. The *E.F. Brewer* court noted further:

While it is clear from the record and briefs in this case that an inguinal hernia usually, if not invariably, occurs only where there is a pre-existing congenital weakness, we have frequently stated that an employer takes an employee in the state of health or physical condition "as is." If the work activity precipitates disability, even though that disability would not have been caused in the absence of congenital weakness, the disability may be compensable.

E.F. Brewer, 82 Wis. 2d at 637-38. The court went on to cite the familiar *Lewellyn* standards. Finally, the commission has previously held, "...compliance with the *Meade/McCarthy* standards are [sic] not a *sine qua non* to recovery in a hernia case. Rather, the standards are something the commission may consider in weighing the credibility of experts." *Gleiss v. Harnischfeger*, WC Claim No. 2002-041689 (LIRC Sep. 30, 2004). *See also Slotowski v. ProfI Power Products Inc.*, WC Claim No. 2011-032758 (LIRC Mar. 26, 2013).

³⁸ *See Passialis v. Grand Geneva, LLC*, WC Claim No. 2009-004412 (LIRC Feb. 29, 2012)(Applicant sustained a blunt trauma to his abdomen that damaged his liver and needed surgery to repair the liver, which resulted in a long incision in his abdomen. He recovered from the surgery and was able to work in heavy employment for a number of years until he tried to lift a heavy mixer that weighed about 200 pounds and felt a pop and pain in his umbilical area. The applicant had surgery using the prior laparotomy scar, and he was eventually returned to work without restrictions. Two years later, the applicant felt a pop and pain in the umbilical area while straining at the stool due to constipation. The applicant had a midline incisional hernia repair and lysis of adhesions, but continued to have pain. He eventually underwent another surgery for repair of multiple recurrent incisional hernias. The applicant's doctor opined that the date of injury was the date of the heavy lifting incident, assessed 25% permanent partial disability, and imposed a 20-pound lifting restriction. The respondent's medical expert stated that the diagnosis of a work-related injury with the heavy lifting and onset of the periumbilical hernia was quite clear. However, he felt that the applicant's subsequent recurrent hernia and surgery were due to his heavy tobacco use and other health conditions, as well as his initial injury. The commission found that the recurrent hernia, continued abdominal pain, abdominal incisions, and need for further treatment arose out of the heavy lifting incident and treatment for that injury.).