

Learning the Basics of the Wisconsin Worker's Compensation System

Brian Bean J.D.
Executive Claims Consultant
R&R Insurance Services, Inc.
brian.bean@rrins.com
262-953-7176

**2020 WASBO Spring Conference - Cancelled
Presentation summary and other resources**



This is the short version

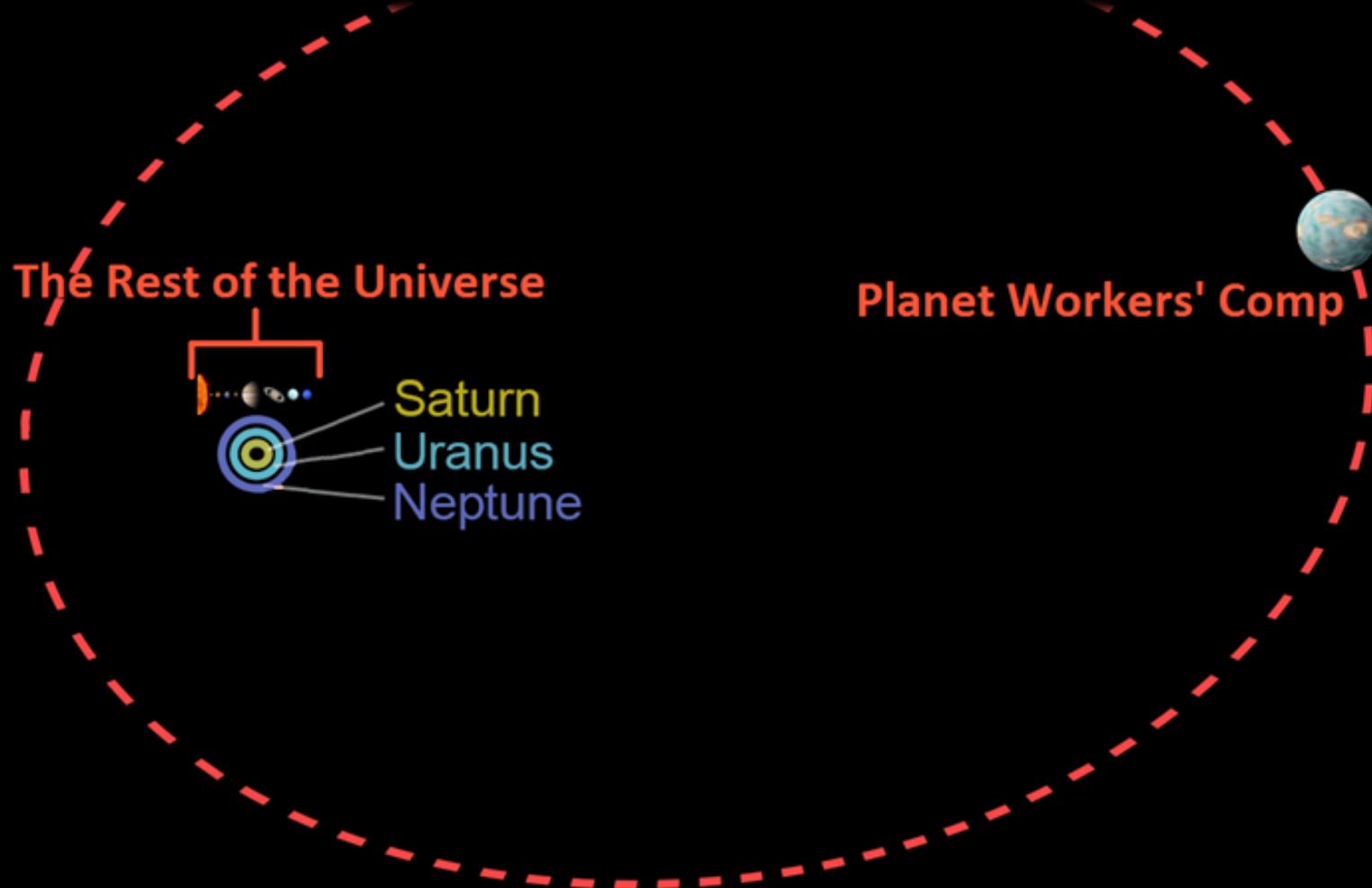
- **Key insights to understand workers compensation**
 - Why do we have it?
 - How is it different to other areas of the law?
 - Features of the system
- **Resources**
- **Select topics**

Get a working knowledge of workers compensation to...

- ✓ *Avoid common mistakes & pitfalls*
- ✓ *Risk control to avoid claims*
- ✓ *Get better claim outcomes*
- ✓ *Save money for your district*

Don't substitute what you think should be compensable for what the law says is compensable

Workers' Compensation is its own little world



Before Workers' Comp in the United States, What happened if you were injured at work?

- **To get compensation for medical bills, lost wages and pain and suffering, employees sued employers in civil court.**
- **Usually unsuccessful due to employers' legal defenses**
 - Contributory negligence
 - Assumption of risk – sometimes built into employment contracts
 - Fellow Servant Rule
- **Attitudes were changing in the early 1900's**
 - Juries started to rule in favor of employees
 - No limit on potential liability damages
 - Expensive to defend
- **Germany 1884** – the first workers' compensation law

The Grand Compromise

➤ **Employers gave up:**

- ✓ Traditional negligence defenses – it's a no-fault system

➤ **Employees gave up:**

- ✓ Right to sue in the court system
- ✓ Pain and suffering damages
- ✓ Other potentially unlimited damages: full wages, loss of consortium, etc.

➤ **Employees received:**

- ✓ Defined benefits outlined by the no-fault system
- ✓ Immediate payments of medical bills and lost wages when out of work
- ✓ More streamlined dispute resolution system

➤ **Employers received:**

- ✓ Exclusive remedy protections
- ✓ Limited liability exposure to damages
- ✓ More predictable financial outcomes, including defense costs
- ✓ Insurance market place to spread the risk of losses– pay premium, not the damages
- ✓ More streamlined dispute resolution system

Liberally construed

- **Presumption in favor of the employee**

- *“The Workmen’s Compensation Act must be liberally construed in favor of including all service that can, in any sense, be said to reasonably come within it”
Breinen, 1917*

- **Wisconsin’s Positional Risk Doctrine**

- Employer liability will be found where the obligations or circumstances of the employment place
 - the employee in the particular place where, and
 - the particular time when,
 - that employee is injured by
 - a force not solely personal to them

The employee was in a “special zone of danger” ...

- **Some states adopted other standards**

- Increased risk doctrine, or
- Actual risk doctrine

What is a compensable claim?

1. Must be an “employer” and “employee” subject to the Workers Compensation Act
 - “Independent Contractor” or “employee”?
2. Employee acting in the course and scope of their employment, and not deviating
3. Employee sustains an injury arising out of that employment, that was not self-inflicted.

Now the employee’s “exclusive remedy” against the employer are the benefits allowed under the Workers’ Compensation Act



Where does Wisconsin's Worker's Compensation Law come from?

State Statutes Chapter 102

Administrative Rules DWD 80-81

Administrative Law Judges (ALJ)

Labor and Industry Review Commission (LIRC)

Wisconsin Court of Appeals

Wisconsin Supreme Court



What types of benefits?

Medical Bills

Indemnity

- TTD – Temporary Total Disability
 - TPD – Temporary Partial Disability
 - PPD – Permanent Partial Disability
 - PTD – Permanent Total Disability
 - Loss of Earning Capacity
 - Vocational Rehabilitation – a.k.a. Retraining
 - Death Benefits
-
- ✓ **Types of benefits paid will begin or end when the injured employee reaches a healing plateau.**
 - End of healing, maximum medical improvement (MMI)

 - ✓ **The point when the employee has reached maximum medical improvement**
 - 100% recovery without residual symptoms
 - Something less than 100% recovery from an injury

TTD – Temporary Total Disability

- **There are two ways to control work comp premiums and costs**
 - Avoid accidents through risk control and safety
 - **Reduce TTD payments on these LOST TIME CLAIMS**
 - ✓ Light-duty work meeting the doctor's restrictions
 - ✓ Nurse-case managers
 - ✓ Closely monitoring an employee's medical treatment
 - ✓ Contact the physician for clarification and availability of light duty

Lowering TTD helps reduce your experience modification formula (Mod), and therefore your work comp premiums

Workers' Compensation Litigation System Resolving Disputes

Work Comp Hearings

- **Unresolved disputes are heard in front of an Administrative Law Judge (ALJ)**
 - ALJ is the finder-of-fact, assesses credibility, and makes a ruling
- **Unlike being in civil court**
 - No jury
 - Rarely any pre-hearing depositions – unavailable witnesses
 - Limited discovery unlike civil court
 - Medical records and reports are obtained
 - Doctors complete reports rather than testifying in-person
 - Fact witnesses do testify including the injured employee
 - Only disputed issues are reviewed at the hearing

Question: *“Are we going to win at the hearing?”*

Answer: *“Well, it depends on which ALJ we get.”*

Litigation Process

ALJ

- **Administrative Law Judge**
- Hearing – fact-finding and ruling

LIRC

- **Labor & Industry Review Commission**
- Still inside a government agency

Court

- **Circuit Court** – Judicial branch
- **Before 6/26/18** “Great weight and deference” to the agency’s interpretation of the law”
- **As of 6/26/18** – “Due weight and deference”

Court of Appeals

- **Court of Appeals**
- Mandatory Jurisdiction

Supreme Court

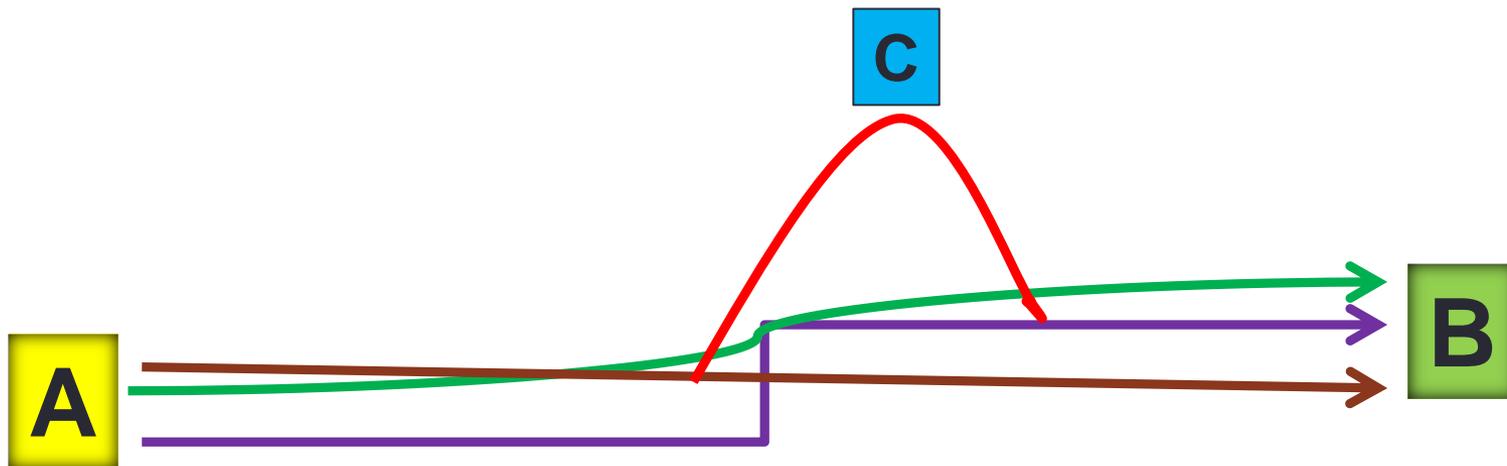
- **Wisconsin Supreme Court**
- Discretionary & the last word

Remand

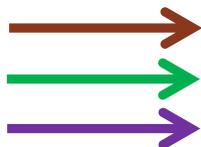
- Could go back down for further findings of fact

Deviations – Course & Scope

It's the employer's burden to prove



- 3 routes that are reasonable between A and B
- Need not be the most direct route



When an employee goes to C, they are deviating from the course and scope their employment



- Once they return, they are back in the course and scope
- Getting lost is not deviating

What happens in...?

- **Parking lots and areas adjacent**
- **Public bus stops**
- **Commuting to and from work**
- **Company carpools**
- **Special or overtime trips**
- **Traveling Employees**



Scenario

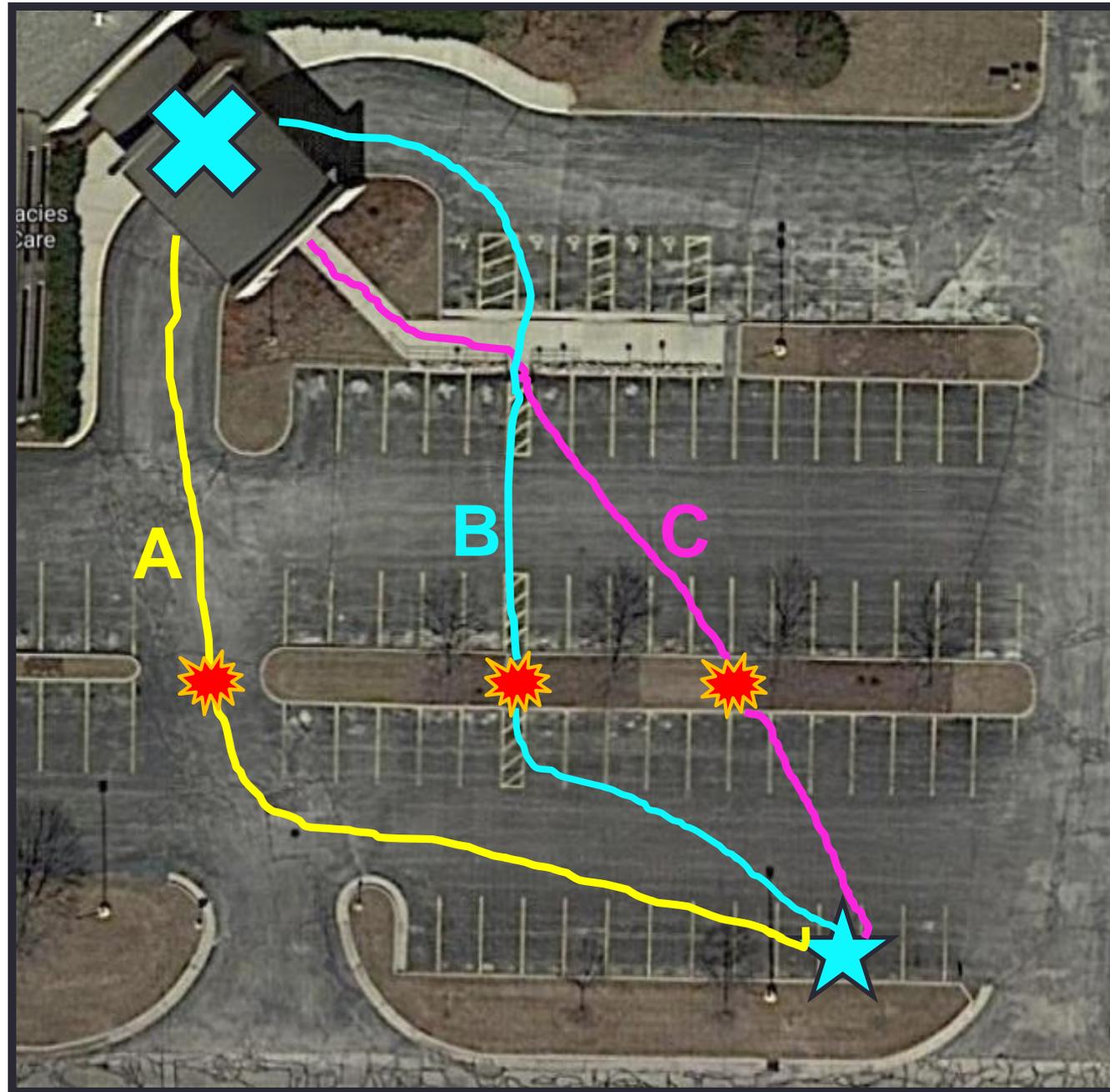
Employees A, B, and C arrive in the same car and park in the spot marked with a blue star.



Each employee takes a different route to the entrance. While walking, each trips and falls where indicated.



Is each considered to be in the course and scope of employment?



“Employee” or “Independent Contractor” 9-Part Test

1. Maintain a separate business
2. Obtain a Federal Employer Identification number from the IRS, or have filed business or self-employment tax returns with the IRS based on the work or service in the previous year.
Not a social security number!!
3. Operate under specific contract
4. Be responsible for operating expenses under the contracts
5. Be responsible for satisfactory performance of the contracts

“Employee” or “Independent Contractor”

6. Be paid per contract, per job, commission or competitive bid
 7. Be subject to profit or loss performing work under the contracts.
 8. Have recurring business liabilities and obligations
 9. Be in a position to succeed or fail if expenses exceed income
- All 9-parts must be met to be an independent contractor for purposes of the Workers Compensation Act
 - You cannot just say you are an independent contractor
 - WKC-13486
 - Status can change in an instant

COVID-19 – Work comp issues

- ***Did the infection arise out of work?***
 - Can the employee prove they were infected at work?
- ***Working from home...course and scope***
 - 3 Indications
 1. The quantity and regularity of work performed at home
 2. The continuing presence of work equipment at home
 3. The special circumstances of the particular employment that make it necessary, and not merely personally convenient, to work at home
 - Note: Not 24 hour coverage

Summary and Key Lessons

- **Get facts quickly after all accidents**
 - Make the correct decision whether a claim is compensable
 - If it's owed, it's owed
 - Unnecessary litigation should be avoided
- **Review your policies and practices**
 - What is usual and customary for your business?
 - What do you condone and are you ok with the risk?
- **Educate**
 - Yourself and those in management positions

Sources

Wisconsin Statutes – Chapter 102

- <https://docs.legis.wisconsin.gov/statutes>
 - Search “102”

Dept. of Workforce Development – Worker Comp Division

- <https://dwd.wisconsin.gov/wc/>

LIRC decisions

- http://lirc.wisconsin.gov/wc_digest.htm#5

R&R Insurance webinars and seminars

Basics of the Wisconsin Worker's Compensation System

➤ <https://www.myknowledgebroker.com/basics-of-wi-work-comp>

When is my employee in the course and scope of employment?

➤ <https://www.myknowledgebroker.com/scopeofemployment>

Work Comp 101 – Managing your MOD

➤ <https://www.myknowledgebroker.com/work-comp-101>

Thank you for your time

Brian Bean, J.D.

**Executive Claims Consultant
R&R Insurance Services, Inc.**

brian.bean@rrins.com

262-953-7176