**COURT OF APPEALS DECISION DATED AND FILED**

**August 16, 2007**

**David R. Schanker**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2006AP1899**

**Cir. Ct. No. 2005CV1741**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**GENERAL MOTORS CORPORATION,**

**PETITIONER-APPELLANT,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION AND DARWIN D. HAWKINSON,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. General Motors Corporation appeals a circuit court order that upheld LIRC's award of worker's compensation benefits to Darwin Hawkinson. We affirm the award for the reasons discussed below.

## BACKGROUND

¶2 Hawkinson began working for General Motors in 1986 and started installing left front doors on vehicles in November of 2002. He testified that he would install up to 600 doors per shift and that frequently the doors would not line up properly, so that he had to use his weight to pull down on them and force them into place. For the first few months on this assignment he experienced what he described as regular aches and pains. On July 14, 2003, however, he began experiencing "more of a burning sensation, it started in my neck and it just progressed down my shoulder and down through my arm."

¶3 The symptoms became worse over the next two days. On July 16, Hawkinson reported the injury to the plant nurse. Two days later, the pain increased to the point where Hawkinson was forced to go to the emergency room for treatment. He saw a doctor the following day, and was referred to Dr. Christopher Sturm, an orthopedic surgeon. Dr. Sturm reviewed an MRI and diagnosed Hawkinson with one herniated disc, one ruptured disc, and one slipped disc. Dr. Sturm eventually performed surgery to replace and fuse these three discs.

¶4 Hawkinson filed a worker's compensation claim, alleging 20% permanent partial disability stemming from either a traumatic injury or occupational exposure or both while working for General Motors. Dr. Strum filled out a WKC16-B report in which he concluded that Hawkinson's work activities directly caused the herniation of one disc and accelerated the spondylosis of another disc beyond normal progression. The ALJ found that, although there was no one specific traumatic incident that caused Hawkinson's condition, Hawkinson's "highly repetitive and strenuous door hanging activities were a

material contributory causative factor in the onset or progression of his cervical spine pathology." LIRC affirmed the ALJ's findings of fact and the resulting permanent partial disability award.

## STANDARD OF REVIEW

¶5 In an appeal of a circuit court decision affirming an administrative agency's ruling, we review the agency's decision, not the circuit court's. ***Target Stores v. LIRC***, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). We do not substitute our judgment for that of the agency's on findings of fact, as long as the agency's factual findings are supported by substantial evidence. WIS. STAT. § 227.57(6). Although we ordinarily review questions of law de novo, we often give agency decisions increasing degrees of deference, from due weight to great weight, to correspond with the agency's expertise. ***Kannenberg v. LIRC***, 213 Wis. 2d 373, 384-85, 571 N.W.2d 165 (Ct. App. 1997). We apply great weight to an agency's determination when that agency has extensive experience and expertise in interpreting and applying the statute at issue. ***Hutchinson Tech., Inc. v. LIRC***, 2004 WI 90, ¶22, 273 Wis. 2d 394, 682 N.W.2d 343. Under that standard, we will uphold an agency's interpretation as long as it is reasonable and not contrary to the statute's clear meaning, even if we find a different interpretation more reasonable. ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996). Because LIRC has been charged with the legislature with administering the worker's compensation program and has considerable expertise in that area, we will ordinarily accord the agency's legal conclusions great deference. We do not need to decide what level of deference might be appropriate here, however, because we would affirm even under de novo review.

## DISCUSSION

¶6 General Motors argues that WIS. STAT. § 102.01(2)(c) requires a worker's compensation claimant to specify whether a claimed injury is either occupational or traumatic in nature, and bars proceeding on alternative potentially inconsistent theories. The Respondents counter that General Motors waived this issue by failing to raise it before the ALJ, although it did raise the issue before LIRC. We need not determine whether General Motors waived this issue, because we conclude that the issue lacks merit.

¶7 WISCONSIN STAT. § 102.01(2) provides definitions for key terms in the worker's compensation act. Paragraph (c) defines "injury" in relevant part as "mental or physical harm to an employee caused by accident or disease." General Motors contends this definition means that a claimed injury must be *either* traumatic (i.e., caused by accident) *or* occupational (i.e., caused by disease), but cannot be caused by both, and further argues that a claimant must choose only one theory under which to proceed. We are not persuaded that this is a reasonable interpretation of the statute.

¶8 We read the "or" in the statute to mean that a claimant may establish an injury under either a traumatic *or* occupational theory, and need not prove both. We see nothing in the plain language of the statute which would bar a claimant from attempting to show that a particular injury could have been caused in one of several ways, or in some circumstances, may even have had more than one cause. Here, for instance, Hawkinson suffered damage to three different discs. The damage to two of the discs was apparently progressive in nature, while the rupture could have happened at one particular point in time. So when the three discs were fused together, either or both traumatic and occupational injuries could be deemed

to have caused the resulting disability. In short, the text of WIS. STAT. § 102.01(2)(c) does not limit a claimant to establish one form of injury to the exclusion of the other.

¶9 In addition, even if we were to assume that Hawkinson's theories on what caused his injuries were in some manner inconsistent, General Motors provides no authority to support its position that worker's compensation claims cannot be made in the alternative, and we are aware of none. The practice of alternative pleading has long been accepted in circuit courts, and General Motors has provided no authority or logical reason why it should not apply in administrative proceedings as well.

¶10 General Motors next claims that it was denied its due process right to a fair hearing because it was not made seasonably aware of the theory of injury under which Hawkinson was proceeding. A fair administrative hearing requires that a party be made aware of the claims asserted with sufficient notice to be able to meet them with competent evidence and address the probative force of all the evidence under the applicable law. ***Theodore Fleisner, Inc. v. DILHR***, 65 Wis. 2d 317, 326, 222 N.W.2d 600 (1974). The record here shows that Hawkinson set forth both theories of injury in his initial claim; General Motors did not object when the ALJ presented both theories as matters to be decided at the hearing; and General Motors' expert was prepared to discuss both theories. In short, we are satisfied that General Motors had a fair opportunity to defend against both of Hawkinson's theories of injury and see no due process violation.

¶11 Finally, General Motors contends that LIRC improperly required it to carry the burden of proof, and that there was no credible and substantial evidence to support LIRC's determination that Hawkinson suffered from an

occupational disease. General Motors relies on a statement that "the evidence does not establish that the applicant had any other injuries to account for the onset of his symptoms" to support both propositions. It further points out that there were some inconsistencies between Dr. Strum's initial report and his final report.

¶12 We again find General Motors' arguments unpersuasive. The fact that LIRC found insufficient evidence to support the occurrence of a traumatic injury does not lead to the conclusion that it was relieving Hawkinson of the burden to show that he had suffered an occupational injury. In considering whether Hawkinson had met his burden, LIRC was entitled to make credibility determinations and resolve any discrepancies in the evidence. Hawkinson's testimony explaining his repeated struggles to properly align doors over a period of months and the escalation of his symptoms during his last week of work, in conjunction with Dr. Strum's initial report concluding that Hawkinson's employment was a material contributory factor to his disc problems, were sufficient to support LIRC's decision.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.