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PREHEARING DISCOVERY UNDER WISCONSIN’S WORKER’S COMPENSATION ACT: A REVIEW AND CRITIQUE

LAWRENCE ALAN TOWERS*

The value of a successful permanent total disability action averaged $265,548 in 1983. Yet, under the Wisconsin Worker’s Compensation Act, almost no party-initiated pre-hearing discovery is permitted. As a consequence, counsel for the employee and employer enter hearings with almost no information respecting the other’s position. Unfocused hearings and unjust decisions are too frequently the result.

This article will examine the existing discovery rules and policy underpinnings of Wisconsin’s Worker’s Compensation Act; it will explore the problems attendant to these discovery rules and examine some recurring examples of each; and finally, this article will suggest ways of modifying the existing discovery rules to permit more party-initiated discovery thereby remedying these problems while maintaining consonance with the Act’s policy underpinnings.

I. WISCONSIN’S WORKER’S COMPENSATION ACT

A. Introduction.

In enacting the Worker’s Compensation Act, Wisconsin’s legislators sought to expedite the process from initial applica-
tion through hearing and award. Since "fault" is not at issue under the Worker's Compensation Act, and thus, facts going to the issue of negligence need not be discovered and litigated, it was thought that simplification of the procedures parties use to prepare for hearing would expedite worker's compensation actions. In this manner, the drafters of Wisconsin's Worker's Compensation Act sought to provide compensation to injured workers and their dependents by a method as simple and summary as was consistent with the protection of the interests of all parties.

Of course, while expediency is a worthy objective, the Act must also comply with the due process requirements of a full hearing and fair play. In *Theodore Fleisner, Inc. v. Department of Industry, Labor and Human Relations*, the Wisconsin Supreme Court held that a worker's compensation hearing, in order to comply with the requisites of due process, must afford procedural protections of (1) the right of each party to seasonably know the charges or claims proffered; (2) the right of each party to meet such charges or claims by competent evidence; and (3) the right to be heard by counsel upon

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   In *Borgnis v. Falk Co.*, 147 Wis. 327, 337, 133 N.W. 209, 211 (1911), the Wisconsin Supreme Court commented on the purpose of the newly-created "Workmen's Compensation Act":
   It has endeavored by this law to provide a way by which employer and employed may, if they so choose, escape entirely from the very troublesome and economically absurd luxury known as personal injury litigation, and resort to a system by which every employee not guilty of willful misconduct may receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules, without a lawsuit and without friction.
5. See *Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 183, 290 N.W.2d 276, 281 (1980).
6. See *Borgnis v. Falk*, 147 Wis. at 337, 133 N.W. at 211.
7. Speelmon Elevated Tank Serv. v. Indus. Comm'n, 2 Wis. 2d 181, 185, 85 N.W.2d 834, 836 (1957).
9. It is not contended that failure to provide prehearing discovery procedures violates due process. This does not appear to be open to dispute. See *Starr v. Comm'r*, 226 F.2d 721, 722 (7th Cir. 1955), *cert. denied* 350 U.S. 993 (1959). But see infra notes 77-82 and accompanying text.
the probative force of the evidence and upon the law applicable thereto.\textsuperscript{11}

Thus, Wisconsin's Worker's Compensation Act, like all worker's compensation laws, seeks to "strike[e] a balance between relaxation of rules to prevent injustice and retention of rules to ensure orderly decision making and protection of fundamental rights."\textsuperscript{12} Prehearing discovery provisions under the Act evidence the dynamic nature of this quest for such a balance.

\textbf{B. Prehearing Discovery Rules Under Wisconsin's Worker's Compensation Act.}

The Worker's Compensation Act provides the Department of Industry, Labor and Human Relations ("DILHR") with the authority to conduct prehearing discovery through vehicles that are as varied and broad in scope as those designed for civil actions under the Wisconsin and Federal Rules of Civil Procedure.\textsuperscript{13}

As in a civil action, a pleading is filed and served to commence a worker's compensation action. This pleading, called an Application for Hearing and made on a form prescribed by DILHR,\textsuperscript{14} supplies information respecting "the general nature of any claim as to which any dispute or controversy may have arisen. . . ."\textsuperscript{15} However, since the applicant, at this point, has already provided the employer with the statutory notice of injury,\textsuperscript{16} including at minimum information pertaining to the nature, timing and location of the injury,\textsuperscript{17} the information

\begin{footnotesize}
\begin{enumerate}
\item Fleisner, 65 Wis. 2d 317, 326, 222 N.W.2d 600, 606 (1974).
\item 3 Larson, Workmen's Compensation Law § 77A.83 (1952).
\item Applicants are to use DILHR form WC-7.
\item Wis. Stat. § 102.17(1)(a) (1983-84).
\item Wis. Stat. § 102.12 (1983-84) requires an employee who sustains a work-related injury to give notice to his employer.
\item Prior to filing the application, the employee is required to give the employer "Notice of Injury", which must include the fact of the injury, the nature of the disability, and the relationship of the disability to the employment. See Wis. Stat. § 102.12 (1983-84); Glancy Malleable Iron Co. v. Indus. Comm'n, 216 Wis. 615, 620, 258 N.W. 445, 448 (1935).
\item According to W. Casualty & Sur. Co. v. Indus. Comm'n, 24 Wis. 2d 439, 442-43, 129 N.W.2d 127, 130 (1964), "actual notice of injury" need be no more than a declaration made to the employer that an injury occurred under circumstances that would apprise the employer that it arose out of and was incidental to his employment.
\end{enumerate}
\end{footnotesize}
provided in the Application appears more for the benefit of DILHR than for the employer.\textsuperscript{18}

The employer, in turn, files an Answer to Application, on a form provided by DILHR;\textsuperscript{19} the Answer places in issue those allegations which the employer disputes.\textsuperscript{20} Inasmuch as the employer, prior to this step in the procedure, has denied voluntarily approving payment for the alleged injury,\textsuperscript{21} the key aspects of its position, as set forth in its Answer to Application, should be of no surprise to the applicant. Again, the Answer to Application appears more for the benefit of DILHR than for the applicant.

Section 102.17 of the Wisconsin Statutes is the repository of most of the Act's prehearing discovery rules and procedures. Section 102.17(1)(e) provides:

The department may, with or without notice to either party, cause testimony to be taken, or an inspection of the premises where the injury occurred to be made, or the time books and payrolls of the employer to be examined by any examiner, and may direct any employee claiming compensation to be examined by a physician, chiropractor or podiatrist. The testimony so taken, and the results of any such inspection or examination, shall be reported to the department for its consideration upon final hearing. All ex parte testimony taken by the department shall be reduced to writing and either party shall have the opportunity to rebut such testimony on final hearing.

Thus, throughout the pendency of the action, DILHR is granted the power to conduct almost all modes of civil discovery,\textsuperscript{22} including depositions of parties or witnesses, the pro-

\textsuperscript{18} See Balczewski v. DILHR, 76 Wis. 2d 487, 490, 251 N.W.2d 794, 796 (1977) (employer "apparently failed to recognize the legal theory upon which the claimant proceeded" because "the claimant did not identify the theory of her claim with particularity"). See also Bituminous Casualty Co. v. DILHR, 97 Wis. 2d 730, 734-35, 295 N.W.2d 183, 187 (Ct. App. 1980) (employer even had the benefit of a prehearing brief filed by the applicant).

\textsuperscript{19} Employers are to use DILHR form WC-19.

\textsuperscript{20} Wis. ADMIN. CODE § IND 80.05(2) (1982).

\textsuperscript{21} An employer is always free to stipulate to liability and file a written stipulation with DILHR. Wis. STAT. § 102.16(1) (1983-84). See also, Levitan, Practice Before the Industrial Commission, 1950 Wis. L. REV. 252.

\textsuperscript{22} Indeed, DILHR has one valuable power that reaches much farther than the powers granted private civil litigants. Wis. STAT. § 102.17(1)(g) (1983-84) provides:
duction of documents and things and entry upon land,23 and the medical examination of the applicant by a medical expert of DILHR's choice.24 Significantly, DILHR has the authority to conduct such discovery ex parte.25

Whenever the testimony presented at any hearing indicates a dispute, or is such as to create doubt as to the extent or cause of disability or death, the department may direct that the injured employe be examined or an autopsy be performed, or an opinion of a physician, chiropractor or podiatrist be obtained without examination or autopsy, by an impartial, competent physician, chiropractor or podiatrist designated by the department who is not under contract with or regularly employed by a compensation insurance carrier or self-insured employer. The expense of such examination shall be paid by the employer. The report of such examination shall be transmitted in writing to the department and a copy thereof shall be furnished by the department to each party, who shall have an opportunity to rebut such report on further hearing.

Thus, DILHR also has the power to conduct discovery after the conclusion of the hearing. This power also extends to ordering post-hearing autopsies where the cause of death is in dispute. See Wis. Stat. § 102.17(1)(c) (1983-84).

23. Wis. Stat. § 102.17(1)(h) (1983-84) permits DILHR to employ and utilize industrial safety specialists to investigate alleged safety violations on an employer's premises:

The contents of certified reports of investigation, made by industrial safety specialists who are employed by the department and available for cross-examination, served upon the parties 15 days prior to hearing, shall constitute prima facie evidence as to matter contained therein.

24. Wis. Stat. § 102.13(3) (1983-84) grants DILHR the authority to hire a medical expert to examine the applicant in order to decide an existing disparity between opinions of the applicant's and employer's medical experts:

If 2 or more physicians, chiropractors or podiatrists disagree as to the extent of an injured employe's temporary disability, the end of an employee's healing period or an employe's ability to return to work at suitable available employment, the department may appoint another physician, chiropractor or podiatrist to examine the employe and render an opinion as soon as possible. The department shall promptly notify the parties of this appointment. The employer or its insurance carrier or both shall pay for the examination and opinion.

25. Professor Larson underscores the due process dangers of such an ex parte procedure:

The basic right to confront, cross-examine and refute must be respected. . . . Under the increasingly common practice of referral of claimant to an official medical examiner or an independent physician chosen by the commission, it is particularly important that commissions not lose sight of the elementary requirement that the parties be given an opportunity to see such a doctor's report, cross-examine him, and if necessary provide rebuttal testimony.

LARSON, supra note 12, at § 79.63.

Of course, Wisconsin procedure would permit such cross-examination of a subpoenaed witness at hearing. However, such action would unnecessarily multiply the pro-
DILHR is also granted power to conduct a prehearing conference, much like a pretrial conference in civil litigation, where "the clarification of issues, the joining of additional parties, the necessity or desirability of amendments to pleadings, the obtaining of admissions of fact or of documents, records, reports, and bills which may avoid unnecessary proof and such other matters as may aid in disposition of the dispute or controversy" may be considered. Upon conclusion of the prehearing conference, the hearing examiner is empowered to order "disclosure or exchange of any information or written material which it considers material to the timely and orderly disposition of the dispute or controversy." While DILHR is granted authority to conduct prehearing discovery almost as broad as that granted parties in civil litigation, the parties themselves can do little more than request that DILHR conduct such discovery.

Three exceptions exist to this rule that parties cannot conduct discovery independent of DILHR. First, Section 102.13(1) of the Wisconsin Statutes requires an applicant to submit to a medical examination by a medical expert of the employer's choice. Second, Section 102.13(2) creates a statutory waiver of the applicant's physician-patient privilege of confidentiality with respect to his medical history upon the proceedings—which is antithetical to the Act's expediency purpose. Moreover, the parties would have no time to develop rebuttal testimony. This ex parte procedure, and the concern that due process be complied with, has existed for a long time. See Int'l Harvester v. Indus. Comm'n, 157 Wis. 167, 147 N.W. 53 (1914).

28. Id.
30. See infra notes 77-82 and accompanying text.
31. Wis. Stat. § 102.13(1) (1983-84) provides, in relevant part:

Except as provided in sub. (4), whenever compensation is claimed by an employee, the employee shall, upon the written request of the employer's employee, submit to reasonable examination by a physician, chiropractor or podiatrist, provided and paid for by the employer, and shall submit to examination by any physician, chiropractor or podiatrist selected by the commission or an examiner...

The remainder of § 102.13(1) provides for the conditions upon which an employer can conduct such a medical examination and the sanctions available where the applicant resists or obstructs such medical examination.
filing of an Application, and thereby permits the employer, among others, to discover the applicant's medical file. Third, under very limited conditions, a party is allowed to conduct prehearing depositions of witnesses (party or non-party). Essentially, depositions of witnesses can be conducted and utilized only when it is apparent that the witness will not otherwise be available for the hearing. However, these prehearing depositions are not discovery depositions but serve instead to preserve testimony for the hearing. Therefore, the scope of prehearing depositions is more narrow than the scope of discovery depositions, as it is limited to admissible evidence.

C. Policy Underpinnings of These Discovery Rules.

The aforedescribed discovery tools are many and varied. Indeed, they generally parallel in quantity and kind those available to civil litigants under the Wisconsin and Federal

32. See also Analysis by the Legislative Reference Bureau, 1981 Senate Bill 625.
33. Wis. Stat. § 102.13(2) (1983-84) reads:
   An employee who reports an injury alleged to be work-related or files an application for hearing waives any physician-patient privilege. Notwithstanding sec. 51.30 and sec. 146.82 and any other law, any physician, chiropractor, podiatrist, hospital or health care provider shall, within a reasonable time after written request by the employee, employer, worker's compensation insurer or department or its representative, provide that person with any information or written material reasonably related to any injury for which the employee claims compensation.
34. Wis. Admin. Code § IND 80.21 (1982) permits DILHR to distribute the applicant's medical reports to the employer:
   “Upon the request of the department, any party in interest to a claim under ch. 102, Stats., shall furnish to the department and to all parties in interest copies of all reports by practitioners and expert witnesses in their possession or procurable by them.”
35. Wis. Admin. Code § IND 80.11 (1982) makes this explicit: “Depositions may be taken and used in any hearing only in accordance with § 102.17(1)(f), Stats. These depositions shall be taken in the same manner as in courts of record. Depositions for the purpose of discovery are specifically prohibited.” Id. (emphasis added).
Civil Rules of Procedure. However, these discovery tools are rarely used. This fact is undoubtedly due in part to the fact that except in limited circumstances, prehearing discovery is conducted by DILHR rather than the parties.

In civil litigation, discovery may be initiated by a party without judicial intervention. Judicial intervention occurs only when disputes arise concerning the proper scope of discovery under the existing circumstances. Thus, in civil litigation, the court acts as a policeman.

In Wisconsin worker's compensation litigation, however, discovery is channelled through, controlled by, and generally even implemented by DILHR. Moreover, in most cases the initial decision as to whether or not discovery will occur must be made by DILHR rather than by the parties. Indeed, DILHR is given great latitude in determining if, when and how much discovery takes place in any particular action. The only limiting considerations are those demanded by due process. Thus, under the Act, DILHR acts as a gatekeeper rather than as a policeman.

This worker's compensation procedure, it is thought, prevents conflict thereby avoiding the protraction of proceedings that discovery disputes can create. Collateral benefits reduce financial and time burdens on the parties, preserve DILHR's scarce resources since it does not have to preside over discovery hearings, and reduce reversible errors founded upon incorrect discovery decisions. Thus, the Act's discovery procedure has at least four integral objectives: (1) prevention of discovery abuse; (2) expedition of the proceedings; (3) pres-

36. See supra note 29.
37. See, e.g., Wis. Stat. § 804.01(1) (1983-84); Fed. R. Civ. P. 26(a), (b)(1).
38. See, e.g., Wis. Stat. § 804.01(2), (3); Fed. R. Civ. P. 26(b)(1).
39. Wis. Stat. § 102.17(1)(b), (e) (1983-84) are the best examples of this.
40. Id.
41. See supra notes 13-25 and accompanying text.
42. See Bituminous Casualty Co. v. DILHR, 97 Wis. 2d 730, 295 N.W.2d 183 (Ct. App. 1980).
43. See Borgnis v. Falk Co. 147 Wis. 327, 337, 133 N.W. 209, 211 (1911).
44. DILHR employs 14 hearing examiners to conduct approximately 3,791 hearings annually. Thus, each hearing examiner averages 271 hearings per year. U.S. Department of Labor, Employment Standards Administration, State Worker's Compensation: Administration Profiles, 344 (Sept., 1983).
ervation of DILHR's financial and personnel resources; and (4) reduction of financial and time burdens on the parties.

Whether the Act's discovery rules advance these objectives better than civil discovery procedures do is open to debate. However, even if they do, it is necessary to ask whether the cost is too high. Moreover, if there is a substantial price to be paid for the advancement of these objectives, a further question arises: Is there a more efficient, less problematic procedure that will advance these objectives yet not demand such a high price? This concern was expressed by Professor Larson:

[T]he theme pervading much of the adjectival law of workmen's compensation is the necessity of striking a balance between relaxation of rules to prevent injustice and retention of rules to ensure orderly decision making and protection of fundamental rights.45

Wisconsin's ongoing, evolutionary effort to find the optimal balance between procedural simplicity and substantive fairness is evident in the changes the Act has incorporated over the years. In 1911, when the Act was first created, there was essentially no prehearing discovery.46 In 1931, the Act was amended to permit DILHR47 to depose the parties, inspect the employer's premises, inspect the employer's books, and direct the employee to submit to a medical examination.48 In 1943, the Act was amended to permit DILHR to appoint an independent expert to investigate the cause of death.49 In 1949, the Act was amended to permit the employer to medically examine the employee50 and to permit either party to depose those witnesses who are beyond the reach of DILHR's subpoena.51 In 1961, the Act was amended to permit either party to conduct depositions to preserve evidence for hearing when the witness will likely be unavailable for the hearing.52

In 1971, the Act was amended to permit DILHR to investi-

45. LARSON, supra note 12 at § 77A.83.
46. See 1911 Wis. Laws 50.
47. Prior to 1931, DILHR was called the Industrial Commission. However, in the interest of simplicity, DILHR is being uniformly used throughout this article.
48. See 1931 Wis. Laws 413 §§ 1(b), (c).
49. See 1943 Wis. Laws 270 §§ 12, 14.
51. See 1949 Wis. Laws 107 § 5.
52. See 1961 Wis. Laws 621 § 24.
gate alleged safety violations. In 1977, the Act was amended to create a prehearing conference where issues are to be clarified and refined, possible admissions of fact are explored and stipulations respecting documentary evidence may be procured. In 1979, the Act was amended to permit either party to subpoena documents for the hearing. In 1981, the Act was amended to permit DILHR to order further disclosure of information following the prehearing conference. This amendment also permitted the parties to utilize, at hearing, reports respecting loss of earning capacity.

These amendments of the Act illustrate an evolutionary process whereby prehearing discovery rules are being expanded while DILHR retains ultimate gatekeeping authority. It is noteworthy that since the Act was created, the legislature has never chosen to contract rather than expand such prehearing discovery procedures.

D. Problems Attendant to Prehearing Discovery Rules.

Even as the scope of prehearing discovery has been expanded over the years, the existing limitations on prehearing discovery may still operate to interfere with the administration of justice and the promotion of just results. An examination of various worker's compensation cases reveals four conceptual categories of deficiencies attributable to lack of adequate methods of prehearing discovery. First, misinformation and misassumption of facts may account for failures of proof at hearing. Second, substantial disparities between pleadings and proof, never corrected during the course of prehearing discovery, may cause preclusion at hearing of theories of recovery and defenses to recovery. Third, lack of discovery vehicles may interfere with a party's preparation of its case. Fourth, lack of discovery vehicles prevents discovery of valuable information which might otherwise affect the outcome of the hearing.

55. See 1979 Wis. Laws 278 § 8.
57. Id.
58. To maximize the illustrative impact, cases from all jurisdictions have been utilized.
It is the thesis of this article that modification of the Act to permit more party-initiated prehearing discovery will avoid most of these problems and better serve the objectives of the Act.

1. Misinformation and misassumption respecting critical facts.

Misinformation and misassumptions respecting critical facts can prove disastrous at hearing. Although information respecting the applicant’s wages, job history and job demands is usually within the applicant’s knowledge, often an applicant’s recollection or understanding of these facts is inaccurate. Without prehearing discovery, an applicant has no way of correcting such misinformation or misassumption respecting critical facts.

Two illustrations of this problem come from this writer’s own trial experience. In a recent worker’s compensation action, *Eckert v. Armour Food Company*, Eckert alleged in his compensation application that the maximum wage he earned at Armour was $20,000 per year (which was not placed in issue by Armour’s answer). Eckert gave the same earnings figure to Armour’s vocational expert. However, apparently in response to his own vocational expert’s more specific questioning, Eckert revealed that he made an additional $6,000 per year by pocketing the $125.00 per week provided him by Armour to hire someone to help load and unload his truck. At the hearing, the examiner ruled that Eckert was bound by the lower earnings figure because, to hold otherwise, would unfairly surprise Armour (and Armour’s vocational expert). Consequently, Eckert’s vocational expert was required at hearing to adjust his wage impairment opinion downward by approximately twenty-five percent — an immediate loss to Eckert of almost $6,000. If Armour would have had the opportunity to depose Eckert or his vocational expert prior to the hearing, the “unfair surprise” argument would not have prevailed.

An applicant’s misinformation respecting the physical demands of her job worked an even more disastrous result in

Olson v. Armour Food Company. In this case, Olson alleged she was permanently and totally disabled due to debilitating back and shoulder pain caused by repeated heavy lifting at work. Olson told both her treating physician-medical expert and Armour's medical expert that her meat packing jobs required her to lift 60 pounds at shoulder level. Apparently, Olson was misinformed or confused as to the physical demands of her several jobs since they actually required her to lift no more than 25 pounds at shoulder level although she did have to lift as much as 60 pounds at waist level. At the hearing, evidence of this substantial factual inaccuracy underlying the medical expert's opinion was offered. Consequently, the hearing examiner determined that this expert's opinion was fatally flawed. As a result, Olson's claim of permanent total disability was denied in its entirety.

Disparities between an applicant's description to a medical expert of work demands and actual work demands appear to be common in worker's compensation actions. Moreover, if an expert is not at the hearing to revise an opinion based on misinformation, the hearing examiner is left with no alternative but to strike the opinion, thus working a possible injustice.

In many cases, an employer's better access to the applicant's work history creates an unfair advantage at hearing. The Olson v. Armour Food Company case serves as a good illustration of this as well. The theory of Olson's case was

60. Hearing Nos. 81-47796, 81-45979, 81-24182 (March 22, 1984), aff'd, August 24, 1984 (unreported).
61. See also, Erickson v. DILHR, 49 Wis. 2d 114, 126, 181 N.W.2d 495, 500-01 (1970); Davis v. Indus. Comm'n, 22 Wis. 2d 674, 679, 126 N.W.2d 611, 613-14 (1964); Ostrowieoki v. Maynard Steel Corp., Hearing No. 80-52267 (May 12, 1982). Similarly, employers' counsel attempt to undermine a medical opinion by establishing the inaccuracy of facts respecting the cause of the injury as assumed by the medical expert. See, e.g., Soper v. Indus. Comm'n, 5 Wis. 2d 570, 574, 93 N.W.2d 329, 331 (1958); Pressed Steel Tank Co. v. Indus. Comm'n 255 Wis. 333, 336, 38 N.W.2d 354, 355 (1949).
62. Pressed Steel Tank Co., 255 Wis. at 334, 38 N.W.2d at 355; Scott v. A.O. Smith Corp., Hearing No. 81-05936 (Nov. 19, 1982).
63. In Lucas v. Phillip Lithographing Company, Hearing No. 391-34-6264 (Jan. 21, 1983) and Udelhofen v. Midwest Protein, Inc., Hearing No. 81-40109 (Dec. 13, 1982) both refusal to rehire actions, the employers' knowledge of the applicants' work histories proved valuable in rebutting the applicants' charges that they were illegally refused re-employment.
64. Hearing Nos. 81-47796, 81-45979, 81-24182 (March 22, 1984), aff'd, Aug. 24, 1984 (unreported).
that repeated heavy lifting caused her disability. However, Olson's sketchy recent work history, because of vacations, layoffs and illnesses, belied this fact. Since Olson, her attorney and her experts were not privy to her attendance record, they were not prepared to explain it in a manner consistent with their theory. Instead, this fact undoubtedly encouraged the hearing examiner to reject her claim in its entirety.

2. Disparity between pleading and proof.

There are countless examples where a party's pleading varies so substantially from his proof at hearing that the proof is precluded and an otherwise viable theory of recovery or defense is lost. Of course, Wisconsin's Worker's Compensation Act evinces a strong policy against dismissal of actions or theories of recovery or defense where there are technical defects in the pleadings or in the proceedings. However, if the variance between pleading and proof is so great that the party is prejudiced by the unfair surprise of having to deal at the hearing with a theory entirely different than the one pleaded, the variance may be deemed fatal. The struggle is between expediency and due process:

The whole idea is to get away from the cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. On the other hand, as every lawyer knows, there is a point beyond which the sweeping-aside of "technicalities" cannot go, since evidentiary and procedural rules usually have an irreducible hard core of necessary function that cannot be dispensed within an orderly investigation of the merits of the case. The question that constantly recurs in a survey of the procedural side of workmen's compensation is whether, in any particular case involving a loss of benefits for procedural reasons under an otherwise meritorious claim, the indispensibility of the procedural purpose so served outweighs the thwarting of the protective functions of the act.

65. Cruz v. DILHR, 81 Wis. 2d 442, 450, 260 N.W.2d 692, 695 (1978). See also Int'l Harvester v. Indus. Comm'n, 157 Wis. 167, 147 N.W. 53 (1914); LARSON, supra note 12, at § 77A.45.

66. Id.

67. LARSON, supra note 12, at § 77A.10.
A few cases illustrate the risks attendant to this problem. In *Sun Control Tile Company v. Industrial Commission*, 68 the applicant’s pleading alleged an industrially-related knee injury. However, as the preparation of the case progressed, and as a direct consequence of his knee injury, the applicant developed a back injury as well. Since respondent-employer was not apprised of this fact prior to the hearing, the Commission disallowed evidence on this “new” claim:

> We think it would be violative of the most fundamental concepts of due process to allow a claimant to litigate an entirely new injury, even one which is a consequence of a previous injury, without giving the carrier meaningful notice. 69

Employers, too, are subject to this problem. In *Hannigan v. Goldfarb, t/a 20th Century Cab*, 70 the applicant was killed while driving a cab for his employer, 20th Century Cab. Without having pleaded intoxication as an affirmative defense, 71 the employer attempted to offer such proof at the hearing. The New Jersey court affirmed the Commission’s preclusion of such proof, stating in pertinent part:

> Here, however, the petitioner had no warning of the defense of intoxication until the proceedings were one short step to completion, 17 months after the accident and seven months after the petition was filed. . . . Upon near completion of its defense, a party, albeit a party in a workmen’s compensation court where niceties of pleadings have never been required, who has proceeded throughout on one issue, will not be permitted to then suddenly present a totally new attack. 72

In *Gallagher v. Industrial Commission*, 73 the Commission appointed Dr. Eichman, a neurologist, to examine the applicant. It was Dr. Eichman’s opinion that the applicant suf-

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69. *Id.* at 271, 571 P.2d at 1066 (1977). *See also* Munroe Memorial Hospital v. Thompson, 388 So. 2d 1338, 1339 (Fla. Dist. Ct. App. 1980), where the applicant pleaded a back injury and attempted to prove a knee injury as well. As in *Sun Control Tile*, this “new” claim was disallowed based on due process.
71. In its answer, 20th Century Cab only generally denied that the accident was employment related. *Id.* at 262, 150 A.2d at 517.
72. *Id.* at 263, 150 A.2d at 518.
73. 9 Wis. 2d 361, 101 N.W.2d 72 (1960).
fered from an industrially-related conversion hysteria injury. However, the applicant’s pleading and proof only included physical injury to her right hip and ankle. Thus, the Commission, and the reviewing court, rejected any theory of injury based on Dr. Eichman’s testimony: “There was no issue of fact created by the pleadings on conversion hysteria, nor was the case tried on that theory.”

The significance of this outcome seems to be that unless the parties are privy to all discovery that DILHR conducts, and the pleadings are amended to incorporate such discovery, a critical theory of recovery or defense could be lost. Merely providing that DILHR must give each party a summary report of such discovery may well prove insufficient.

Thus, as the cases discussed above indicate, although DILHR reserves the right to conduct discovery and uncover the truth of the case, it is arguable that unless a party pleads the theory that DILHR discovers, such theory is subject to preclusion at hearing. This problem is further complicated by the fact that DILHR can conduct such discovery *ex parte*.

3. Lack of discovery interfering with a party’s ability to prosecute or defend.

Lack of opportunity to conduct discovery can even deprive a party of his constitutional right to a fair hearing. *Bituminous Casualty Company v. DILHR* provides a graphic illustration of the due process ramifications of such prohibitions on prehearing discovery. In *Bituminous Casualty Company*, the applicant, John Gibson, had previously been compensated for a two percent permanent disability. Gibson then applied for additional compensation and his employer, N.M. Isabella,

74. In *Int'l Harvester v. Indus. Comm'n*, 157 Wis. 167, 173, 147 N.W. 53, 56 (1914), the Industrial Commission, having conducted *ex parte* discovery, commented: The statute carefully provided for one full and fair hearing on the merits. This necessarily included the right on the part of both parties to know what the [Commission’s *ex parte*] testimony taken without notice tended to prove. Otherwise it could not be met, no matter how successfully the party against whom it operated might meet it, if he knew what it was . . . . [It] would be a much more serious and prejudicial error to decide an important controversy on evidence which the defeated party did not and could not know of.

75. *Id.* at 368, 101 N.W.2d at 76.


77. 97 Wis. 2d 730, 295 N.W.2d 183 (Ct. App. 1980).
Marquette Law Review, Inc., denied the additional liability stating that it had no information to justify further compensation. Pursuant to a controlling provision of the Wisconsin Administrative Code, Isabella then requested that DILHR order the exchange of medical information. DILHR denied Isabella's request for Gibson's medical information presumably because evaluation of the need for such medical information could be accomplished at the prehearing conference. However, the prehearing conference was never held. A DILHR hearing examiner then told Isabella that if evidence was presented at the hearing that constituted a claim substantially beyond what Isabella could have reasonably anticipated, a further hearing "presumably" would be permitted.

At the hearing, Gibson placed in evidence medical testimony of a two or three percent disability and vocational testimony of a fifty percent wage impairment. Based on this new vocational testimony, Isabella requested a further hearing in which to offer rebuttal vocational evidence. DILHR denied this request and entered an award of fifty percent permanent disability.

The appellate court found that DILHR's refusal to permit Isabella to procure current information regarding Gibson's claim, to know the identity of Gibson's witnesses, and to know the true nature of Gibson's claim prior to the hearing, constituted a denial of Isabella's due process rights to seasonably know the claim against it and to meet the claim with competent evidence. The holding necessitated another hearing.

78. See supra note 32.
79. 97 Wis. 2d at 732-33, 295 N.W.2d at 185.
80. Id.
81. 97 Wis. 2d at 734-35, 295 N.W.2d at 186. The appellate court held that an employer has a due process right to know the identity of the applicant's witnesses and vocational evidence prior to the time it presents its rebuttal evidence either through prehearing disclosure or a further hearing. Yet, there are no procedural guarantees that such information will be granted to an employer. Currently, there are no procedural rules requiring exchange of non-medical information. Bituminous Casualty Co., 97 Wis. 2d at 741 n. 1, 285 N.W.2d at 189 n. 1, (Gartzke, J., dissenting) makes it clear that Wis. Admin. Code § IND 80.21 does not require such disclosure. Moreover, whether to hold a prehearing conference, at which the exchange of witnesses and non-medical information might be ordered, is discretionary with DILHR. (Wis. Stat. § 102.17(1)(b) (1983-84) provides that DILHR "may" direct the parties to appear at a prehearing conference). Accordingly, the present state of the rules of procedure may well lead to
4. Facts never known because of lack of discovery.

Without methods of prehearing discovery available to a party, it can never be known for certain what information was available to bolster the case. It is certainly conceivable that many cases end in a result contrary to the just result because of a lack of information available to the losing party. For instance, in *Allis-Chalmers Manufacturing Company v. Industrial Commission,* the applicant applied for and received unemployment compensation benefits based on an injury that later became the subject of a worker's compensation action. In the unemployment compensation application, the applicant attested that he was ready and able to work; while, in the workmen's compensation action, he alleged that he was disabled and unable to work. The Commission permitted this admission against interest, denied compensation, and the reviewing court affirmed. Had this information not been discoverable by the employer, the result in this case may well have been different.

These examples are not intended to be an all-encompassing list of problems due to the lack of party-initiated discovery under the Act. However, they do serve as illustrations of problems that lead to unfocused and unfair hearings, the need for further hearings, with concomitant further delays and expense, in order to comply with due process.

82. 97 Wis. 2d at 734-35, 295 N.W.2d at 186.
83. 23 Ill. 2d 497, 179 N.E.2d 1 (1962).
84. *Id.* at 499-500, 179 N.E.2d at 2-3. The applicant also applied for and received disability pay from a company fund designed to compensate for non-industrial injuries. The applicant, on his application for these benefits, told an investigator he had incurred no recent industrial injury. This evidence, too, was admitted. Of course, such a company funded disability policy would be within the employer's knowledge. However, with the recent growth in private insurance companies providing such disability policies, such information would not be available to an employer without a change in the Act's discovery rules.
85. In a similar case, *United States Steel Corp. v. Industrial Commission,* 8 Ill. 2d 407, 413-14, 134 N.E.2d 307, 310 (1956), the Illinois Supreme Court implied the importance of such admissions against interests. "Obviously statements in formal written documents [claims for benefits for non industrial injuries] cannot be tendered at face value for the purpose of obtaining benefits and then lightly explained away when they stand in the way of claims for [worker's compensation] benefits of an inconsistent nature."
86. *See also* Johnson v. Quality Aluminum Casting Co., Hearings Nos. 81-30777, 81-30778 (Feb. 18, 1983) (hearing examiners noted the applicant's application for unemployment benefits in denying worker's compensation).
II. PROPOSED IMPROVEMENTS TO THE EXISTING DISCOVERY RULES UNDER WISCONSIN'S WORKER'S COMPENSATION ACT

Historically, civil litigation was said to culminate in "trial by ambush." 87 This condition existed primarily because of the lack of sufficient methods of discovering the opponent's case prior to trial. 88 Lack of information and misinformation often worked unjust results. With adoption of liberal discovery rules for civil litigation, parties now have ample methods and opportunity to educate themselves prior to trial. Indeed, trial often enlightens only the fact finder. In this manner, liberal discovery rules promote just results.

Discovery rules serve another important purpose as well. In addition to permitting a party to discover the factual and legal position of the opposing party, discovery assists parties and the court to define and narrow the disputed factual 89 and legal 90 issues in advance of trial. Thus, if discovery rules are properly employed, discovery can expedite rather than protract proceedings. 91 Similarly, party-initiated prehearing discovery can serve to increase fairness and expediency in worker's compensation actions as well. Of course, while DILHR has the authority to conduct all modes of discovery on behalf of the parties, it is safe to assume, at least in many cases, that its discovery is not as thorough as would be made by a private litigant. 92

88. See id.
90. Id.
92. In Knob v. Copeland Refrigeration Corp., 118 Ohio App. 324, 194 N.E.2d 599 (1963), the Ohio Court of Appeals came to this same conclusion:
Defendant's basic contention is that plaintiff should simply file her claim and thus set in motion the investigative machinery of the administrator who will then fully inquire into the facts for her and determine the merits of her claim; . . . .
Whether the Industrial Commission would in fact investigate the broad, general complaint contained in this petition, such an investigation by an impartial
A. Discovery Rules Under Other States' Worker's Compensation Laws.

The scope of discovery in worker's compensation actions is not uniform among the states. Moreover, about eighty percent of the states permit more party-initiated discovery than Wisconsin. A fundamental rationale for tolerating and even promoting disparity in the law among the various states is that stated by Supreme Court Justice Brandeis: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel and social and economic experiments without risk to the rest of the country." 93

Fairness and expediency are objectives shared by all worker's compensation laws.94 Yet, the manner in which states employ discovery rules to advance these objectives nearly run the gamut of conceivable alternatives.

Wisconsin, as discussed above, permits almost no party-initiated discovery.95 Generally, such discovery is limited to exchange of medical information.96 Additional discovery, if any, is conducted by DILHR. Only eight other states share this restrictive discovery scheme.97

A substantial majority of states represent the opposite extreme and provide that the scope of discovery in worker's compensation actions is coterminous with the scope of discov-
ery in civil actions. Most states have provided for this discovery scheme by statute. However, some states have relied on judicial interpretation of their worker's compensation acts to reach the same result.

States representing the middle ground have approached discovery in a variety of ways, however, all states conditions party-initiated prehearing discovery upon approval of the state's worker's compensation agency. North Carolina's discovery rules, for example, require the interested party to first show that such discovery is warranted: "Any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the state to be taken, . . ." New Mexico actively involves the Commission:

It is provided, however, that any interrogatories, discovery procedures and depositions authorized by the Rules of Civil Procedure shall be had only after motion of one of the parties therefore and the court having jurisdiction finds, after due hearing, that good cause exists, that the evidence to be ob-


tained will probably be material to the issues of the cause and the court enters an order authorizing the same.\textsuperscript{101}

A number of other states have similar statutory schemes.\textsuperscript{102}

Thus, in these states, all avenues of discovery permitted in civil actions are available to parties in a worker's compensation action. However, the worker's compensation agency reserves a "gate-keeping" function and thereby protects against burdensome and abusive discovery tactics.

One other noteworthy variation on discovery schemes is provided not by a state's worker's compensation law but, instead, by the United States District Court for the District of South Carolina. In the District Court for the District of South Carolina, by local rule of court,\textsuperscript{103} parties are required to file and serve answers to standard interrogatories created and adopted by the court. The standard interrogatories directed toward the plaintiff are filed by the plaintiff at the time he files his complaint and a copy of these answers is served on the defendant with the complaint.\textsuperscript{104} The standard interrogatories directed toward the defendant are filed and served on the plaintiff within thirty days after the time for answering expires.\textsuperscript{105} Thus, under this new practice, the South Carolina District Court conducts some preliminary discovery aimed at defining and narrowing the issues. Since these interrogatories are standardized, this court-initiated discovery is accomplished with a minimum of judicial burden.

These standard interrogatories, which are designed for use in all types of actions except those expressly excluded by the local rule,\textsuperscript{106} are designed to accomplish the following functions: provide the court and the opposing party with the factual background of the claim(s) or defense(s); identify all applicable law; identify all anticipated lay and expert witnesses; provide defendant with an itemization of damages; identify any subrogation interest(s); and identify all antici-

\textsuperscript{101} N.M. STAT. ANN. 52-1-34 (1983) (emphasis added).

\textsuperscript{102} See, e.g., DEL. CODE ANN. tit. 19, § 2348(a) (1984); MASS. GEN. LAWS ANN. ch. 152, § 5 (West 1983); OHIo REV. CODE ANN. § 4123.09 (1983).

\textsuperscript{103} See D.C.S.C. M83-3.

\textsuperscript{104} Id. at 7.

\textsuperscript{105} Id. at 7.

\textsuperscript{106} It appears many pro se actions are included as well. The Rule provides that only where "all plaintiffs are unrepresented by an attorney," the parties are relieved from filing answers to such interrogatories. Id. at 2.
While a party’s interrogatories are sometimes abused in civil litigation, it might be anticipated that because the court poses these questions, more complete answers will be forthcoming.

B. The Proposal.

The Wisconsin Worker’s Compensation Act is structured so DILHR maintains control of discovery and thereby controls discovery abuse. However, the existing structure often results in unfocused and unfair hearings. Throughout the life of Wisconsin’s Worker’s Compensation Act, the Wisconsin legislature has continually expanded discovery while maintaining the general structure that permits DILHR to act as gatekeeper. Further expansion, through application of some of the experiments from other states’ laboratories, can alleviate the problems of unfocused and unfair hearings while maintaining DILHR’s role as gatekeeper against discovery abuse. Presiding Judge Gartzke, in his dissenting opinion in Bituminous Casualty Company v. DILHR,\(^{108}\) presaged this suggestion concerning discovery:

If neither party must disclose the nature of the nonmedical evidence it will present, then each party may feel forced to retain an economic expert for fear that the other side will do so. If the parties must produce not only medical but economic experts, the cost of worker’s compensation hearings will be considerably increased. That may become a compelling reason, if the legislature or department deems it such, to force complete prehearing disclosures in the future.\(^{109}\)

First, to avoid such recurring problems as misidentification of parties and reliance on misinformation about such things as work, medical and vocational history, standard interrogatories, understandable by lay people, could be pronounced by DILHR and distributed to the parties in a manner similar to that now in effect in the United States Dis-

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107. *Id.* at 3-6.
108. 97 Wis. 2d 730, 295 N.W.2d 183 (Ct. App. 1980).
109. *Id.* at 741, 295 N.W.2d at 189 (footnotes omitted).
110. In *Bituminous Casualty Co.*, both the majority and dissenting opinions took cognizance of the increasingly important role of vocational economic experts while lamenting the lack of any rules requiring prehearing disclosure of their opinions. *Id.* at 738, 741, 295 N.W.2d at 188-89.
district Court for the District of South Carolina. These interrogatories could provide DILHR and the opposing party with factual background of the claim or defense, identity of all anticipated lay or expert witnesses, an itemization of damages, and a description of any anticipated further discovery.

Second, further party-initiated discovery, depositions of lay or expert witnesses, inspection of employer's records or premises, or further interrogatories, for example, could be permitted only upon approval by DILHR. DILHR could require a specific showing of need and a specific outline of the type of discovery requested as well as the subjects of such discovery. In deciding whether to permit such discovery, DILHR could consider such things as the nature and severity of the subject injury; the extent and completeness of discovery to that date; the opposing party's ability to participate in or accommodate such further discovery; and the good faith shown by the requesting party in the discovery process to that date. In this manner, the attendant burden on the parties of further discovery could be conditioned upon a showing of reasonable necessity.

Under the scheme suggested, DILHR would maintain its role as gatekeeper, and discovery abuse could be kept to a minimum. If such further discovery requests are required before the prehearing conference, and considered at the prehearing conference, dates for such further discovery could be established with little additional burden on DILHR.

In order to avoid burdensome discovery in smaller actions, such expansion of the Act's discovery rules might best be limited to those worker's compensation actions that involves serious injuries. According to DILHR's data, only about 13% of all cases closed in 1983 involved death or permanent injury; yet, those 13% permanent injury or death cases accounted for

111. See supra text accompanying notes 104-09.
112. One such valid purpose is to encourage narrative testimony by medical experts while limiting the burden on their practices. In Georgia-Pacific Corp. v. McLaurin, 370 So. 2d 1359, 1362 (Miss. 1979), the court recognized "the necessary cost of producing live medical testimony at hearings" as well as physicians' reluctance to attend them.
113. Of course, sanctions similar to those available to a court in civil actions should be made available to DILHR as well. See Wis. STAT. § 804.12 (1983-84).
58% of total benefits paid in 1983. Accordingly, such expansion of the Act's discovery rules might best be limited to these costly actions that allege either permanency or death.

Certainly from the applicant's perspective, a total disability case warrants the most thorough preparation and presentation at hearing. From the employer's perspective, where multiple hundreds of thousands of dollars are at stake, the need for thorough preparation for hearing is no less than in any other litigation involving such substantial exposure. In *U.S. Fidelity & Guaranty v. Gagne*, the reviewing court, after taking cognizance that worker's compensation actions must be summary and simple, commented:

However, there may be instances in workmen's compensation appeals where it is not only desirable but necessary that a party use depositions or discovery process in properly preparing his case for trial. In this case it is the employer who seeks the information but the process of acquiring information by deposition or discovery cuts both ways and tomorrow it may be the employee who needs it. It should be available to both parties when circumstances require it.

### III. Conclusion

Discovery rules, as they exist today under the Worker's Compensation Act, may or may not advance the Act's objective to resolve work-related personal injuries with a minimum expenditure of time, money, and other scarce resources.

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115. This discovery scheme may have the added benefit of discouraging applicants' attorneys from exaggerating their clients' conditions since to do so will invite discovery beyond the scope actually warranted by the condition.

116. A permanently, totally disabled worker is entitled to $300.00+ per week for 1,000 weeks ($300,000+ total) as per the formula contained in the statutes. *See Wis. Stat. § 102.44 (1983-84).* Such a worker is also entitled to wage payments for the healing period, which might last several years. *See Wis. Stat. § 102.43 (1983-84).* To this must be added such "incidental compensation" as the cost of medical treatment, prosthetic devices and rehabilitation (physical and vocational). *See Wis. Stat. § 102.42 (1983-84).* Add to this the maximum $50,000 death benefit (§ 102.46), and such a claim can be worth several hundreds of thousands of dollars.


118. *Id.* at 292, 155 A.2d at 805.
However, the price paid for such expediency is that hearings are often unfocused and ill-defined. Perhaps more distressing, parties are too frequently “ambushed”, and the truth is not always fully represented at the hearing. At times this results in an injustice. At other times, this necessitates a second hearing.\textsuperscript{119} Both of these consequences are antithetical to the purposes of the Act. Expansion and modification of the Act’s discovery rules, consistent with the objectives and policy underpinnings of the Act, will preserve the laudable objectives of the Act while minimizing the concomitant problems.

The Council on Worker’s Compensation\textsuperscript{120} should consider proposing such a modification of the Act to the legislature.

\begin{footnotesize}
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\item \textsuperscript{119} See, e.g., Bituminous Casualty Co. v. DILHR, 97 Wis. 2d 730, 734-35, 295 N.W.2d 183, 186 (Ct. App. 1980); Balczewski v. DILHR, 76 Wis. 2d 487, 490, 251 N.W.2d 794, 796 (1977).
\item \textsuperscript{120} Wis. Stat. § 102.14 (1983-84) creates an advisory committee, called the Council on Worker’s Compensation, whose purpose is to “submit its recommendations with respect to amendments to [the Worker’s Compensation Act] to each regular session of the legislature. . . .” Id.
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