CASE LAW UPDATE

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PUBLISHED APPELLATE DECISIONS

A. Brown v. LIRC: 2003 WL 328828 (Ct. App. 2003) 2003 WI App 56. Petition for review by the Wisconsin Supreme Court granted March 22, 2003.

FACTS: Brown, a butcher, suffered a work-related back injury in 1993 and again in 1995, after which he could not work. Reliance Insurance, the workers' compensation carrier, paid Brown TTD. Later, an anonymous call to the workers' compensation fraud unit reported that Brown was working as a full-time insurance salesman. An ensuing investigation revealed that Brown had been a licensed insurance agent for 12 years. The insurer Reliance discontinued Brown's TTD payments. Brown admitting that he had a business, but argued it had yet to show a profit.

At the hearing on the TTD, the insurer and employer were unable to prove that Brown was earning income from the business that would justify the reduction, so the ALJ ordered an additional payment. Brown then filed a bad faith claim against Reliance. The ALJ determined that Reliance had a reasonable basis for terminating Brown's TTD benefits and dismissed Brown's bad faith claim. Both LIRC and the circuit court affirmed.

COURT OF APPEALS HOLDING: Ruled that Reliance did not have a reasonable basis for terminating Brown's TDD benefits because it failed to properly investigate and develop the facts necessary to evaluate Brown's claim.

B. Virginia Surety v. LIRC, 258 Wis.2d 665, 654 N.W.2d 306 (Ct. App. 2002). Petition for review denied February 19, 2003.

FACTS: McGaw worked as a grinder for Stainless Foundry & Engineering almost continuously from 1954 to until 1997. Throughout McGraw's employment, he was exposed to sand and dust, which resulted in silicosis. McGaw never missed any work because of the symptoms from his condition, but an employer-directed medical evaluation in 1983 revealed abnormalities. On several occasions in 1991 and 1997, McGaw was referred to a pulmonary specialist by Stainless, but later admitted he never followed the specialist's advice.

TIG Insurance insured Stainless Foundry from August 18, 1991, to June 30, 1997. Virginia Surety Company's insured Stainless starting on July 1, 1997, which was 53 days prior to McGaw's retirement date. The ALJ awarded benefits to McGaw and ordered payment from Stainless Foundry and Virginia Surety, but not TIG Insurance Company. Both LIRC and the circuit court affirmed.

COURT OF APPEALS HOLDING: Determined that the "date of disability" was the date when the employee could no longer work rather than when he underwent employer-required medical examinations. Although Virginia Surety assumed the workers' compensation risk a mere two months prior to McGaw's forced retirement, the Court of Appeals felt that this perceived inequity "evens out" in the long run.

C. Vidal v. LIRC, 253 Wis.2d 426, 645 N.W.2d 870 (2002).

FACTS: Guden injured his back while working for Buena Vista, a Wisconsin Rapids cranberry grower. The ALJ concluded that Guden sustained a compensable back injury that temporarily and totally disabled him for fifteen weeks. Guden filed a petition for review with LIRC, arguing that he incurred PPD and a vocational impairment. LIRC affirmed.

Nearly a year after his petition for review was denied, Guden faxed LIRC a petition to set aside the previous orders and remand for further proceedings based upon new records of treatment from the U.W. Hospital and Clinic that showed objective trauma, injury and significant treatment, culminating in spinal surgery. LIRC concluded that the evidence was newly discovered and, thus, ordered its previous decision to be set aside.

Buena Vista filed suit against LIRC and Guden in circuit court seeking relief pursuant to the grounds for judicial review in § 102.23(1)(e) and common law certiorari. The parties stipulated to dismissal of the § 102.23 claim. The circuit court dismissed the common law certiorari claim, stating that it lacked subject matter jurisdiction to review. The Court of Appeals certified Buena Vista's appeal to the Supreme Court.

SUPREME COURT HOLDING: Buena Vista was prohibited from seeking judicial review via common law certiorari because Buena Vista was not yet foreclosed from obtaining future judicial review of its claim.

D. Beecher v. LIRC, 2003 WL 1878728 (Ct. App. 2003). Recommended for publication in the official reports. Petition to review by Wisconsin Supreme Court pending.

FACTS: Beecher worked at Outokumpu foundry for twenty-nine years. He developed sharp pains in his lower back that increased until he could no longer work. Beecher underwent three surgeries to ease the problem, and eventually returned to light duty work at Outokumpu until it ran out of light-duty work. Since then, Beecher has not returned to work and Outokumpu has moved from Wisconsin and did not offer to relocate Beecher to a light-duty job at the new location.

The ALJ awarded compensation for TTD from October 14, 1998, to May 19, 1999, for PTD thereafter, and payment of medical expenses. Outokumpu appealed for LIRC review, which found that Beecher did not established a prima facie case for PTD. The circuit court affirmed.

COURT OF APPEALS HOLDING: Relying on Balczewski v. ILHR, 76 Wis.2d 487 (1977), it held that establishing permanent total disability for odd-lot status is a two-step process. Step one rests on the claimant, in this case Beecher, to make a prima facie case that he or she is totally disabled. Step two shifts to the employer to rebut the prima facie showing and demonstrate that some kind of suitable work is regularly and continuously available to the claimant. The Court reversed and remanded the case to allow Outokumpu to present evidence to rebut Beecher's prima facie case.

E. Kopfhamer v. Madison Gas & Elec. Co., 258 Wis.2d 359, 654 N.W.2d 256 (Ct. App. 2002). Petition for review denied on December 10, 2002.

FACTS: Kopfhamer was injured on the job at the Kewaunee Nuclear Power Plant that is jointly owned by Wisconsin Power and Light Company (WPL), Wisconsin Public Service Corporation (WPSC), and Madison Gas & Electric Company (MGE). As part of the agreement between the three power companies, WPSC operated the plant, but WPL provided skilled employees like Kopfhamer to perform maintenance during shutdowns.

Although Kopfhamer received workers' compensation benefits from WPL, he and his wife brought an action in tort against both WPSC and MGE. The circuit court held that WPSC was estopped from invoking the exclusive remedy provision, but that MGE was not vicariously liable for Kopfhamer's injury.

COURT OF APPEALS HOLDING: The circuit court was incorrect to deny WPSC's use of the exclusive remedy provision, but it had properly dismissed MGE from Kopfhamer's action. WPSC was entitled to summary judgment as a matter of law due to the exclusive remedy provisions. The Court of Appeals determined that WPL qualified as a temporary help agency with Kopfhamer as one of its temporarily placed employees. Also, MGE was not vicariously liable for Kopfhamer's injury because it had surrendered its right to supervise and control the employees of the plant to the independent operating contractor, WPSC.

UNPUBLISHED COURT OF APPEALS DECISIONS

A. Express Services v. LIRC, 260 Wis.2d 603, 655 N.W.2d 547 (Ct. App. 2003). See appendix A.

FACTS: Potts was injured while lifting a brine tank at Culligan Water Systems while employed by Express Services, a temporary employment agency. After treatment for a ruptured bicep tendon, Potts was referred to another doctor who gave him a 10 percent PPD in his shoulder. Express Services paid certain temporary workers' compensation benefits as well as 1 percent PPD benefits, which had been assessed by its own doctor.

At the hearing, the ALJ found the testimony of Potts and his doctors to be credible, but denied Potts' claim for temporary benefits because a doctor had not given him any limitations that would have prevented him from working. The ALJ awarded Potts benefits for the 10 percent PPD minus those benefits paid by Express Services due to its 1 percent assessment. Express Services appealed to LIRC, which affirmed the ALJ. The circuit court affirmed LIRC's decision

COURT OF APPEALS HOLDING: The disability ratings found within Wis. Admin. Code DWD § 80.32(7) are minimum awards that injured workers are entitled to, and nothing indicates that the minimum for one level serves as the maximum for another. It further acknowledged that the code specifically allows for upward adjustments for additional factors because guidelines simply cannot be developed to cover every conceivable condition of disability.

B. Larson v. Tower Insurance Co., 260 Wis.2d 602 (Ct. App. 2003). See appendix B.

FACTS: Larson, a part-time employee for Happy Cookers, was injured in an auto accident while traveling to work as passenger in a car driven by Rotter, president of Happy Cookers. Larson sued both Tower Insurance, which was Rotter's automobile insurance carrier, and Happy Cookers' workers' compensation insurance carrier. The circuit court determined that Rotter was Larson's employer and therefore Larson was unable to recover under Wis. Stat. § 102.03(2), which provides an exception to the exclusive remedy provision for actions against co-employees for negligent operation of a motor vehicle not owned or leased by the employer, did not apply.

COURT OF APPEALS HOLDING: Using Marlin Elec. Co. v. Industrial Comm., 33 Wis. 2d 651, 657-58, 148 N.W.2d 74 (1967), it ruled that a corporate officer, like Rotter, is considered a co-employee rather than an employer for the purposes of liability for negligent operation of a motor vehicle under Wis. Stat. § 102.03(2), so Larson was not precluded from bringing a claim against Rotter's auto insurance.

C. Floerchinger v. Nestle Trans., 2003 WI App 1, 655 N.W.2d 547 (Ct. App., 2002). Petition for review denied, March 13, 2003. See appendix C.

FACTS: Floerchinger owned and operated a tractor to haul freight for Nestle Transportation. Floerchinger's contract with Nestle identified him as an independent contractor, but directed Nestle to provide him with trailers to carry the freight loads, trip permits and licenses, and a credit card for fuel that he would ultimately pay. Also, Floerchinger was required to prominently display the Nestle name on his tractor and was prohibited from working for any other freight-haulers. Floerchinger paid his own trip expenses with the exception of tolls deemed necessary by Nestle. He claimed self-employment of his taxes and deducted office expenses.

LIRC denied Floerchinger's workers' compensation claim for his work-related injury by addressing each of the nine criteria under Wis. Stat. § 102.07(8)(b). The circuit court used the great weight deference standard in confirming LIRC's decision. In doing so, it relied heavily on the decision in Jarrett v. LIRC, 233 Wis. 2d 174, 607 N.W.2d 326, which provides that an exclusive arrangement does not preclude a finding of a separate business.

COURT OF APPEALS HOLDING: Floerchinger failed to overcome the separate business requirement per Wis. Stat. § 102.07(8)(b)1. It accepted LIRC's decision to focus on other terms of the contractual relationship.

D. Schaalma v. LIRC, 256 Wis. 2d 695, 647 N.W.2d 468 (Ct. App. 2002). Petition for review denied on July 26, 2002. See appendix D.

FACTS: Schaalma sustained a workplace injury that amputated four fingers on his dominant hand. Reattachment was successful, but Schaalma lost some use of those fingers and wrist. The ALJ calculated Schaalma's PPD using the multiple injury factor set forth in Wis. Stat. § 102.53. Schaalma claimed that he was also entitled to a 25 percent increase pursuant to Wis. Stat. § 102.54, which provides for such increase where there is a total loss of use or an amputation of more than two-thirds of the distal joint of a finger. The ALJ rejected the argument, LIRC agreed with the ALJ, and the circuit court agreed with LIRC.

COURT OF APPEALS HOLDING: Agreed that the 25 percent increase for PPD or amputations to a dominant hand under Wis. Stat. § 102.54 does not apply where there is only a partial loss of use.

E. Eckelberg v. Scientific Molding, 2003 WI App 89 (Ct. App. 2003). See appendix E.

FACTS: Eckelberg made a workers' compensation claim for benefits from a knee injury that he testified occurred because he tripped while walking through foot wide, quarter-inch plastic sheets hung as drapery in a doorway. At hearing, two of Eckelberg's supervisors testified that Eckelberg initially stated that his knee simply "popped" out, and that Eckelberg wanted to add the detail about tripping after his initial description, and Eckelberg fell 10 to 15 feet from the draped doorway. The ALJ found that Eckelberg failed to prove that his injury was work-related. LIRC affirmed the ALJ, and the circuit court affirmed LIRC.

HOLDING: The Court of Appeals agreed and held that a worker who included a doorway with his alleged work-related accident was not entitled to benefits because the idiopathic injury did not occur in a zone of danger.

F. Badger Scaffold v. Hartford Underwriters, 260 Wis.2d 602, 658 N.W.2d 88 (Table) (Ct. App. 2003). Petition for review filed on March 7, 2003. See appendix F.

FACT: Brassard sustained an injury from a scaffold accident while working in Michigan for Badger Scaffold, a Wisconsin corporation, and received workers' compensation benefits under Michigan law. A Brown County circuit court ruled that Brassard's employer's workers' compensation and employer's liability policy did not provide coverage for Brassard's injury outside of Wisconsin.

COURT OF APPEALS HOLDING: A worker hired outside of Wisconsin to work in another state is not entitled to compensation under Wisconsin's workers' compensation act.

G. The Travelers Insurance Co. v. Keller, 260 Wis.2d 601, 658 N.W.2d 87 (table) (Ct. App. 2003). Petition for review filed on Feb. 21, 2003. See appendix G.

FACTS: Keller was only able to obtain workers' compensation insurance through the mandatory risk-sharing plan. Travelers was designated and issued Keller four policies, each to last one year after the other. Travelers cancelled the final policy because it alleged Keller owed $58,000 in premiums. Keller denied Travelers' allegations, and counterclaimed for breach of contract which caused his business to fail, and that Travelers notified the department of workforce development that he was delinquent.

At trial, Keller acknowledged that he owed premium and the jury determined that amount owed to Travelers was more than $32,000. The jury determined that Travelers owed Keller $71,500 as a result of the contract breach. On appeal, Travelers argued that the circuit court should have dismissed the claim because it was immune from liability under Wis. Admin. Code §INS 21.01(11).

COURT OF APPEALS HOLDING: Wis. Admin. Code §INS 21.01(11) does not provide immunity for any liability arising out of an insurer's auditing and billing practices, but there was no evidence that Keller's business closed because of Travelers' conduct. As a matter of law, Travelers' demand for owed premium in order to avoid cancellation was

not a breach of the policy terms or that of the implied covenant of good faith.

CIRCUIT COURT DECISIONS

A. Brillion Iron Works v. LIRC, Appeal No. 02-2006, Summary affirmance April 16, 2003. Petition for review filed. See appendix H.

FACTS: Kalies worked for Brillion Iron Works for over 44 years, retiring on December 23, 1997. On August 29, 1988, Kalies was diagnosed with hemoptosis and chest x-rays showed bilateral interstitial changes, which may be consistent with silicosis. A September 2, 1988, bronchoscopy showed fibrotic nodules, but no silica. By July 1989, Kalies' treating physician noted that his pulmonary status was stable. On October 6, 1989, Kalies' employer sent him for an independent medical evaluation (IME), which resulted in the diagnosis of simple silicosis, chronic bronchitis and mild chronic obstructive pulmonary disease. Prior to attending the IME, Kalies never missed work time due to a work-related condition.

LIRC concluded that the simple onset of symptoms did not cause a worker to seek treatment or lose work time does not automatically establish a date of disability for fixing liability for occupational disease. In deciding date of disability, the Calumet County District Court looked at "actual physical incapacity to work" rather than a disability that does not result in wage loss. Montello Granite Co. v. Industrial Comm., 227 Wis. 170, 278 N.W.391, 399 (1938). Here, Kalies was not incapacitated or disabled by silicosis during his employment. Therefore, the date of disability was Kalies' last day of work, December 23, 1997.

COURT OF APPEALS HOLDING: Affirmed.

B. Vandeveer v. LIRC, Case No. 02-CV-2056 (Brown County, 2003). Appeal pending before the Court of Appeals, Dist. III. Appeal No. 03-0928. See appendix I.

FACTS: The ALJ denied Vandeveer's workers' compensation benefits. Question for LIRC was whether Vandeveer's pre-existing multiple sclerosis (MS) was exacerbated by her working conditions. Vandeveer alleged that her employer, Fort James, was trying to drive her out of the workplace due to Fort James' anti-lesbian animus. LIRC concluded that any stress Vandeveer may have suffered from was not caused by Fort James, but rather by her inappropriate behavior and own personal reaction, and could not be causally linked to the aggravation of her pre-existing MS.

CIRCUIT COURT HOLDING: Gave great weight to LIRC's legal determination and found that LIRC's findings of fact were supported by credible and substantial evidence, and its legal interpretations were correct, and no due process violation occurred.