CASE LAW UPDATE

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I. SUPREME COURT DECISIONS

Bosco v. LIRC
2004 WI 77, ___ Wis. 2d ___, 681 N.W.2d 157 (filed June 15, 2004)

It is bad faith, as a matter of law, for an employer or its insurer to fail to pay benefits to an injured employee when the only question on appeal is who will pay the benefits.

Facts

Bosco filed an application for hearing with his employer, A.T. Polishing Company, alleging pulmonary problems due to occupational exposure. The date of injury was listed as "occupational; 7/22/96." Although it disputed both the nature and extent of his disability, the insurance carrier, Shelby, on its answer to the application, admitted the exposure to Bosco occurred at or about the time claimed. At the hearing, for the first time, Shelby disputed the date of injury and claimed a date of injury in 1993 when it was not on the risk. The ALJ, pursuant to Wis. Admin. Code § DWD 80.08, did not permit Shelby to amend its answer, and found PTD based on the date of injury admitted. LIRC and the circuit court both affirmed LIRC's decision. Shelby indicated in its reply brief at the circuit court level that it did not contest the findings of PTD from occupational exposure, but that the issue in dispute was LIRC's legal conclusion that Bosco's last day of work in 1996 was the date of disability. Bosco sought payment pending appeal under Wis. Stat. § 102.23(5), which reads as follows:

> The commencement of an action for review shall not relieve the employer from paying compensation as directed, when such action involves only the question of liability as between the employer and one or more insurance companies or as between several insurance companies.

Arguing that Shelby's argument on appeal only raised the question of liability between Shelby and some other insurer on the risk in 1993, Bosco asserted that

Wis. Stat. § 102.23(5) applied during judicial review of LIRC's decision affirming the ALJ. By contrast, Shelby, arguing that Wis. Stat. § 102.23(5) contemplates the actual presence of another insurer in the action, chose not to pay compensation to Bosco during the judicial review by the Court of Appeals of LIRC's decision.

Bosco filed an amended application for hearing, seeking bad faith penalties under Wis. Stat. § 102.18(1)(bp) and Wis. Admin. Code § DWD 80.70(2). At the hearing on bad faith, the ALJ found Shelby's interpretation of § 102.23(5) to be correct—the section does not apply when one insurer unilaterally raises the issue of some unnamed insurer's liability. The ALJ, thus, denied Bosco's claim for bad faith and refused to reserve jurisdiction for any future claim for excusable neglect under Wis. Stat. § 102.22(1), which he had not sought in the amended application for hearing. LIRC affirmed, specifically finding that "the…employer's liability is not questioned."

The circuit court reversed LIRC, finding it "abundantly clear" that the purpose of Wis. Stat. § 102.23(5) is to ensure that injured workers will not have to wait for the outcome of a dispute between the employer and the insurer, or between multiple insurers, to begin the collection of benefits for an unchallenged injury. It further held that LIRC erred in its interpretation of Wis. Stat. § 102.23(5) and "consequently, in its application of the law." The case was then remanded to LIRC for proper determination of such penalties as authorized by law and the facts of the case. A.T. Polishing and Shelby appealed.

The Court of Appeals affirmed the circuit court's reversal, concluding that LIRC erred in its interpretation of Wis. Stat. § 102.23(5) when it was agreed that the employer's liability was not questioned. It held, as a matter of law, that such nonpayment by the employer was bad faith.

Because it focused its review specifically on LIRC's conclusion that Shelby's interpretation of Wis. Stat. § 102.23(5) was reasonable, the Court of Appeals gave no deference to LIRC based on the latter's acknowledgement that it had never interpreted Wis. Stat. § 102.23(5). Using this *de novo* review, the Court of Appeals determined that Wis. Stat. § 102.23(5) is plain and unambiguous and its intent is unequivocal: "an employer *must* make payments of benefits during judicial review when the only question is who will pay the benefits." Here, Shelby conceded an occupational injury and all that was left for contestation was whether there was PTD or PPD. The Court of Appeals concluded that "[a]n interpretation of Wis. Stat. § 102.23(5) that would permit an employer or insurer to impugn liability on a phantom insurance company would be tantamount to permitting employers and insurers to engage in mischief and to avoid paying benefits that they concede are due to the injured employee."

Issues

First, does Wis. Stat. § 102.23(5) unambiguously require "an employer to pay benefits to an employee upon commencement of an action for judicial review of LIRC's award when only the date of injury is challenged on appeal, but it is conceded that the employee suffered permanent total disability that was caused by his employment with the employer, such that failure to make payment pending appeal could not be based on a reasonable interpretation of § 102.23(5)?" 2004 WI 77, ¶14.

Second, is "an insured employer [ ] subject to bad faith penalties under § 102.18(1)(bp), separate from its insurer, for failure to comply with § 102.23(5)?" Id.

Holding

The Supreme Court affirmed the holding of the Court of Appeals, answering "yes" to both of the above questions.

Analysis

As did the Court of Appeals, the Supreme Court identified the review standard as *de novo*. 2004 WI 77, ¶¶21-22. Answering the first question, the Supreme Court concluded that Wis. Stat. § 102.23(5) "unambiguously requires an employer to make payment to a disabled employee pending appeal of a date of injury defense in an occupational disease case when the employer's liability is not disputed on appeal and the only question is who will pay benefits." 2004 WI 77, ¶62. Echoing the Court of Appeals rationale, the Supreme Court rejected Shelby's argument that Wis. Stat. § 102.23(5) applies only where two or more insurers are parties to the original hearing, stating "[t]o permit an insurer to shirk its statutory obligations to make payment pending appeal when it contends that another carrier is liable simply because the other insurer is not a party to the action would contravene the statutory language." 2004 WI 77, ¶47.

In answer to the second question, the Supreme Court dismissed Shelby's contention that an insured employer cannot be held separately liable for failure to make benefit payments because such an employer is "under no independent obligation" to make benefit payments, concluding, among other things, that the plain language of Wis. Stat. § 102.23(5) mandates that an employer pay benefits pending judicial appeal. 2004 WI 77, ¶¶54, 60. It noted, however, that, when bad faith penalties are sought directly against an insured employer for acts occurring after the insurer began handling the defense of the claim, the fact that an insurer generally maintains the right to control the defense should be taken into consideration "in determining whether the employer had a reasonable basis for denying benefits and whether the employer knew it lacked a reasonable basis for

denying benefits or recklessly disregarded a lack of reasonable basis for denying payment." 2004 WI 77, ¶61.

Brown v. LIRC
2003 WI 142, 267 Wis. 2d 31, 671 N.W.2d 279 (filed November 18, 2003)

An insurance company's termination of an employee's TTD despite the fact that it had performed an inconclusive investigation regarding the employee's side business was reasonable under the great weight deference standard of review.

Facts

Brown, a meat cutter, suffered a work-related back injury while lifting items at his place of employment, Schultz Sav-o-Racine, in 1993. Although he continued to work under a doctor's treatment for some time, Brown re-injured his back in 1995 and could no longer work. Reliance Insurance Company, the worker's compensation carrier for Schultz Sav-o-Racine, paid Brown TTD starting that same year. In late 1995, an anonymous call was received by the worker's compensation fraud unit stating that Brown was working as a full-time insurance salesman. An ensuing report by an investigator indicated that Brown had been a licensed insurance agent for 12 years and had been seen dressed in a suit in the middle of a weekday. As a result, Reliance discontinued TTD payments to Brown in early 1996. In a response letter to the claims adjusting agent, Brown claimed that while he had a business, it had yet to show a profit.

At the hearing on the TTD issue, Reliance and Schultz were unable to prove that Brown was earning income from the business that would justify the reduction, and additional payment of TTD was ordered by the ALJ. Brown then filed a claim for a penalty award pursuant to Wis. Stat. sec. 102.18(1)(bp), alleging that Reliance had acted in bad faith when it terminated TTD payments. The ALJ determined that Reliance had a reasonable basis for terminating Brown's TTD benefits and dismissed his bad faith claim.

LIRC affirmed the ALJ's finding, setting forth six reasons that the investigation provided Reliance with a reasonable basis for believing that Brown was engaging in wage-earning services. The circuit court affirmed LIRC's decision.

On appeal, the Court of Appeals reflected on its decision in Kimberly-Clark Corp. v. LIRC, 138 Wis. 2d 58, 405 N.W.2d 684 (Ct. App. 1987), in which it set forth the test for determining whether a claim was "fairly debatable" under Wis. Stat. § 102.18(1)(bp) and Wis. Admin. Code. § DWD 80.70(2). The Court of Appeals here noted that Brown had to demonstrate that the insurer did not have a reasonable basis for denying benefits and that it had knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Such a determination required examination of whether the claim was properly

investigated and if the results of the investigation were subject to reasonable evaluation and review. Benefits could not be terminated based on the knowledge that Brown might be working.

Instead, in order for Reliance to be entitled to an offset on TTD, it would need information establishing that Brown was earning a profit during the time he was receiving benefits. Reliance had no information to indicate that Brown was earning a profit, Brown himself stated that the business had not yet turned a profit, and it had not contacted Brown to request information.

The Court of Appeals concluded that Reliance had no reasonable basis for believing it would be entitled to an offset. Furthermore, it rejected Reliance's argument that a February 1996 letter to Brown was a request for information since the actions constituting bad faith had already occurred. Finally, it stated that allowing Reliance to terminate benefits and then requiring Brown to demonstrate he was not earning a profit would improperly shift to Brown the burden of disproving Reliance's entitlement to an offset.

Issue

Whether LIRC's conclusion of law—that Brown's claim for benefits was fairly debatable and Reliance's suspension of benefits did not constitute bad faith under Wis. Stat. §102.18(1)(bp) and Wis. Admin. Code § DWD 80.70(2)—should be affirmed.

Holding

The Supreme Court overruled the Court of Appeals, affirming LIRC's dismissal of the bad faith claim against Reliance.

Analysis

In so overruling, the Supreme Court acknowledged LIRC's "extensive experience interpreting penalty provisions contained in the Worker's Compensation Act [WCA]," and, therefore, utilized the great weight deference standard. It then concluded that the record just barely supported LIRC's determination that Reliance's suspension of benefits to Brown did not constitute bad faith because it had conducted a "brief, inconclusive investigation" before such suspension. Reliance had information from a total of three independent sources (the anonymous tip, the investigation, and his supervisor) that Brown was working and presumably earning wages that he was not reporting to it. Despite its holding in favor of Reliance, the Supreme Court provided the following warning that this case probably represents the outer limits of what it would accept in terms of a defense to a bad faith claim:

> ¶52 That said insurers, employers, and LIRC should not infer from this opinion that suspending an employee's benefits after a brief, inconclusive investigation is an acceptable means of avoiding a bad faith penalty. The court recognizes that employees are often financially dependent upon worker's compensation benefits and a reasonable investigation under the circumstances is needed before suspension of benefits occurs. The insurer's actions in the present case may have been reasonable in LIRC's opinion, but the insurer's actions press very near the limit of what the great weight deference level of review will bear.

The Supreme Court noted that it might have reached a different conclusion under the lesser standard of *de novo* review.

Crystal Lake Cheese Factory v. LIRC
2003 WI 106, 264 Wis. 2d 200, 664 N.W.2d 651 (filed July 11, 2003 and motion for reconsideration denied September 18, 2003)

The proper emphasis when interpreting the "reasonable accommodation" requirement is on the employee's ability to perform her or his job responsibilities adequately, rather than on terms such as "some" or "most" or "all."

Facts

Catlin, who worked as a department head at Crystal Lake Cheese Factory, became quadriplegic as a result of a nonwork-related automobile accident in 1996. After treatment and rehabilitation, Catlin, then having regained some use of her arms, but confined to a wheelchair, wanted to return to work in 1997. Crystal Lake refused to permit her to resume her position as a department head, arguing in response to her eventual complaint of disability discrimination that her disability was "reasonably related to [her] ability to adequately undertake the job related responsibilities of [her] employment". Crystal Lake argued that the only accommodation that would allow Catlin to perform *all* of the duties of her previous position would be a modification of those job duties and such a modification, it asserted, would not be a reasonable accommodation. LIRC found discrimination by Crystal Lake, concluding that Catlin could perform *most* of the duties of her previous position, and that a reasonable accommodation would include *some* modification of her job duties, unless Crystal Lake could show this was a hardship. LIRC found that Crystal Lake had (1) not shown such a hardship, and (2) failed to prove that the physical modifications in the workplace which Catlin needed would be a hardship.

On appeal, the circuit court and the Court of Appeals each affirmed LIRC's decision.

Issue

To what extent must an employer provide modifications to an injured employee to comply with the “reasonable accommodation” requirement under the Wisconsin Fair Employment Act (WFEA)?

Holding

The Supreme Court affirmed LIRC, holding that requiring employers to modify employee’s job duties and make physical modification to the workplace was not unreasonable and would be a reasonable accommodation.

Analysis

The Supreme Court’s decision here was guided by three previous Court of Appeals decisions, Target Stores v. LIRC, 217 Wis. 2d 1, 576 N.W.2d 545 (Ct. App. 1998), McMullen v. LIRC, 148 Wis. 2d 270, 434 N.W.2d 830 (Ct. App. 1988), and Frito Lay v. LIRC, 95 Wis. 2d 395, 290 N.W.2d 551 (Ct. App. 1980). Based on those three decisions, and according great weight deference to LIRC's interpretation, the Supreme Court held that a reasonable accommodation is not limited “to that which would allow the employee to perform adequately all of his or her job duties. A change in the job duties may be a reasonable accommodation in a given circumstance.” The Supreme Court stated that the proper emphasis was on the employee's ability to perform her or his job responsibilities *adequately*, rather than on terms such as "some" or "most" or "all." This determination rejected the notion that it was necessary to interpret the "reasonable accommodation" requirement within the WFEA as looking to whether an employee could (with accommodation) perform "some", "most" or "all" job responsibilities. The Supreme Court also upheld LIRC's conclusion that Crystal Lake failed to prove that providing those accommodations to Catlin would have posed a hardship for it.

It should be noted that three dissenting justices took issue with, among other things, the majority opinion’s failure to accommodate the interests of Wisconsin employers. The dissenters asserted the following:

> ¶121 The inescapable effect of LIRC's ruling is that Crystal Lake must either (1) have nobody perform the duties that Catlin used to do, and thereby decrease productivity; (2) hire a new employee to do these duties and incur unnecessary costs; or (3) have other existing employees undertake the duties that Catlin can no longer perform, thereby taking these employees away from the duties they would otherwise be performing. Each of these options necessarily imposes hardship on an employer in a manner that § 111.34(2)(a) expressly states need not occur.

*** While this decision is framed against the "reasonable accommodation" requirement within the WFEA, the Supreme Court's reasoning is germane to an employer's consideration of the handling of any future refusal to hire claims under the WCA.

II. PUBLISHED COURT OF APPEALS DECISIONS

Beecher v. LIRC
2003 WI App. 100, 264 Wis. 2d 394, 663 N.W.2d 316 (Ct. App., Dist. II, April 16, 2003) (Appeal No. 02-1582) (Affirmed by the Wisconsin Supreme Court in 2004 WI 88 on June 29, 2004)

It was erroneous for LIRC to conclude that the applicant failed to establish a *prima facie* case of permanent total disability under the "odd-lot" rule because he "could have made more of an effort" to find work.

Facts

Beecher worked for 29 years in strenuous work at Outokumpu Copper Kenosha, Inc., a foundry. In April 1997, Beecher sought medical treatment with an orthopedist because he had developed sharp pains in his lower back. For the past several months, Beecher had been working on a "Z-mill" machine, which ran sheets of metal from one large roll of metal to another roll or spool. Beecher's job was to lean over the first roll of metal to pick up the sheet of metal as it wound off of the first roll and then thread the sheet of metal into a slit on the second roll. Beecher's back pain increased over time until he could no longer work. On September 10, 1997, Beecher underwent his third surgical procedure on his lower back, which included a diskectomy, fusion and graft. In April 1998, Beecher returned to light-duty work for two weeks until Outokumpu apparently ran out of light-duty assignments for him. Thereafter, Outokumpu moved to another state and did not offer Beecher a chance to relocate to a light-duty job at its new location. Beecher testified at hearing that if he had been offered such a transfer from Outokumpu, he would have accepted it. In September 1999, Beecher filed an application for hearing, seeking temporary total disability benefits from October 14, 1998, through May 14, 1999, permanent partial disability benefits on a functional basis at 15% to the body as a whole, and permanent disability on a vocational basis for loss of earning capacity, including permanent total disability and payment of medical expenses.

The ALJ found a compensable injury and awarded Beecher compensation for temporary total disability from October 14, 1998 to May 19, 1999, and for permanent total disability thereafter. The ALJ also awarded payment of certain medical expenses. LIRC partially reversed the decision of the ALJ, determining that Beecher had sustained a disability from an occupational disease arising out of his employment with Outokumpu, but that he had not established a *prima facie* case for permanent total disability. LIRC instead awarded Beecher

compensation for permanent partial disability for loss of earning capacity at 60%.

Beecher sought review of LIRC's decision in the circuit court. Relying upon the "odd-lot" doctrine set forth in Balczewski v. DILHR, 76 Wis. 2d 487, 251 N.W.2d 794 (1977), Beecher contended that he had made a *prima facie* case of unemployability that was not rebutted by the employer and its insurer. In confirming LIRC's decision, the circuit court rejected this argument by Beecher, holding that the ultimate "odd-lot" issue was a question of fact for LIRC to decide. The circuit court affirmed LIRC's decision and Beecher appealed to the Court of Appeals.

Issue

What must an injured worker show to make a *prima facie* case of permanent total disability under the "odd-lot" rule?

Holding

The Wisconsin Supreme Court's decision in Balczewski, which instructs in part that when the claimant produces evidence that he or she is relegated to "odd-lot" status and makes a *prima facie* case, the burden shifts to the employer to then rebut that *prima facie* showing and demonstrate that some kind of suitable work is regularly and continuously available to the claimant, is still good law in this state.

Analysis

The Court of Appeals reversed and remanded the matter for the purpose of permitting Outokumpu to present evidence, if any it may have, in rebuttal of Beecher's *prima facie* case. It explained that establishing permanent total disability is a two-step process: (1) requiring the claimant to make a *prima facie* case that he or she is permanently and totally disabled; (2) requiring the employer to rebut that *prima facie* showing and demonstrate that some kind of suitable work is regularly and continuously available to the claimant. With the second step, the burden of proof shifts to the employer. LIRC erroneously added a step to be taken by the worker in cases where he or she is not "obviously unemployable," requiring such a worker to prove that he or she has conducted a job search and has been unable to find a job within the physical limitations the doctor has ordered before the burden shifts to the employer. The Court of Appeals concluded that once the requirements of the second step are properly removed from Beecher and assigned to his employer, as Balczewski requires, Beecher's evidence sufficiently established a *prima facie* case that he is permanently and totally disabled.

Although LIRC drew support for its own decision here from 4 Arthur Larson & Lex K. Larson, Larson's Worker's Compensation Law § 84.01[4], the Court of Appeals concluded that LIRC erroneously applied a standard in Beecher's case that is not the current law in Wisconsin. Additionally, the Court of Appeals held that the final report of Beecher's treating physician continued his restriction to part-time work, which was in contrast to LIRC's interpretation of the same report that Beecher's restrictions permitted full-time work.

Epic Staff Management v. LIRC
2003 WI App. 143, 266 Wis. 2d 369, 667 N.W.2d 765 (Ct. App. Dist I, June 26, 2003) (Appeal No. 02-2310)
A retroactive contract cancellation does not change the liability of an insurer under the WCA, which fixed by the circumstance existing on the date of the injury.

Facts

In January 1999, Epic Staff Management entered into an "Agreement for Services" with Steelwind, a steel fabricator, to provide various human resource services including paying wages and taxes, procuring health benefits, and securing and obtaining workers compensation coverage for Steelwind. Epic initially hired Steelwind's workforce and Steelwind provided Epic with funds to issue payroll checks and pay various insurance premiums, together with a fee for Epic's services. On January 12, 2000, Epic and Steelwind agreed to cancel the "Agreement for Services," retroactively to January 1, 2000. In the interim, an employee at Steelwind's plant, Viveros, was injured on January 10, 2000. A dispute arose as to who was the liable employer, Steelwind (which had procured workers compensation insurance in anticipation of terminating the contract), or Epic.

LIRC found that Epic was a "temporary help agency" pursuant to Wis. Stat. § 102.01(2)(f) because it leased or placed its employees with Steelwind. Because an Epic witness described the former Steelwind employees as Epic employees and because both parties clearly intended the workers to be Epic employees covered under Epic's worker's compensation insurance policy for the life of the "Agreement for Services," LIRC determined that Epic was the employer on the date of Viveros' injury. Despite the retroactive cancellation of then "Agreement for Services," LIRC found Epic liable under Wis. Stat. § 102.03(1) for Viveros' January 10, 2000 injury. While LIRC acknowledged that Epic might be able to obtain contribution from Steelwind in an action in contract or in equity, for the purpose of the authority of LIRC under Wis. Stat. Ch. 102, Epic was the employer at the time of Viveros' injury.

Epic and its insurer appealed, but the circuit court affirmed LIRC's decision, using the great weight deference standard.

Issue

Whether the parties' January 12, 2000 agreement to cancel the "Agreement for Services," retroactive to January 1, 2000, made Steelwind the employer liable for Viveros' January 10, 2000 injury.

Holding

The Court of Appeals, using due deference, concluded that LIRC's determination that Epic was liable was consistent with the plain language of Wis. Stat. § 102.03(1), the closely-related case law, and the legislative intent behind the WCA.

Analysis

According to the plain language of Wis. Stat. § 102.03(1), worker's compensation liability is determined by the circumstances existing "at the time of the injury." Additionally, the Court of Appeals highlighted the fact that "Wisconsin courts have long held that the parties' rights and responsibilities become fixed under the [WCA] on 'the date when the employee is disabled from rendering further service.'" See Employers' Mut. Liab. Ins. Co. v. McCormick, 195 Wis. 410, 414, 217 N.W. 738 (1928).

It concluded, too, that Epic's contrary interpretation of Wis. Stat. § 102.03(1) based on its fundamental right to contract was not more reasonable than LIRC's interpretation, noting LIRC's observation that Epic might still have an action beyond the WCA in equity or on the contract itself.

However, concluding that LIRC's additional finding that Epic was a "temporary help employer" was not necessary to the decision, and that such finding might prevent Epic from obtain the relief in equity or on the contract under Wis. Stat. § 102.04(2m), the court modified the circuit court and LIRC decisions by striking all discussion of that issue therefrom.

Keller v. Kraft
2003 WI App. 212, 267 Wis. 2d 444, 671 N.W.2d 361 (Ct. App. Dist. I, September 23, 2003) (Appeal No. 02-3377)

The third co-employee exception provided in Wis. Stat. § 102.03(2) unambiguously precludes suits between co-employees where a local ordinance provides that the employer will indemnify the co-employee from any judgments.

Facts

Keller was driving his personal automobile while on duty as a firefighter with the Milwaukee Fire Department in August 2000 en route to a grocery store to purchase supplies for a meal at the firehouse. At the same time, Kraft was driving a Milwaukee Police Department vehicle, which collided with Keller's automobile. Keller's automobile was totaled and he suffered personal injuries as the result of the accident, which was allegedly due to Kraft's negligence. The fact that Keller received worker's compensation benefits from the City of Milwaukee is not disputed. Keller and his wife subsequently filed a complaint against Kraft and the City of Milwaukee seeking compensation for personal injuries. Kraft and the City of Milwaukee filed an answer, alleging that the exclusive remedy provision precluded Keller's lawsuit and filed a motion for summary judgment based on the same. The trial court granted the summary judgment motion brought by Kraft and the City of Milwaukee, and dismissed the Kellers' lawsuit.

Issue

Does the third co-employee exception provided in Wis. Stat. § 102.03(2) bar suits between co-employees where a local ordinance provides that the employer will indemnify the co-employee from any judgments?

Holding

The Court of Appeals held the third co-employee exception to the exclusive remedy provision of the WCA to be unambiguous, permitting an employee who receives worker's compensation benefits to also file suit against a co-employee when a governmental until is obligated to pay judgments against that employee pursuant to a collective bargaining agreement or local ordinance.

Analysis

The Kellers contended that the third co-employee exception removes their claim from the general rule that an employee who receives worker's compensation is precluded from bringing suit against a co-employee. The relevant Wis. Stat. § 102.03(2) language is as follows:

> against a coemployee of the same employer to the extent that there would be liability of a governmental unit to pay judgments against employees under a collective bargaining agreement or a local ordinance.

Identifying Milwaukee City Charter Section 3-23, the Kellers argued that a local ordinance does exists and it acts to indemnify Kraft for any liability he incurs as a

result of any personal injury arising from this case. Milwaukee City Charter 3-23 provides in full:

> Liability When Sued in Official Capacity. No officer of any city, no matter how organized, shall be required to file an undertaking, or any other bond required on appeal in any court when such party has been sued in his official capacity, except in actions of quo warranto or any other kind of action involving directly the title to his office, nor shall any city officer be liable for any costs or damages, but costs or damages, if any, shall be awarded against the city.

Conversely, Kraft and the City of Milwaukee contended that Milwaukee City Charter Section 3-23 was enacted solely to reflect the public employee indemnification requirement of Wis. Stat. § 895.46, that the purpose of Milwaukee City Charter Section 3-23 is to protect the City of Milwaukee's officers from lawsuits, and that Section 3-23 does not operate to waive the WCA's exclusive remedy provision. In reversing the circuit court, the Court of Appeals reviewed the WCA and its exclusive remedy provision and stated "[a]n employee who receives worker's compensation benefits may also file suit against a co-employee when a governmental unit is obligated to pay judgments against that employee pursuant to a collective bargaining agreement or a local ordinance." Milwaukee City Charter Section 3-23 is such an ordinance. It rejected the City of Milwaukee's suggestion that interpreting the statute in this way would be inconsistent with the theory of the WCA, which assures a smaller but more certain recovery than what might be available in tort, because "[t]he legislature determined that individuals injured by co-employees in certain circumstances should not be limited to worker's compensation benefits."

Milwaukee County v. Juneau County
2004 WI App. 23, 269 Wis. 2d 730, 676 N.W.2d 513 (Ct. App., Dist. IV, January 22, 2004) (Appeal No. 02-2880)

The most reasonable interpretation of "command" in Wis. Stat. § 66.0513(2) encompasses a request, an order, and a directive.

Facts

During the pursuit of a murder suspect from Sauk County into Juneau County, Juneau County law enforcement officers established a command post to coordinate search efforts by law enforcement personnel from multiple jurisdictions, which included Sauk County and Juneau County. At the request of a Juneau County officer, the Sauk County Sheriff contacted Milwaukee County officials to request the use of a helicopter to assist in the search of the suspect. Following its participation in the search in Juneau County, the helicopter, which contained to Milwaukee County deputy sheriffs, crashed in Dodge County on the return trip. Both deputy sheriffs were killed in the crash. Milwaukee County

made worker's compensation payments to the families of the deceased deputy sheriffs and then sought reimbursement from Sauk County and Juneau County.

The circuit court concluded that Juneau County was required to reimburse Milwaukee County for the payments made under the WCA to the deceased deputy sheriffs' families. It also concluded that Juneau County's worker's compensation insurance policy with Safety National did not provide coverage. Sauk County was not ordered to reimburse Milwaukee County for such payments. Juneau County and Safety National each filed separate appeals.

Issue

Whether the Juneau County Sheriff's request for assistance falls within the term "commanded" contained within Wis. Stat. § 66.0513(2), which sets forth a worker's compensation scheme for law enforcement personnel who are called upon to perform duties outside of the territorial limits of the municipality where they are regularly employed.

Holding

The Court of Appeals affirmed the circuit court, concluding that the most reasonable interpretation of "command" in Wis. Stat. § 66.0513(2) encompasses the request of Juneau County.

Analysis

Rejecting Safety National's cross-appeal challenging the summary judgment order dismissing all claims against Sauk County and requiring Juneau County to reimburse Milwaukee County, the Court of Appeals agreed with the circuit court that it was undisputed that Juneau County requested the services of the Milwaukee County deputy sheriffs. Although the Sauk County Sheriff suggested that Milwaukee County be contacted and it identified itself as the requesting agency on the related paperwork, he was acting on the request of the Juneau County officer in charge of the command center. Sauk County was properly dismissed.

Safety National urged the Court of Appeals, to no avail, to accept its interpretation of Wis. Stat. § 66.0513(2)'s reimbursement provision to only apply when officers from the requesting municipality "commanded" the police services of the assisting municipality. The Court of Appeals commented that "the phrase 'commanded the services,' as used in the statute, could commonly be understood to refer to services that are ordered authoritatively, or that are requested by or performed under the direction of officers of another political subdivision." It continued by stating "the legislature could not have intended that liability for worker's compensation claims and other benefits under Wis. Stat. § 66.0513(2) depend on subtle distinctions between how requests and directives

are uttered." "Commanded "in Wis. Stat. § 66.0513(2) encompasses "ordered," "directed," and "requested."

Turning to Juneau County's appellate question of whether its liability fell within the scope of its worker's compensation policy, the Court of Appeals found no ambiguity in the relevant policy language, which provided "In no event shall [Safety National] be liable for any Loss voluntarily assumed by the EMPLOYER under any contract or agreement, expressed or implied." Safety National asserted that there was no coverage because the deputy sheriffs killed in the crash were not Juneau County employees, that the use of the helicopter fell within the policy's aircraft exclusion, that the policy did not cover losses voluntarily assumed by Juneau County, that Juneau County forfeited coverage by accepting liability for the helicopter use with Safety National's approval, and, finally, that there was no coverage because Juneau County did not pay a premium to cover employees from other counties rendering law enforcement services to Juneau County. Discounting each one of Safety National's arguments for various reasons, the Court of Appeals reversed the portion of the summary judgment dismissing Safety National and remanded the matter to the circuit court to enter summary judgment in Juneau County's favor on the coverage issue.

III. UNPUBLISHED COURT OF APPEALS DECISIONS

Anderson v. MSI Preferred Ins. Co.
2004 WI App. 68, ___Wis. 2d ___, 677 N.W.2d 733 (Ct. App., Dist. III, February 10, 2004) (Appeal No. 03-1880) (petition for review filed with the Wisconsin Supreme Court on March 29, 2004)

Where there has been a careful review of an affidavit prepared by the attorney for a Wis. Stat. § 102.29 lien holder setting forth the costs and fees associated with protecting its lien, a circuit court had a rational basis for allowing its entire costs of collection.

Facts

Anderson sustained a work-related injury as the result of an automobile accident. The driver at fault, Jones, was insured by Acceptance Insurance Company, which provided him with a policy limit of $25,000. Anderson's insurer, MSI Preferred Insurance Company, provided him with underinsured motorist coverage and was involved in the circuit court action due to a potential subrogation lien, but did not participate in the appeal. The Accident Fund Company paid worker's compensation benefits to Anderson and, pursuant to Wis. Stat. § 102.29(1), obtained a lien in the process. In July 2002, Anderson filed suit against Jones without naming the Accident Fund as a party to the action or notifying it of the litigation. One month later, the Accident Fund referred Anderson's worker's compensation claim to Walther Law Offices, which learned

of his suit against Jones during an investigation of Jones' insurer. Concerned that Anderson would try to circumvent the requirements of Wis. Stat. § 102.29(1), Walther field a motion to intervene, but Anderson voluntarily amended his complaint shortly thereafter to bring the Accident Fund into the suit in October 2002.

Walther traveled from Milwaukee to Eau Claire to attend mediation between Anderson and Jones in March 2003. He received a telephone call en route from Anderson's attorney asking if he would agree to cancel the mediation because she believed it would not be fruitful, but Walther refused. At the mediation, Acceptance Insurance Company offered to tender Jones' policy limits of $25,000 to settle the case and Anderson agreed. At that time, Walther sought to recover his "reasonable cost of collection" for the Accident Fund, offering to accept payment of approximately $3,500, but Anderson refused. When Anderson filed a motion to approve his settlement, he listed $3,500 as the amount to be distributed to the Accident Fund. The circuit court set a hearing for arguments on the distribution of the settlement amount, but approved the settlement itself. At the motion hearing, the Accident Fund sought payment of nearly $7,500 in costs and Anderson objected contending that the employee's attorney usually also protects the worker's compensation payor. Anderson also argued that it was unreasonable that the Accident Fund had incurred $7,500 in costs when it only made $8,500 in payments to him. The Accident Fund disputed that it only paid $8,500 to Anderson, but that issue was not the subject of this appeal.

The circuit court approved Anderson's attorney's one-third contingent fee as well as Walther's $7,500 fees and costs. After receiving only $2,400 from the $25,000 settlement, Anderson appealed.

Issue

Were the fees and costs of the attorney representing the Accident Fund for its Wis. Stat. § 102.29 lien reasonable?

Holding

The Court of Appeals affirmed the circuit court, concluding that the latter had a rational basis for finding Walther's fees and costs to be reasonable. It rejected the Accident Fund's argument that Anderson's appeal was frivolous.

Analysis

On appeal, Anderson argued that there was no factual basis in the record to support the Accident Fund's claimed costs and that the circuit court erred when it interpreted Zentgraf v. Hanover Ins. Co., 2002 WI App. 13, ¶14, 250 Wis. 2d 281, 640 N.W.2d 171, to require an award of the "entire claimed costs of collection." The Court of Appeals rejected Anderson's argument because the circuit court did

not, in reaching its decision, rely on the interpretation of Zentgraf that he presented. It was apparent to the Court of Appeals that the circuit court requested an affidavit detailing the basis for each side's costs and indicated that it reviewed such at least three times. Rather than relying on the language of Zentgraf, the circuit court carefully considered the "entire claimed costs of collection" on their own merit.

With regard to the issue of reasonableness of the Accident Fund's fees, the Court of Appeals turned to the factors in Supreme Court Rule 20:1.5(a) (1999), which provide an appropriate assessment of reasonable attorney fees. While each and every one of the factors need not be examined, the Court of Appeals noted that Walther's affidavit listed each action for which labor was required, that Anderson's attorney received $8,333 for pursuing the action, plus costs, that Walther was responsible for getting Acceptance Insurance to tender the $25,000 policy limits, that Walther had been the Accident Fund's attorney for approximately 15 months, and that Walther had extensive experience working with worker's compensation insurers and had been rated highly by his peers. For the above reasons, the Court of Appeal held that the circuit court had a rational basis to conclude that Walther's fees were reasonable.

Wisconsin Worker's Compensation Uninsured Employers Fund v. LIRC
2003 WI App. 225, 267 Wis. 2d 962, 671 N.W.2d 718 (Ct. App., Dist. IV, September 25, 2003) (Appeal No. 03-0258)

The calculation of disability and the amount of disability awards are issues concerning whether the evidence supported the factual finding, rather than questions of law.

Facts

Aslakson sustained a work-related hip fracture, among other injuries, during his employment with Ken Donais Construction. He had surgery on the injured hip and was hospitalized for one week. His only further treatment was a second operation approximately one year later. Aslakson's physician declared that he had reached a healing plateau on December 27, 1999. The Wisconsin Worker's Compensation Uninsured Employers Fund ("Fund"), which insured Ken Donais Construction, contested several aspects of Aslakson's claim and an evidentiary hearing was held. The ALJ determined that Aslakson earned $450 per week with Ken Donais Construction, he was entitled to periods of TTD and PTD between July 9, 1998 and December 31, 1999, he sustained 15% PPD attributable to his hip injury, he suffered PPD of 5% to his body as a whole, and he suffered a 40% loss of earning capacity as a result of his disabilities. LIRC affirmed the ALJ, adopting her findings and conclusions as its own. The circuit court affirmed LIRC's decision, and the Fund appealed.

Issue

Whether LIRC had sufficient evidence to calculate Aslakson's wages at $450 per week, to award temporary disability benefits, to find 40% loss of earning capacity, to conclude that the hip injury caused a 15% PPD.

Holding

The Court of Appeals affirmed LIRC decision, finding sufficient evidence to support the calculated disability and amount of disability awards.

Analysis

While the Fund categorized all of its issues as questions of law, necessitating the application of *de novo* review, the Court of Appeals concluded that each issue concerned whether the evidence supported the factual finding. The Court of Appeals determined that Aslakson submitted substantial evidence supporting his weekly wage through testimony of his hours worked per week and his hourly salary as well as the introduction of a receipt showing a $460 payment purportedly representing a week's pay. Substantial evidence also supported LIRC's award of temporary disability benefits. The Court of Appeals commented on this point that "[n]o rule of law requires a particular minimum amount or level of treatment during a healing period." Regarding the loss of earning capacity, the Court of Appeals rejected the Fund's argument that its vocational expert's report was far superior to that of Aslakson's vocational expert, concluding that such argument goes directly to the weight and credibility of the evidence. Lastly, the 15% PPD, as with the loss of earning capacity, was within "LIRC's prerogative as a matter of weight and credibility."

Hutchinson Technology v. LIRC

2003 WI App. 225, 267 Wis. 2d 961, 671 N.W.2d 717 (Ct. App., Dist. III, September 18, 2003) (Appeal No. 02-3328) (Affirmed by the Wisconsin Supreme Court in 2004 WI 90 on June 30, 2004)

An employer must be able to point to significant evidence demonstrating that it was unreasonable to make an accommodation for a disabled employee in the specific context of its production process to establish hardship.

Facts

Roytek was an employee of Hutchinson Technology working at a position pre-injury that required twelve-hour shifts. Due to a back condition, Roytek was restricted to working no more than 8 hours per day. Hutchinson Technology allowed her to work 8-hour shifts for ten months, but then terminated her Roytek filed a complaint with the DWD alleging unlawful discrimination on the basis of

disability. The ALJ decided in Roytek' favor and LIRC issued a decision affirming the ALJ. LIRC held that Hutchinson Technology had not established that it would have been unreasonable to accommodate Roytek by continuing to allow her to work an 8-hour shift or that it would be a hardship for it to do so.

LIRC's decision was upheld by circuit court. Hutchinson Technology appealed.

Issue

Did Roytek have a disability and, if so, did Hutchinson Technology fail to make a reasonable accommodation for such?

Holding

The Court of Appeals affirmed LIRC, determining that Hutchinson Technology unlawfully discriminated against Roytek on the basis of disability.

Analysis

Following the Wisconsin Supreme Court's relevant decision in Crystal Lake Cheese Factory, discussed above, the Court of Appeals was faced with several arguments from Hutchinson Technology. First, Hutchinson Technology argued that LIRC erred by concluding that Roytek was a person with a disability, citing federal case law standing for the proposition that Roytek must have been limited in her capacity to work in general to meet the definition. The Court of Appeals rejected this argument based on the fact, conceded by Hutchinson Technology, that existing Wisconsin case held that the relevant part of the definition for disability under Wis. Stat. § 111.32(8)(a) applies to the particular job in question. See City of La Crosse Police & Fire Comm. v. LIRC, 139 Wis. 2d 740, 761-62, 407 N.W.2d 510 (1987). Second, the Court of Appeals rejected Hutchinson Technology's argument that LIRC erred by holding against it on the issue of reasonable accommodation. Using great weight deference, the Court of Appeals remarked that Hutchinson Technology "remains unable to point to significant evidence in the record that demonstrates hardship in this particular situation, rather than speculation or theoretical complaints." Third, Hutchinson Technology argued that, regardless of the reduction in working hours, Roytek's other physical restrictions made it unreasonable to accommodate her disability because she would be limited to performing only one of the four functions that employees in her position are usually rotated through. Citing Crystal Lake Cheese Factory, the Court of Appeals noted that Hutchinson Technology had not pointed to significant evidence demonstrating that it was unreasonable to make that accommodation in the specific context of its production process. Fourth, although Hutchinson Technology argued that LIRC erred by ordering it to reinstate Roytek and give her back pay through the reinstatement date, it cited no relevant law to guide the Court of Appeals in analyzing the situation.

United Heartland, Inc. v. LIRC
2003 WI App. 225, 267 Wis. 2d 961, 671 N.W. 2d 717 (Ct. App., Dist. I, September 3, 2003) (Appeal No. 02-3150)

Where an injury is ultimately found to have been work-related in causation, it is insignificant that there is an inconsistency in the time of pain onset or the area on the employee's body in which the "noise" was heard to have been coming from at the time of the accident.

Facts

Amaihe, a part-time employee for New Berlin Plastics, allegedly was injured while lifting a box from the ground to an overhead skid during an early morning 4-hour shift. At the time, Amaihe had already given notice to New Berlin Plastics that he was quitting. Amaihe filed an application for hearing and testified thereat that he heard a "noise" in his neck or back when he was lifting the box, but continued to work because he did not experience pain until later. Amaihe did not report the injury until two days later because he did not work a shift on the weekend.

The medical doctors who either examined Amaihe or reviewed his records were in disagreement as to what injury he suffered and whether the injury was work-related. The doctor at the clinic where Amaihe initially sought treatment, Concentra Clinic, diagnosed his condition as a "left shoulder strain" and released him to return to work with restrictions. Amaihe went to an emergency room after his pain increased and was subsequently diagnosed with an "acute left shoulder strain." Amaihe then saw Dr. Tyne, who diagnosed his injury as a "cervical radiculopathy, secondary to degenerative changes at C6-7" and opined that the work incident aggravated this underlying condition. Another Concentra Clinic doctor noted that Amaihe displayed exaggerated and inconsistent responses during his physical examination, opining that any neck and back pain experienced by his was not work-related. Amaihe next saw Dr. Masci, whose record reflects that Amaihe told him that he originally heard the "noise" at the time of the accident coming from his cervical spine. Dr. Masci diagnosed Amaihe as having a work-related herniated disc at C7-T1, after an MRI revealed the injury. Dr. Karr, who was hired by New Berlin Plastics' worker's compensation insurer, United Heartland, examined Amaihe and was told by him that he first heard the "noise" at the time of the accident coming from his neck and that he first experienced pain upon waking the next morning. Dr. Karr opined that Amaihe experienced a cervical strain/sprain resulting in an aggravation of a multi-level degenerative cervical spondylosis beyond its expected progression. Finally, Dr. McDevitt reviewed Amaihe's medical file on the request of United Heartland, concluding that he did not receive a work-related injury to his neck, that any work-related injury on the alleged date was a temporary shoulder strain, and that the disc problem revealed by the MRI was a preexisting problem.

After hearing, the ALJ dismissed Amaihe's claim for benefits, apparently adopting the view of the doctors who found Amaihe only strained his shoulder on the alleged injury date. LIRC reversed the ALJ, finding a compensable work injury, and awarded Amaihe temporary disability benefits, PPD, and continuing medical expenses. LIRC also retained jurisdiction for future awards. The circuit court affirmed LIRC's decision. New Berlin Plastics and United Heartland appealed.

Issue

Did LIRC make an unreasonable inference regarding the date of the onset of Amaihe's pain and was such an inference a material finding of fact?

Holding

The Court of Appeals affirmed LIRC, finding that the exact time of Amaihe's onset of pain to be inconsequential against the eventual diagnosis that he suffered a herniated disc as the result of lifting boxes onto a skid at his workplace.

Analysis

On appeal, New Berlin Plastics and United Heartland argued that LIRC's decision should be overturned because it wrongfully inferred that Amaihe's onset of pain occurred on Friday night rather than Saturday night and because such inference is a material finding of fact unsupported by credible evidence. In rejecting this argument, the Court of Appeals highlighted a portion of LIRC's decision that read "There is no indication that the determination as to pain onset makes any difference to LIRC's ultimate determination." The Court of Appeals agreed with LIRC's conclusion, observing that the latter's finding that pain occurred on Friday was irrelevant and not a material finding of fact as alleged. New Berlin Plastics and United Heartland also argued that LIRC's award relied on medical evidence that was not credible because Amaihe provided an inaccurate history. The Court of Appeals also rejected this argument, concluding, with regard to the discrepancy of Amaihe's report of the "noise" in his neck versus his back, that "[t]he challenge to this slight difference in Amaihe's report of where he first heard the noise that signaled his injury is insignificant, nor do we agree that Dr. Masci failed to consider whether Amaihe's injury was preexisting."

Burger King v. LIRC

2003 WI App. 225, 267 Wis. 2d 962, 671 N.W. 2d 718 (Ct. App. Dist. III, September 3, 2003) (Appeal No. 03-0697)

An employee's reinjury is sufficiently evidenced by her credible testimony and corroborating medical records.

Facts

Buchholz began working at Burger King as a hostess when she was 80 years old. After working there for over five years, Buchholz injured her back in January 2001 while emptying garbage, stating that she "got a sharp pain right down the middle lower middle part of my back it just cut like I broke a bone or something" while lifting a 50-pound bag. A diagnostic imaging report from the hospital noted "marked degenerative changes in the lumbar spine, but no fracture or other acute abnormality" and physical therapy for low back pain was prescribed. Buchholz was then treated at Ford Chiropractic, where she was diagnosed as having a "sever lumbosacral sprain/strain injury; right saroiliac subluxation; right L5 radiculopathy; myalgia and myositis." She continued off work and under a doctor's care for several months. On April 11, 2002, Ford Chiropractic noted that Buchholz continued to experience pain and spasm, but she was showing some signs of improvement and "we may try to return the patient to work on 4/19/01." On April 19, 2001, Buchholz did return to work, but reinjured her back while emptying garbage in much the same way.

The ALJ found that Buchholz had sustained a work-related injury in January 2001 and again on April 19, 2001. Burger King appealed to LIRC, which affirmed, after conferring with the ALJ regarding witness credibility. It specifically stated that "[t]he commission credits Dr. Ford's assessment the applicant was unable to return to work following her work injuries, and suffered four-percent permanent partial disability." The circuit court affirmed LIRC and Burger King further appealed.

Issue

Did LIRC err as a matter of law by finding that a work-related injury occurred on April 19, 2001, awarding temporary disability benefits, permitting Buchholz to maintain a claim for loss of earning capacity, and finding that she sustained a 4% PPD?

Holding

The Court of Appeals rejected all of Burger King's arguments and affirmed LIRC's decision favoring Buchholz.

Analysis

In affirming LIRC, the Court of Appeals concluded that the record disclosed substantial and credible evidence supporting a finding that Buchholz suffered a work-related injury on April 19, 2001, as shown by the following: (1) Buchholz testified that on that date she reinjured her back while emptying the garbage

cans at work, and (2) medical notes from Dr. Ford and another health care facility corroborate such testimony.

Essbaum v. National Ins. Co. of Wisconsin
___ WI App. ___, ___ Wis. 2d ___, ___ N.W.2d ___ (Ct. App., Dist. I, March 16, 2004) (Appeal No. 03-1365)

Facts

In March 1994, Essbaum injured his back while working for the Fox Point/Bayside School District, which provided him with disability coverage with National Insurance Company of Wisconsin. The National policy covering Essbaum included a section titled "Monthly Benefit Provision Direct Offset," providing that an insured's monthly benefit would equal his or her "Plan Monthly Benefit minus Other Specified Income, if any," derived from other sources. Those other sources included worker's compensation, social security, as well as "[a]ny disability or retirement benefits the Insured Employee…receives or is eligible to receive because of Employee's disability or retirement from any government plan not otherwise specified." National received notice of Essbaum's claim for disability benefits in November 1994.

An investigator for National wrote to Essbaum in December 1994 advising him that his claim for total disability benefits was approved, but the letter included the following direction regarding relevant policy provisions:

> We also understand that you are continuing to pursue your claim for Worker's Compensation benefits. If your Worker's Compensation benefits are reinstated, we understand that your sick leave benefits will also be reinstated and this would create an overpayment in your Long Term Disability benefits. If that occurs, you will be required to remit the amount of the overpayment to us. Please be sure to keep us informed concerning your Worker's Compensation claim.
>
> This plan also requires you to apply for Social Security and Wisconsin Retirement System Disability benefits. If you have not done this, we would suggest that you apply for those benefits in the near future and advise us in writing of the dates that your applications for Social Security and Wisconsin Retirement System disability benefits were submitted to the appropriate agencies. As your Long Term Disability benefits would be calculated in conjunction with those benefits, please also keep us informed of your eligibility for Social Security and Wisconsin Retirement System Benefits by providing us with copies of any written determinations that you should receive concerning your eligibility for those benefits.

> In addition to the Worker's Compensation benefits, if Social Security and/or Wisconsin Retirement System benefits are awarded, your benefits with us may become overpaid. If you wish us to provide full benefits to you pending favorable determination on your Worker's Compensation, Social Security and Wisconsin Retirement System claims, please complete the enclosed Promise to Repay Agreement and return the completed and notarized agreement to us as soon as possible.

Although Essbaum did not initially seek compensation from some of the potential sources referenced in the November 1994 letter from National, he received $25,000 in worker's compensation benefits as well as some social security benefits. National adjusted the substantial payments is made to Essbaum by offsetting them by the amounts he received, or was eligible to receive, from other sources.

Essbaum sued National in July 1995, disputing that it had the authority to require him to pursue and obtain benefits from some of the other sources. He also disputed some of the offset amounts. The circuit court judge granted National's motion for summary judgment. Essbaum filed a first amended complaint, again disputing the offset amounts, but a second circuit court judge dismissed the action based on Essbaum's failure to mediate in good faith. The Court of Appeals reversed the dismissal, holding that the circuit court could not require Essbaum to accept a mediated agreement. On remand, in March 2001, a third circuit court judge asked the parties whether they needed time to amend the pleadings or name additional parties, and Essbaum's attorney stated that no additional time was needed. Approximately three weeks later, Essbaum filed a motion requesting leave to file a 27-page second amended complaint, alleging four new claims, which the circuit court denied.

The day after his motion for leave was denied, Essbaum filed another action against National, alleging essentially the same claims he had sought to pursue in the second amended complaint. A fourth circuit court judge granted National's motion to consolidate the case with the one before the third circuit court judge, and the third circuit court judge then granted National's motion to strike and/or dismiss the action that had been filed before the fourth circuit court judge.

After transfer of the case in 2002, a fifth circuit court judge concluded that the National policy was clear and unambiguous, that it provided for the offsets National took into account in computing its payments to Essbaum, and that National had shown no bad faith in denying the additional amounts he sought. Essbaum appealed once again to the Court of Appeals.

Issue

Whether the third circuit court judge's denial of Essbaum's motion for leave to file his second amended complaint was erroneous?

Whether the fifth circuit court judge's dismissal of Essbaum's breach of contract and bad faith claims was erroneous?

Holding

The Court of Appeals affirmed the circuit court in a *per curium* opinion.

Analysis

On Essbaum's argument that the Court of Appeals should independently review the circuit court's decision denying his motion to file a second amended complaint, giving no deference to the circuit court, the Court of Appeals rejected such argument, indicating that he had already amended his complaint once and had "offered nothing to establish that justice required the court to grant his request." It found the circuit court's discretionary denial of Essbaum's request was consistent with Wis. Stat. § 802.09(1) and the standard found within Grothe v. Valley Coatings, Inc., 2000 WI App. 240, ¶12, 239 Wis. 2d 406, 620 N.W.2d 463.

The Court of Appeals also rejected Essbaum's argument that the circuit court erred in concluding that the pleadings failed to establish any material factual issue for further proceedings, determining that "the clear terms of the policy, together with the undisputed facts, establish that National was entitled to offset its payments to Essbaum by the amounts he received, or was eligible to receive, from the other sources to which the policy referred."

IV. UNPUBLISHED COURT OF APPEALS DECISION REMANDED TO LIRC

Following up with a doctor, who was one of three recommendations by another doctor, one year later still qualifies as a "referral" under Wis. Stat. § 102.42(2).

Trinity Memorial Hospital v. Villwock
___ WI App. ___, ___Wis. 2d ___, ___ N.W.2d ___ (Ct. App., Dist. I, May 23, 2003) (Appeal No. 02-3187) (reversed on summary disposition and remanded to LIRC with directions)

Facts

Villwock filed an application for hearing seeking compensation arising from an alleged 1993 work-related neck injury. At the 1999 hearing, there was testimony

and evidence that Villwock had originally treated with her family doctor, Dr. Cyrus, and his partner, Dr. Steinman. Dr. Cyrus referred Villwock to Dr. Krug. Apparently dissatisfied with her treatment from Dr. Cyrus or Dr. Krug, Villwock began treating with Dr. Tsuchiya, on her own initiative and without any referral. Dr. Tsuchiya, who Villwock described as a "neck specialist," then referred her to Dr. Vasudevan, who further referred her to Dr. Kim, a psychiatrist. Finally, Villwock began treating with Dr. Aldred, a family doctor, who referred her to Dr. Heydarpour, a pain specialist, who referred her to Dr. Maiman, a neurosurgeon who performed surgery on her. While the ALJ found a compensable injury and LIRC affirmed on that aspect of the case, the parties disputed whether the self-insured employer, Trinity Memorial Hospital of Cudahy, could be held liable for certain items of treatment expense under the choice of practitioner rules at Wis. Stat. § 102.42(2). The ALJ found that the treatment with Dr. Aldred was a third choice of treating doctors starting a third referral chain.

LIRC affirmed the ALJ's decision on causation and disability issues, but remanded for further hearing on the issue of whether Dr. Kim referred Villwock to Dr. Aldred within the meaning of Wis. Stat. § 102.42(2).

At the second hearing on the referral issue in 2000, a different ALJ found that Dr. Kim "referred" Villwock to Dr. Aldred. LIRC affirmed, finding that Dr. Kim gave Villwock three names and that he had hoped that she would follow up with one of them. Dr. Kim's recommendation was not the type of "may wish to consider further testing" or "seek follow-up from a specialist if condition worsens" recommendation LIRC had previously rejected as a "referral" under Wis. Stat. § 102.42(2)(a). It determined that Dr. Kim's recommendation did not constitute doctor-shopping leading to unnecessary expense or unneeded treatment. Because Dr. Kim referred Villwock to Dr. Aldred within the meaning of the statute, the medical expense from treatment with Dr. Aldred, Dr. Heydarpour, and Dr. Maiman was not beyond the second choice and, therefore, was compensable to the extent its rendering was to cure and relieve the effects of the work injury.

The circuit court affirmed LIRC's decision, which contained a liberal construction of the word "referral," ruling that it comported with a basic purpose of the WCA to ensure that injured workers receive the prompt and comprehensive medical care that is necessary for their well-being.

The Court of Appeals reversed and remanded with direction to address the following issues: (1) Villwock's decision to fire Dr. Tsuchiya, and (2) Villwock's decision to wait one year between soliciting a recommendation from Dr. Kim for a new family doctor and acting on the recommendation. It concluded that the absence of these two facts rendered LIRC's decision incomplete.

Issue

Should the word "referral" in Wis. Stat. § 102.42(2)(a) be interpreted to include a recommendation to see one of three doctors that a patient follows up on one year later?

Holding

LIRC affirmed the findings of the ALJ from the 2000 hearing on the referral issue, holding that the medical expense from the treatment with Dr. Aldred, Dr. Heydrapour, and Dr. Maiman was not beyond the second choice under Wis. Stat. § 102.42(2)(a), and was, therefore compensable to the extent it was rendered to cure and relieve the effects of the work injury.

Analysis

In its decision in WC Claim No. 1993-043895 (LIRC, January 20, 2004), LIRC pointed out that Villwock did not fire Dr. Tsuchiya, as the Court of Appeals indicated in its remand directions, and that Dr. Tsuchiya sent her to another doctor because he no longer performed surgery. According to LIRC, "dissatisfied with the treatment she was getting from the Cyrus-Steinman-Krug chain, Villwock made her second choice contemplated in Wis. Stat. § 102.42(2). She quite reasonably chose to seek treatment instead with neurosurgeon Tsuchiya, from whom she had had prior treatment." While it conceded that Villwock's choice to stop treating with Dr. Cyrus to commence treatment with Dr. Tsuchiya may be regarded as doctor-shopping, in its broadest sense, such is the type permitted by the statute because "it is the choice of an informed consumer or patient to return to a provider who previously rendered care she apparently regarded as satisfactory."

On the issue of why Villwock waited one year before seeing Dr. Aldred, LIRC highlighted the fact that she learned that she was pregnant shortly after Dr. Kim made the recommendation. LIRC stated it "cannot conclude that the delay in acting on Dr. Kim's recommendation indicates Villwock was doctor-shopping. Indeed, if Villwock were really trying to get unnecessary treatment, or shopping around for a favorable medical opinion, it seems unlikely she would have delayed by waiting."

V. CIRCUIT COURT DECISION

Hot Line Freight, Inc. v. LIRC
Case No. 03-CV-0036 (La Crosse County, June 4, 2003) (an appeal pending before the Wisconsin Court of Appeals, Dist. IV, Appeal No. 03-1934, was voluntarily dismissed on October 13, 2003)

The employer, Hot Line Freight, contended that it had been denied a fair hearing on a claim brought by an injured employee under Wis. Stat. § 102.35(3). Hot Line pointed to the ALJ's refusal to schedule a fifth hearing on the refusal to rehire claim to permit the testimony of Hot Line's president and co-owner, who had been unable to attend the fourth hearing due to illness. The ALJ had previously allowed a letter from the Hot Line president and co-owner to be admitted, and such was admitted without any objection or any request for a continuance. LIRC affirmed.

The circuit court affirmed LIRC's decision, rejecting Hot Line's argument that it had been severely hindered in its presentation of its case when it was unable to present the testimony of the president and co-owner to the ALJ. It added that Hot Line had failed to demonstrate the necessary prejudicial error pursuant to Wis. Stat. § 102.23(2) and, further, that there was nothing in the record to indicate that the president and co-owner's direct testimony would have added anything more significant than the content of the letter he wrote.

Denial of a fifth hearing was not erroneous because Hot Line, like any other litigant, was only entitled to a "fair" hearing, not a "perfect" one. See Roberts v. State, 41 Wis. 2d 537, 551, 164 N.W.2d 525 (1969).

Irvine v. LIRC
Case No. 03-CV-819 (Waukesha County, December 15, 2003)

Irvine, a mechanic, sustained a back injury from a fall while trying to fix the windshield wipers of a truck while working for United Parcel Service in April 1998. He underwent a laminectomy and fusion surgery in February 1999, but was left with burning leg pain. His doctor recommended the implantation of a dorsal column stimulator for the leg pain, but the surgery was not performed until June 2001, which was after the ALJ's decision. The ALJ found an end of healing plateau of October 1999, which ended United Parcel Service's liability for temporary disability at the same time.

On appeal Irvine, LIRC awarded temporary disability to May 2000 based on a report from United Parcel Service's independent medical examiner, who opined that the dorsal column stimulator would be palliative—a lessening of the pain—only, but would not improve function. Irvine then filed another application seeking continued temporary disability pending another hearing regarding the dorsal column stimulator. In February 2002, a hearing was held regarding payment of temporary disability (August to December 2001 and January 2002 to the date of hearing), medical bills, and an interlocutory order. Although his burning leg pain subsided, Irvine claimed that no one ever told him that he could return to work and that United Parcel Service never contacted him to do so.

United Parcel Service argued before LIRC that there was insufficient evidence that Irvine was in a period of renewed healing after the dorsal column stimulator

implantation and that because the stimulator was palliative rather than restorative he should get no temporary disability. The fact that Irvine's treatment was palliative did not make it noncompensable or unnecessary, as evidenced by the Wis. Stat. § 102.42(1) reference to payment of expenses to cure and relieve the effects of a work injury. Palliative treatment, according to LIRC, is not inherently suspect.

United Parcel Service appealed to the circuit court, specifically arguing (1) LIRC's decision to award TTD for the time period it did was unsupported by any evidence; (2) there is no proof that medical expenses were reasonable and necessary and/or related to the industrial accident; and (3) the circuit court must rule that palliative care of the dorsal column stimulator was not necessary to relieve and cure the effects of the industrial injury, so the decision was not based on a proper interpretation of Wis. Stat. § 102.42(1).

Utilizing great weight deference, the circuit court affirmed LIRC's decision "in all aspects." First, the circuit court was satisfied that there existed substantial evidence to support LIRC's finding of TTD for the subject period because medical records indicated both that the stimulator procedure was done for radicular symptoms that followed the failed fusion surgery and that Irvine had entered into a renewed healing period after his second stimulator surgery. Second, it relied on a doctor's notation that the stimulator was reasonable and medically necessary treatment of Irvine's radicular symptoms, which were residual from the failed fusion surgery resulting from his original work injury.

Third, the circuit court, concluded that the Wis. Stat. § 102.42(1) language "as may be reasonably required to cure and relieve from the effects of an injury" should be read to mean that necessary treatment can be for curing *or* relieving. Drawing inspiration from how the New Jersey judiciary addresses its rules of construction as applied to its own worker's compensation statute in Howard v. Harwood's Restaurant Co., 40 N.J. Super. 564, 123 A.2d 815 (Law Div. 1956), the circuit court set forth the following regarding § 102.41(1):

> There is no question but that treatment can, in fact, be required that has nothing to do with healing from surgery. Clearly the statute envisions a circumstance where additional treatment may be necessary, not only to address questions relative to healing, but to allow the individual to maintain their physical status or to prevent deterioration from occurring even if healing has completed. Clearly by definition any treatment provided after healing is completed could be construed as palliative. However, the statute clearly allows for the employee to be furnished this type of treatment even after healing is completed if it is still necessary to prevent any further deterioration or for the employee to maintain their present status.

> To read § 102.42 Wis. Stats. to require that treatment has to be for both curing and relieving the effects of the injury would be at odds with other portions of the statute, as well as what is the clear intent as established by the legislature to help workers recover and be made as functional as possible from injuries that are work related.

Kubacki v. LIRC
Case No. 03-CV-0386 (Milwaukee County, June 30, 2003) (an appeal pending before the Wisconsin Court of Appeals, Dist. I, Appeal No. 03-2103, was dismissed on January 27, 2004)

The ALJ reached a decision regarding the compensability of Kubacki's injury and such decision states that it was dated and mailed on May 13, 2002. Based on that date, pursuant to Wis. Stat. § 102.18(3), Wis. Admin. Code § LIRC 1.02, and Wis. Admin. Code § LIRC 3.01, the last date on which a timely petition for review could have been filed was June 3, 2002. LIRC received Kubacki's petition for review via facsimile transmission on June 5, 2002 with a cover letter from his attorney stating that while the ALJ's decision reflects that it was dated and mailed on May 13, 2002, the decision was received by the attorney in an envelope postmarked May 15, 2002. Kubacki's attorney asserted that the postmark date establishes (1) the date of mailing as May 15, 2002, (2) the 21-day deadline date as June 5, 2002, and (3) that the petition for review was timely received.

LIRC's general counsel, on the representation from Kubacki's attorney, sent a letter to all parties informing them that LIRC would accept Kubacki's petition for review as timely. Milwaukee County's attorney immediately wrote to LIRC stating that he did not receive a copy of Kubacki's petition for review, but, more importantly, that he had received a copy of the ALJ's decision. The copy of the ALJ's decision that Milwaukee County sent to LIRC contained a May 14, 2002 date-stamp, which is indicative of a May 13, 2002 mailing. Milwaukee County took the position that, pursuant to a prior LIRC decision, Kaiser v. ADM Milling, WC Case No. 1996-010271 (LIRC, June 22, 1999), Kubacki's petition for review should be dismissed as untimely.

LIRC issued an order withdrawing its tentative acceptance of Kubacki's petition for review as timely, and directing the taking of additional evidence on the facts involving Kubacki's attorney's receipt of the ALJ's decision. Specifically, LIRC's order stated the particular desire for admission into evidence of the original envelope said to contain the May 15, 2002 post-mark. Kubacki's attorney appeared at the ordered hearing before a different ALJ than the one who authored the May 13, 2002 decision, but she testified that she could not find the original envelope.

In concluding that Kubacki's petition for review was untimely, LIRC examined the Kaiser decision. It stated:

> In Kaiser, the applicant apparently did not assert he received the decision at issue in an envelope bearing a later postmark date than the decision date. Kaiser, thus, indicates that in the absence of other evidence, a decision should be assumed to have been mailed on the day that it is dated.
>
> In other words, Kaiser states a rebuttable presumption. An irrebuttable or conclusive presumption that a decision is mailed on the day it recites it was dated and mailed, in the face of evidence establishing a later actual date of mailing, could potentially run afoul of Wis. Stat. § 102.18(3). That section clearly starts the clock running when a decision is actually mailed, not when the decision is dated or recites that it was mailed.

Although Kubacki's attorney introduced into evidence a copy of the original envelope, LIRC found a genuine question existed as to the authenticity of the original envelope because the ALJ's decision was dated May 13, 2002, Milwaukee County received its copy on May 14, 2002, and Kubacki's attorney was unable to produce the original envelope despite its "paramount importance." Under such circumstances, Kubacki's provision of the copy of the original envelope was insufficient to rebut the presumption established in Kaiser.

On review before the circuit court, Kubacki argued that LIRC erred in making an issue as to the authenticity of the of the original postmark because Milwaukee County stipulated to the authenticity of the photocopied postmark at the hearing. The circuit court affirmed LIRC, concluding that LIRC had the duty to find the facts and determine the final outcome irrespective of the presentation of the case by counsel for the parties.

Peterson v. Arlington Hospitality
Case No. 03-CV-705 (Waukesha County, August 25, 2003) (an appeal is pending before the Wisconsin Court of Appeals, Dist. II, Appeal No. 03-2811)

Peterson filed suit against her employer, Arlington Hospitality, alleging that, while working at its Whitewater, Wisconsin hotel, she was sexually assaulted by a co-employee with an extensive criminal history. Peterson's complaint and amended complaint contained the allegation that Arlington was negligent in not advising her of the co-employee's propensities and past behavior when it knew or should have known of his past history. Arlington filed a motion to dismiss, asserting that Wis. Stat. § 102.29, the exclusive remedy provision of the WCA, precluded Peterson's claims against it. Peterson argued that Arlington's position was erroneous because, based on her interpretation of a recently acknowledged tort, a defendant employer is liable for negligent hiring, training and supervision of an assaulting co-employee. By oral decision, the circuit court granted Arlington's dismissal motion. Peterson appealed.

The issue presently before the Court of Appeals is whether Peterson's negligence claim against Arlington is barred by the exclusive remedy provision. Peterson's 55-page argument section in her brief to District II included seven public policy reasons in favor of permitting a negligence claim by an employee against an employer in this situation, due process and equal protection challenges to the Wisconsin Constitution and the federal constitution, as well as interpretation of existing Wisconsin case law and legislative history regarding Wis. Stat. § 102.29.

VI. SELECTED LIRC DECISIONS

Brandt v. Pan O Gold Baking Co.
WC Claim No. 2002-043709 (LIRC January 30, 2004)

This case follows the respective LIRC and circuit court decisions in Kubacki, discussed above, but it does not directly apply such. Here, the ALJ issued a decision dated and mailed on November 4, 2003. Pursuant to the 21-day rule, the last day on which a timely petition for review could have been filed was November 25, 2003. The applicant, Brandt, filed a petition for review, which was received by LIRC on December 2, 2003, making such petition untimely. Brandt explained that the petition for review was untimely because his former attorney had incorrectly informed him via letter that he had 30 days from the date of the ALJ's decision to petition LIRC.

LIRC commented that "[w]hile the applicant's reliance on this misinformation was unfortunate, it nonetheless was not beyond the applicant's control to have timely filed a petition." Brandt did not deny receiving a copy of the AlJ's decision and well as a copy of the appeal rights (the mustard one-third-sheet of paper stapled to the decision) that correctly indicate that the petition period is 21 days. In general, LIRC held that it "holds parties responsible for the errors of their agents, including attorneys." It, therefore, found Brandt's petition for review to be untimely and that he had not shown probable good cause that the reason for having failed to file the petition timely was beyond his control, within the meaning of Wis. Stat. § 102.18(3).

Hoefs v. Midway Hotel/Paytons Restaurants
WC Claim No. 1999-029146 (LIRC October 21, 2003)

Hoefs claimed disability from a knee injury, which her employer, Midway Hotel, and its worker's compensation insurer, Wausau Underwriters, conceded as work-related. Midway and Wausau denied that the knee injury resulted in any permanency, though. Although Hoefs also claimed to have sustained a back injury, Midway and Wausau refuted such. The ALJ found a compensable knee injury, which required surgery, but not a back injury. Hoefs was awarded additional temporary disability compensation, compensation for PPD at 7%

compared to amputation at the knee, and medical expenses. Midway and Wausau filed a petition for review, asserting that LIRC should adopt the opinion of their medical expert that Hoefs' work injury was only a calf strain rather than a torn meniscus requiring surgery. In the alternative to adopting their expert's opinion, Midway and Wausau asked LIRC to reduce the PPD award to 5%. Midway and Wausau additionally requested that LIRC deny Hoefs' expenses for treatment with a chiropractor that they felt were not related to the work injury and that LIRC rewrite the ALJ's order so that they would not have to pay the amounts identified as having been written off by Marshfield Clinic.

LIRC, among other modifications to the ALJ's decision, substituted a portion of the decision with the following:

> Hoefs has, however, incurred reasonable and necessary medical expenses to cure and relieve the effects of the work injury on her knee and leg from Marshfield Clinic in the sum of $14,128.74, of which the insurer paid $1,909.40, NCHPP/WPS paid $8,730.25, Medical Assistance paid $612.36, and $2,765.93 was written off. She has also incurred $629.88 in medical mileage for treatment at Marshfield Clinic (in both the Mosinee and Marshfield locations.)

It also deleted the ALJ's interlocutory order in its entirety.

LIRC agreed with Midway's and Wausau's argument that because Marshfield Clinic has written off part of its bill, it is admitting that only the bill as adjusted was reasonable in amount. It acknowledged that "[b]ecause an employer is liable only for reasonable medical expenses under Wis. Stat. § 102.42(1), and because the commission has the authority to decide reasonableness of fees under Wis. Stat. § 102.18(1)(bg), it follows from the respondent's argument that the commission should limit the award of medical expense to the Marshfield Clinic to the charges that were not written off." In the context of Wis. Stat. § 102.42(1), "expense" means the cost or price to the applicant of the treatment, according to LIRC. Hoefs took no position on the issue and there was no indication in the record as to why Marshfield Clinic wrote off a portion of the expense or why it regarded that portion as uncollectible.

Overton v. Interfaith Older Adult Programs Inc.
WC Claim No. 2001-050512 (LIRC February 27, 2004)

Overton sustained a compensable injury in October 2001 when he lifted a table while working as a custodian for Interfaith Older Adult Programs. Both Interfaith and its worker's compensation insurer, Highlands Insurance Company, conceded the compensability of Overton's injury and paid medical expenses and temporary benefits for various periods through February 19, 2002, which was the date it stopped paying based on its doctor's opinion that Overton ended healing without permanent or residual disability. Overton filed an application for hearing seeking

compensation for additional temporary disability after February 19, 2002, for permanent disability, and for additional medical expense. The ALJ decided in favor of Interfaith and Overton appealed.

After Overton filed his petition for review with LIRC and the parties had filed their briefs, Highlands went into receivership in Texas. A permanent injunction was issued by the circuit court in Travis County, Texas on November 6, 2002. The injunction is addressed to Highlands, financial institutions, and "all other parties, including but not limited to"…claimants…and all other persons…or other legal entities…asserting claims or causes of actions" against Highlands.

Assuming that the language of the Texas injunction was broad enough to cover Overton's appeal, LIRC identified the primary issue as whether it must comply with such injunction. In answering in the negative, LIRC held that, if Highlands "desires to dismiss an otherwise valid and timely appeal that the commission is required by statute to address, it must present either a local court order or clear Wisconsin authority indicating the commission is bound by the Texas injunction." LIRC indicated that for the Wis. Stat. § 806.24 "full faith and credit" and the Wis. Stat. § 618.61 "foreign decrees" provisions to apply, Highlands is required to file a copy of the order in Wisconsin circuit court. Furthermore, LIRC located nothing in Wis. Stat. Ch. 645, which contemplates that foreign receiverships may affect claims by Wisconsin residents against insurers domiciled in other states, that requires Wisconsin claimants or LIRC to follow the terms of an injunction issue by the court of another state which has not been filed here.

Klatt v. Milwaukee Composites
WC Claim Nos. 1998-065107 & 2000-012004 (LIRC October 16, 2003)

A hearing in this matter was held over three days, February 12, 2001, April 30, 2001, and September 26, 2001. Prior to the first hearing, Milwaukee Composite's worker's compensation insurer, St. Paul Fire & Casualty, arranged for surveillance of the employee, Klatt. The surveillance occurred in April 2000 and videotapes of such were entered into evidence as exhibits by the ALJ. St. Paul hired Dr. Clark to examine Klatt in May 2000 and Dr. Clark prepared a report dated May 25, 2000. Dr. Clark subsequently authored a follow-up report after watching the activities shown on the surveillance tapes. Klatt was not provided a copy of Dr. Clark's second report until just prior to the first hearing date. Despite Klatt's objection pursuant to the 15-day rule under Wis. Stat. § 102.17(1)(d) and the immediate disclosure rule under Wis. Stat. § 102.13(1)(b), the ALJ admitted Dr. Clark's second report at the February 12, 2001 hearing. At that hearing, it came out that St. Paul had provided the videotapes to a treating doctor, Dr. Saini, and Klatt then requested that he be provided copies of the same. Klatt did not receive the requested copies. While the ALJ indicated that he could not force the production of the videotapes to Klatt before the second hearing date, the ALJ stated that he might allow additional time to Klatt to have his doctor review the videotapes once they were produced. The videotapes were

finally introduced on the third hearing date, and the ALJ admitted it with the direction that Klatt be provided with copies so that he "would have the chance to observe them and look over the tapes and even comment on them in a letter after today's hearing."

Based largely on the activity shown in the videotapes, the ALJ denied worker's compensation benefits to Klatt. Although LIRC affirmed the ALJ's decision, its own order did not specifically address Klatt's argument regarding Dr. Clark's second report and the videotapes. The circuit court reversed LIRC, ruling that both it and the ALJ had failed to provide any reasons for the determination regarding Klatt's argument of a violation of Wis. Stat. § 102.13's immediate disclosure rule. On remand, the circuit court directed LIRC to address the following issues: (1) whether the tapes were evidence which the applicant had a right to request under Wis. Stat. § 102.13(2)(a) by virtue of the fact that Dr. Saini, a treating doctor, had them, and what effect that has, (2) the effect of St. Paul's refusal to submit the tapes to Klatt prior to the end of hearing, as he could not have his medical experts examine them, and (3) whether Dr. Clark's second report was a "report of the examination," which Klatt should have received immediately under Wis. Stat. § 102.13(1)(a) and (b), and if so, the effect of the failure of St. Paul to provide it immediately.

First, LIRC concluded that, under the facts of this case, Klatt's right to obtain videotapes from Dr. Saini or Dr. Clark under Wis. Stat. § 102.13(2)(a) had not been prejudiced by St. Paul's actions. It, therefore, declined to exclude either the videotapes or Dr. Clark's second report based on the videotapes on that basis. Second, LIRC held that, while there are no state statutes specifically requiring advance disclosure of the videotapes, "fairness requires that where an employer or insurer refuses to disclose its videotape surveillance in advance of the hearing, an injured worker be given the chance to provide a countering medical report or other responsive testimony or evidence which may necessarily require leaving the record open or continuing the hearing." Even on the basis of fairness, though, LIRC still declined to exclude the videotapes or Dr. Clark's second report. Third, LIRC concluded that Dr. Clark's second report was a "report of the examination" and was, thus, required to be provided immediately to Klatt. However, LIRC declined to exclude Dr. Clarks' second report from the record because neither Wis. Stat. § 102.17(1)(d) nor Wis. Stat. § 102.13(1)(b) expressly allows exclusion here. LIRC set aside its previous order as well as the ALJ's decision, and provided Klatt with 60 days to provide a report from his own expert addressing the activities shown in the videotapes and their effects on his claim.