Greenfield Pontiac — Buick v. LIRC
Decided on: 10/14/2009
Court of Appeals # 2009-AP239 (unpublished)

This was an unpublished decision from District 1 concerning whether the applicant's claim was barred under s. 102.12 because he did not file a claim for benefits or provide notice to his employer within 2 years from the date of injury. Date of injury was January 22, 2003 when applicant felt something tear loose in his back. Injury was reported on June 29, 2005. LIRC held that this was a complicated causation issue and inferred that the applicant delayed so long in reporting the work injury because he was simply uncertain as to what had been and had not been causative. The commission found he had satisfied the notification requirement. The Court of Appeals recognized that there are certain accident cases where the employee will be in doubt as to the nature of the disability and its relation to the employment. The Court of Appeals adopted LIRC's application of the statutes, finding it was reasonable. The Court held that under the unique facts of this case where the applicant had a previous injury that had continued to bother him and doctors offered differing opinions as to whether his back problems were caused by an earlier injury or the 2003 injury or both, that it was reasonable to conclude that the applicant did not immediately know, and need not have immediately known, "the nature of the disability and its relation to the employment." The Court therefore upheld the LIRC decision denying the defense argument.

Aurora Healthcare Metro, Inc v. LIRC
Decided on: 09/15/2009
Court of Appeals # 2009-AP-103 (unpublished)

The Court of Appeals, District 1 upheld a LIRC finding. Applicant, Morgan, had been a nursing assistant for fourteen years, lifting patients, moving furniture and equipment. On February 4, 2005 she was working at Aurora. Two days later she was taken to the hospital for a "stroke-like event." While in the hospital she rolled on to her left side and experienced intense pain in her left shoulder. The applicant herself said that the pain came on while she was in the hospital for a non-work related incident. She also denied there was any occurrence at work which injured her left shoulder on February 4, 2005, although she had previously filled out an incident report in March, 2005, indicating that she injured her left shoulder moving a patient. She had surgery for a torn rotator cuff. shortly after in April, 2005. The medical evidence was conflicting and confusing. LIRC affirmed the ALJ holding that the long history of strenuous work along with the applicant's testimony of the onset of shoulder pain on February 7, 2005 (while in the hospital) along with two physician's reports was sufficient evidence to establish she suffered a work related shoulder injury.

The Court of Appeals held as follows:

1. Merely because the applicant did not exhibit symptoms significant enough to warrant treatment or failed to appreciate the condition of her shoulder did not mean that there was nothing wrong with her shoulder. "Many

conditions develop and progress insidiously" without any outward signs or indications of their existence. Simply because the onset of pain happened while away from work does not mean that Morgan's work duties did not play a material contributory role to the condition's onset or progression.

2. The Court adopted the treating physician's opinion that the injury occurred likely due to the repetitive type of injuries she was being exposed to during the course of her occupation.

3. The Court stated that the resolution of inconsistencies in medical testimony was within LIRC's authority noting that the treating physician offered different opinions on the cause of injury in his various letters and treating notes. The treating physician had at various times indicated that it was traumatic injury and at other times a repetitive type injury. The Court of Appeals adopted LIRC's acceptance of the treating physician's final opinion where he indicated he was attempting to address confusion concerning the cause of injury and had reviewed the history again before giving his final conclusion, which apparently was that it was a repetitive type injury.

4. The Court noted that the applicant had not experienced or recognized pain in her shoulder before February, 2005. That however was not determinative of whether she was injured. "Pain is but one piece of the puzzle." The Court of Appeals held that LIRC was free to accept the applicant's testimony that she did not previously experience pain and, at the same time, conclude that her shoulder was being injured over a period of time as she worked as a nursing assistant."

Note: Interesting result. Same result if she had first experienced pain throwing a ball at home on the weekend, or falling on the shoulder while skiing etc.? Or is rolling on your side in bed somehow not the same type of event causing pain or actual injury?

Ellis v. Department of Transportation
Decided: 08/27/2009
LIRC # 2003-017003

Here LIRC upheld the dismissal of the application. The applicant claimed he was PTD. His surgeon, Dr. Block, declined to assess any permanent restrictions and indicated that he had not performed a functional capacity evaluation. The applicant underwent a FCE performed by a physical therapist. The applicant's vocational expert gave an opinion based in part on the restrictions from the FCE.

LIRC stated that pursuant to s. 102.17 (1) (d), certified reports of physicians podiatrists, surgeons, psychologists and chiropractors are admissible as evidence of the diagnosis, necessity of treatment and cause and extent of disability. However, in this case, no physician has determined the applicant's physical restrictions. Even though

there was an FCE and it was relied upon by the vocational expert that FCE was prepared by a physical therapist who was not qualified under the statute to render an opinion as to the extent of disability and permanent restrictions. LIRC noted that Dr. Block did not present a functional evaluation and did not present any further comment or report of physical restrictions after the FCE was performed. Therefore, LIRC found that the applicant failed to establish a prima facie case for permanent total disability.

Note: A FCE done by a physical therapist may be more comprehensive and lengthy than the physician's mere stating of restrictions, which may be nothing more than those customarily given to patients with like or similar injuries or conditions. But it is clear that an FCE done by a physical therapist, no matter how thorough, would not alone be useable for the purpose of determining the extent of disability and permanent restrictions.

Cerny v. Open Hearth Homes
Decided: 09/09/2009
LIRC # 2004-032172

This is a refusal to rehire case where LIRC reversed the ALJ. Applicant phoned the employee on January 24, 2005 to tell the employer he was going to undergo surgery. He was fired during that phone call, the employer telling him to "go ahead and get the operation but don't come back to work". The employer testified that he had had enough of the employee and it was time for him to go because of his slow work ethic and poor work performance. LIRC recognized that an employer could terminate if the employee's position had been eliminated to reduce costs and to therefore increase efficiency. However, LIRC concluded that the employer discharged the applicant at least in part because of the work injury and therefore found liability. LIRC noted that the ALJ found the employer to be a credible witness, but LIRC, in relying on the record, did not share the AL's credibility impressions.

Note: This case is interesting from the standpoint that one of the factors in determining credibility is assessing the witness when he or she testifies in terms of demeanor. Obviously LIRC does not have that opportunity, but can make its own determination of credibility from the record.

Dumesic v. Car Max
Decided: 11/09/2009
LIRC # 2007-030617

In this case the commission held that a knee injury sustained by the applicant while walking up a ramp at work was not idiopathic. LIRC indicated that injuries caused by normal employment effort are compensable. Although the medical evidence and history given by the applicant was conflicting, LIRC held that the work activity of walking up the ramp caused breakage or at least precipitated, aggravated and accelerated the applicant's degenerative left knee condition beyond its normal progression. Either way, LIRC held, the injury's compensable. The case is also noteworthy in that LIRC

found that the employer made a good faith offer of work during the healing period and therefore the period of temporary total disability would be reduced because the employee did not have reasonable cause to refuse the offer.

Ball v. Neenah Foundry Company
Decided: 11/09/09
LIRC # 2008-030765

Here, the employee sustained scarring to both of his arms due to steam burn injuries. He was 55 years of age, had worked for the employer since 1977, had a high school degree and no abundance of transferable skills to other work if he should lose his current job. LIRC noted that his scarring was noticeable on both arms when wearing a short sleeve shirt which the employee did at work. The employer contended that the employee's base pay rate increased in 2007, 2008 and 2009, but the ALJ noted that the actual earnings had decreased in each of those three years. If the employee was returned to work at a wage at or above the wage at time of injury, he would have to prove *probable* wage loss from the disfigurement, per s.102.56(2). LIRC held, however, that the s. 102.56(1) standard applied, allowing for proof based on *potential* wage loss. LIRC stated it agreed "with the administrative law judge that the appropriate determination of wage under Wis. Stat. § 102.56(2), is contained in Wis. Stat. § 102.11(1)(d), which must include all earnings."

LIRC held that the evidence indicated that the applicant has established potential wage loss due to his disfigurement and agreed that an appropriate award of 60% of annual earnings in the amount of $33,488.00 be awarded.