Summaries Jan. Feb. March 2010

Jeanne and Joe Welcenbach

Parent v. Madison Gas & Electric
Decided: 11/30/09
LIRC # 1998-012234

Parent tore his left medial meniscus in December, 1997. Dr. Lemon did an initial surgery on August 26, 1998 and rated the PPD at 5%. Parent had a total knee replacement on March 7, 2007, again with Dr. Lemon who found a 50% PPD at the left knee. Here the employer argued that it was unfair to award him the initial 5% and an additional 50%:

> "The employer states the reasoning in *DaimlerChrysler* regarding awarding cumulative disability awards for multiple surgeries only makes sense, and the cases holding should only be applied, when the surgeries have a cumulative disabling effect on the applicant. The employer states it does not make sense, however, to award cumulative permanent partial disability benefits when the applicant has undergone a total joint replacement."

The commission ruled that pursuant to *Daimler Chrysler* each surgical procedure that results from the given injury must receive the minimum PPD rating.

Adamski v. Stevens Point Area Public School
Decided: 11/30/09
LIRC #: 2008-006551

A teacher from Stevens Point was attending a teacher's convention in Wausau. She left before noon to go to lunch and while she was going to lunch went to a boutique to buy a t-shirt. The majority of the commission held that her side trip was within the course of employment. The dissent stated that he could not conclude that the side trip to buy a t-shirt was an act reasonably necessary to living or incidental thereto. The majority held that the employer did not actually require the applicant to remain at the convention during its entire duration, but that there was a long accepted practice of leaving the convention to have lunch off premises and that making a brief stop to buy a clothing item in route to lunch was only incidental to an act reasonably necessary for living.

Applicant's counsel, Richard Fortune, advises that the matter has been appealed by the employer to the circuit court.

Tower Automotive Milwaukee v. Samphere
Decided: 02/09/10
Court of Appeals #: 2009AP 1043 (Unpublished)

Applicant worked for Tower for 31 years until June 30, 2003 in various positions. He began treatment for left knee pain in November, 1998 and again in August, 2000. In January, 2003 he went to the ER with knee pain and followed-up with Dr. Hasbough. MRI revealed medial and lateral meniscal tears and possible medial collateral ligament tear. Surgery was performed in January, 2003. He returned to work in March, 2003 and retired 3 months later. The 2003 knee surgery was never claimed as a work injury. He then saw Dr. Potos in February, 2004 and throughout 2005 and 2006. In April, 2006 he saw Dr. Stones and consulted with Dr. Zoltan. In May, 2006 Dr. Zoltan did a total arthoplasty of the left knee. Dr. Karr did an IME in January, 2007 stating his knee problems were unrelated to work. In April, 2007 Dr. Zoltan stated that Samphere's duties at Tower were a material cause of his knee condition. After a hearing, in May, 2007, the ALJ concluded that the years of strenuous work activity were causal of his knee conditions and awarded him TTD because the applicant testified he retired solely because of his knee condition. A review of the briefs filed by parties indicates that the ALJ awarded TTD commencing May 24, 2006, the date of the arthoplasty to the date of the order. LIRC affirmed.

On appeal to the circuit court, LIRC agreed with the respondent's argument that it improperly awarded TTD benefits past the date of the hearing.

The Court of Appeals cited the LIRC decision that Samphere's injury was a cause of his retirement and that he would have continued working at Tower but for his knee problems.

The Court of Appeals upheld the award of TTD benefits approving the LIRC decision that even though Samphere retired from employment he did not withdrawal from the labor market.

Butterfield v. ABS Freight Systems, Inc.
Decided: 12/22/2009
LIRC #: 2006-019167

Applicant worked as a dock worker. His orthopedic doctor recommended he have cervical surgery. ALJ found this was related to an injury at work dated May 11, 2006. ALJ held that even though the applicant had retired from employment the employer had the burden to establish that the applicant had withdrawn from the labor market before it could deny payment of TTD in the event he has the surgery.

LIRC held that the commission can award medical treatment payments prospectively, but generally declines to award accompanying TTD benefits prospectively. It was noted that employers and their insurers are liable for compensation due to a disability from a work injury and are potentially liable for

penalties if they stop payment without reason. This apparently was a reminder that even though LIRC was not ordering prospective TTD that the carrier could very well be liable for it.

LIRC also upheld the ALJ's decision that the May 11, 2006 work injury caused the need for surgery that Dr. Perlewitz has opined, stating that the applicant's condition has gotten worse since that date.

Finally, LIRC noted that the doctor failed to mark the "yes" box as to further treatment, however he did write that surgery was recommended. LIRC held it was reasonable to conclude the doctor meant to mark the box. LIRC also indicated that statutes 102.17 and 102.42(1), when read together, permit the reimbursement of treatment expense only if the physician indicates the treatment is necessary. LIRC noted that this is done ordinarily by the physician providing the service himself. The department or the commission may reasonably infer a physician would not provide treatment he believes is not necessary or if the physician prescribes or recommends the applicant obtain the treatment from another provider it also is an indication of necessity. LIRC held that since Dr. Perlewitz recommended the surgery it is reasonable to assume he believes to a requisite degree of certainty that it is reasonable and necessary. As to prospective TTD after the surgery, the commission states that issue was not actually at issue at the hearing and that furthermore, the commission generally declines to award TTD prospectively.

Martinson v. City of Sturgeon Bay
Decided: 12/17/2009
LIRC #: 2006-004672

This is an occupational back claim. Applicant employed for 27 years until January, 2006. Initial injury in June, 1983 followed by laminectomy in July, 1983 and fusion in 1984. Treated for back pain in 1986 and again in 1987. Off work in May and June, 1994 after twisting his back at work. Additional back complaints in September, 2000 after cutting grass and missed a day of work lifting a man hole cover in January, 2002. During his last month of employment in January, 2006 he continued his general lifting and physical work and claimed an accident on January 26, 2006 when he was cleaning out storm sewers and doing repairs and bending and lifting. On that date he felt pain in his back radiating down his buttocks. Applicant has not returned to work because employer declined to take him back at less than full duty. Fusion surgery or disc replacement is recommended. ALJ concluded the back injury was occupational, caused by occupational exposure to heavy lifting. ALJ relied on Dr. Lerner's report. LIRC agreed that this was an occupational disease based on his strenuous work over 27 years, stating that the work exposure was at least a material contributory cause of the factor in the onset of the progression of the condition.

As to the date of injury LIRC noted that this is the earlier of the date of disability or the last day of work for the last employer whose employment caused disability. The respondent suggested that the date of disability was before the last day of work, arguing it went back as far as 1981. LIRC, citing *Virginia Surety*, held that it was reasonable to conclude that his condition was not yet an occupational disease until January 26, 2006. LIRC held that ALJ correctly found January 31, 2006 as the date of disability as that was the first day of wage loss attributable to the effects of the disease and that therefore this was the date of injury. LIRC changed that date to January 26, 2006 because this was his last day of employment.

Electro-Connect Ink v. Weed
Decided: 02/10/10
Court of Appeals #: 2009-AP-1022 (Unpublished)

Refusal to rehire case. Weed injured on October 18, 2005. While off of work employer hired another person who took over some of the duties Weed had. Weed's position ceased to exist. After being released Weeds sent his restrictions to the employer, but the employer refused to rehire him. Employer advised Weed that it had no choice but to fill his position to meet its business needs. Court held that Weed made a prima facie case and the burden shifted to employer to show reasonable cause for the refusal to rehire.

The reasonableness of the decision not to rehire Weed was not an issue, nor was whether there were openings in Weed's former areas. What Weed argued was that he could have worked on circuit boards, which was different work than he did before. LIRC held that the employer failed to show reasonable cause. The circuit court reversed. The Court of Appeals affirmed, basically holding that there was nothing in the record to show that circuit board work was full time ("a dedicated position.") The Court held that although Weed could perform some task when he sought to be rehired, it concluded that there was no suitable employment available within his physical and mental limitations because being able to perform part of a job is not the equivalent of being able to discharge the requirements of employment. An employment that entails performing duties prohibited by the employee's physician is not suitable because it is not within his limitations.

Query: Because the Statute of Limitations is twelve years, the finding in this case would not preclude a claim based on a failure to rehire him for other jobs that he could do, but was passed over on. See:

> Douglas E Daun, Applicant v. Briess Industries Inc, Employer No. 1998-013480
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> In the applicant's case, the employer demonstrated that it had reasonable cause for not rehiring the applicant for any of the jobs that it had available during the period in question, which was the period ending on the date the last hearing was

held in this matter (January 12, 2004). **The commission modified the administrative law judge's order to make it clear that the applicant continues to have the statutory right to bring a claim under Wis. Stat. § 102.35(3), for an alleged unreasonable refusal to rehire for any period subsequent to January 12, 2004, subject to the time limitation of Wis. Stat. § 102.17(4).**

King v. B Hive Restaurant
Decided: 09/28/09
LIRC #: 2008-039334

Refusal to rehire case. Bar tender injured. Released to work one week later. Employer contends she quit and did not return to work. LIRC simply reaffirmed the rule that it is the burden of the employer to show reasonable cause for not rehiring the employee. LIRC concluded that she was injured and denied rehire and thus made a prima facie case.

Mallett v. Briggs & Stratton
Decided: 03/02/10
Court of Appeals #: 2009-AP-1130

Pro Se appeal with lengthy, somewhat confusing, factual history beginning with a 1981 back injury. LIRC affirmed the initial ALJ decision on April 6, 1984. The decision was in favor of Mallett but was final with no reservation of jurisdiction. The finality of the decision was upheld by a prior Court of Appeals case, Mallett, 85-0929, unpublished.

Mallett sustains a different injury in December, 1983 to his wrist. In 1987 he filed a hearing application for both the 1981 and 1983 dates of injury. The hearing was held four years later in March, 1991. Claims relating to the 1981 injury were dismissed. In 1993 Mallett's appeal was dismissed. In 2004 the Department responded to a letter from Mallett explaining that the filing of a hearing application in 1987 had tolled the statute on the 1983 injury and that claim was still viable. Mallett then proceeded with his 1983 injury, claiming that his work exposure was a material contributory causative factor in the onset of cervical myelopathy of the neck and right arm.

A hearing was held on May 3, 2007 and Mallett's claim for additional benefits was denied. Mallett appealed. Court of Appeals had held that 1.) That Wisconsin does not recognize the treating physician's rule; 2.) That Mallett could not have his 1981injury claim considered; and 3.) That he was not denied due process because the commission lost both of his administrative records which he claimed placed him at a disadvantage amounting to adeprivation of due process. The due process claim was dismissed because Mallett failed to raise it before the hearing examiner or commission. Thus, the Court did not address the merits of whether he was denied due process because of the alleged loss of his records.

Schneidewend v. Randstad Staffing
Decided: 12/17/09
LIRC #: 2004-001650

The two main issues before LIRC were: (1) what temporary disability was owed following the applicant's return to limited work and subsequent termination, and (2) the what vocational rehabilitation benefits were owed under Wis. Stat. § 102.43(5) and 102.61.

The applicant worked for a temporal help agency. While still in a healing period from his conceded injury, he was offered an assignment doing industrial painting. The worker complained it was beyond his ability and restrictions and it did not pay enough. An unpleasant argument arose which occasioned the termination of the applicant. The worker apologized and requested reinstatement, which was denied. The ALJ awarded ttd until the end of healing. LIRC found the assignment offered to be within his restrictions and reversed, relying on § 102.43(9), and credited the employer (until the end of healing date) with wages that would have been paid as if the job assignment had been accepted (even without any evidence as to how long that assignment would have lasted). LIRC found that a Brakebush analysis was not appropriate under these facts.

The applicant was found eligible for services by DVR and undertook a retraining program that included finishing his high school diploma. The ALJ awarded all the retraining benefits sought. The respondents complained at LIRC that: the applicant did not apply for DVR services soon enough, that the applicant's work to obtain his high school diploma (LIRC mistakenly regarded as a GED) should not qualify for retraining, and that § 102.61(1g)(c) (and its interpretative note) required an injured worker seeking vocational rehabilitation benefits to provide a copy of his restrictions to the employer at some point after receiving notice that he or she is eligible to receive vocational rehabilitation services and the applicant did not do that. LIRC rejected all of those arguments, and in regard to the later, LIRC said "In this case, after the discharge, the applicant apologized for his outburst and asked the employer twice for his job back but was rebuffed on both occasions. Even after learning of his vocational rehabilitation claim, the employer has not offered the applicant reemployment. Consequently, the commission concludes that informing the employer of his desire to return to work in August 2006 when the applicant was certified for services would have been futile." (Respondents have appealed the retraining award to circuit court.)

deBoer Transportation v. Swenson and LIRC
Decided: 03/25/10
Court of Appeals #: 2009AP564(Recommended for Publication)

The Wisconsin Court of Appeals reversed the circuit court for Wood County on whether deBoer Transportation (deBoer) illegally refused to rehire Charles Swenson after he recovered from a work-related injury.

The circuit court had upheld LIRC which concluded that deBoer failed to show "reasonable cause" for its refusal to rehire Swenson.

Swenson was a truck driver when he injured his knee at work. When he was cleared by his doctor to return to work several months later, he began the reorientation program that deBoer uses for drivers who have been off work for more than 60 days which requires a returning driver to be away from home for several days so another deBoer driver can evaluate driving skills. Prior to his injury, Swenson drove a daily route for deBoer that allowed him to be home during part of the day to provide care for his terminally ill father. If Swenson participated in the overnight check-ride, he would have to locate and pay for a care provider for the time he was away.

Swenson asked deBoer if he could complete his check-ride locally, or alternatively, asked if the company would pay the additional cost of caring for his father during the overnight check-ride. deBoer refused both requests, and Swenson refused to cooperate with the check-ride so was not rehired.

deBoer employees testified to the LIRC that it had never before made an exception to the check-ride policy, and there was no evidence that Swenson was treated any differently than any other returning driver. In addition, deBoer asserted that the purpose of the check-ride was to ensure it employed safe drivers. The LRIC found that the policy was reasonable on its face.

However, the LIRC concluded that deBoer didn't demonstrate that accommodating Swenson would have compromised safety or been a financial burden, and therefore deBoer failed to show reasonable cause for its refusal to rehire. The circuit court upheld the LIRC's decision and deBoer appealed.

The issue was whether deBoer's refusal to rehire Swenson was based on "reasonable cause."

LIRC argued that it is not enough for deBoer to show it refused to rehire Swenson by uniformly applying its check-ride policy (which the LIRC acknowledged "may have some legitimate business purpose behind it"), but that deBoer also needed to present evidence that it was an unreasonable burden to accommodate Swenson's request. DeBoer argued that this amounts to an incorrect interpretation of the statute because it requires something more than reasonable cause, and the court of appeals agreed.

"We conclude that the reasonable cause standard in Wis. Stat. § 102.35(3) does not contemplate requiring employers to either deviate from a facially reasonable and uniformly applied policy, or explain why it would be burdensome to do so, when a returning employee requests the deviation to accommodate a non-work and non-injury-related personal need," the court found.

The court continued, "What if Swenson's accommodation request was…based on his desire not to miss classes that he had paid for to enrich his live, such as woodworking or dance classes? We do not think the legislature intended to require employers to assess which non-work, non-injury-related requests merit accommodations and which do not."

Accordingly, the court concluded that the LIRC erred in determining that deBoer failed to show reasonable cause. "Reasonable cause is shown here by deBoer's uniform application of its longstanding safety testing procedure to Swenson," the court added. "There is no basis for the conclusion that deBoer did not have reasonable cause to require Swenson to participate in the check-ride and, therefore, no basis for the conclusion that 'reasonable cause' was lacking."

The court found that LIRC's decision depended on an incorrect interpretation of the reasonable cause standard in Wis. Stat. § 102.35(3), and reversed the circuit court's order confirming the LIRC's decision and remanded for dismissal of Swenson's claim against deBoer.

The dissent said the majority train "runs off the track" when it uses the uniform and long standing practice to interpret "reasonable cause", noting the statute says nothing about longstanding and uniform practices. The issue for review is whether LIRC properly found the employers decision not to rehire was either reasonable or not.

That statute says nothing about accommodation. LIRC's decision holding that de Boer unreasonably refused to accommodate Swenson's reasonable request was not a necessary part of the decision. The only issue is whether de Boer had reasonable cause not to rehire because Swenson would not perform a several day road trip. The dissent agreed that requiring Swenson to spend several days of overnight driving when he was not an overnight driver was unreasonable, noting that he did a day trip for the employer without any problems.

"LIRC was entitled to believe that no useful purpose would be served by requiring Swenson to take an extended overnight trip when his future employment would have nothing to do with that type of driving and therefore deBoer's insistence on a multi-day, overnight check-ride as a condition of employment was unreasonable."

The majority noted in a footnote:

> [4] The majority chooses not to spend time responding to specifics in the dissenting opinion. At the same time, we caution that, in several respects, the dissent misreads the majority opinion, attributing to it reasoning and conclusions that it does not contain. Accordingly, readers should look to the source for our analysis and conclusions, and not to the dissent's characterizations of them.

The dissent had some interesting footnotes of its own:

> [3] DeBoer might also have a long-standing and uniformly enforced policy requiring its janitors to take a check-ride or to attend three supreme court oral arguments as a condition of re-employment after an injury. But that would not require LIRC to find that these long-standing and uniformly enforced requirements were reasonable. The focus of our review should be on the rationality of LIRC's reasoning as to the reasonableness of the conditions for re-employment as applied to each returning employee. We should defer to LIRC's decisions on this issue.
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> [4] Paragraph two of LIRC's decision reads:
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> The simple accommodation the applicant requested for the testing process was reasonable, and it would not have jeopardized any of the employer's safety concerns. The applicant merely asked for an alternative schedule so that he could care for his terminally ill father, but the employer gave no explanation for failing to even consider this request. As noted by the administrative law judge, the employer had the burden of demonstrating reasonable cause for discharging the applicant, but failed to carry that burden. The employer's safety director refused to discuss any possible accommodation with the applicant, resulting in what constituted a discharge. The courts have regularly held that the statute must be liberally construed to effectuate its beneficent purpose of preventing discrimination against injured employees. The employer's actions evinced an unreasonable disregard for the applicant's circumstances, leading to the credible inference that the work injury did play a part in the discharge. The employer violated both the spirit and the letter of the law set forth in Wis. Stat. § 102.35(3).
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> While I have concluded that paragraph two of LIRC's decision is unnecessary, I do not agree with the majority's decision even if I consider paragraph two. The ultimate question is whether deBoer's refusal to rehire Swenson was unreasonable. Reasonableness is a large enough

> umbrella to cover deBoer's response to Swenson's request for accommodation. The majority tells us that any non-work, non-injury request for accommodation to an employer's long-standing and uniformly enforced rehire policy makes an employer's decision to refuse to rehire the employee reasonable. That conclusion ignores the plain meaning of WIS. STAT. § 102.35(3).

John Edmondson posted the following regarding SSA TRIENNIAL REDETERMINATION RATIOS. They are now available for this year (2010) at:

http://dwd.wisconsin.gov/dwd/publications/wc/wkc-15546-P.pdf

Waldvogel v. City of Antigo
Decided: 01/28/10
LIRC #: 2007-032141

Applicant is sewer construction worker who twisted his right knee on January 29, 2007 and had a partial tear of the ACL. Surgery was not recommended. Exams showed he was doing quite well. Treating physician initially gave 10% TTD and later raised it to 15% TTD. IME said 0% permanency due to lack of limitations or restrictions. Issue before LIRC was permanency. LIRC said the 10% minimum disability rating under DWD 80.32 (4) was based on the "repair" of the ACL not nearly on the presence of an ACL tear. The applicant had no surgery. As to the second and higher rating of the treating doctor LIRC indicated that if a doctor recommends an ACL repair which is not undertaken TTD might be warranted at a higher level than the minimum for a successful procedure especially if a correspondingly increase functional loss were documented. But where the repair surgery is neither recommended nor preformed because the knee is stable and symptom free, the commission saw no logic in rewarding PPD based on the code minimum. LIRC gave credence to the IME and found no PPD, at least not as of the date of hearing. So no PPD. LIRC entered an interlocutory order indicating that the level of evidence required to support and exercise of discretion to reserve jurisdiction is very low. Even though the applicant prognosis was good, he could require and ACL surgery in the future or perhaps have future disability even if no surgery is done and therefore an interlocutory order was proper.

Staffeldt v. School District of Elmbrook
Decided: 02/24/10
LIRC #: 2005-028710

Occupational injury claimed by a high school teacher claiming that she had permanent mold sensitization attributable to mold exposure at the high school. ALJ dismissed the claim. LIRC decision basically explained why one positions'

opinions were more credible than another, holding that the applicant's physician basically failed to articulate any credible medical explanation for why she would have increase in her symptoms.

Howard v. Kraft Pizza
Decided: 02/24/10
LIRC #: 2008-018907

This is a review of a left knee injury claim where LIRC basically reviewed the evidence and concluded that the injury was compensable. The commission noted that the commission can order an insurer to pay for future treatment but that an award for temporary disability would not be made to continue indefinitely into the future and therefore the commission did not order in advance the payment of TTD resulting from the proposed surgery. It reminded the employer and its insurer of their liability for compensation due to disability however, and indicated that they would be potential liable for penalties if they refused to pay without reason.