Case Law Update

By

Scott E. Wade
Luke B. Kingree
William R. Sachse, Jr.
PETERSON, JOHNSON & MURRAY, S.C.
Milwaukee, Wis.

COURT OF APPEALS

DeBoer Transportation v. Swenson (Court of Appeals, 2009 AP 564, March 25, 2010)
Penalties – Unreasonable Refusal to Rehire

The employee, a truck driver, sustained a work-related injury and, after reaching a healing plateau, requested his employer rehire him. The employer required him to complete a road test, a requirement the employer contended it applied to all returning employees. The employee refused on the grounds that he needed to care for his ailing father. The employer refused rehire, causing the employee to claim unreasonable refusal to rehire compensation pursuant to Wis. Stat. § 102.35(3). The Labor and Industry Review Commission (LIRC) held that the employer did not demonstrate that accommodating the employee would have compromised safety or been a financial burden and, therefore, failed to show "reasonable cause" for its refusal to rehire, as required by § 102.35(3). **The appeals court reversed, holding that the LIRC relied upon an incorrect interpretation of the reasonable cause standard in Wis. Stat. § 102.35(3).** The reasonable cause standard in § 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 a deviation to accommodate a non-work and non-injury-related personal need.

CIRCUIT COURT

Madison Gas & Electric v. LIRC, (Dane County Circuit Court, 09 CV 6390, May 10, 2010)

Permanent Partial Disability – Minimum Ratings – Joint Replacement after Reparative Surgery

The applicant injured his knee in 1997 and underwent a meniscectomy, after which the employer paid 5% PPD. The employee later had total knee replacement surgery in 2007 and was assessed 50% PPD. The employer conceded that the same injury necessitated both surgeries, but deducted the 5% previously paid from the later 50% award, conceding 45% PPD for the knee replacement, a procedure that is supposed to result in at least 50% PPD per Wis. Adm. Code § DWD 80.32(4). At hearing and at the LIRC, the employee was awarded 50% for the knee replacement. The respondents appealed to the circuit court. **The Dane County Circuit Court reversed the LIRC, holding that when there are successive surgeries on the same body part for the same injury, only reparative surgeries are entitled to cumulative PPD awards under Daimler Chrysler v. LIRC, 2007 WI 15, 299 Wis. 2d 1, 727 N.W.2d 311.** Surgeries that replace a joint are not entitled to cumulative "stacking" of PPD, but rather, deduction in PPD may be made for any prior reparative surgery. The court reasoned that since the employee received a new knee joint, there was not a cumulative negative affect on his knee from successive surgeries. If this holding becomes law, it would eliminate stacking permanent disabilities in cases of knee, hip and spinal disc replacements.

LIRC

McCue v. Philips Plastics Corp. (WC Claim No. 2007-002079, LIRC July 27, 2009)

Wagner-Butler Doctrine – Restrictions

The applicant suffered from chronic obstructive pulmonary disease, reactive airway disease and asthma. These non-work-related conditions resulted in permanent restrictions prohibiting exposure to fumes, gases and solvents. After sustaining flare ups of his personal conditions due to exposure to the prohibited substances at work, the applicant claimed entitlement to worker's compensation benefits pursuant to the Wagner-Butler doctrine, asserting that he could no longer work in the employer's premises as a result of the flare ups. (The rule in the Wagner-Butler line of cases is that a systemic disorder causing flare ups in "scheduled" body parts should be compensated as unscheduled injuries; arguably, a flare of pulmonary conditions is at least a temporary injury to an unscheduled body part, the lungs.) The administrative law judge denied the claim, finding that the applicant's permanent sensitization was not caused by work exposure, only that it manifested itself due to work exposure. The applicant appealed. **The LIRC affirmed, holding that a medical restriction attributable to nonindustrial conditions is not synonymous with permanent sensitization under the Wagner-Butler doctrine, and temporary aggravation of those conditions by work exposure is not permanent sensitization.**

Ellis v. Department of Transportation (WC Claim No. 2003-017003, LIRC August 27, 2009)

Permanent Partial Disability – Medical Support

The applicant sustained a conceded back and head injury at work. His doctor assessed 27% PTD (body as a whole) as a result of a surgery and pain. He obtained a functional capacity assessment that assessed severe permanent restrictions, and he

obtained a vocational expert opined that sedentary work restrictions rendered the applicant odd-lot permanently and totally disabled. The respondent denied the claim, citing restrictions from its medical expert and a vocational opinion that held the applicant could work. The administrative law judge awarded only the 27% PTD and the applicant appealed. **The LIRC affirmed, holding that the applicant had submitted inappropriate medical support for his permanent restrictions: a functional capacity assessment conducted by a nurse practitioner as opposed to a physician, and no physician opined that the functional capacity assessment's restrictions were the applicant's actual permanent restrictions.** An applicant must have FCE results adopted by a qualified medical practitioner under Wis. Stat. § 102.17(1)(d) to use those FCE restrictions to support a vocational opinion.

Leipzig v. City of Kenosha (WC Claim No. 2007-010735, LIRC September 8, 2009)
Performing Services – Deviation – Wellness Program

The applicant, a captain in the respondent's fire department, was injured while playing basketball in a court next to the fire station and off the employer's premises. The firefighters were on duty, being paid at the time, and the fire department's administration encouraged basketball playing because it kept the firefighters in good physical condition. The employer denied compensation, claiming the injured firefighter was not performing services growing out of and incidental to employer, but rather deviating for a personal purpose. The administrative law judge awarded benefits and the respondents appealed. **The LIRC affirmed, holding that when an employee is paid a salary while engaging in recreational activity that is encouraged by the employer for the physical fitness of the employee in a physically-demanding job, injuries sustained during the recreational activity are compensable.** To avoid Wis. Stat. § 102.03(1)(c)3, the LIRC had to find that the basketball playing was a compensated activity.

Ball v. Neenah Foundry Co. (WC Claim No. 2008-037065, LIRC November 9, 2009)
Disfigurement – Wage Loss

The applicant sought disfigurement benefits after he sustained burns to his forearms. He had returned to work for the time-of-injury employer at a higher base wage rate, but actually earned less income during the years after the injury because he worked fewer hours. Respondents argued that any disfigurement benefits should be based on the "probable" wage loss standard set forth in Wis. Stat. § 102.56(2), as opposed to the "potential" wage loss standard set forth in Wis. Stat. § 102.56(1). The applicant asserted that he should receive disfigurement benefits based on the "potential" wage loss standard. The administrative law judge agreed with the applicant and awarded disfigurement benefits at 60% of the annual time-of-injury wage, and respondents appealed. **The LIRC affirmed, holding that when a disfigured worker returns to work at the time-of-injury employer at the same or higher hourly wage rate, but actually earns less for any reason, the "potential" wage loss standard in Wis. Stat. § 102.56(1) applies.** Notably, the LIRC seemed to consider the poor state of the current economy as justification for allowing the "potential" wage loss standard.

Cerny v. Open Hearth Homes (WC Claim No. 2004-032172, LIRC November 9, 2009)
Unreasonable Refusal to Rehire – Reasonable Cause

The applicant sustained a compensable work injury and worked part time for a while, then returned to full duty. He then informed his employer that he would need surgery and that he would be off work for several weeks. The employer told him to have the surgery and to not come back. The applicant then sought an unreasonable refusal to rehire penalty. The employer argued that the applicant was terminated because of poor work performance, attitude problems and lack of experience. The administrative law judge found in favor of the applicant and the employer appealed. **The LIRC affirmed, holding that when an employer terminates an employee during a conversation in**

which a work injury is mentioned, the employee may seek unreasonable refusal to rehire penalties if the proffered excuse for the termination, e.g. poor work performance or attitude problems, were also present before the work injury with no adverse affect on the employee's employment status.

Dumesic v. Carmax (WC Claim No. 2007-030617, LIRC November 9, 2009)

Arising Out of Employment – No Extreme Exertion Required

The applicant fell while walking diagonally up a ramp at work when she felt a snap in her knee, and her knee buckled. She was not carrying anything; rather, she was simply moving from place to place within her employer's premises. She had long suffered from osteoarthritis and she told her doctors that she did not twist her knee on the ramp, or trip on anything, and that she was not rushing from one place to another. She said that she was not sure whether the fall was work related and she was not sure how she fell. Her doctor opined that the activity of walking up the ramp at the time of injury precipitated, aggravated and accelerated the applicant's underlying osteoarthritis. The IME doctor opined that the applicant sustained a manifestation of a pre-existing condition. The administrative law judge awarded benefits and respondents appealed. **The LIRC affirmed, holding that walking diagonally up a ramp in the workplace is a "normal exertive activity" in the course and scope of employment, and that such activity is sufficient for compensation under Brown v. Industrial Comm., 9 Wis. 2d 555 (1960), when there is evidence that the event caused an precipitation, aggravation or acceleration of an underlying pre-existing condition.** The distinction between idiopathic falls and unexplained falls is briefly discussed by the LIRC in this decision.

First Choice Temporary v. MM Schranz Roofing, Inc. (WC Claim No. 1996-026642, LIRC November 9, 2009)

Loaned Employee – Temporary Help Agency

In this reverse application, First Choice, a temporary help agency, and its worker's compensation insurer, sought reimbursement from Schranz, the injured worker's former employer, and its worker's compensation insurer, on the theory that the injured worker was actually a loaned employee of Schranz. Schranz was the general contractor on the project on which the worker was injured and had directly employed the worker, a roofer, on the project up until about three weeks prior to the date of injury. About three weeks prior to injury, Schranz arranged for the worker to become employed with First Choice so that he could be assigned to a minority-owned subcontractor on the project due to Milwaukee County regulations specifying that city projects had to include some minority subcontractors. Schranz had wanted the worker to remain on the project, presumably because he was a skilled worker that Schranz could trust. The worker became employed by First Choice, then was assigned to a minority-owned subcontractor, and resumed work on the Schranz-supervised project until he was injured. First Choice and its insurer paid the significant worker's compensation benefits then filed this application against Schranz. The administrative law judge found that the injured worker was not a loaned employee of Schranz, but rather was an employee of the temporary help agency First Choice, and First Choice appealed to the LIRC.

The LIRC reversed, holding that when an injured worker is loaned by his employer to a temporary help agency with the intent of having the worker be assigned to work with a subcontractor on the same project for which worker was performing work for the employer, the temporary help agency is not liable as a temporary help agency under Wis. Stat. § 102.01(2)(f). The worker is a loaned employee of his prior employer. This decision ignores that Wis. Stat. § 102.06, the loaned employee statute, was eliminated from the Worker's Compensation Act with the enactment of §102.01(2)(f).

Fortune-Adamski v. Stevens Point Area Public Schools (WC Claim No. 2008-006551, LIRC November 30, 2009)

Performing Services – Traveling Employee – Deviation

The applicant, a school teacher, attended a training conference at a location away from her employer's premises. She left the conference early and went to lunch, then decided to take a side route so that she could buy clothing. While on the side route, she was injured. The respondents denied compensation, arguing that the applicant deviated from her business trip for a personal purpose not reasonably necessary or incidental to living. The administrative law judge found in favor of the applicant and respondents appealed. **The LIRC affirmed, holding that leaving a training conference early for lunch is not a deviation from a business trip unless there is evidence that the employer required employees to stay for the entire conference and not leave early, and that deviating slightly to buy clothing is not a substantial deviation.** One of the commissioners dissented, stating that the deviation to buy clothing was substantial enough to make the applicant's injury non-compensable.

Martinson v. City of Sturgeon Bay (WC Claim No. 2006-004672, LIRC December 17, 2009)

Occupational Injury – Date of Injury

The applicant had a series of work-related traumatic back injuries dating to the early 1980s. He further developed an occupational back condition which resulted in disability in January 2006 after he felt pain while lifting objects at work. The respondent denied compensation on the theory that he had actually missed time from work more than 12 years prior to 2006 due to his previous back injuries, which caused the same type of pain he suffered from and surgical procedures he underwent following the January 2006 work event. It contended the injury date occurred more than 12 years earlier, barring a

claim against the employer under Wis. Stat. § 102.17(4), the statute of limitations. The respondent argued that the Work Injury Supplemental Benefits Fund should be on the risk. The administrative law judge found in favor of the applicant against the respondents, and the respondents appealed. **The LIRC affirmed, holding that prior traumatic back injuries cannot be used as the date of injury when the worker later develops an occupational injury that causes substantially the same types of symptoms he suffered from after the previous traumatic events.**

Truesdale v. Curwood, Inc. (WC Claim No. 2008-013039, LIRC December 28, 2009)
Average Weekly Wage – Swing Schedule

The applicant was employed on a "3 weeks on, 1 week off" schedule, as were all his co-workers. After his work injury, he returned to work at this schedule and did not miss any time during his "on weeks." No hearing was held, and it is unclear what average weekly wage the Department determined and what TPD, if any, was awarded, and it is similarly unclear who petitioned the LIRC for review. **The LIRC held that when an employee is employed on a "swing schedule" consisting of "3 weeks on, 1 week off," the average weekly wage shall be the wage earned in the 52 weeks prior to injury divided by the number of weeks worked. To determine whether TPD is payable, the actual earnings of every 4 week period after injury and until end of healing shall be averaged compared to the 52-week average weekly wage. If the 4 week average is less than the 52-week average weekly wage calculation, TPD shall be paid according to percentage of wage loss as set forth in Wis. Stat. § 102.43(2). If the 4 week average is more than the 52-week average weekly wage calculation, no TPD is payable. The LIRC further held that the delay in payment of TPD, if any, in this situation will be acceptable pending prompt calculation of the 4 week average.** While it did not specifically hold that this method is applicable to anything other than a "3 week on, 1 week off" swing schedule, the LIRC set forth this principle as a general

proposition, meaning that other similar situations may be covered by this decision, e.g. "2 weeks on, 2 weeks off."

Waldvogel v. City of Antigo (WC Claim No. 2007-032141, LIRC January 28, 2009)
Permanent Partial Disability – Schedule – Minimum Ratings

The applicant sustained a partial anterior cruciate ligament (ACL) tear at work. His knee later became stable and he never underwent corrective surgery. Nevertheless, his doctor assessed him with 10% PPD to the knee, which was the doctor's understanding of minimum ratings under Wis. Adm. Code § DWD 80.32(4). The doctor later increased the assessment to 15% as a result of continued knee instability, despite the fact that the applicant had not undergone corrective surgery. The administrative law judge found in favor of the applicant, and the respondents appealed. **The LIRC reversed, holding that an injured body part must be surgical for minimum code ratings which specify "repair" or "surgery" to apply.** An unrepaired partially-torn ACL is not entitled to 10% PPD minimum under § DWD 80.32.

Gomez v. Republic Services of Wis. (WC Claim No. 2006-018015, LIRC April 27, 2010)
Temporary Total Disability – Drug Use

The applicant sustained a work-related low back injury. He was subsequently terminated by his employer while still in the healing period for violating the employer's alcohol policy. The claim proceeded to hearing and the administrative law judge found that the applicant was entitled to temporary total disability compensation during the healing period. The respondent appealed, arguing that the applicant had violated an employer drug use policy and was therefore ineligible for ongoing TTD per Wis. Stat. § 102.43(9)(c). **The LIRC affirmed, holding that employees who are terminated for violation of an employer's alcohol policy are entitled to ongoing TTD while in the healing period.** Wis. Stat. § 102.49(9)(c) precludes TTD for employees who have been

suspended or terminated for violation of a drug abuse policy, and the LIRC found that "drug policy" as the term is used in the statute does not apply to an employer's alcohol policy. Wis. Stat. § 102.58 specifically refers to intoxication by alcoholic beverages, and the LIRC reasoned that the legislature would have included more specific language if it had intended to bar TTD for injured workers who violate an employer's alcohol policy.

Leach v. Prent Corp. (WC Claim No. 2005-027936, LIRC April 30, 2010)

Bad Faith – Multiple Awards

The applicant originally claimed an unreasonable refusal to rehire penalty against the employer and prevailed at hearing and on appeal to the LIRC. The employer failed to pay on the unreasonable refusal to rehire order before the expiration of the 30-day appeal period, and the applicant filed claimed bad faith penalties. The employer then made a partial payment on the unreasonable refusal to rehire penalty, withholding payroll taxes from the award, and made a second partial payment several weeks later, this time withholding the remainder of the payment as a result of what it claimed was an offset for excess TTD it paid on the underlying injury. The applicant claimed four instances of bad faith – the initial refusal to pay the unreasonable refusal to rehire award within the 30-day appeal time limit after the LIRC issued its decision, partial payment withholding payroll taxes, the second partial payment withholding the TTD offset, and continued failure to pay at the hearing site. The ALJ awarded the maximum award for one act of bad faith, $30,000, and the applicant appealed.

The LIRC affirmed, holding that continuing nonpayment of a single award constitutes one act of bad faith. That is, a second bad faith penalty for continuing nonpayment of a single award may be assessed only after there has been nonpayment of a first bad faith penalty on that award.

Lawrence v. MJ Systems (WC Claim No. 2007-037574, LIRC May 26, 2010)

Loss of Earning Capacity – Medical Support

The applicant sustained work injuries to his back and legs. After end of healing, he was assessed with permanent restrictions that largely included weight lifting limitations, without specific opinion as to whether the permanent restrictions arose out of the back injury or the leg injuries. The applicant sought loss of earning capacity, offering an expert vocational opinion based on the treating doctor's permanent restrictions. The administrative law judge awarded loss of earning capacity and the respondent appealed. **The LIRC reversed and remanded for a second hearing, holding that loss of earning capacity assessments must be based upon disability to an unscheduled body part.** Doctors ascribing permanent restrictions in multiple body part injuries which include unscheduled body parts must specifically assess permanent restrictions attributable to the unscheduled body part for loss of earning capacity to apply. This rule would not apply in claims for permanent total vocational disability, only permanent partial disability. Mireles v. LIRC, 2000 WI 96, 237 Wis. 2d 69, 613 N.W.2d 875.