Case Law Update

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COURT OF APPEALS

Cargill Feed Div./Cargill Malt and AIG Cas. Co. v. LIRC, 2010 WI App 115, 329 Wis. 2d 206, 789 N.W.2d 326

Charles Renz offered an opinion from his vocational expert that the combination of his permanent work-related limitations and other relevant vocational factors rendered him unfit for any regular work, other than "odd lot" positions. The employer rebutted Renz's claim with evidence from its vocational expert that Renz could work. Respondents' vocational expert contacted employers in Renz's area and identified available jobs she felt Renz would be able to perform, based upon descriptions provided by the potential employers. The Labor and Industry Review Commission rejected the respondents' vocational expert's opinion because she did not inform the potential employers of Renz's specific situation, including his age and restrictions, and also because respondents' expert did not refer Renz to those employers.

The court of appeals held that the respondents were not required to inform prospective employers of Renz's age and disability, nor were they required to refer Renz to the employers. To meet its burden of showing that actual jobs exist, respondents must obtain information from prospective employers about the job requirements, not advise those employers about the applicant. The court also held that prior judicial decisions in this area did not impose a burden on respondents to refer the applicant to the potential employer.

This decision should make it easier for respondents to rebut odd-lot permanent total disability claims. Had the court made the respondents contact prospective employers and tell them about the applicant, it is likely that most employers would have indicated they would not hire the person, if for no other reason than most employers would like to avoid worker's compensation claimants. Such a requirement would have been impractical.

Aurora Consolidated Health Care v. LIRC, (2010 WI App 173, November 30, 2010)

In *Aurora Consolidated Health Care v. LIRC*, 2010 WI App 173, the dispute centered on permanent restrictions arising out of a conceded back injury. The Labor and Industry Review Commission assigned a tiebreaker medical examiner to resolve questions about the worker's permanent work-related physical impairments. After the tiebreaker doctor released his opinion, the LIRC asked the doctor how many hours per day the employee could work, how many hours per day he had to take a break due to back pain, and how many days per month he would have to miss work due to back pain. After the tiebreaker doctor offered his opinions on those three questions, the LIRC afforded the parties time to offer other evidence on the same issues. The employer asked the LIRC to have the tiebreaker doctor opine as to whether his predictions on missed work time were to a reasonable degree of medical probability and whether the employee would have to miss as much work if he worked less than full time. The LIRC denied the employer's requests and also refused to let the employer cross-examine the tiebreaker doctor at a hearing.

After the LIRC awarded permanent total disability compensation based on the tiebreaker doctor's opinions, the employer appealed, making three arguments, all of which were rejected by the appeals court. First, the employer contended Wis. Stat. § 102.17(1)(g), the statute that authorized tiebreaker exams, mandated the LIRC allow cross-exam of the tiebreaker doctor. The court disagreed, citing the statute's language that the tiebreaker was required to submit a report "in writing" to the LIRC, not testify, and that the statute allowed each party "an opportunity to rebut such report." The court reasoned that the Legislature did not intend to allow testimony of the tiebreaker doctor because it required only a written report. The court further reasoned that rebutting a report could be done without cross-examining the expert. In dissent, Justice R.A. Fine argued that rebutting a report without cross-examination deprived the employer of a way to explore the allegedly impartial tiebreaker expert's methodology and analysis, depriving the employer of a fair hearing.

The appeals court majority also rejected the employer's contention that Wis. Stat. § 102.17(1)(d)1 did not require the LIRC to allow the employer to cross-examine the tiebreaker doctor. That statute, the court held, allows cross-exam of experts offered by the parties, not the LIRC. It therefore held that the Legislature did not intend for tiebreaker doctors to be cross-examined because it used different language in the statute authorizing tiebreaker exams ("rebut the report"). The court also seemed peeved that the employer took a long time to request cross-examination, although it appeared the employer met all deadlines. It happened to request cross-exam on the final date of the final deadline.

Finally, the court's majority rejected the employer's claim that by refusing to allow cross-examination of the tiebreaker doctor deprived the employer of a "fair

hearing" as mandated by Wis. Stat. § 102.18(1)(a). The court held that allowing the employer to offer other evidence was sufficient to satisfy due process concerns. It held that cross-examination is not the only way to ensure that due process is satisfied. It did not suggest what other ways the employer might have tried.

This holding stands for the proposition that the LIRC can appoint a tiebreaker medical examiner and rely on that examiner's opinion to award or deny compensation, but deny the parties a chance to question the expert under oath. Thus, the expert takes on a status akin to a judge, not an expert, without there being any showing that the expert has the qualifications and experience of an administrative law judge. Cross-exam is a powerful tool because along with it comes the right to issue subpoenas to determine if the expert is truly impartial. Wis. Stat. § 102.17(1)(g) excludes experts who are "not under contract with or regularly employed by a compensation insurance carrier or self-insured employer" from the panel of available tiebreakers. How is a party to confirm that is not the case, without requiring the expert to produce that evidence in response to a subpoena? What if the expert rated permanent disability based on the American Medical Association's guide to permanent disability -- a disfavored tool -- but did not specify that in a report. How would the parties be able to determine that without cross-examining the expert? Rebutting a report is difficult because a report is not capable of being questioned. What exactly qualifies as rebutting a report? The court offered no clue. The court's decision strikes a blow against transparency and in favor of secret deliberations. As noted by dissenting Justice Fine, it strikes a blow against "fair play."

Oshkosh Corp. v. LIRC, (appeal no. 2010AP1219, Feb. 23, 2011)

The employee sustained a conceded knee injury and, as a result, had permanent physical limitations. His employer accommodated those limitations until the employee was caught sleeping on the job and his employment was terminated. After that, the employee went to the Division of Vocational Rehabilitation and was approved for a retraining course. The employer refused to compensate the employee for retraining, asserting that it had accommodated the restrictions at no less than 90% of his average weekly wage, as required by Wis. Stat. § 102.16(1g). Because the employee lost his job for just cause, the employer was not required to pay for retraining.

At hearing before an administrative law judge and on appeal to the Labor and Industry Review Commission, the employer lost. In *Oshkosh Corp. v. LIRC*, appeal no. 2010AP1219 (Feb. 23, 2011), the Wisconsin Court of Appeals affirmed the LIRC. It found that there is no law allowing employers to deny compensation for vocational retraining when the employee is discharged for cause. “It is the injury sustained by the employee and not the employee’s acts that underlie the principles in § 106.61(1g),” the court held at ¶17.

This is a different result than may have occurred had the employee sustained an "unscheduled" permanent injury, returned to work at 85% of his average weekly wage, and lost his job for sleeping at work. Wis. Stat. § 102.44(6)(g) holds that an employee who refuses an employer's good faith offer of such employment "without reasonable cause . . . is considered to have returned to work with the earnings the employee would have received had it not been for the refusal." Wis. Stat. 102.43(9)(a) probably does not apply to retraining programs because it requires that the employee be in a healing period.

This decision sends a terrible policy message. Employees who are brought back to work by their employers after the employer accommodates permanent restrictions can take themselves out of the work by their own misconduct and pursue retraining claims they may prefer. The court's decision enables that poor behavior.

Unified Management Co. v. LIRC, (2009 AP 2412 ,Court of Appeals 2010)

In *Unified Management Co. v. LIRC*, 2009 AP 2412 (Court of Appeals 2010), the applicant, a full-time receptionist, sustained a conceded occupational injury. When she informed her employer that she had been released to return to work without physical restriction and expressed interest in coming back to work at her old position, her employer informed her that her position was being eliminated due to force reduction. Four months later, the employer created a part-time receptionist job and hired someone else to perform it. The employer did not contact the applicant about the job and she did not apply for it. The applicant filed an application for hearing seeking a penalty from the employer for unreasonable refusal to rehire under Wis. Stat. §102.35(3). The ALJ found in favor of the applicant and the employer appealed to the LIRC, which affirmed and awarded damages. The employer appealed to the circuit court which affirmed the LIRC, and the employer appealed to the court of appeals. The court of appeals affirmed in part and reversed in part, holding that an employer who eliminates an injured worker's full-time position due to force reduction is required to contact that injured worker for rehire if it creates a part-time position within four months of eliminating the full-time position. It also held that the measure of damages for an unreasonable refusal to rehire claim is properly based upon the new part-time wage, as opposed to the time-of-injury wage, because the injured worker was refused rehire for the part-time job. Note that this decision seemingly overrules long-established DWD policy whereby unreasonable refusal to rehire penalties are based upon the time-of-injury wage, but the decision is unpublished and may not be cited as precedent. It may, however, be cited as persuasive authority.

Madison Gas & Electric v. LIRC, (2010 AP 1849, June 16, 2011 (rec. for publication)

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. The court of appeals reversed. Surgeries that replace a joint are entitled to cumulative "stacking" of PPD

LIRC

Busse v. Norco Windows, Inc. (WC Claim No. 1992-021488, LIRC June 23, 2010)

In *Busse v. Norco Windows, Inc.* (WC Claim No. 1992-021488, LIRC June 23, 2010), the applicant claimed temporary total disability compensation for periods of time she was off work to treat with her doctor for the effects of a work injury. However, her claim was not that she was physically unable to work as a result of her work injury. Rather, it was that it was impractical for her to work during those periods given the distances between her home, her doctor's office, and her employer. The ALJ denied her claim, and the applicant appealed. The LIRC affirmed, holding that for temporary disability to be payable, there must be a physical incapacity to work, as opposed to the impracticality of working given distances between an injured worker's home, her doctor's office, and her workplace.

Lynn v. Stoughton Trailers (WC Claim No. 2009-015770, LIRC November 30, 2010)

In *Lynn v. Stoughton Trailers* (WC Claim No. 2009-015770, LIRC November 30, 2010), the applicant injured her elbow when she slipped and fell on a public sidewalk about six inches from the employer's property line while walking from her car – which was not parked in an employer-designated parking lot – to her workplace. Her elbow made contact with the public sidewalk but, as she fell, her head crossed onto the employer's property. The respondents denied the claim, arguing that employees who are not on the employer's premises and not traveling between the premises and the employer-designated parking lot are not covered by worker's compensation. After a hearing, the ALJ dismissed the application, finding that the applicant was not performing services

growing out of and incidental to her employment at the time of injury. The applicant appealed to the LIRC. The LIRC affirmed, holding that when an employee slips and falls on a public sidewalk while not traveling to or from an employer-designated parking lot and the injured body part lands on the public sidewalk, but a part of the body that is not injured lands on the employer premises, the injury does not occur on the employer's premises and the employee is not performing services growing out of an incidental to her employment. It is a logical decision because the hazard that caused the fall was off premises.

Nofzinger v. City of Appleton (WC Claim No. 2009-009564, LIRC January 27, 2011)

In *Nofzinger v. City of Appleton* (WC Claim No. 2009-009564, LIRC January 27, 2011), the applicant was employed as a detective with the Appleton Police Department. He was injured at home performing push-ups in preparation for an employer-mandated physical fitness test that included push-ups. The respondent denied the claim on the basis of Wis. Stat. § 102.03(1)(c)(3), which states that injuries sustained in voluntary, uncompensated activity designed to improve the physical well-being of the employee are not work injuries. After a hearing, the ALJ found that the preparation exercises were voluntary, uncompensated activities, and dismissed the application. The applicant appealed to the LIRC. The LIRC reversed, holding that when an employee performs the same activity in preparation for a mandated physical fitness test as is required by the mandated physical fitness test, the activity is not voluntary and any injury sustained is a work injury. Does this mean that a lawyer who trips on the sidewalk at his home while carrying a case file from his car in order to work on it at home also sustained a work injury?