Case Law Update

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SUPREME COURT

DeBoer Transportation v. Swenson (2011 WI 64, July 12, 2011)

The applicant, a truck driver, drove a route at night so he could care for his terminally ill father during the day. The applicant sustained a work injury and was returned to work at full duty after he recovered. The employer required him to complete an overnight check-ride road test (that could last a few days or weeks) as a condition for re-employment. Applicant asked for an accommodation, either a local check-ride so he could be home to care for his ailing father or that the employer pay for a nurse to care for his father during the check-ride. The employer refused because it had never before allowed an exception to its policy. The employer terminated the applicant, and he then sought an unreasonable refusal to rehire penalty against the employer pursuant to Wis. Stat. § 102.35(3). The LIRC held that the employer did not demonstrate that accommodating the applicant would have compromised safety or been a financial burden and, therefore, failed to show "reasonable cause" for its refusal to rehire him, as required by § 102.35(3).

The employer appealed, the circuit court affirmed, and the employer appealed to the court of appeals. The court of appeals reversed, holding that the LIRC relied upon an incorrect interpretation of the reasonable cause standard in Wis. Stat. § 102.35(3). The applicant then appealed to the Wisconsin supreme court. The supreme court affirmed, holding that 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. Unlike Wisconsin's employment discrimination statutes, Section 102.35(3) does not contain an "accommodation" requirement.

COURT OF APPEALS

M.M. Schranz Roofing, Inc. v. First Choice Temporary (2012 WI App 9, December 21, 2011)

M. M. Schranz Roofing was working on a school building project in the City of Milwaukee. One of its employees, Eddie Crews, worked on the project as its direct employee from April 3, 1995, through April 29, 1995. Because Schranz's contract with Milwaukee Public Schools required a certain percentage of contract work to be performed by companies owned by minorities, Schranz contacted P.L. Freeman Roofing, a minority contractor, to provide workers. Freeman, a one-man shop, did not want the responsibility of having his own employees, so he informed Schranz that he would contract with First Choice Temporary, a temp worker agency, to provide workers. Because Schranz wanted Crews on the job, it sent Crews to First Choice, who then loaned Crews to Freeman. Freeman, in turn - and unbeknownst to First Choice - then loaned Crews to Schranz. While working on May 22, 1995, Crews sustained a severe work injury. After paying worker's compensation benefits, First Choice's worker's compensation insurer then filed a "reverse application" arguing that Schranz, and not First Choice, was actually the employer.

The ALJ found that, even though Crews met the definition of "loaned employee" in Seaman Body Corp. v. Industrial Commission, 204 Wis. 157, 235 N.W. 433 (1931) and was thus a loaned employee of Schranz, First Choice was nevertheless liable for worker's compensation benefits because Wis. Stat. § 102.04(2m) specifies that "temporary help agencies are liable for all compensation." First Choice appealed the decision to the LIRC, which reversed the ALJ, holding that when a 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 the worker was performing work for the employer, the temporary help agency is not liable as a temporary help agency under Wis. Stat. § 102.04(2m). Rather, the worker is a loaned employee of his prior employer. Schranz appealed the LIRC decision to the circuit court, which affirmed, and then to the court of appeals. The court of appeals affirmed, holding that First Choice was not a "temporary help agency" under the definition in Wis. Stat. ch. 102 because it had loaned Crews to Freeman, who in turn loaned Crews to Schranz. Thus, First Choice did not place Crews directly with Schranz, which is required under the definition of "temporary help agency."

Note: Supreme Court petition for review is currently pending.

Dalka v. American Family Mutual Ins. Co. (2011 WI App 90, May 24, 2011)

The case involves issues surrounding a settlement of a third-party tort case under Wis. Stat. § 102.29. Specifically, the plaintiff was injured in an auto accident while in the course and scope of his employment and he received worker's compensation benefits. He then sued the other driver. The worker's compensation insurer joined as a subrogated plaintiff pursuant to Wis. Stat. §102.29. Prior to trial the defendant offered to settle the case. When the plaintiff refused, the worker's compensation insurer moved the court to compel the plaintiff to accept the offer, arguing that under Bergren v. Staples, 263 Wis. 477, 57 N.W.2d 714 (1953), the circuit court had discretion to order the plaintiff to accept the settlement offer. The plaintiff asserted that Bergren involved the converse of the situation here—where a plaintiff wanted to settle but the worker's compensation insurer refused—and that he should therefore not be compelled to settle the case. The circuit court agreed with the worker's compensation insurer and compelled the plaintiff to accept the defendant's settlement offer, and the plaintiff appealed to the court of appeals. The court of appeals affirmed, holding that, in a tort action where an injured worker and his worker's compensation carrier are plaintiffs, the worker's compensation insurer may move the circuit court to compel the injured worker plaintiff to accept a defendant's settlement offer. The court further held that when a worker receives worker's compensation benefits he waives his right to a jury trial in a tort action against the third party tortfeasor. Therefore, upon a motion by the worker's compensation insurer, a circuit court can compel the injured worker plaintiff to accept a defendant's settlement offer

Martine v. Williams (2011 WI App 68, April 21, 2011)

This case involved the applicability of the exclusive remedy provision in a tort action against a co-worker. Applicant, Martine, injured his leg when a co-worker, Williams, grabbed him from behind. The carrier initially denied the worker's compensation claim, arguing that the applicant was not performing services growing out of and incidental to employment, based on a horseplay theory. Applicant and the carrier entered into a full and final compromise agreement for the worker's compensation claim—thus, there was no official ruling on the Act's applicability to Martine. Applicant subsequently brought a tort action against his co-worker Williams, alleging an assault. Williams moved for summary judgment, asserting exclusive remedy. Applicant argued that the issue of whether he was in the course and scope of employment was never answered in the worker's compensation proceeding. In a decision bordering on tortured logic, the Court of Appeals ruled that because the applicant entered into a prior compromise agreement, the exclusive remedy provision of the Act precludes the tort claim against the co-worker.

LIRC

Clemons v. Kimberly-Clark Corp. (WC Claim No. 2008-016261, LIRC May 24, 2011)

This case addresses the rarely successful assertion of the two-year statute of limitations under § 102.12. The applicant alleged that he had sustained a traumatic low back injury while cleaning a machine at work in July 2005. However, he did not report it to his employer as work related until May 1, 2008. In fact, in October 2005 he had filed a non-work-related long term disability claim with his company's disability insurance carrier. He also informed his employer's human resource manager in the summer of 2005 that his back condition was not work related. The applicant asserted that he had actually informed two of his co-workers that his low back condition was work related in the summer of 2005. One of those co-workers had semi-supervisory job duties but was not responsible for filling out work injury reports or reporting work injuries to the plant nurse or human resources manager. The ALJ found in favor of respondent and dismissed the application under § 102.12. In order to dismiss under the two-year provision, it must be shown that the employee knew or ought to have known of the relationship of his disability to the employment and that the employer did not know or should not have known that the employee sustained the injury on which the claim was based The LIRC affirmed the dismissal of the traumatic back claim, holding that when an injured employee informs his co-workers about an injury, the employer is not deemed to have had actual or constructive notice of a work injury within the meaning of Wis. Stat. § 102.12 unless he reports the injury to a manager or bona fide supervisor.

Notably, LIRC did not dismiss a potential occupational back claim under § 102.12. The Commission could not conclude that the applicant should have known that he had an occupational disease from his work exposure based simply on his familiarity with his job duties. The Commission has previously declined to charge a lay worker with knowledge of an occupational disease, which is a medical-legal question. Therefore, the Commission considered the occupational disease claim and dismissed it on the merits.

Rehlinger v. Menard, Inc. (WC Claim No. 2006-012095, LIRC August 31, 2011)

The applicant sustained a low back injury, with permanent restrictions after reaching end of healing. Applicant initially returned to the time-of-injury employer as cashier, but this position required frequent bending, twisting, or pivoting in violation of his work restrictions. Due to the pain, the applicant quit the cashier job and underwent vocational retraining as a paralegal. After a job search, he found part time work as a paralegal at $9.50/hr and claimed a loss of earning capacity. Initially, his vocational expert opined that he had sustained a 5% to 10% loss of earning capacity. He continued searching for full time paralegal work but claimed that he was unable to find any due to the recent economic slowdown. His vocational expert then increased his loss of earning capacity assessment to 20% to 25%. The claim went to a hearing, and the ALJ found entitlement to 22.5% loss of earning capacity. Due to the applicant's low starting wage,

the ALJ concluded that it likely will take the applicant longer to progress to higher wages in the future than a paralegal who entered before the economic downtown—thereby resulting in a higher loss of earning capacity award.

On appeal, the LIRC only granted 10% loss of earning capacity, noting that while economic conditions may be considered with regard to the applicant's efforts to obtain suitable work, they cannot serve as the basis for doubling the loss of earning capacity assessment, especially when loss of earning capacity is to be determined over an applicant's lifetime and not with respect to current economic conditions.

Additionally, the respondent argued against any loss of earning capacity award based on its provision of accommodated work post-injury. LIRC rejected this argument under Wis. Stat. § 102.44(6)(b) because the provided work exceeded the applicant's permanent physical limitations.

Toufar v. Harley-Davidson Motor Co. (WC Claim No. 2009-011335, LIRC October 31, 2011)

The applicant claimed an occupational neck injury arising from one day's worth of employment activity on March 30, 2009. He was hired by the employer in 2000 and since that time had been working in a position where 75% of his work was automated. He had a pre-existing injury to his neck for which he underwent a one-level fusion in 1995, then had three-level fusion in 2005 due to complications arising from his pre-existing condition. He did not make a worker's compensation claim for the 2005 surgery. On March 30, 2009, he was transferred to a position where 100% of his work was manual, and where he was required to repetitively bend and twist his neck to inspect parts coming off a conveyor. After four hours in that position, he complained to his supervisor and union steward that he was experiencing pain with radiculopathy into his arms. He continued working in this position for another three days before being taken off work by his doctor, and he later had another surgery to his neck.

The respondent argued that this was a textbook case of a "manifestation of a pre-existing condition," which is non-compensable under Lewellyn. The ALJ agreed and dismissed the application, and the applicant appealed to the LIRC. The LIRC reversed, holding that the applicant's repetitive bending and twisting in his new position permanently changed his neck condition, as he was largely symptom-free prior to March 30, 2009. Under Gumieny v. County Concrete (WC Claim No. 2004-017501, LIRC July 11, 2006), there is no minimum period of employment exposure as a matter of law before the exposure can become compensable. Additionally, the LIRC cited to Professor Larson: "this contrast between accident and occupational disease is gradually losing its importance, and awards are frequently made without specifying which category the injury falls in." Note that this case is on appeal to the circuit court. It should also be noted that the applicant in Lewellyn, who was denied compensation, was required to repetitively twist her low back and bend over to pick up objects, and she had surgery after the claimed work exposure.

Westerhof v. Dewitt, Ross & Stevens (WC Claim No. 2010-001099, LIRC November 30, 2011)

The applicant, an attorney, suffered a severe injury when he crashed his motorcycle near Wausau while riding to a motorcycle rally in Tomahawk with a potential client/friend. The accident rendered the applicant a quadriplegic. At the time of injury, they were en route to the rally and applicant borrowed the motorcycle of the potential client. He sought worker's compensation benefits, arguing that he was in the course and scope of employment because he was "rainmaking" or "networking" with this client. As evidence of his networking activities, the applicant claimed that he had intended to visit this client's home in Wisconsin Rapids on the way back to play poker and socialize as they did every week, thus increasing the chances of the client providing the firm with additional work. The ALJ found that the trip was primarily for a social purpose, and that any networking purpose was too remote or tangential to make the trip a business trip. The ALJ further found that, even if the purpose of the trip was business, the applicant undertook a deviation for a personal purpose when he drove up to the motorcycle rally in Tomahawk.

The applicant appealed, noting that his trip should be considered a compensable "dual purpose" trip because he had permission from his firm to engage in networking activities generally, because he was able to have his entertainment expenses reimbursed by his firm, and because his social activities with this client could, and on some occasions did, have a benefit to his firm. Applicant previously brought food, snacks and drinks to poker events that were reimbursed by his firm, and applicant previously performed some legal work for the potential client, who was a member of the poker group. The firm also previously reimbursed trip expenses, including the potential client's plane ticket, when the applicant and potential client traveled to Las Vegas. The LIRC affirmed the ALJ denial, holding that the weekly poker games with this client produced minimal business, and even if the trip to Tomahawk could be considered client entertainment it does not follow that every trip they took together was business-related. Rather, the LIRC found that the trip to Tomahawk was simply a social outing among friends who happened to do business together on occasion.

Keene v. L & S Trucking (WC Claim No. 2008-037854, LIRC November 30, 2011)

The applicant, an OTR truck driver, suffered a stroke while on a trucking run to deliver a load in Pennsylvania. At the time of his stroke, he was sleeping in the sleeper compartment of his truck while at a truck stop. He sought worker's compensation benefits, arguing that as a traveling employee he was presumed to always be in the course and scope of employment. He cited Hansen v. Industrial Commission, 258 Wis. 623 (1951), which held that "because his injury occurred during such [traveling] employment, it is deemed to have arisen out of his employment." The respondents argued that, regardless of the Hansen case, the applicant still needed to prove that the stroke arose out of employment per Wis. Stat. § 102.03(1)(f), which states that "any accident or disease

arising out of a hazard of such service shall be deemed to arise out of the employee's employment." Notably, this language is different from the language in the statute from 1951. The ALJ dismissed the application, holding that the applicant did not prove that the stroke arose out of his employment, and the applicant appealed.

On appeal, the applicant made the new argument that the extent of his physical condition was made worse by a hazard of employment: being isolated in his truck cab at a truck stop. Accordingly, the applicant asserted, his condition was made worse by a hazard arising out of employment. The LIRC confirmed the stroke was not work related, but remanded for the taking of additional evidence as to whether his present condition was made worse by being isolated in his truck cab at a truck stop. The LIRC analogized this case to a compensable idiopathic fall resulting from a seizure where the worker falls from a height or into a buzz saw because he is at work, thus making the physical condition resulting from the overall incident compensable because it was sustained, at least in part, due to a hazard of employment.

Veleke v. Speed Queen Co. (WC Claim No. 1995-010295, LIRC November 30, 2011)

The applicant sustained a work-related low back injury in 1995. As a result of this injury, in 1998 he alleged that he developed a psychological conversion reaction/panic disorder and made a claim for worker's compensation benefits. At that time, the applicant's treating physicians indicated he could not return to work, and the respondent's IME opined that the psychological condition was not work-related. That claim was compromised on a limited basis in 1998. The compromise agreement stated that it resolved "all claims related to the alleged psychological claims," but left future claims, including loss of earning capacity, open. Around the time of the compromise the applicant stopped working and began receiving SSDI, on the basis of the psychological condition, and never worked again. Thereafter, in the 2000s, he developed left foot drop from the low back condition and had surgery in 2009 to his left ankle. He then sought permanent total disability benefits as a result of the combined unscheduled low back and scheduled left ankle injuries (under a *Mireles* theory). The ALJ awarded PTD benefits, noting that all of applicant's limits stemmed from the unscheduled back injury (the nerve injury in the back necessitated the ankle surgery). The respondent appealed to the LIRC. The LIRC reversed, holding that an applicant cannot claim permanent total disability from the physical affects of a work injury where he had previously stopped working due to psychological affects of the injury, and where the psychological claim had already been compromised. The LIRC noted that a claim for permanent total disability may not be made where the worker has no residual earning capacity. Presumably, this holding also applies to cases where the worker stops working due to a non-work related physical or mental condition. However, it would not apply to cases where the worker retired, as retirement does not extinguish loss of earning capacity or permanent total disability claims. See, e.g., Kohler Co. v. ILHR Department, 42 Wis. 2d 396 (1969); Binder v. Neenah Foundry (WC Claim No. 2009-010250, LIRC May 24, 2011)

Cunningham v. Ernie's Riverdale Inn, WC Claim No. 2008-022784 (LIRC November 30, 2011).

Applicant burned while attempting to clean a deep fryer. She returned to work in September 2008, but was fired in January 2009. The employer's former owner testified that he fired the applicant for theft. He testified that three employees told him in October 2008 that the applicant was stealing product. LIRC found that the ALJ properly found an unreasonable refusal to rehire, as there was only hearsay testimony about the theft, the employer did not bring any witnesses, and the applicant was deemed more credible. The applicant made her *prima facie* case by establishing that she was an employee who was injured and then discharged by the employer. The employer, in turn, failed to prove a reasonable cause for the discharge. LIRC discussed the recent DeBoer Supreme Court decision. According to LIRC, there is no requirement for a worker, in an unreasonable refusal to rehire case, to show that he or she was discharged *due to* his or her work injury. The employee's *prima facie* case simply consists of showing that he sustained a work injury and was subsequently discharged by the time-of-injury employer.

Brawn v. County of Washington, WC Claim No. 2010-009193 (LIRC January 30, 2012).

This is a "mental-mental" compensation claim. Applicant was a sheriff deputy for Washington County. On May 8, 2008, he took custody of an individual, Rosario, acting irrationally and making "slashing" motions at his wrist. Applicant searched Rosario's belongings, including the contents of his wallet, and then placed Rosario in the squad car for transportation to Winnebago Mental Health Center. While in the car, Rosario—despite being handcuffed—removed his wallet, containing an undiscovered miniature scalpel, and cut open an artery in his neck. Applicant attempted to render first aid to Rosario and was covered in his blood. Rosario died on the scene. After the incident, the applicant had hallucinations concerning the dead individual and was diagnosed with PTSD, resulting in continuing missed work.

The issue is whether the claim was compensable under the mental stress standard of School District No. 1 of Brown Deer v. DILHR, 62 Wis. 2d 370 (1974): "mental injury nontraumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the 'fortuitous event unexpected and unforeseen' can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability under ch. 102, Stats., be found." The LIRC analyzed a number of duty disability mental stress cases involving law enforcement personnel, as well as the case of Bretl v. LIRC, 204 Wis. 2d 93 (Ct. App. 1996), in which a police officer's mental claim from shooting a suspect in the line of duty was found not compensable. Here, the applicant testified to feeling responsible for Rosario's death, as he was in applicant's custody when the incident occurred. Also, the retired chief of a nearby police department, West Bend, testified that it was not a day-to-day experience for officers to respond to the scene of a gory accident or fatality and it was even more unique to have someone take their life while in direct custody. The LIRC found this case met the

extraordinary stress test, focusing particularly on the element of "responsibility." (Commissioner McCallum dissented).