

Appeals

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I. From ALJ to LIRC

A. Procedural Requirements

1. Petition must be received within 21 days of the date the ALJ's decision was mailed. If no petition is received within 21 days, the ALJ's order is binding and no appeal may be had. Wis. Stats. §102.18(3), LIRC 1.02
 - a. If the last date of the appeal falls on a legal holiday, Sunday or any other day upon which the mail is not delivered, the appeal period shall end on the next business day. LIRC 1.02
 - b. The petition for review may be accepted at the Madison LIRC office or the Madison, Milwaukee or Appleton WCD offices. LIRC 3.01
 - c. Petitions for review may be filed by fax. The date of the transmission recorded by the fax machine shall constitute the date of the filing of the petition. LIRC 1.025
2. Briefs may be submitted with the petition for review or a briefing schedule may be requested. LIRC 1.07
 - a. A copy of the brief or memorandum should be provided to the opposing party. LIRC 1.07
 - b. Transcripts of the hearing may be requested. LIRC 3.06 If a transcript is requested, a briefing schedule will be established by LIRC.
 - i. It is helpful and strengthens the argument if proper citations to the transcript are included.
3. No oral argument unless requested and then granted by LIRC. LIRC 1.06

B. Substance of Petition for Review

1. Petitions for review should set forth, separately, the particular findings in which error is claimed. WKC-28 (a copy of which is attached).

C. Responses to Petition for Review

1. All petitions for review, including cross-petitions, are subject to the requirements of timeliness provided for in LIRC 1.02, thus cross-petitions must all be served within 21 days from the date of mailing of the administrative law judge's order. LIRC 1.026
2. A party opposing a petition for review *may* file an answer. If an answer is filed, a copy must be provided to the opposing party. LIRC 1.02. As such, answers are not required, but often filed. If the parties do not request a briefing schedule, one may not be granted. LIRC may then proceed to decide the case based on the submitted record.

D. Scope of Review

1. LIRC must affirm, reverse, set aside or modify the order or direct the taking of additional evidence. Wis. Stats. §102.18(3)
2. LIRC cannot substitute a theory of liability that was not tried by the parties at hearing level without remanding for the taking of additional evidence. Joseph Schlitz v. DILHR, 67 Wis. 2d 185, 226 N.W.2d 492 (1975).
3. LIRC may not rule on issues that were not litigated at the hearing. Wright v. LIRC, 210 Wis. 2d 289, 565 N.W.2d 221 (Ct. App. 1997).
4. LIRC may remand if they do not feel that the record is adequate. LIRC 1.05
5. If credibility of witnesses is at issue, the ALJ will advise the LIRC of his or her impressions of witness credibility. Transamerica Ins. Co. v. DILHR, 54 Wis. 2d 272, 195 N.W.2d 656 (1972).
 - a. Such consultation with the ALJ has been held not to violate due process. Hakes v. LIRC, 187 Wis.2d 582, 523 N.W.2d 155 (Ct. App. 1994).

E. Burden of Proof

1. While the LIRC defers to the administrative law judge on questions of credibility, the LIRC essentially performs a *de novo* review.
 - a. In a worker's compensation matter, the burden remains on the applicant to prove his case. Lewellyn v. DILHR, 38 Wis. 2d 43, 52, 155 N.W.2d 678, 683 (1968).

F. Miscellaneous

1. Seven (7) % interest is payable on awards affirmed by LIRC. Wis. Stats. §102.22(3)
 - a. Interest is paid on amounts that are modified downward, as well as affirmed or modified upward.
2. LIRC may set aside its own decision for any reason within 28 days of the decision. Wis. Stats. §102.18(4)(b)
3. Chances of obtaining relief. See attached tables.
4. LIRC is currently issuing decisions approximately six months from the time of the petition for review.

II. From LIRC to Circuit Court

A. Procedural Requirements

1. Judicial review to the circuit court is initiated in accordance with Wis. Stats. §102.23, rather than ch. 277 or Wis. Stats. §801.02, Wis. Stats. §102.23(1), LIRC 3.05
 - a. Note that an ALJ's award must first be appealed to LIRC and then to the circuit court. A party seeking an appeal may not bypass the LIRC.
 - b. Either party may seek review from the circuit court. LIRC 3.05.
2. Judicial review to the circuit court must be made within 30 days of the LIRC order. Wis. Stats. §102.23(1)(a)
 - a. The court requires strict compliance with the 30-day guideline. Cruz v. DILHR, 81 Wis. 2d 442, 260 N.W.2d 692 (1977); Schiller v. DILHR, 103 Wis. 2d 353, 309 N.W.2d 5 (Ct. App. 1981)

3. A summons and complaint must be filed in the county where the plaintiff resides, except if the plaintiff is a state agency, the summons and complaint shall be filed in the county where the defendant resides. If the plaintiff is a non-resident of Wisconsin, the summons and complaint shall be filed in Dane County. §102.23(1)(a), LIRC 3.05.
 - a. The party seeking review must serve the summons and complaint on the Madison LIRC office within thirty days. LIRC 3.05
 - i. Note that the time for service upon LIRC does not include an extra three days for mailing. Schiller, 103 Wis. 2d at 357, LIRC 3.05. Thus, if service is effectuated by mailing, it must be done within the 30 day time-frame.
 - b. The Department will effectuate service over the other parties. A copy for each other party involved must be left with the LIRC. LIRC 3.05.
 - c. Failure to serve LIRC, but not name LIRC as a defendant, is a jurisdictional defect. Gomez v. LIRC, 153 Wis. 2d 686, 451 N.W.2d 475 (Ct. App. 1989), depriving the court or jurisdiction to hear the appeal.
4. There is no filing fee in the circuit court for a worker's compensation appeal. §102.26(1).
5. LIRC must be named as a defendant in the appeal. Holly v. DILHR, 39 Wis. 2d 260, 158 N.W.2d 910 (1968).
6. Failure to name one of two insurance carriers is a jurisdictional defect and precludes judicial review. Miller Brewing Company v. LIRC, 173 Wis. 2d 700, 495 N.W.2d 660 (1993).

B. Substance of Complaint

1. The complaint shall state the grounds upon which review is sought. LIRC 3.05.

C. Responses

1. LIRC must serve an answer within 45 days. Wis. Stats. § 102.23(1)(c)
 - a. The LIRC is represented by an assistant attorney general. Wis. Stats. §102.64
2. Other parties may also file an answer, counterclaim or cross-complaint

within 45 days. Wis. Stats. §102.23(1)(c)

D. Scope of Review

1. The circuit court may confirm or set aside an order on the following grounds:
 - a. That the LIRC acted without or in excess of its powers.
 - b. That the order or award was procured by fraud.
 - c. That the findings of fact by the LIRC do not support the order. Wis. Stats. §102.23(1)(e)
2. The circuit court may only affirm or set aside an award, it may not amend an award.
3. The court shall disregard any irregularity or error of the commission or department unless it is made to affirmatively appear that the plaintiff was damaged. Wis. Stats. § 102.23(2)
4. The court has held that a LIRC decision should be upheld unless it directly contravenes the words of a statute, is clearly contrary to legislative intent or is otherwise without a rational basis. Wisconsin Electric Power Co. v. LIRC, 226 Wis. 2d 778, 595 N.W.2d 23 (1999).
5. LIRC may not rely upon “cultivated intuition,” but rather must base its decision on reasonable analysis and credible evidence. Leist v. LIRC, 183 Wis. 2d 450, 515 N.W.2d 268 (1994).
6. LIRC’s interpretation and construction of a worker’s compensation statute is entitled to “great weight” deference. Pigeon v. DILHR, 109 Wis. 2d 519, 32 N.W.2d 752 (1982).

E. Burden of Proof

1. An award may only be set aside if a *material fact* is not supported by credible and substantial evidence. §102.23(6), E.F. Brewer Co. v. Department of Industry Labor and Human Relations, 82 Wis. 2d 634, 264 N.W.2d 222 (1978).
2. As LIRC’s interpretation of worker’s compensation statutes are afforded “great weight” deference, see Pigeon, thus the court defers to LIRC’s interpretation.

F. Miscellaneous

1. If the dispute is between insurance carriers, compensation must be paid during the pendency of the appeal. Wis. Stats. §102.23(5) That compensation should be paid by the party ordered to pay it in the underlying proceedings.
2. The court may remand the case to the commission for further hearings or proceedings. Wis. Stats. §102.24(1).

III. From Circuit Court to Court of Appeals

A. Procedural Requirements

1. The circuit court's decision may be appealed to the court of appeals pursuant to Wis. Stats. §102.25
 - a. Appeal follows the same procedure as a civil case. Wis. Stats. §102.25(1)
2. Notice of appeal should be filed with the trial court clerk. Wis. Stats. §809.10
 - a. Each party should be served with a notice of appeal. Wis. Stats. §801.14(1) (4)
3. Within fourteen days of filing the notice for appeal, the appellant must file a statement on the transcript informing the clerk of whether a transcript is necessary for the appeal. Wis. Stats. §809.11(4)(b)
4. The appellant's brief must be filed no later than 40 days after the record is filed. Wis. Stats. §809.19(1)
5. The brief must include the following:
 - a. A table of contents
 - b. A table of authorities, with the cases in alphabetical order
 - c. A statement of issues presented for review and how the circuit court decided them.
 - d. A statement whether oral argument is necessary and a statement whether the decision of the court of appeals should be published.

- e. A statement of the case
 - i. Every statement of fact must be properly cited by its record citation. As an example, document #10, page 2 would be: (Rec.10, p.2).
 - f. An argument section
 - g. A short conclusion, requesting relief under Wis. Stats. §809.19(1)(d). The best practice for the request for relief is that it should comport with their powers of review under Wis. Stats. §102.23 (1)(e)
6. The appellant's brief must also contain an appendix which includes docket entries, opinion of the circuit court and other essential information from the records.
 7. The brief, counting only the statement of the case, argument and conclusion cannot exceed 50 pages. Wis. Stats. §809.19(8)
 8. Each brief must be signed by the person filing it and should also have a signed Certification page which states that the brief conforms to the statutory length and form requirements. Wis. Stats. §§809.19(1)(h) and (8)
 9. The respondent must file her brief thirty days from service of the appellant's brief. Three additional days may be added to that time if the brief was mailed. Wis. Stats. §809.19(3)
 - a. The respondent's brief need not include a statement of the issues, a statement of the case or an appendix - but may be included if the respondent wishes to include them.
 10. The appellant may file a reply brief.
 - a. The reply brief may be no longer than 13 pages. A signature and certification page are required. Wis. Stats. §809.19(4)(b)
 - b. The appellant's reply brief must be filed within the later of:
 - i. 15 days of service from the respondent's brief, 18 days if mailed.
 - ii. 15 days after the court accepts the respondent's brief for filing. Wis. Stats. §809.107(6)(c)

- c. If the appellant does not wish to file a reply brief, it must inform the court of that fact.
 - 11. Ten briefs must be filed with the court and all other parties must receive three copies.
 - 12. Brief covers
 - a. The appellant's initial brief must have blue front and back covers.
 - i. The reply brief must have gray front and back covers.
 - b. The respondent's brief must have red front and back covers. Wis. Stats. §809.19(9)
 - c. The cover of each brief must contain:
 - i. the name of the court
 - ii. the case name and caption
 - iii. the court and judge appealed from
 - iv. the title of the document
 - v. the name, address and State Bar number of the lawyer filing the document.
- B. Substance of Appeal
 - 1. The brief must allege the errors committed by the trial court. Wis. Stats. § 809.19(1) The purpose of the court of appeals is to act as an error correcting court.
- C. Responses
 - 1. A cross-appeal must be filed within 30 days after the filing of a notice of appeal. Wis. Stats. §809.10(2)
- D. Scope of Review
 - 1. The court of appeals will not consider issues beyond those presented to the trial court. Goranson v. DILHR, 94 Wis. 2d 537, 289 N.W.2d 270 (1980).
 - 2. The court of appeals does not owe deference to the trial court. Stafford Trucking v. DILHR, 102 Wis. 2d 256, 306 N.W.2d 79 (Ct. App. 1981).

3. The court reviews LIRC's decision and not the decision of the circuit court. Langhus v. LIRC, 206 Wis. 2d 494, 557 N.W.2d 450 (Ct. App. 1996).

E. Burden of Proof

1. A LIRC decision should be upheld unless it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise without a rational basis. Wisconsin Power Electric v. LIRC, 226 Wis. 2d 778, 595 N.W.2d 23 (1999).
2. "This court is to affirm the findings of the Commission if there is any credible evidence in the record to support those findings. Madden, 43 Wis. 2d at 547, 169 N.W.2d at 82. In reviewing the sufficiency of credible evidence, we need find only that the evidence is sufficient to exclude speculation or conjecture. Bumpas v. Department of Industry, Labor & Human Relations, 95 Wis. 2d 334, 343, 290 N.W.2d 504, 508 (1980). The Commission's findings must be upheld even if against the great weight and clear preponderance of the evidence." Goranson v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 537, 554, 289 N.W.2d 270, 278 (1980). L&H Wrecking Co., Inc. v. Labor & Industry Review Com'n, 114 Wis. 2d 504, 508, 339 N.W.2d 344, 346-47 (Ct. App. 1983).
3. "In applying the credible evidence test to findings of the Department, a reviewing court does not weigh conflicting evidence to determine which should be believed. If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might affirm lead to the opposite conclusion, a court must affirm." Id. at 509, 339 N.W.2d at 347 *quoting* Valadzic v. Briggs & Stratton Corp., 92 Wis. 2d 583, 592-94, 286 N.W.2d 540, 544-45 (1979).
4. The LIRC's legal conclusion will be upheld if it is reasonable. Id. at 510, 339 N.W.2d at 347, *quoting* United Way of Greater Milwaukee, Inc. v. Department of Industry, Labor & Human Relations, 105 Wis. 2d 447, 453, 313 N.W.2d 858, 861 (Ct. App. 1981).

IV. From Court of Appeals to Supreme Court

A. Procedural Requirements

1. The court of appeals decision is only reviewable if the Supreme Court accepts the Petition for Review. Wis. Stats. §808.10
 - a. Supreme Court review is by virtue of judicial discretion and is not

a matter of right. The Supreme Court will only grant review when special and important reasons are presented. Wis. Stats. §809.62(1)

- b. The court will also consider the following reasons in accepting a petition for review:
 - i. A real and significant question of federal or state constitutional law is presented.
 - ii. The petition for review demonstrates a need for the Supreme Court to consider establishing, implementing or changing a policy within its authority,
 - iii. A decision by the Supreme Court will help develop, clarify or harmonize the law, and
 - (1) the case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
 - (2) the question presented is a novel one, the resolution of which will have statewide impact; or
 - (3) the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the Supreme Court.
 - iv. The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals's decisions.
 - v. The court of appeals' decision is in accord with opinions of the Supreme Court or the court of appeals but due to the passage of time or changing circumstances, such opinions are ripe for reexamination. Wis. Stats. §809.62(1)
2. The Petition for Review must be filed within 30 days of the date of the court of appeals decision. Wis. Stats. §808.10

B. Substance

1. The Petition for Review must contain the following:
 - a. A statement of issues presented for review and how the court of appeals addressed those issues.

- b. A table of contents
 - c. A concise statement of the criteria for granting the petition for review, or a statement of the substantial and compelling reasons warranting review
 - d. A statement of the case, including the procedural history with appropriate citations to the record.
 - e. An argument amplifying the reasons the petition for review should be granted.
 - f. An appendix, including the decision of the court of appeals and any portions of the record needed for an understanding of the petition for review. Wis. Stats. §809.62(2)(f)
2. Ten copies of the petition for review, with white covers, should be filed with the Supreme Court Clerk. Wis. Stats. §809.62(4)
 - a. The petition for review should not exceed 35 pages in length. Wis. Stats. §809.62(4)
 3. The same procedure as was used in the court of appeals should also be used in the Supreme Court.
 - a. The original and nine copies of briefs must be filed with the Supreme Court. Wis. Stats. §809.81(2)
 4. It is the Supreme Court's practice to order the parties to file ten copies of their court of appeals briefs.

C. Responses

1. A response for a petition for review, filed with a white cover, may be filed within fourteen days after service of the Petition for Review. Wis. Stats. §809.62(3)
2. A petition for cross-review may be filed within thirty days after service of the Petition for Review. Wis. Stats. §809.62(7)

D. Scope of Review

1. The Supreme Court reviews the LIRC's decision and not the decision of the circuit court or the court of appeals. CBS, Inc. v. Labor and Industry

Review Commission, 219 Wis. 2d 564, 579 N.W.2d 668 (1998).

E. Burden of Proof

1. A LIRC decision should be upheld unless it directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise without a rational basis. Wisconsin Power Electric v. LIRC, 226 Wis. 2d 778, 595 N.W.2d 23 (1999).
2. “The guiding principle is that statutory interpretation is a question of law which courts decide *de novo*. See Kania v. Airborne Freight Corp., 99 Wis. 2d 746, 758, 300 N.W.2d 63, 68 (1981). Furthermore, a court is not bound by an agency’s interpretation of a statute. See State ex rel. Parker v. Sullivan, 184 Wis. 2d 668, 699, 517 N.W.2d 449, 460 (1994). As important, however, is the principle that courts should defer to an administrative agency’s interpretation of statute in certain situations. This court has applied three distinct levels of deference to agency determinations: great weight, due weight and *de novo* review. See Jicha v. DILHR, 169 Wis. 2d 284, 290, 485 N.W.2d 256, 258-59 (1992). Great weight deference is appropriate once a court has concluded that (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed by its expertise or specialized knowledge in forming the interpretation; and (4) that the agency’s interpretation will provide uniformity and consistency in the application of the statute. See Lisney v. LIRC, 171 Wis. 2d 499, 505, 493 N.W.2d 14, 16 (1992). Harnischfeger Corp. v. Labor and Industry Review Com’n, 196 Wis. 2d 650, 539 N.W.2d 98 (1995).
 - a. “An interpretation is unreasonable if it directly contravenes the words of the statute, it is clearly contrary to legislative intent or it is without rational basis.” Id. at 662, 539 N.W.2d at 102, quoting State ex rel. Parker v. Sullivan, 184 Wis. 2d at 700, 517 N.W.2d 449 (1994); Lisney, 171 Wis. 2d at 509, 493 N.W.2d 14.

**STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION**

PETITION FOR REVIEW OF FINDINGS AND ORDER OF ADMINISTRATIVE LAW JUDGE

Personal information you provide may be used for secondary purposes [Privacy Law, s. 15.04(1)(m)].

_____, Applicant
vs.
_____, Respondent
_____, Insurance Carrier

TO THE DEPARTMENT OF WORKFORCE DEVELOPMENT, MADISON, WISCONSIN

The undersigned petitions for a review of the law judge's findings issued on (mo/day/year)

The specific finding(s) which the petitioner claims are in error are as follows for the reasons stated:

Petitioner Signature	Date Signed
Petitioner Street Address	City, State, Zip Code

NOTE CAREFULLY: Petition must be received by the Department of Workforce Development within twenty-one (21) days from the date a copy of the findings or order of the law judge was mailed to the last known address of the parties at interest. The petition may be filed at the Worker's Compensation Division, 201 E. Washington Ave., P.O. Box 7901, Madison, WI 53707; or the Worker's Compensation Division, Associated Bank Building, 1500 North Casaloma Drive, Suite 310, Appleton, WI 54915; or the Worker's Compensation Division, 819 N. 6th St., Milwaukee, WI 53203; or the office of the Labor and Industry Review Commission, 3319 West Beltline Highway, P.O. Box 8126, Madison, WI 53708

WORKERS COMPENSATION (2002)

(1) 2002 - NUMBER OF WC APPEALS FILED AND DECISIONS ISSUED:

	Appeals Received*	Files Received at LIRC	Decisions Issued	Pending at End of Month**
January	42	29	35	141
February	38	27	37	142
March	35	51	34	143
April	33	39	38	138
May	24	28	32	130
June	42	32	27	145
July	35	27	37	143
August	31	35	17	157
September	35	37	26	166
October	35	39	35	166
November	43	38	29	180
December	20	21	32	168
Total	413	403	379	168
	34/mo.	34/mo.	32/mo.	

* "Appeals Received" is number of new appeals filed.

** "Pending at End of Month" is number of new appeals filed plus number of files on hand at LIRC.

(2) 2002 -- WC DECISIONS ISSUED BY TYPE OF APPELLANT:

Total Applicant Appeals	151 (40% of all appeals)		
Affirmed	129/151	-	85.4%
Modified & Affirmed	14/151	-	9.3%
Aff'd in part/Rev'd in part	1/151	-	0.7%
Reversed	7/151	-	4.6%
Total Respondent Appeals	144 (38% of all appeals)		
Affirmed	69/144	-	47.9%
Modified & Affirmed	15/144	-	10.4%
Aff'd in part/Rev'd in part	25/144	-	17.4%
Reversed	35/144	-	24.3%
Applicant & Respondent Appeals	15 (4% of all appeals)		
Affirmed	3/15	-	20.0%
Modified & Affirmed	3/15	-	20.0%
Aff'd in part/Rev'd in part	6/15	-	40.0%
Reversed	3/15	-	20.0%
Remanded for:			
Approval of Compromise	32	-	8%
New Findings & Order	8	-	2%
Other	8	-	2%
Dismissed with Prejudice	1	-	0%
Dismissed/No Jurisdiction	7	-	2%
Dismissed/Late Petition	6	-	2%
Petition Withdrawn	7	-	2%

2002 -- WORKERS COMPENSATION COURT DECISIONS

Total WC Court Decisions	71		
Circuit Court	51		
Court of Appeals	17		
Supreme Court (incl. Petitions denied)	3		
<u>Circuit Court Decisions</u>	51		
Affirmed LIRC	38	-	75%
Reversed LIRC	2	-	4%
(In favor of employee 2 - 100%)			
Aff'd in part/Rev'd in part	1	-	2%
Remanded	1	-	2%
Dismissed	9	-	18%
<u>Court of Appeals Decisions</u>	17		
Aff'd Cir.Court, Aff'd LIRC	11	-	65%
Rev'd Cir.Court, Aff'd LIRC	3	-	18%
Aff'd Cir.Court, Dismissed	1	-	6%
Aff'd in part/Rev'd in part	1	-	12%
<u>Supreme Court</u>	3		
Petition Denied	3	-	100%

COMPARISONS BETWEEN YEARS AND PROGRAMS -
WORKERS COMPENSATION

	Appeals Received	Decisions Issued	Appeals to Court	%
1989	543	485	97	20%
1990	587	478	84	18%
1991	620	625	87	14%
1992	655	685	134	20%
1993	587	571	119	21%
1994	502	669	143	21%
1995	502	495	97	20%
1996	559	553	91	16%
1997	502	493	85	17%
1998	491	495	73	15%
1999	406	483	93	19%
2000	412	405	60	15%
2001	388	399	56	14%
2002	413	379	55	15%