WISCONSIN CASE LAW UPDATE
by
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Court of Appeals

McRae v. Porta Painting, Inc., 2009 WI App. 89; 320 Wis. 2d 178; 769 N.W. 2d 74 (2009)

Mr. McRae was a union painter employed by Porta Painting when he was involved in an automobile accident on January 7, 2005. As a result of the accident, he sustained injuries to his left hip and ankle and head. At the time of the injury, he was traveling in his personal car from his home to a job site in Milwaukee. He regularly worked at job sites away from the employer's location, and his compensation did not begin until arriving at the job site. He occasionally would stop by the employer's location to pick up supplies on the way to the job site but did not do so on the date of injury. He was not reimbursed for travel expenses unless the job site was outside of a five-county area.

Issues: Did the injury occur while performing services growing out of and incidental to employment? Was Mr. McRae a traveling employee at the time of the injury?

Decision: LIRC denied workers' compensation benefits finding that this was simply a commuting situation and the employee was going to work, which was at the local job site, and not performing any type of special errand at the time of the accident. As a result, the injury was not growing out of and incidental to his employment. The Circuit Court and the Court of Appeals affirmed with the Court of Appeals refusing to make an exception to the "coming and going" rule just because the employee was commuting to a job site away from the employer's premises. In addition, Mr. McRae was not a "traveling employee" because this was in the geographic area that would be considered his normal commute.

Regent Insurance Co. v. LIRC, 2009 WI App. 95; 320 Wis. 2d 482; 769 N.W. 2d 877 (2009)

Mr. McFarland sustained an injury on September 27, 2002 while working for the employer, which was a grocery warehouse operation. He was transporting a load to a warehouse cooler using a pallet jack when he encountered a less experienced worker who was having difficulty maneuvering his own pallet jack around a dock loader. Mr. McFarland decided to move the dock loader out of the way so that he and his co-worker could proceed. When he exited the dock loader, the machine rolled backwards and pinned Mr. McFarland against the wall, causing injuries to his back, pelvis, bladder, etc. Mr. McFarland had no training to operate the machine and did not have permission from the employer to run the machine.

The employer argued that Mr. McFarland was prohibited from using the dock loader and, as a result, he was engaged in a prohibited act which should relieve them of liability.

Issue: Whether by engaging in a "prohibited act" the employee would be barred from receipt of workers' compensation?

Holding: The Court of Appeals held that an employee who sustains injuries while disobeying the employer's directives is still performing services growing out of and incidental to employment if the disobedient action is undertaken to further employer's interest rather than those of the employee, which under the Workers' Compensation Act did not hinge on whether the employee was engaged in an activity prohibited by his employer but, rather, on whether the activity is ultimately done in the employer's interest. Since in this case the movement of the machine was done in the employer's interest, workers' compensation benefits were awarded.

Aurora Health Care Metro, Inc. v. LIRC, 2009 WI App. 158; 776 N.W. 2d 101 (2009)

The employee, Ms. Morgan, was a nursing assistant for 14 years, the final seven of which were with Aurora Health Care. Her work activities included lifting and moving patients, moving furniture and other equipment, pushing beds, carrying laundry and other heavy lifting. She was 48 years old at the time of the alleged injury. Her last day of work was on February 4, 2005, and at that stage she was having no symptoms with her left shoulder. Two days thereafter, she was admitted to the hospital for a "stroke-like" event. While in the hospital, she rolled onto her left side and experienced an intense pain in her left shoulder. She denied that there was any specific injury and alleged an occupational injury to the left shoulder. On April 28, 2005, she had surgery to repair a tear in the left rotator cuff. The treating physician, Dr. Pennington, opined that in the absence of any specific injury and considering the physical nature of her work, it was likely that the rotator cuff tear resulted from repetitive-type injuries during the course of her employment. This was also supported by another of her physicians, Dr. Ahuja.

The insurer had an IME with Dr. Mark Aschliman, who opined that the left rotator cuff problem was due to her intrinsic physiology and not due to work activities. The ALJ and LIRC found the employee credible and awarded benefits. The employer and insurer appealed, alleging that the evidence presented was merely conjecture or speculation and not credible, relevant evidence.

Issue: Whether or not the employee sustained an occupational injury to her left shoulder despite the fact that she had no symptoms while working and had an immediate onset of symptoms while rolling over in bed?

Decision: The Court of Appeals affirmed the decision of LIRC and found that simply because the onset of pain happened while away from work does not mean that the work duties did not play a material contributory role in the condition's onset or progression. They stated that the employee can only testify as to what she experiences, but whether her shoulder was actually injured and the cause of the injury are questions for medical experts. Since LIRC adopted the opinion of Dr. Pennington, the decision was affirmed.

Greenfield Pontiac Buick, Inc. v. LIRC, 2009 WI App. 174; 776 N.W. 2d 288; (2009)

The employee, Mr. Werdin, was an auto body repairman for Greenfield Pontiac Buick. He had a prior back injury from an earlier employer on July 27, 1998. On January 22, 2003, he was bending over while riveting nails into a minivan and testified that he "felt something tear loose" in his low back. He testified that he felt his tail bone "wagging." He thought something had torn loose in his back, and he had never experienced this before and he was in a great deal of pain. Within a couple of days he contacted the insurer for the earlier injury and requested renewed medical care. He received medical care in June of 2003 authorized by the earlier insurer.

It was undisputed that Mr. Werdin did not give notice of any injury to the employer and did not file an Application for Hearing until June 2005, more than two years after the date of injury. In addition to other defenses, the insurer for Greenfield denied liability based upon W. S. 102.12, which provides that "regardless of whether notice was received, if no payment of compensation, other than medical treatment or burial expense, is made, and no Application is filed with the Department within two years from the date of the injury or death, or from the date the employee or his or her dependent knew or ought to have known the nature of the disability and its relation to the employment, the right to compensation therefore is barred..."

Issue: Was the employee's claim barred by failure to file an Application for Hearing within two years from the date of injury when he testified that the injury was immediately apparent?

Discussion: The Court of Appeals affirmed LIRC's decision finding that the employee's claim was not barred by the two-year filing requirement because Mr. Werdin was "understandably confused as to the cause or causes of his low back/leg pain as of January 22, 2003 due to the fact that he suffered an injury in 1998 and had continued to suffer pain from that injury." Because of the complicated nature of the causation issue, the Court felt that it could be inferred that Mr. Werdin delayed so long in reporting a work injury because he was simply uncertain as to what had been and had not been causative. It was felt that the reasonable inference was that after seeking medical care and considering the matter, he finally arrived at this conclusion in June of 2005.

Hall v. School District of St. Croix Falls (Decided 11/24/09)

The employee was the coach of a school district basketball team. He signed a contract with the school district to be a volunteer assistant basketball coach. Pursuant to a "volunteer coaches contract," Mr. Hall agreed to work the hours assigned, perform whatever duties and attend such meetings and training programs as are assigned by the board of education through his supervisor. The contract indicated that there would be no compensation and listed no fringe benefits. In December 2003, Mr. Hall injured his left knee while practicing with the basketball team and ultimately underwent arthroscopic surgery to reconstruct his ACL. Although Mr. Hall admitted he received no wages or money from the school district, he claimed tangible compensation in the form of coaching shirts, a duffle bag, transportation

to games on a team bus, a key to the facility and a pass for all conference basketball games. He also had unlimited access to the school locker room, weight room and gym to work out and exercise on his own. The employee additionally argued that at the end of the 2003-2004 coaching season, the paid coaches gave the employee a $600 appreciation check for his work as an assistant coach. The evidence, however, established that the money from the coaches was merely gratuitous and was not sanctioned by the school district or paid by the school district. The employee argued that this $600 was similar to gratuities left for servers in restaurants.

Issue: Did the "incidental" compensation received by Mr. Hall make him an employee under the Workers' Compensation Act and entitled to benefits?

Decision: The ALJ did find an employment relationship, but this was reversed by LIRC. The Court of Appeals affirmed LIRC and held that the benefits received by Mr. Hall were merely incidental and otherwise of minimal value and could not reasonably give rise to an expectation on his part that he was an employee of the school district. They declined to apply the analogy to the wait staff in restaurants because in those situations, the tips were a supplement of base pay received by the employer. In this case, there was no such base pay.

Electro-Connect, Inc. v. LIRC (Decided 2/18/10)

Facts: The employee, Mr. Weed, was the lead worker or supervisor in the wire harness area for an electro-mechanical assembly business. On October 28, 2005, he was involved in a motor vehicle accident in the employer's parking lot. Mr. Weed was taken completely off work by his doctor. The employer had considered for some time hiring an individual to both assume the duties that were done by Mr. Weed as well as cross-train workers in the wire harness area. They filled this position two weeks after the injury and , therefore, Mr. Weed's position ceased to exist. A letter was sent by the employer to Mr. Weed advising him that after he had been off work four weeks, the employer had no choice but to fill the position in order to meet their business needs.

Approximately five weeks after the injury, the treating physician authorized return to work subject to no pushing, pulling or repetitive bending and a 20-pound lifting and carrying limit. Although the pre-injury job no longer existed, Mr. Weed argued that he could perform the task of "stuffing circuit boards," which was a task the regular employees performed if there was time to fill. It is undisputed that the other duties as a regular assembler would exceed the restrictions.

The ALJ denied the request for benefits for unreasonable refusal to rehire, but LIRC reversed.

Issue: Whether the ability to perform a task that was part of the duties of regular employees is sufficient to support an unreasonable refusal to rehire claim?

Decision: The Court of Appeals found that there were valid economic reasons for the hiring of the new person in a position which eliminated the need for Mr. Weed's pre-injury job. In addition, the Court of Appeals stated that although Mr. Weed could perform some tasks that were part of the assembly job duties, he was unable to perform all of the tasks, and the rotation of employees to various tasks was reasonable. The Court stated that "Weed's ability to perform part of a job is not equivalent to being able to discharge the requirements of "employment," and employment that entails performing duties prohibited by physician's orders is not "suitable" because it is not within his limitations." As a result, the decision of LIRC was reversed.

DeBoer Transportation, Inc. v. Swenson (decided March 25, 2010)

Mr. Swenson, the employee, was working at DeBoer when he sustained a knee injury at work. He was a truck driver at the time of injury, and when his doctor cleared him to return to work, he contacted the employer and began a reorientation program that DeBoer used for any driver who had been off work for more than 60 days. The employee cooperated with the initial aspects of this reorientation program including a physical examination, drug screening, review of company policies and a short road test required by the state. DeBoer was in the process of hiring Mr. DeBoer if he passed one final test, which was an overnight "check ride." The "check ride" required the returning driver to be away from his or her home for a few days (possibly longer). DeBoer had a representative who testified that the time away from home would be less than five days, whereas the employee claimed he was told he may be on the road up to two or three weeks in duration.

The reason for the "check ride" was so another driver could evaluate the driving skills over an extended period of time. Prior to his injury, the employee had driven a daily route that did not require him to be away from home. The route allowed him to be home every day to provide care for his terminally-ill father. If he participated in the overnight check ride, he would have to locate and personally pay for part of each day that he is away on the check ride.

Mr. Swenson asked DeBoer if he could complete the check ride locally so that it would not interfere with his daily routine of caring for his father. Alternatively, the employee told DeBoer that if the company would pay the cost associated with caring for his father during the overnight check ride, he would complete the ride. DeBoer refused to consider any alterations or alternatives to their normal check ride procedure. They also refused to pay for the additional care for Mr. Swenson's father. Because of the refusal to participate in the check ride, Mr. Swenson was not rehired.

LIRC concluded that the employer did not demonstrate that accommodating Swenson would have compromised safety or been a financial burden and, therefore, DeBoer failed to show the reasonable cause necessary for its refusal to rehire. The Circuit Court affirmed LIRC's decision, and appeal was taken to the Court of Appeals.

Issue: Whether an employer must accommodate non-injury-related personal needs of an employee in connection with return-to-work efforts?

W. S. 102.35(3) provides:

> Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, ... has exclusive liability to pay to the employee the wages lost during the period of such refusal, not exceeding one year's wages.

The dispute in this case over whether the refusal of the employer to rehire the employee was based upon "reasonable cause." The case law provides for a shifting burden of proof. First, the employee must show that he or she "has been injured in the course of employment and subsequently is denied rehire." If an employee makes this prima facia showing, the burden shifts to the employer to show "reasonable cause" for its refusal to rehire. This burden may be met with proof of a valid business reason for its action.

The Court of Appeals stated that, regardless of the level of deference applied to LIRC's decision, the Court would not uphold an unreasonable agency interpretation of a statute. The Court stated that it was apparent from the Commission's decision as a whole that it considered the reasonableness (or lack thereof) of the employer's refusal to deviate from its check ride policy in light of what it considered to be the legitimate need of the employee to provide care for his father. The Court of Appeals held that this reasoning was an incorrect interpretation of the statute because it required something more than "reasonable cause."

It was undisputed that the employer's longstanding practice for the "check ride" was based upon the employer's belief that it was a means of ensuring safe driving and that, as a general matter, having safe drivers is a legitimate business concern for the employer. There was no evidence that the employer's refusal to accommodate Mr. Swenson had anything to do with his work injury. There was testimony that the company had never deviated from the "check ride" policy. The Court of Appeals concluded that "the reasonable cause standard in W. S. § 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." In this case, the Court felt that there was a facially reasonable basis for the policy because it furthered the employer's interest in employing safe drivers. As a result, the decision of LIRC was reversed and the unreasonable refusal to rehire claim was denied.