WISCONSIN CASE LAW UPDATE
by
David N. Larson

Supreme Court

Society Insurance v. LIRC, 2010 WI 68 (filed July 8, 2010).

Mr. Liska suffered a severe work injury in 1982 resulting in a right leg amputation below the knee. Society Insurance paid benefits through June 1990. The law in effect as of the date of injury provided that after 12 years from the last payment of disability benefits, the Supplemental Benefit Fund would be liable for benefits. In 2004, the employee filed a claim for medical expenses, and Society Insurance denied, alleging that the claim was barred by the statute of limitations. After a hearing, the ALJ issued an order agreeing that the insurer had no further liability and that medicals should be paid by the Supplemental Benefit Fund.

Effective April 1, 2006, the law was changed to eliminate the Fund's liability for certain traumatic injuries, including amputations such as sustained by Mr. Liska, and liability was shifted back to the employer and insurer. After this change in the law, the Fund began forwarding Mr. Liska's medical expenses to the insurer for payment. The insurer filed an Application for Hearing, and the ALJ found that the amendments were to be applied retroactively making the insurer responsible for ongoing medical expenses. This decision was affirmed by LIRC.

Issue: Whether it is unconstitutional to retroactively apply the amendments to § 102.17(4) and § 102.66(1) after the statute of limitations are already expired?

Holding: The Court of Appeals found that a two-part test should be applied to the due process challenge. First of all, it must be determined whether or not there was a vested property right in the insurer which was violated by retroactive application of the statutes. The Court held that since the statute of limitations had already run prior to the amendment to the law, Society Insurance did have a vested property right in the statute of limitations defense.

The Court then applied a balancing test weighing the private interests overturned by the retroactive legislation against the public purpose served by that legislation. It found that Society had a "right to fixed exposure to liability" and that this right was unsettled by the retroactive application of the amendments. This is because the amendments were to renew Society's liability for the employee's treatment expenses until his death. In addition, the Court noted that if retroactive application was allowed, Society would not have the opportunity to recover the increased premium from the employer because of the increased exposure on the claim. This interest of the employer was balanced against the interest of the public purpose of the amendment. The Fund argued that the purpose was to maintain the Fund's solvency, but the Court said there was nothing in the legislative history to suggest that the purpose was to maintain the Fund's solvency. The Court felt there was nothing in the history to demonstrate a rational

legislative purpose justifying retroactive application. As a result, the Court held that retroactive application violated the insurer's due process rights.

The Court of Appeals also held that retroactive application would unconstitutionally violate the insurer's rights under the contracts clauses in both the United States and Wisconsin Constitutions. This is because retroactive application would change Society's contractual expectations by renewing its liability on a claim where the original liability had already expired. This constituted a substantial impairment because it modified a basic term of an insurance contract.

Court of Appeals

Cargill Feed Division v. LIRC, 2010 WI App. 115.

The employee injured his low back while working for Cargill in 2002 and again in 2005. He underwent surgery following the last injury and was released to return to work with restrictions. Not long thereafter, the employee was terminated as part of a reduction in Cargill's workforce. He had worked for Cargill for over three decades at that stage and was 61 years of age.

The employee was claiming permanent total disability based upon a vocational opinion under the "odd lot" doctrine. Cargill's vocational expert found no greater than 85% loss of earning capacity and submitted a labor market survey that identified various jobs that would have been available to the employee within his sedentary restrictions. The administrative law judge accepted the employee's vocational opinion and awarded permanent total disability. The ALJ further criticized the employer's vocational expert's report because she did not inform the employers in the labor market survey of the employee's age and disability when conducting the survey. LIRC affirmed pursuant to *Beecher v. LIRC*, 682 N.W.2d 29 (2004). LIRC found that under *Beecher*, the employer's vocational expert must show that actual jobs are available for the employee in the labor market. LIRC felt that this meant that the prospective employers must know all of the relevant facts concerning the injured worker, which should include age and disability. The employer argued that this expanded the reach of *Beecher* and was inappropriate because disclosure of age and disability required them to inform the employer of information that the employer could not lawfully consider when making hiring decisions.

Issue: Whether an employer must establish that prospective employers were informed about the employee's age, disability and other employability factors in its labor market survey to successfully rebut the odd lot permanent total disability presumption?

Holding: The Court of Appeals held that *Beecher* required the employer to prove "that the claimant is probably employable and that an actual, suitable job is regularly and continuously available to the claimant." The Court held that the employer did not need to go beyond that to establish that the worker's age and specific limitations or disability were disclosed to prospective employers. In addition, the Court held that LIRC cannot prefer evidence that an employer actually referred the employee to a prospective employer with open positions.

Pick 'n Save v. LIRC, 209AP2594 (August 25, 2010).

The employee, Jo Lucchesi, was a cake decorator for Pick 'n Save, which was a grocery store. She developed carpal tunnel syndrome which was work related. Her restrictions specified "no cake decorating," and she was returned to work as a bakery clerk. She worked in that capacity for several years and then was asked by her supervisors to temporarily work as a decorator after two of the stores' decorators were transferred. She agreed to do this despite her restrictions because it allowed her to work the required amount of hours to maintain her health insurance. A years later she was asked to fill in again as a cake decorator and agreed to do so until her carpal tunnel symptoms recurred. She underwent bilateral carpal tunnel release procedures, and her doctor assigned 5% permanent partial disability at the wrist.

The employer denied liability, alleging that the employee's injuries were self-inflicted because she knowingly performed work outside of her restrictions. The ALJ and LIRC found in favor of the employee because they felt there was no evidence that she intentionally sought to reinjure herself.

Holding: The Court of Appeals affirmed LIRC's decision. The Court of Appeals felt that LIRC's interpretation of the statute was reasonable and applied great weight deference. The employee's "poor judgment" did not preclude her from recovering under the Workers' Compensation Act. In addition, the employer was aware of her restrictions and made the request for her to violate those restrictions.

LaBeree v. LIRC

The employee in this case was struck by a train in his vehicle and sustained traumatic brain injuries which left him as a quadriplegic. The insurer paid for institutional care at Dunn County Healthcare Center. They attended all of his personal and medical needs. The family thought that the employee had not been adequately challenged while institutionalized, although they concluded he was receiving good care. The guardian for the employee requested a community integration plan which called for construction of a specially-equipped duplex on land owned by the employee's father. The employee was to live on the site opposite his father where he would receive 24-hour-a-day care. The cost of the community integration plan was $549 per day as opposed to the $174 per day at the Dunn County Healthcare Center. The insurer refused to pay the difference.

The Circuit Court had found that the Dunn County Healthcare Plan was not the "least restrictive setting consistent with his needs." They approved the home-based care program.

Despite the Circuit Court's finding, the insurer denied that the additional expense was reasonable and necessary under the Workers' Compensation Act.

After a hearing, the ALJ dismissed the employee's claim alleging that he failed to prove that the transfer from institutional to home care was reasonable and necessary under the Workers' Compensation Act. This was affirmed by LIRC.

Holding: The Court of Appeals held that the Circuit Court had exclusive determination to determine whether or not the in-home placement constituted the maximum liberty possible consistent with the employee's disability. The case was remanded for the Department to determine whether or not the specific care received was compensable. If the care was compensable (i.e. related to the work injury) then it must be payable at the higher rate.

State of Wisconsin, County of Barron v. LIRC (October 29, 2010).

Darlene Cobb was selected by Barron County under the Community Options Waiver program (COP-W program) to care for a quadriplegic. She lived at the patient's residence and attended to his basic needs of ordinary daily living. The COP-W program is financed by State and Federal Medicaid funds. The State requires the counties to arrange for the implementation of the program including arranging for the service contracts, insuring the provision of necessary care and providing assessment services.

On May 2, 2006, Ms. Cobb fell and fractured her arm while making a bed in Mr. Budlowski's home. As a result, she sustained a 12% permanent partial disability at the shoulder. The County denied workers' compensation benefits under its policy alleging that she was not an "employee" of the County but rather an employee of Mr. Budlowski. The County argued that it did not fund the program and no funding was provided by either the State or Federal authorities to fund the workers' compensation premiums associated with the program.

Holding: The Court of Appeals affirmed the decision of LIRC that Ms. Cobb was an employee of the County. The Court discussed the test established in *Kress Packing Co. v. Kottwitz*, 212 N.W.2d 97 (1973). In *Kress*, the Court stated that the primary test for determining the existence of an employer/employee relationship is "whether the alleged employer has the right to control the details of the work." In making this determination, four secondary factors are to be considered: (1) direct evidence of the exercise of the right of control; (2) the method of payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right to fire or terminate the employment relationship.

The Court held that Ms. Cobb was an employee of the County. Mr. Budlowski did have the power to terminate Cobb's employment. However, the County monitored Ms. Cobb's performance to make sure that she adequately took care of Mr. Budlowski, and if they found the quality of care insufficient, they could have stopped the funding, which would have effectively terminated her employment, as well. In addition, the County originally arranged for Ms. Cobb's services, determined the amount of payment and had sufficient right of control to warrant an employment relationship with the County.

City of Kenosha v. LIRC (decided March 16, 2011).

The employee was a firefighter with the City of Kenosha and was on active duty working a 24-hour shift when he sustained a ruptured biceps while playing basketball with fellow firefighters and members of the public in a City park next to the fire station. The fire chief testified that it was common for on-duty firefighters to play basketball during their shifts and that

those playing basketball would be regarded as "in their quarters" for the purpose of the collective bargaining agreement between the City and the firefighters. He did not consider playing basketball while on active duty to be an abandonment of the job duties of a firefighter. The chief made clear that it was important for firefighters to be physically fit, and the department had an informal fitness program under which fire department employees were encouraged to engage in physical fitness activities while on duty. The station did have an exercise room for use by the firefighters.

The City denied liability alleging that W. S. § 102.03(1)(c)(3) excluded liability if, at the time of injury, (1) the employee is engaged in an activity designed to improve his physical well being, (2) his participation is voluntary and (3) he receives no compensation for participation.

The Court agreed with LIRC that this injury was compensable. They indicated that all three provisions of the statute as outlined above needed to be met in order to avoid liability. The employee was being compensated at the time that this injury occurred, and engaging in fitness activities was part of employment. As a result, the biceps tear was compensable.

Unified Management Co., LLC v. LIRC.

The employee, Gwendolyn Klay, was a full-time receptionist for Unified. In April and May of 2007, she had surgery on her wrist for a work-related carpal tunnel syndrome. She informed her supervisor on May 20th that she expected to be released from work restrictions in early June. On May 22nd the president of the company wrote to tell her that the company was reducing its workforce and no longer needed a full-time receptionist. In June, Unified hired a temporary part-time receptionist. In September and October of that year, Unified advertised for and hired a permanent part-time receptionist. The job was not offered to Ms. Klay. Ms. Klay brought an unreasonable refusal to rehire claim and LIRC affirmed an ALJ's decision which found that Unified had unreasonably refused to rehire Klay for the part-time position. LIRC further held that the maximum amount of lost wages that the employee could receive was the annual amount of her salary at the time of her injury, $35,152.

The Court of Appeals affirmed LIRC's decision regarding the unreasonable refusal to rehire aspect of the case. The Court first held that the employee did not have to reapply with the employer because she was released by the doctor to return to her preinjury job without restrictions. If she could only return in a <u>different</u> capacity, she did have an obligation to communicate to the employer the extent of her interest. Since it was the same job at only half-time which was available, the employer had an obligation to offer this position to Ms. Klay.

The second issue is whether LIRC properly determined the lost wages due as a result of the statutory violation. LIRC had awarded the amount of lost wages based upon the part-time receptionist job and not the full-time job at the time of injury. The Court of Appeals held that the employer had legitimate business reasons for not rehiring the employee into her previous position because of business needs. The permanent part-time position was the position that Ms. Klay lost, and therefore the maximum amount of lost wages should be the salary of the permanent part-time position.