WISCONSIN CASE LAW UPDATE
by
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I. Supreme Court

A. *Aurora Consolidated Healthcare v. LIRC,* 814 NW2d 824 (2012)

The employee in this case sustained a low back injury in 2001 that was related to his employment with Aurora Consolidated Healthcare. He underwent surgery for the low back problem and continued treatment with his physician for ongoing pain problems following the surgery. Later, in 2005, he underwent a total hip replacement which was not work related.

In 2006 the treating physician assigned work restrictions which he alleged were solely due to the work injury and not to the hip problem. The employee made a claim for permanent total disability benefits based upon those restrictions and permanent total was found by the ALJ.

The employer appealed to LIRC arguing that the treating physician mistakenly included the left hip in his restrictions. The case was remanded by LIRC with instructions to have the Department obtain an independent medical examiner (neutral) to render an assessment regarding disability. Dr. Jerome Ebert was selected by the Department, and he opined that the restrictions were wholly attributable to the work-related back injury. The ALJ then gave all parties 90 days to submit medical evidence in response to Dr. Ebert's opinions. The case was then to be referred back to LIRC for its decision. LIRC again remanded the case requesting clarification from Dr. Ebert on three issues: (1) the number of hours that the employee could work in an average workday; (2) how many unscheduled breaks he would be required to take in an average workday because of his disability; and (3) how often he would miss time from work on a recurring basis.

Following Dr. Ebert's clarifications, both sides issued supplemental reports from their vocational experts. At this point, Aurora requested that LIRC remand the case back to the Department again so that it could cross-examine Dr. Ebert or, in the alternative, requested that the Department submit three additional questions to Dr. Ebert: (1) whether Dr. Ebert's estimate that the employee would miss work roughly two times per month due to his back pain was based upon a reasonable degree of medical certainty; (2) whether Dr. Ebert's estimate of days missed would change if the employee worked on a part-time basis under his restrictions; and (3) what restrictions would apply to the employee that would not result in two days of work missed per month. LIRC denied Aurora's request, and the Circuit Court and Court of Appeals affirmed.

Issue: Whether or not Aurora had a statutory right or a constitutional right under the due process clause to cross-examine Dr. Ebert?

Whether LIRC erroneously exercised its discretion by denying the request to cross-examine Dr. Ebert or submit the additional inquiries.

Decision: The Supreme Court found that Aurora had no statutory right or due process right to cross-examine Dr. Ebert, and LIRC did not erroneously exercise its discretion when it denied Aurora's request.

Under W. S. § 102.17(1)(g) the Court held that the term "rebut" as contained in that section did not grant a party the right to cross-examine an independent physician. Aurora had been given the opportunity to rebut the report by submitting additional medical evidence, and this would be all that the statute required. W. S. § 102.17(a)(d) was held to cover only certified medical reports submitted on behalf of either party but did not apply to an independent medical report obtained by the Department.

With respect to the constitutional due process claim, the Court held that the ultimate test to determine whether a party had been accorded due process of law was whether there was the presence or absence of fair play. Three elements determined whether the fair play was present: (1) the right to seasonably know the charges or claims made; (2) the ability or right to meet the charges or claims by competent evidence; and (3) the right to be represented by counsel.

The Court held that Aurora had been seasonally informed of the employee's claims and had been adequately represented by counsel. It had further been allowed two months following Dr. Ebert's supplemental report to present any additional medical evidence they wanted to rebut Dr. Ebert's opinions, and this satisfied the ability to meet the claims by competent evidence. Therefore, LIRC did not violate the right of due process by denying the request for cross-examination.

II. Wisconsin Court of Appeals

A. *Xcel Energy Services, Inc. v. LIRC*, 810 NW2d 865 (Ct. App. 2012)

The employee in this case was injured on the job in 2007 and was awarded temporary total disability by the ALJ. The issue of permanent total disability/loss of earning capacity was deferred until additional tests had been performed. In 2009 the employee renewed the claim for permanent total disability. Following

the hearing, the ALJ awarded 60% loss of earning capacity. The employee appealed and LIRC found the employee permanently and totally disabled.

Xcel Energy Services filed an action in Circuit Court to review LIRC's decision. In its action Xcel named LIRC and the employee as respondents but did not name its workers' compensation insurer, American Insurance Company, as a party in the action. LIRC made a motion for dismissal based upon jurisdictional grounds because Xcel had failed to include its insurer as a party. The Circuit Court denied the motion to dismiss but affirmed LIRC's order on the merits. Xcel appeals to the Court of Appeals.

Issue: Whether or not the Circuit Court had jurisdiction when the employer failed to join its insurer as a party?

Decision: The Court of Appeals held that the Circuit Court did not have jurisdiction to adjudicate the action. The failure to comply with W. S. § 102.23, which requires one who seeks judicial review to join all "adverse parties" rendered the appeal invalid. The Court stated that an adverse party included any party in whose favor the compensation award is made, any party whose interests are in conflict with the modification or reversal of the administrative decision and any party whose interests were adversely in the administrative proceedings. It further held that an adverse party for workers' compensation actions included <u>any</u> party bound by LIRC's order or award granting or denying compensation to the claimant. Therefore, the employer's own insurer is considered an "adverse party" and failure to join them in the action invalidated the appeal.

B. *City of Appleton Police Department v. LIRC*, 813 NW2d 237 (Ct. App. 2012)

Police officers who work for the City of Appleton must pass a physical fitness test two times per year. This includes testing strength, flexibility, cardiovascular performance and body fat percentage. If an officer passes these tests, they receive cash premiums and bonuses, but officers who fail the test are subject to disciplinary action. Officers are required to participate in a physical fitness program during the six-month period prior to the test.

At the time of his alleged injury, the employee in this case was performing pushups in his home as part of the training program for the test. While doing a pushup, he injured his shoulder. LIRC awarded benefits.

Issue: Whether or not LIRC was reasonable in concluding that the employee's in-home training was not voluntary and, therefore, he was injured in the course of employment?

Decision: W. S. § 102.03(1)(c)(3) provides that employees are not considered to be performing services in the course of their employment when they are engaged in activities "designed to improve the physical wellbeing of the employee" if those activities are voluntary and uncompensated." Citing its previous case of the *City of Kenosha v. LIRC*, the Court of Appeals held that this statutory provision is to be interpreted by a three-part test: (1) the courts must determine whether the employee was engaged in activity designed to improve physical wellbeing; (2) was the employee's participation in the activity voluntary; (3) was the employee compensated for participating in the activity.

The Court of Appeals affirmed LIRC's decision. They felt that the In-home training was not voluntary because he was engaged in a type of activity that would be the subject of the test, he was complying with the employer's requirement that he participate in a physical fitness program, the Workers' Compensation Act should be liberally construed and the decision was consistent with the City of Kenosha decision. In that case a firefighter who was injured while playing basketball during a short break during his employment was awarded compensation benefits.

C. *Greed Foundries, Inc. v. LIRC,* (June 19, 2012)

The employee in this case filed a workers' compensation claim which was settled with the self-insured employer. The Department approved the settlement by Order issued June 17, 2009. In the Order, the employer was to pay the employee $11,600 and the employee's attorney $2,900 by July 8, 2009.

On June 30, 2009, the employer filed a Chapter 11 petition for bankruptcy which triggered an automatic stay provision under federal bankruptcy law which prohibited "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." The employer did not pay the employee until September 18, 2009, a little over two months later than provided in the Order. The Department assessed bad faith penalties because of the late payment, and LIRC affirmed the Order. LIRC stated that because the self-insured employer was required to hold a surety bond for payment of workers' compensation claims, it should have taken action to have the bondholder pay the employee's claim.

Issue: Whether or not the bankruptcy filing barred the assessment of a penalty for late payment?

Decision: The Court of Appeals held that because of the Supremacy Clause in the U. S. Constitution, it was bound by the bankruptcy act. The filing of bankruptcy on June 30, 2009 triggered an automatic stay

and thus prevented the Department from enforcement of its Order as of the date of filing. The Court held that the Order essentially was a money judgment against the bankrupt employer and the stay covered any money judgments. Therefore, the assessment of bad faith penalties for late payment was reversed.

D. *Menard, Inc. v. LIRC*, (Ct. App. September 5, 2012)

The employee in this case sustained a low back injury on April 5, 1999. She was given permanent restrictions following the injury and then returned to work for the pre-injury employer, Menard's. She was paid 2% permanent partial disability to the body as a whole. On April 4, 2005, the general manager of the Wausau store, Mr. Maki, terminated the employee's employment. Menard's had an "open door" policy under which employees were encouraged to discuss issues, problems, etc. with a store manager.

The employee claims that she asked to meet with Mr. Maki in March of 2005 and she brought with her a list of questions concerning her employment situation and Maki's management practices. She testified she was not argumentative or disrespectful (this is disputed by Mr. Maki) and that Mr. Maki refused to answer many of her questions. At the end of the meeting, he suspended her for three days. When she returned to work on April 4, 2005, Mr. Maki said that to keep her job, she must "do what he said, when he said it and without question and without argument." The employee responded that she could not agree to such an open-ended statement, and she asked that it be modified because agreeing to this statement would mean she could not refuse work that exceeded her restrictions. Mr. Maki testified that he could not recall exactly what was said in the second meeting. However, he stated that he discussed the employee's attitude toward himself and Menard's and asked if she would change her attitude and not be insubordinate with respect to his decisions. He claims the employee responded that she "would not go against her beliefs and would not change her attitudes." The employee's termination followed.

The employee then brought a loss of earning capacity claim.

The ALJ determined that Menard's did not have reasonable cause to terminate the employee and allowed an additional claim for loss of earning capacity. This was affirmed by LIRC.

Issue: Whether or not the employee is entitled to loss of earning capacity under the facts outlined above.

Decision: W. S. § 102.44(6)(a) provides that if the employee returns to work for the same employer following the injury at a wage loss of 15% or less, there can be no loss of earning capacity claim. Historically, LIRC has held that it will exercise its discretion to reopen an award

under that statutory section if the employer terminates the employee without reasonable cause within 12 years.

The Court of Appeals held that there was "credible and substantial evidence" to support LIRC's decision. This is the standard of review on factual determinations. Under that standard, the decision of LIRC can only be set aside when "the evidence including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." The Court held that the ALJ would be in the best position to determine the demeanor of witnesses and credibility of each witness. There was sufficient evidence based upon LIRC's acceptance of the credibility of the employee to affirm the award.

E. *Mofoco Enterprises, Inc. v. LIRC*, (Ct. App. September 29, 2012)

This case presents a refusal to rehire claim. The employee worked as an automobile mechanic building Volkswagen engines. He alleged an injury to his right wrist at work on June 16, 2008 when lifting a motor casting. He went to the hospital where he was treated for a wrist sprain. He was released to work on June 17, 2008 with the limitation that he only use his left hand. He reported to work on each of the next four business days, and the employer told him that no work was available. On June 24, 2008, he reported to work and worked for several hours. The employee testified that he then asked one of the owners of the company about wages for the previous week. According to the employee, the owner responded by saying that he "had never paid a workers' compensation claim and wasn't about to start now." After some heated words, the employee was told, "Get out of here, you're fired, go home." The employee's personnel records at Mofoco indicate that he was terminated.

The reports from the treating physician opine that the employee suffered a work injury on June 16, 2008. The IME, Dr. William Moore, concurred that the employee did sustain an injury at work.

The ALJ awarded one year's wages for unreasonable refusal to rehire, and this was affirmed by LIRC.

Issue: Whether or not the employee is entitled to compensation for unreasonable refusal to rehire?

Decision: The Court of Appeals first set forth the standard of review:

We may not substitute our judgment for LIRC's as to the credibility of witnesses or the weight to be accorded to the evidence. Further, we must uphold LIRC's findings of fact

that they are supported by any credible evidence even if LIRC's findings appear contrary to the great weight and clear preponderance of the evidence.

Since LIRC found a work injury and accepted the credibility of the employee's testimony, the Court of Appeals found no merit in any defenses asserted by the employer. The Court of Appeals stated, "In short, Mofoco Enterprises offers nothing that permits this Court to set aside LIRC's decision. The decision is based on a reasonable view of the law and on testimony and evidence that the agency deemed credible."

F. *Petrovic v. LIRC*, (Ct. App. December 4, 2012)

This case presents an independent contractor situation. Mr. Petrovic is a truck driver who was injured while hauling cargo in November 2009 and applied for workers' compensation benefits alleging that he was an employee of DBG Trucking. DBG did not carry workers' compensation insurance, so the Workers' Compensation Uninsured Employers Fund handled the defense of the claim. The employment status was denied, and it was affirmatively alleged that the employee was an independent contractor.

DBG served as a middleman for entities with cargo that they wanted shipped by truckers. Truck drivers were under contract with DBG. Customers would call his company and tell him where their cargo is located and when there would be a required pickup and delivery of the goods. He would also obtain information regarding the fees that the customers were willing to pay for shipping. The drivers that were under contract with DBG (four at the time of the injury) would inform DBG when they were available and how far they were willing to drive. DBG would offer each customer's proposal to an available driver and the driver could accept or refuse the proposal or ask DBG to try to negotiate a higher fee for the transport.

The facts further disclose that drivers under contract with DBG could drive for other companies but must first notify DBG because the DOT number on the truck was assigned to DBG Trucking. Therefore, those displays must be removed when the drivers hauled other cargo for another company.

The contract between DBG and Mr. Petrovic indicates that Mr. Petrovic is an independent contractor. Petrovic would receive 90% of the gross receipts of any delivery and DBG would receive the remaining 10%. DBG did not deduct any taxes from the amounts paid to Mr. Petrovic but did deduct $300 a week to pay for cargo liability insurance which he obtained for the benefit of all the drivers so they could take advantage of a multiple-contractor discount. Through the deduction of receipts, the drivers paid for the coverage.

Mr. Petrovic owned the truck that he used to haul the cargo and paid for all costs of maintaining the truck. He admitted that DBG paid him only for freight-hauling assignments that he accepted and that he could refuse an assignment that he did not want. He could choose his own route for each assignment and was responsible for all expenses such as tolls, fuel costs, etc. He had his own federal tax ID number, and he filed tax returns in previous years that included a schedule C involving profit or loss from a business. He gave his business address on the tax return as his home address and reported gross receipts and deducted business expenses, including insurance, showing a profit for each year. He also spent a brief period of time driving for another company while he was doing work for DBG.

Issue: Whether or not Mr. Petrovic was an employee of DBG entitling him to workers' compensation benefits?

Decision: W. S. § 102.07(8)(b) 1-9 provides a nine-part statutory test for independent contractor status under the Workers' Compensation Act. A worker has to meet all of the statutory criteria to be an independent contractor rather than an employee. In this particular case, the dispute was over whether or not the employee maintained a separate business with his own office, equipment, materials and other facilities. LIRC determined that his truck, which he owned, as well as his home listed as his office address on his tax return constituted all of the facilities that he needed to maintain a separate office. Therefore, LIRC decided that all of the requirements for independent contractor status were met and denied the claim for workers' compensation benefits.

The Court of Appeals used the "great deference" standard with respect to LIRC's decision because of the years of experience that LIRC had had in interpreting the independent contractor statute. Under this statute, the Court of Appeals affirmed LIRC's decision indicating that a reasonable man could accept the employee's truck and his office and his home to sufficiently comply with the requirement for a separate business with his own office.

G. *Menard, Inc. v. LIRC*, (Ct. App. January 8, 2013)

The employee in this case sustained an admitted right knee injury in 2003 and was later terminated by Menard's. The employee applied for retraining through DVR, and after approximately a year on the waiting list, he was given an Individualized Plan for Employment (IPE) which called for him to obtain a bachelor's degree in business administration. He was to start school in January 2007, and to transition into school he would start with only six credits the first semester and then increase credits until up to full time in the fall of 2008.

A workers' compensation hearing was held on February of 2007, and the ALJ awarded 80 weeks of retraining to the employee, which is the amount that is presumed to be reasonable if the IPE is prepared by DVR. The ALJ reserved jurisdiction for additional weeks beyond that because the record did not contain vocational opinions assessing whether four years was necessary to restore the employee's pre-injury earning capacity or whether it enhanced his earning capacity.

The employee later switched his course of study to alcohol and drug abuse counseling, and the credits that he had obtained up to that point transferred into the new program.

At an additional hearing held in January 2011, the ALJ found that the employee's earning capacity at Menard's was $45,000 per year. The judge further found that with an associate degree in business management, earning capacity would be expected to be $30,000 per year; with an associate degree in drug abuse counseling, the expected earnings were $27,000 per year; and with a bachelor's degree in that area, it would be $43,000 per year.

The ALJ awarded an additional 80 weeks of retraining to the employee. This was appealed to LIRC, but they reduced the additional weeks from 80 down to 40, which was approximately what the employee had completed at that stage. LIRC explained its decision that it reduced benefits due to the uncertainty of the employee's future plan since he had not yet transferred or begun his coursework at the University of Wisconsin in Green Bay. He had still not quite completed is associate degree at the technical college. LIRC reserved jurisdiction to award additional benefits in the future as conditions would warrant. Menard's appealed from this decision.

Issue: Whether or not the award of additional benefits beyond the 80-week minimum is appropriate?

Decision: Menard's first argued that the employee failed to mitigate his retraining expenses because he changed his course of study and engaged in a leisurely pace at school. The Court rejected this argument finding that all credits transferred into the new course of study and that the initial IPE did provide for a four-year degree. The employee's GPAs ranged from 3.0 to 4.0 per semester, and after the first semester, he was averaging 14.2 credits for each semester thereafter.

Secondly, Menard's argued that LIRC completely ignored the employee's felony history as an obstacle to employment. This argument was rejected because the felony history was addressed in the ALJ findings, which were adopted by LIRC, and there was no evidence submitted by Menard's to indicate that the employee could

not be licensed and employed in the drug counseling area or that he would not be employable in that area.

The third argument of Menard's was that any retraining beyond 80 weeks would impermissibly enhance rather than restore the employee's earning capacity. The Court of Appeals held that under Wisconsin Administrative Code § 80.49(10)(b) a retraining program in excess of 80 weeks may be reasonable, but there is no presumption that retraining over 80 weeks was required. Extension beyond 80 weeks is appropriate unless the primary purpose of further training is to improve upon the pre-injury earning capacity rather than restore it. The Court found that a bachelor's degree in the counseling area would not enhance the pre-injury earning capacity and points out that Menard's presented no evidence to the contrary. The Court of Appeals affirmed LIRC's decision in full.

H. *Hooper Corp. v. LIRC*, (Ct. App. November 29, 2012)

This is an occupational exposure case. The employee began working for Hooper on September 11, 2000 and continued until September 27, 2002. He did no welding on previous jobs. While at Hooper he worked at seven different welding substations engaging in cadwelding as well as assisting in aluminum wire welding. When doing the wire welding, he would hold an umbrella or tarp so the wind would not affect the weld. He worked in the open air and occasionally in enclosed structures in which welding occurred. He did not wear any respiratory apparatus while welding or assisting.

While working for Hooper, the employee began to experience balance problems, nausea and breathing trouble once in a while. He began experiencing insomnia, restlessness, sweating, body pains, choking reflex problems and light sensitivity. He denies experiencing any of these symptoms before starting at Hooper. In 2002 his doctor advised him to stop working for Hooper. He was treated for fibromyalgia initially and later was sent to a neurologist, Dr. Nausieda, in 2005 who diagnosed the employee with manganese poisoning. This was a neurological disorder caused by manganese damage to brain cells. In October 2005 and February 2006, Dr. Nausieda hospitalized the employee for chelation treatments. A chelating agent is injected into the employee, and that causes him to excrete manganese into the urine. The urine samples showed manganese levels 10 to 15 times higher than normal. Dr. Nausieda testified that the inhalation of fumes from the welding would have resulted in manganese exposure, which caused the employee's poisoning. He had no specific information about manganese exposure at Hooper, but from his own knowledge of treating this type of condition, he was aware of the fact that manganese is emitted into the air during welding activities.

The independent medical examination was done by Dr. Novom, who opined that it was highly unlikely that the work activities led to manganese poisoning. The high levels of manganese in the employee's system could have been caused by an impaired liver that wasn't properly detoxifying the manganese in foods. More likely, Dr. Novom believed that the employee's symptoms were attributed to fibromyalgia and chronic alcohol consumption.

The ALJ found no causation, but LIRC reversed based upon the testimony of the employee and Dr. Nausieda.

Issue: Whether or not the decision of LIRC was supported by credible and substantial evidence?

Decision: The Court of Appeals stated that, "Evidence is credible if it is sufficient to exclude speculation or conjecture." Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The Court went on to say that they may even agree with the employer that the preponderance of evidence favors Hooper. However, the Court felt bound by the highly deferential standard of review and felt that the testimony of the employee and the treating physician met the test of credible and substantial evidence which required affirmance of LIRC's decision.

I. *Adams v. Northland Equipment Co., Inc.,* (Ct. App. March 7, 2013)

This case involves a third-party action by the employee against Northland Equipment to recover damages for a spinal cord injury sustained while plowing snow for his employer, the Village of Fontana. The injury was apparently caused by a defective plow which was sold to the Village by Northland and repaired by Northland prior to use by the employee.
Workers' compensation benefits had been paid by the Village's insurer, the League of Wisconsin Municipalities Mutual Insurance Company. The insurer was a party to the action because it had paid workers' compensation benefits and had a subrogation interest.

An offer of $200,000 in settlement was made. The employee did not want to accept the settlement and wished to go to trial on the merits, and the workers' compensation insurer which had the subrogation interest did want to accept the settlement amount.

The decision by the Court of Appeals does not give much of the facts of the case but does indicate that there was a summary judgment motion made, and the case presented a difficult case with respect to liability for the employee's injury.

The Circuit Court considered the facts and issued an order compelling the employee to accept the settlement offer made. It found that the settlement offer was a reasonable amount in light of the possible finding of no liability by the jury. The Court of Appeals affirmed. The case of *Bergren v. Staples*, 57 NW2d 714 (1953) held that the Circuit Court, without a jury trial, could compel an employer and the workers' compensation insurer to join in acceptance of an offer of settlement made by a third-party tortfeasor. In that case, the employee wished to settle and the workers' compensation insurer wanted to go to hearing. The case of *Dalka v. American Family Mutual Insurance Co.*, 799 NW2d 923 (2011) made clear that this right was reciprocal and if a workers' compensation insurer which had paid benefits wished to accept an offer and the employee wanted to go to trial, the Circuit Court had authority to determine whether the settlement was fair and, if so, compel the employee to accept a settlement. In the instant case, the *Dalka* case was felt to be controlling, and the Circuit Court's order was affirmed.