WIWC Forum Case Law & Legislative Update

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Dickow Cyzak Tile Co. v. LIRC, 2020 AP 1916 (2021) unpublished

- Injured worker died when the company truck he was driving rear ended a school bus at 60 mph.
- Worker had cocaine in his system, and employer's expert determined that the accident occurred because the employee violated the employer's drug and alcohol policy.
- The injured worker had no dependents, and the State Fund made a claim for death benefits.

Pay the Fund But Don't Pay the Dependents

- 2016 law change to Sec.102.58, Stats says no disability or death benefits to injured worker or his dependents if the employee's injury was caused by a violation of the employer's drug and alcohol policy (Larson frozen fingers case).
- The State Fund said it is not a dependent, so you have to pay the Fund even if nobody else gets benefits.
- LIRC ordered payment to the Fund, because the change to Sec.102.58, Stats. doesn't mention the Fund.
- Circuit said as matter of public policy, the employer should not have to pay the Fund if they don't have to pay the dependents.

Legislature and the Court of Appeals

- The Legislature changed the statute on April 29, 2021, to specifically include the State Fund in Sec.102.58, Stats. After the change, the State Fund cannot claim benefits if the death was caused by a violation of the employer's written drug and alcohol policy.
- The Court of Appeals said that the 2016 change to Sec. 102.58, Stats was clear, and if the legislature had meant to include the State Fund they would have. They ordered the payments to be made to the State Fund.
- There is a 5 year window where the State Fund gets paid death benefits when no one else can claim them.

Sey v. National General Ins. Co., 2020 AP 1676 (2021) unpublished

- Sey was hurt in a MVA while at work. He sued the other motorist and the insurance company, National General.
- The WC insurer was Regent Ins. It was named as an involuntary plaintiff under Sec. 102.29, Stats. Regent also filed its own suit against National General. The cases were consolidated in Circuit Court.
- National General offered settlement. Sey did not want to accept the settlement. Regent moved the Circuit Court to approve the settlement.
- The Circuit Court approved the settlement, and Sey appealed.

The WC Insurer Has a Voice, So Use It!

- Sey argued that the money was not enough because he only netted $6,760 thru the formula.
- The Circuit Court addressed all Sey's arguments that he was more disabled than the settlement money considered.
- The Court of Appeals agreed with Regent and the Circuit Court. They found the record supported the settlement.
- Sey argued that the Circuit Court approved the settlement because Sey was pro se. The Court of Appeals said that was not relevant.

Conway Freight V. LIRC, 2020 AP 1100 (2021) unpublished

- Injured worker claimed an occupational back injury as a dock worker/truck driver.
- Applicant had a blood pressure issue which made it difficult for him to do sedentary work or lift more than 10 pounds
- Dr. Lloyd said the work was a material causative factor in the back condition. Lloyd mentioned the 5% rule and used an FCE for permanent restrictions which included restrictions for the blood pressure. Vocational claim was based on the “odd lot” standard.
- LIRC found PTD based on permanent restrictions.

Is The 5% Rule Now “The Law”?

- The Court of Appeals affirmed the award of PTD benefits. They focused on the substantial medical evidence supporting the LIRC award.
- The Court specifically found that LIRC did not change the causation standard for occupational injury to the “5% Rule”.
- The Court also reinforced the “as is rule”, finding that the high blood pressure issue could impact the jobs available to the injured worker and that impact was properly part of the LOEC analysis.

ADS Waste v. LIRC, 2020 AP 2168 (2022) unpublished

- Markowski drove a garbage truck that picked up dumpsters. He hurt his back getting in and out of the truck 2 times in November of 2017.
- Dr. Coran did back surgery on 5/14/2018.
- ADS claimed that the back condition was not work related.
- At Hearing the ALJ awarded benefits. LIRC affirmed the award of benefits. ADS filed a summons and complaint in Circuit Court.
- LIRC/DOJ did not file a brief in Circuit Court to defend the LIRC decision. The Circuit Court reversed LIRC and dismissed the claim
- LIRC/DOJ and the applicant appealed.

Always File a Brief If You Are a Party

- ADS argued that LIRC forfeited its merits based argument because it failed to file a brief.
- Court of Appeals refused to apply the “rule of forfeiture”.
- Applicant filed a brief to support LIRC’s decision at the Circuit Court.
- Court of Appeals reviewed LIRC’s order, not Circuit Court’s order, and affirmed LIRC’s order awarding benefits as LIRC’s order was supported by credible evidence.
- ADS filed a petition with the Supreme Court, then settled the case before the petition was granted or denied.

Mallett v. LIRC, 2021 AP 1263 (2022) unpublished

- Pro se applicant with 2 claimed injuries at Briggs & Stratton. Won the 1981 injury date but it was appealed and LIRC issued a final order. Circuit Court affirmed the final order.
- Filed a claim in 1987 alleging both the 1981 and a new 1983 injury which he claimed aggravated the 1981 injury. LIRC dismissed the claim as the 1981 order was final. Court of Appeals dismissed the appeal on the 1981 claim as untimely.
- Mallett filed a claim in 2007 alleging that the 1983 claim had not been dismissed. Briggs had an IME with Dr. Karr, and Mallett lost again all the way up to the Court of Appeals.

Never, Ever Give-Up….

- In 2014 Mallett filed another claim alleging that his work through 1984 as a piston inspector aggravated his condition from 1981, 1983 and ongoing. LIRC dismissed, but the Circuit Court remanded the case allowing for a hearing on the 1984 occupational injury date.
- LIRC let the parties stipulate to the evidence already in the record rather than holding another hearing. Then LIRC found Dr. Karr's opinion most credible and dismissed the 1984 claim.
- Mallett appealed again – his 3rd time before the Court of Appeals.

Unless You Really Should!

- The Court of Appeals found that LIRC could rely on Dr. Karr's report finding that Mallett had no new injury in 1984.
- The Court found that Mallett failed to prove that LIRC's order was not supported by credible and substantial evidence.
- The Court found Dr. Karr's report to be "extremely thorough" and given to a reasonable degree of medical certainty.
- The Court also rejected Mallett's argument that LIRC perpetuated fraud finding that Mallett's arguments were not "developed themes reflecting any legal reasoning".

Rood v. Selective Ins. Co., 2021 AP 392 (2022) Recommended for Publication

- Rood was injured at Stockton Stainless when his supervisor Rademaker drove a forklift (called a telehandler) over Rood's foot.
- Rood collected workers compensation benefits, then sued Rademaker and Selective Ins., the CGL carrier for Stockton Stainless, for negligence.
- Rood argued that the "fellow employee extension" in the CGL policy waived the exclusive remedy provision of Sec. 102.03(2), Stats.
- Rood also argued that the telehandler operated by Rademaker was a motor vehicle not owned or leased by Stockton Stainless.

No **Waiver** of The Exclusive Remedy

- The Court of Appeals found that the Fellow Employee Extensionin the CGL policy broadened the definition of an insured and did not constitute a waiver of the exclusive remedy provision of the WCA.
- The Court also found that the telehandler was not a motor vehicle under the WCA as it was not designed “primarily for travel on a public roadway” and therefore was not within the definition of a motor vehicle as used in Sec. 102.03(2), Stats.
- A petition for review with the Supreme Court has been filed in this case.

SK Management v. Mr. Phixitall, 2021AP490 (2022) Unpublished

- King worked for Schweinert d/b/a Mr. Phixitall.
- King fell off a ladder at a property owned by SK Management.
- Mr. Phixitall didn't have workers compensation coverage, so King made a claim against SK Management claiming that it was his employer. SK Management did not have coverage either, so the claim was made against the UEF.
- UEF paid the claim and sued SK Management for reimbursement.
- SK management filed a reverse application claiming that King was not its employee.

Who is on First, and What is on Second?

- The ALJ found that King was SK Management's employee, and SK appealed to LIRC.
- LIRC found that Mr. Phixitall was not an independent contractor under the 9 point test, as he only met 2 of the 9 points, making Mr. Phixitall SK's employee.
- LIRC also found that King was SK's employee and not the employee of Mr. Phixitall because Mr. Phixitall was SK's employee.
- The Court of Appeals affirmed LIRC's findings and application of Sec. 102.07(8m), Stats.

Murff v. LIRC, 2021 AP 1155 (2022) Unpublished

- Murff worked for Aurora as a housekeeper beginning in 2008. She asserted a traumatic back injury in 2010 that was either the direct cause of her disability or an incident that precipitated, aggravated and accelerated a pre-existing condition in her spine – but she kept working.
- She then filed a claim asserting that her job duties at Aurora were a contributory causative factor of her back condition.
- She won at hearing on all fronts and Aurora appealed to LIRC.
- LIRC (Commissioners Falstad and Maxwell) reversed and dismissed.

When All Else Fails Follow Sgt Friday's Advise!

- Aurora argued that the applicant failed to prove her claim at LIRC. Aurora spelled out all the medical and factual errors in the records which undermined the ALJ award.
- LIRC wrote a 27 page decision reversing the ALJ and denying benefits utilizing 50 numbered paragraphs to outline the facts.
- The Court of Appeals wrote an 18 page order reciting the facts which supported the LIRC order.
- When you can, ARGUE THE FACTS!

Koehler v. Milwaukee Brewers, (LIRC 9/17/2021)

- Koehler was a retired Milwaukee police officer who worked from 1994 to 2019 as an usher. He was part of a class of 750 part-time stadium employees.
- Koehler fell and injured his knee. The Brewers paid for the TKR and all medical treatment. The Brewers argued that the wage should be based on the applicant's part-time earnings at the stadium.
- The ALJ ordered payment of benefits at full time wages using the hourly rate times 40 hours a week.
- The Brewers appealed to LIRC.

Sometimes a Loss is Still a Win.

- LIRC found that even though Koehler was part of a part-time class of employees, the wage had to be increased to 40 hours a week because:
- In the 13 weeks preceding injury the hours Koehler worked varied more than 5 hours per week.
- Koehler had a second part-time job at Kohl's when the season was over.
- The case led to the 2022 law change on calculating wages for part-time employees.

Nix v. County of Milwaukee, (LIRC 6/17/2022)

- Nix worked for the County as a psychiatric social worker in the Child Adolescents Inpatient Service at the County Hospital. Nix had a pre-existing history of PTSD.
- While at the Hospital between 2009 and 2018 she sought periodic treatment with Dr. Grunert for exacerbations of her PTSD caused by stresses at work involving understaffing and excessive noise from coworkers because of the “open door” policy required by the County.
- When her complaints resulted in actions taken by the County to counteract the noise issue, Nix felt everyone was mad at her for complaining. She asked to be moved and was refused.

Possible “Eggshell Treatment” for Nix?

- Nix continued to complain and received unfavorable reviews. She alleged that the negative reviews were caused by her complaints.
- Nix filed a form for a hostile work environment on June 12, 2018 and applied for disability retirement on August 30, 2018. She also applied for and received SSDI for her mental impairment effective June 12, 2018.
- At hearing the ALJ found that the stresses experienced by Nix were not unusual for the position she held and denied benefits. Nix filed a petition for review claiming she was entitled to benefits under the County’s Disability Retirement system.

Is School District No. 1 Still the Law at LIRC?

- LIRC reversed the ALJ, awarded benefits and found that Nix proved that she experienced unusual stress in the workplace.
- LIRC's 29 page order focused on the stress experienced by Nix caused by her supervisor and her coworkers for her complaints about the noise level in the workplace. They found the treatment experienced by Nix was by definition "unusual" stress not experienced by similarly situated co-workers.
- Further, LIRC said that because Nix had a bona fide pre-existing mental disability, School District No. 1 might not apply.
- LIRC relied on the disability statute to find for Nix.

Statutory Changes effective 4/10/2022

- **Sec. 102.11(1), Stats.** The Maximum PPD rate for injuries on or after 4/10/2022 is $412.00, up to $430.00 on or after 1/1/2023.
- **Sec. 102.13(1)(b), Stats.** Employees can bring an "observer" to attend the IME with them. No limitations on who the observer can be.
- **Sec. 102.11(1)(f) & (ap), Stats.** The AWW for part-time employees is the greater of the actual average weekly earnings in the 52 weeks preceding injury or the hourly rate times the average number of hours worked in the 52 weeks before injury. Expanded to 40 hours a week if the employee worked less than 12 months or has a second job, but expansion can be rebutted by evidence of self restriction.