

CASE LAW UPDATE**By****Scott E. Wade****PETERSON, JOHNSON & MURRAY, S.C.****733 N. Van Buren, Sixth Floor****Milwaukee, WI 53202****(414) 278-8800****swade@pjmlaw.com****I. COURT OF APPEALS**

Worker's Compensation – Liability for Occupational Disease – Wisconsin Ins. Security Fund and Eau Galle Cheese Factory v. LIRC & Kallstrom 2005 WI App 242, 707 N.W.2d 293 (Ct. App. 2005)

The respondent employer argued that there can be no occupational disease injury in the absence of identifiable traumatic injury-causing events and that the evidence was insufficient to support the LIRC's finding of a compensable occupational back injury. Specifically, the employer argued a back injury caused by disease is compensable only if the injury is caused by a series of identifiable traumatic work-related injury-causing events. The court rejected this contention, holding that a compensable occupational injury may occur as a result of job activity over a period of time, regardless whether there are identifiable traumatic injury-causing events. Applying this ruling, the court found that credible evidence supported the LIRC's finding that the applicant suffered from a compensable occupational disease injury.

In addition, the respondent employer argued that the LIRC erred when it required the employer to reimburse the applicant's health insurance carrier for expenses it incurred relating to the applicant's occupational back injury. Under Wis. Stat. §646.31(11), when the employer's worker's compensation insurer is in liquidation, the LIRC cannot order the employer to reimburse the health insurance carrier.

Travelers Ins. Co. v. Sconzert & LIRC, 2006 WI App 1, 707 N.W.2d 580 (Ct. App. 2005) (unpublished)

Sconzert injured his foot and was found by an ALJ to have suffered a 7% permanent partial disability. On February 12, 2001, the ALJ ordered Travelers to make payments to Sconzert within 21 days. Sconzert petitioned the LIRC seeking additional benefits but the LIRC affirmed the ALJ's order. Travelers did not make the payments ordered by the ALJ, however, until July 11, 2001, after the ALJ's order was affirmed.

Sconzert applied for penalty awards under Wis. Stats. §§102.22(1) [that Travelers inexcusably delayed making the payments] & 102.18(1)(bp) [that Travelers acted in bad faith when it delayed making the payments]. The awards were granted by the ALJ and confirmed by the LIRC and circuit court.

The Court affirmed the order for Travelers to pay penalties. Except for stipulation or compromise, the language of Wis. Admin. Code § DWD 80.15 (July 1996) made clear that a party shall pay an ALJ's compensation order unless *that* party files a petition for review (which Travelers did not). The Court found bad faith because a reasonable insurer would have understood that it had no basis to delay payment if it did not file a petition for review. The determination that Travelers inexcusably delayed making the payments was based on the same facts.

NOTE: Effective December 1, 2002, Wis. Admin. Code § DWD 80.15 (November 2002) states “[If the department orders a party to pay an award of compensation, the party shall pay the award no later than 21 days after the date on which the order is mailed to the last known address of the party, unless a party files a petition for review under s. 102.18(3), Stats.]” (Emphasis added.)

Runice v. LIRC, 2006 WI App 20, 709 N.W.2d 112 (Ct. App. 2005) (unpublished)

Runice joined the Richland Center Police Department in 2000 after undergoing back surgery in 1990. In 2001 he became unable to continue work for the Department due to back problems. Runice filed a worker's compensation claim asserting that three physical altercations while on duty aggravated his pre-existing back condition. While his treating physicians supported this claim, an independent medical examiner concluded that no connection existed between his police work and the 2001 injury. The ALJ found the opinion of the independent examiner to be more persuasive and denied benefits. The LIRC affirmed.

The Court affirmed this decision and declined to impose a rule that the LIRC be required or permitted to give more weight to opinions of treating physicians over non-treating physicians.

Aslakson v. Gallagher Bassett Services, Inc., 2006 WI App 35, 711 N.W.2d 667 (Ct. App. 2006)

Gallagher Bassett Services appeals from an order of the circuit court denying its motion to dismiss applicant's bad faith claim against Gallagher Bassett (fund administrator of the WI Worker's Comp Uninsured Employers Fund).

The Court of Appeals reverses the order based on the plain language of the Worker's Compensation Act & the DWD Administrative Code. The Act provides an exclusive remedy for bad faith claims, precluding common law claims. This is true even though Wis. Stat. §102.81(1)(a) excuses the Fund from paying §102.18(1)(bp) bad faith penalties to the injured employee.

II. LIRC

Graham v. Dane Co., WC claim no. 2001-049352 (LIRC, January 12, 2006).

An employee sustained a right knee injury in a work-related slip and fall. Surgery to repair the knee produced unfavorable results. Applicant requires the use of a cane and walks with a pronounced limp and foot drag. The ALJ awarded her \$15,000 as compensation for the disfigurement.

The LIRC affirmed the ALJ's award, finding that the applicant's severe limp met the requirements of Wis. Stat. §102.56(1) for a disfigurement award ("exposed in the normal course of employment"). This decision explicitly reverses the LIRC's decision in *Spence v. POJA Heating & Sheet Metal*, WC claim no. 88-018562 (LIRC, January 20, 1994), under which an applicant was denied a disfigurement award for a severe limp. *Spence* had relied on the historical application of §102.56 disfigurement awards to injuries resulting in exposed scarring, burns, and amputations.

Murphy v. Badger Mining Corp., WC claim nos. 2003-028125, 2004-012733 (LIRC, January 26, 2006).

This case arises from a conceded compensable occupational disease (silicosis). At issue is the date of injury. Zurich American was on the risk on September 7, 2001 when the applicant left Badger Mining Corp. Zurich argues that the date of injury was actually December 23, 1996 when Phoenix Insurance was on the risk. Zurich argues that on this earlier date, the applicant missed work to undergo a diagnostic procedure due to symptoms associated with his developing silicosis.

The LIRC set the date of injury as September 7, 2001, the last day the applicant was employed with Badger Mining. The determinative question is when did the disease ripen into a disabling condition. The LIRC found that this refers to an actual physical incapacity to work. Simply because the applicant chose to miss work on December 23, 1996 does not mean that the symptoms interfered with his physical ability to perform the work. The condition was, therefore, "non-incapacitating" during the entire time he was employed with Badger Mining.

Stone v. Greenman Technologies, WC claim no. 2003-034689 (LIRC, April 14, 2006).

Thomas Stone suffered an alleged right ankle sprain during a fight with a co-worker on July 17, 2003. The respondents raised an aggressor defense.¹

The ALJ dismissed the applicant's application at hearing. However, between the May 5th hearing and the ALJ's May 19th decision, the applicant offered new evidence contradicting the respondent's witness' testimony. The ALJ withdrew his May 19th order and set the matter for further hearing. After the second hearing, the ALJ issued an order in the applicant's favor.

¹Under *Volmer v. Industrial Commission*, 254 Wis. 162 (1948), an applicant who is the aggressor will not be compensated as his injury did not arise out of his employment.

According to the LIRC, the accounts given at hearing by the applicant and the co-worker were divergent and both men made inconsistent statements. The applicant initially stated that he slammed the co-worker down on the steps and began kicking him until his brother pulled him off. He later gave a different version of the events where he twisted his ankle on the stairs. Similarly, the respondent's witness denied being charged by the police due to the incident. However, information obtained by the applicant from CCAP after the hearing indicated that the respondent's witness had been charged due to the incident. The witness explained that he had "forgotten" about this charge.

Also, the applicant did not seek medical treatment for his injury until about two weeks after the fight. In addition, none of the actual medical treatment notes referred to the twisted ankle from a fall on the steps. **The LIRC held that the inconsistencies in the applicant's story called into question the applicant's testimony to the effect that he was simply reacting to an attack by his co-worker. The LIRC held that the applicant played a much larger role in precipitating the altercation than he testified to and concluded that his behavior led the co-worker to call him out to fight.** The LIRC dismissed his application for hearing.