

GENERAL MOTORS CORPORATION,

Plaintiff,

v.

LABOR AND INDUSTRY REVIEW  
COMMISSION and EDWARD V.  
HOFF,

Defendants. -----

MEMORANDUM OF DECISION  
AND ORDER FOR JUDGMENT

Case No. 83-CV-1339

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NATURE OF ACTION

This is an action by the plaintiff-employer for judicial review under Sec. 102.23, Stats., of an Order of the Labor and Industry Review Commission, dated April 20, 1983.

The Commission's Order corrected only a typographical error and affirmed the Findings of Fact and the Order of the Department Of Industry, Labor And Human Relations dated October 29, 1982.

The Order awarded the employee a sum as compensation for temporary total disability under the Wisconsin Worker's Compensation Law.

Jurisdiction was reserved by the Department to make such further Findings and Awards as may be warranted in the case.

ISSUE RAISED BY APPEAL

The issue raised by this appeal is:

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1. Can an employee who is already physically unable to work, fully retired, collecting pension and Social Security benefits, collect a " . . . weekly indemnity . . ." for "Temporary Disability, during which compensation shall be payable for loss of earnings, . . ."?

#### SCOPE OF JUDICIAL REVIEW

The scope of review by a Circuit Court in this Worker's Compensation case is limited by the provisions of Sec. 102.23, Stats. That statute provides in part:

"(1) . . .

(d) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.

2. That the order or award was procured by fraud.

3. That the findings of fact by the commission do not support the order or award.

. . .

- (6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award

depends on any material and controverted finding of fact that is not supported by credible and substantial evidence."

### STATEMENT OF FACTS

The Department made the following Findings Of Fact which are not disputed by the parties:

#### " F I N D I N G S O F F A C T

The applicant's date of birth is June 26, 1915. On January 21, 1957, the applicant was employed by General Motors and did on that day as a result of his employment suffer a compound fracture of his tibia. As a result of this compound fracture of the tibia, osteomyelitis subsequently infected the tibia. Over the years, the osteomyelitis has caused an open running sore to form on the applicant's leg. At times the sore does close up but it always reopens very soon. It has been in this kind of status since 1957.

After the industrial accident, the applicant did work up until April 4, 1974. At that time at the recommendation of his treating physician, Dr. Odland, the applicant did take disability retirement from General Motors. The applicant also received social security disability income after that time. However, in 1978, the applicant became interested in the new higher pay rates then being paid by General Motors and did ask to return to work. However, his doctor continued to advise against it and he was turned down.

On February 17, 1981, the applicant was admitted to the

hospital. On the 18th, in an attempt to eliminate the osteomyelitis infection, a procedure called saucerization was performed on the applicant's right tibia. From February 17, 1981 to May 20, 1982, the applicant was in the healing period from the saucerization procedure. Ultimately, the saucerization was ineffective and the applicant to the present time still has an open running sore on his right leg.

As a result of the injury of January 21, [1957] the applicant was temporarily totally disabled from February 16, 1981 to May 20, 1982, a period of 65 weeks and 2 days. The respondent argues that the applicant is not entitled to temporary total disability compensation during this period since the applicant was retired on a disability pension and was no longer in the labor market. Therefore it is their contention that since the applicant had no wage loss, he is not entitled to temporary total disability compensation. Under the case of Kohler Company vs. DILHR 42 Wis. 2d 396 (1968), the Supreme Court found that an injured worker could receive benefits based on loss of earning capacity caused by permanent disability even though that individual had voluntarily retired. While that case did deal with permanent partial disability benefits, the court did find that the Worker's Compensation Division cannot assume that since an individual is retired they are no longer interested in working. Therefore that case is operative in situations of claims for temporary total disability. While in retrospect there may be no actual wage loss, the applicant did have constructive

wage loss under that case.

The respondent also argues that Section 102.43(7), Wisconsin Statutes should not apply to this case. Under the clear language of Chapter 102, this department is required to enforce that case where the dates of injury proceed the effective date of that act. Therefore, the rate of compensation to which the applicant is entitled is \$249 per week since his wage in 1957 was set at the maximum. Therefore, for the 65 weeks and 2 days of temporary disability compensation the applicant is entitled to \$16,268.

. . . ."

#### THE COURT'S DECISION

AN EMPLOYEE WHO IS ALREADY PHYSICALLY UNABLE TO WORK, FULLY RETIRED, COLLECTING PENSION AND SOCIAL SECURITY BENEFITS CANNOT COLLECT A " . . . WEEKLY INDEMNITY . . ." FOR "TEMPORARY DISABILITY, . . . FOR LOSS OF EARNINGS, . . .", UNDER THE WISCONSIN WORKER'S COMPENSATION LAW.

Since 1957, when the employee was injured down to the present day the pertinent parts of these Wisconsin Statutes, pertaining to this matter have remained unchanged.

Sec. 102.03, Stats., provides in part:

"102.03 Conditions of liability.

(1) Liability under this chapter shall exist against an employer only where the following conditions concur:

- (a) Where the employee sustains an injury.
- (b) Where, at the time of the injury, both

the employer and employee are subject to the provisions of this chapter.

(c) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment. . . ."

Sec. 102.43, Stats., provides in part:

"102.43 Weekly compensation schedule.

If the injury causes disability, an indemnity shall be due as wages . . . Said weekly indemnity shall be as follows:

. . .

(5) Temporary disability, during which compensation shall be payable for loss of earnings, . . ."

As was recently stated by the Wisconsin Court of Appeals in the case of Dielectric Corp. v. LIRC, 111 Wis. 2d 270, 330 N.W.2d 606 (Ct. App. 1983), beginning at p. 275:

"This court does recognize the principle that some deference to the expertise of an agency is appropriate in certain situations. Pabst v. Department of Taxation, 19 Wis.2d 313, 323-24, 120 N.W. 2d 77, 82 (1963). However, we do not feel that deference to the agency's expertise is required where the court is as competent as the agency to decide a question of law. Boynton Cab Co. v. Department of Industry, Labor & Human Relations, 96 Wis. 2d 396, 405-06, 291 N.W.2d 850-855 (1980) . . .

In Board of School Directors of the City of Milwaukee v. Wisconsin Employment Relations Committee, 42 Wis.2d 637, 650, 168 N.W.2d 92, 98 (1969), our supreme court held that the construction of a statute is a question of law. In a subsequent case, the supreme court stated that 'questions of law, including the construction, interpretation, or application

of a statute, are reviewable ab initio.' Boynton, at 405, 291 N.W.2d at 855. The supreme court has also held that a court is not bound by the interpretation given to a statute by an administrative agency. City of Milwaukee v. Wisconsin Employment Relations Commission, 71 Wis.2d 709, 714, 239 N.W.2d 63,66 (1976) . . . ."

This statute clearly and unmistakably is intended to provide an indemnity to an employee that is injured and temporarily disabled, ". . . for loss of earnings, . . ."

Sec. 102.43, Stats., provides:

" . . . If the injury causes disability, an indemnity shall be due . . . . Said weekly indemnity shall be as follows:

. . .

(5) Temporary disability, . . . shall be payable for loss of earnings, . . ." (Emphasis Added)

As our Supreme Court recently stated in the case of Department of Transportation v. Transportation Commission, 111 Wis.2d 80, 87-88, 330 N.W.2d 159 (1983):

"In the absence of ambiguity, it is the duty of the court to give words of a statute their obvious and ordinary meaning without resort to legislative history, rules of interpretation, or canons of construction. . . ."

Even more recently the Supreme Court has stated:

"On any question of statutory construction, the initial inquiry is to the plain meaning of the statute. If the statute is unambiguous, resort to judicial rules of interpretation and construction is not permitted, and the words of the statute must be given their obvious and

intended meaning. Wis. Bankers Ass'n v. Mut. Savings & Loan, 96 Wis.2d 438, 450, 291, N.W.2d 869 (1980). . . ." State Historical Society v. Maple Bluff, 112 Wis.2d 246, 252-253, 332 N.W.2d 792 (1983).

Clearly, this statute requires a loss of earnings by the injured employee before he is entitled to an indemnity for his temporary disability, following a work-related injury. Unless he has incurred a "loss of earnings," how can he be indemnified for, " . . . Temporary disability, . . . for loss of earnings, . . . ", under the provisions of Sec. 102.43(5) Stats.?

Two Wisconsin writers have interpreted this statute to require an actual wage loss before the employee is entitled to a weekly indemnity for temporary disability.

John D. Neal in the Worker's Compensation Handbook, 1983 Ed. at p. 34 states:

"B. Temporary Disability

1. Generally

Benefits for temporary disability are based on two facts: the employee must be within the healing period for the injury (s. 102.44 [3] provides that permanent disability benefits are in addition to compensation for "the healing period"); the employee must sustain an actual wage loss (s. 102.43 [5] provides that temporary disability is payable for loss of earnings")."

Helen L. Schott writing in the Wisconsin Bar Bulletin, September 1981 in an article entitled, "Payments for Disability Under the Worker's Compensation Act" states at p. 16:

". . . Temporary total disability compensation is paid after an industrial accident during the healing period and during the period of total wage loss. . .

In addition to being in the healing period, the employee must also have a total loss of wages in order to be eligible for temporary total disability compensation. . ."

The rule that the employee must sustain an actual wage loss to be entitled to the weekly indemnity, under the provisions of Sec. 102.43, Stats., has been clearly enunciated by the Wisconsin Supreme Court.

In Employers Mut. L. Ins. Co. v. Industrial Comm., 230 Wis 670, 681, 284 N.W. 548 (1939), the Court stated:

... "When an employee is injured and is wholly or partially disabled he ceases ordinarily to earn wages and as a result sustains a wage loss. Under such circumstances he is entitled to compensation. But if his employer continues to pay him his full wages he cannot collect compensation from him because he has in fact sustained no wage loss. He is, of course, entitled to compensation, but if he is paid full wages during the time of his disability he obviously has sustained no wage loss. Whether the employer carries his own compensation risk or has it carried by an insurance company, can be of no materiality. One who has sustained no wage loss cannot recover compensation based on theoretical loss of wages. . . ." (Emphasis Added)

In Delta Oil Co. v. Industrial Comm., 273 Wis. 285, 291, 77 N.W. 2d 749 (1956), the Supreme Court stated:

" . . . The amount to which the employee may be entitled for partial disability must be based upon an actual wage

loss sustained, for it is provided in sec. 102.43 (2), Stats. 1947, that if an injury causes disability to an employee an indemnity shall be due as follows:

"If the injury causes partial disability, during the partial disability, such proportion of the weekly indemnity rate for total disability as the actual wage loss of the injured employee bears to his average weekly wage at the time of his injury."

The statute means what it says, that for a partial disability "one who has sustained no wage loss cannot recover compensation based on a theoretical loss of wages." Employers Mut. L. Ins. Co. v. Industrial Comm. (1939), 230 Wis. 670, 681, 284 N.W. 548." (Emphasis Added).

There is no dispute in this case that the employee was already unable to work, totally disabled, fully retired, collecting a disability pension from the employer and Social Security disability benefits, before his corrective surgery in February of 1981. There is no dispute that he continued to collect his full disability pension and Social Security disability benefits during his period of temporary disability following his surgery in February 1981, until May 1982.

The employee sustained no actual wage loss and he is entitled to no weekly indemnity for a loss of earnings during his period of temporary disability, under sec. 102.43, Stats.

The reliance of the Department upon the case of Kohler Co. v. ILHR Department, 42 Wis. 2d 396, 167 N.W.2d 431 (1969) is misplaced. The Department's Examiner in the Findings of

Fact, states in part:

" . . . Under the case of Kohler Company vs. DILHR 42 Wis. 2d 396 (1968), the Supreme Court found that an injured worker could receive benefits based on loss of earning capacity caused by permanent disability even though that individual had voluntarily retired. While that case did deal with permanent partial disability benefits, the court did find that the Worker's Compensation Division cannot assume that since an individual is retired they are no longer interested in working. Therefore that case is operative in situations of claims for temporary total disability. While in retrospect there may be no actual wage loss, the applicant did have constructive wage loss under that case."

That case deals only with permanent disability. Permanent disability is based upon the concept of a loss that is to extend into the future and necessarily includes an evaluation of the impairment of lost earning capacity. On the other hand, temporary disability during a healing period is based upon a past event and therefore the "indemnity", "payable for loss of earnings", is logically based upon an "actual wage loss".

This distinction was pointed out by Mr. Justice Wickhem in 1947 in the case of Northern States Power Co. v. Industrial Comm., 252 Wis. 70, 76, 30 N.W.2d 217 (1947), when he stated:

" . . . During the healing period it is possible to establish a wage loss because that is a past event. But since an award for

permanent disability is to be made for all time at the end of this period it must be based upon some sort of prediction as to impairment of earning capacity. . . " (Emphasis Added)

The same distinction was articulated by Currie, J. in Wagner v. Industrial Comm. 273 Wis. 553, 567d Rehearing, 79 N.W.2d 264, 80 N.W.2d 456 (1956), when, on rehearing, he stated:

"Temporary partial disability is under the provisions of sec. 102.43(2), Stats., measured in terms of wage loss, while permanent partial disability, under the provisions of sec. 102.44(3), Stats., is measured on the basis of body impairment. . . . However, temporary partial disability under the provisions of sec. 102.43(2) is measured in terms of actual wage loss. . . ."

The award is based upon an erroneous statutory interpretation made by the Commission acting without or in excess of its powers and therefore it must be set aside.

#### THE COURT'S ORDER

IT IS ORDERED:

That a Judgment be entered:

1. Setting aside the Commission's Order which confirmed the Department's Award of temporary disability compensation to the employee.
2. Recommitting the controversy and remanding the record to the Commission to act within its reserved jurisdiction for such further findings and awards as

may be warranted in the case.

Dated this 22nd day of November, 1983.

BY THE COURT:

  
J. Richard Long, Circuit Judge