

APR 25 1985

No. 83-2378

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

**NOTICE**  
This opinion is subject to further editing. If published the official version will appear in the bound volume of the Official Reports.

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GENERAL MOTORS CORPORATION,

Plaintiff-Respondent,

v.

LABOR & INDUSTRY REVIEW  
COMMISSION,

Defendant-Appellant,

EDWARD V. HOFF,

Defendant-Appellant.

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**FILED**

APR 25 1985

CLERK OF COURT OF APPEALS  
OF WISCONSIN

APPEAL from a judgment of the circuit court for Rock county:  
J. RICHARD LONG, Judge. Affirmed.

Before Gartzke, P.J., Dykman, J., and Bruce F. Beilfuss, Reserve  
Judge.

GARTZKE, P.J. The Labor and Industry Review Commission and Edward Hoff appeal from a judgment setting aside LIRC's decision ordering General Motors Corporation to pay Hoff \$16,268 in temporary total disability benefits under sec. 102.43(7), Stats. The benefits were awarded for a period during which he was retired and receiving a disability pension from GM. The issues are whether on the undisputed

facts Hoff is eligible for temporary total disability under sec. 102.43(7), and whether the retrospective application of the "maximum rate" provision in that section is unconstitutional.<sup>1</sup> We conclude that LIRC's interpretation of the Act is unreasonable because Hoff did not have a wage loss during his disability. We affirm the judgment, without reaching the constitutional question.

Section 102.43, Stats., provides in part:

If the injury causes disability, an indemnity shall be due as wages commencing the 4th calendar day from the commencement of the day the scheduled work shift began .... Said weekly indemnity shall be as follows: ...

(7)(a) If an employee has a renewed period of temporary total disability commencing more than 2 years after the date of injury ... payment of compensation for the new period of disability shall be made as follows:

1. If the employee was entitled to maximum weekly benefits at the time of injury, payment for the renewed temporary total disability shall be at the maximum rate in effect at the commencement of the new period.

LIRC's findings are undisputed. Hoff fractured a leg in the course of his employment with GM January 21, 1957. As a result of the fracture, osteomyelitis infected his tibia, causing a running sore which has continued since 1957. On the advice of his physician April 4, 1974, Hoff retired from GM on a disability pension. He wanted to return to work at GM in 1978, but his physician advised against it. February 18, 1981 an operation related to the 1957 injury was performed on his leg. He was

totally disabled during the healing period, February 16, 1981 to May 20, 1982.

Additional facts are undisputed. Hoff has received 25% permanent disability benefits for his injured leg. He was not working when he became totally disabled February 16, 1981. He continued to receive retirement benefits during his healing period disability. The record contains no evidence that Hoff had a possibility of other employment February 16, 1981. He was sixty-five years old at that time.

LIRC affirmed the order awarding Hoff \$249 per week disability benefits for the sixty-five weeks and two days between February 16, 1981 and May 20, 1982. Relying on Kohler Co. v. ILHR Department, 42 Wis.2d 396, 167 N.W.2d 431 (1969), LIRC found that Hoff had suffered a "constructive wage loss." It made no finding that Hoff had in fact lost wages. The trial court concluded that he had not lost wages during his disability and was ineligible for temporary total disability benefits.

Our review of LIRC's decision under ch. 102, Stats., is the same as the trial court's. L&H Wrecking Co., Inc. v. LIRC, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983). The facts being undisputed, the only question is whether sec. 102.43(7) was correctly applied. The application of a statutory standard to a set of facts is a question of law. Bucyrus-Eric Co. v. ILHR Department, 90 Wis.2d 408, 417, 280 N.W.2d 142, 146-47 (1979). LIRC's interpretation of sec. 102.43(7) is a question

of law which we review de novo. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 251, 253 (1977). We will generally defer to LIRC's interpretation if it is reasonable. L&H Wrecking, 114 Wis.2d at 510, 339 N.W.2d at 347.

LIRC's decision awarding Hoff temporary total disability benefits during his healing period is an unreasonable interpretation of sec. 102.43(7), Stats. Temporary disability benefits are payable for loss of earnings. Hoff lost no earnings during his healing period. He was retired, not working and was receiving a pension. No evidence exists that he had a real possibility of obtaining other employment had he not become disabled.

Kohler Co., supra, does not support LIRC's decision. The employee in that case retired without knowing the extent of his employment-related silicosis and emphysema. DIHLR's award of permanent partial disability benefits was upheld by our supreme court. The Kohler court rejected the contention that because he had not lost wages, the employee was not eligible for benefits. It concluded that benefits for permanent disability are based on lost earning capacity, not lost wages. 42 Wis.2d at 407-08, 167 N.W.2d at 436. The question before us is whether Hoff is entitled to temporary total disability, not permanent disability, and whether he sustained a loss of wages, not loss of earning capacity.

We reject LIRC's contention that its decision is consistent with sec. 102.30, Stats., which provides that "liability for compensation shall not be reduced or affected by any insurance, contribution or other benefit whatsoever, due to or received by the person entitled to such compensation ...." Because GM is not liable for temporary disability benefits to an employe who has not lost wages, the availability of insurance or other benefits covering earnings, had he lost them, does not affect the issue before us.

Accordingly, we affirm the judgment of the trial court setting aside LIRC's decision awarding Hoff temporary total disability benefits.

By the Court.--Judgment affirmed.

Inclusion in the official reports is not recommended.

## APPENDIX

<sup>1</sup> Hoff was injured January 21, 1957. Section 102.03(4), Stats. 1957, provided that "[t]he right to compensation and the amount thereof shall in all cases be determined in accordance with the provisions of law in effect as of the date of the injury." According to GM the total disability rate in effect at the time of Hoff's injury was \$45.50 per week. Section 102.03(4), as amended by ch. 272, sec. 56, Laws of 1977, and ch. 278, sec. 4, Laws of 1979, now provides that "[t]he right to compensation and the amount of compensation shall in all cases be determined in accordance with the provisions of law in effect as of the date of the injury except as to employees whose rate of compensation is changed as provided in ss. 102.43(7) ...." (Emphasis added.) GM contends that application of the present section is unconstitutional because it results in a total disability rate for Hoff of \$249.50 per week.

DYKMAN, J. (dissenting). In West Bend Education Ass'n v. ERC, 121 Wis.2d 1, 12-13, n.13, 357 N.W.2d 534, 540 (1984), the court quoted Hewitt, The Scope of Judicial Review of Administrative Agency Decisions in Wisconsin, 73 Wis. L. Rev. 554, 575:

[T]he court has deferred to agencies in an inconsistent manner. The court employs different review standards in cases involving similar issues without attempting to resolve the conflict. Although the factors surveyed ... seem to play some part in influencing the court's choice of standards, none provides a comprehensive rationale for the court's behavior.

We should carefully consider our scope of review of administrative agency decisions because we are an error correcting court. State v. Mosley, 102 Wis.2d 636, 665-66, 307 N.W.2d 200, 216-17 (1981). Prospective appellate litigants should be able to ascertain our standard of review when deciding whether to appeal, because in many cases this will answer the question whether the trial court erred in its review of an agency decision. A consistent standard of review is also beneficial to trial courts, for they review administrative agency decisions using the same standard we do. Boynton Cab Co. v. ILHR Dept., 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980).

My concern with the majority opinion starts with the standard of review adopted. While I agree that LIRC's interpretation of sec.

102.43(7), Stats., is a question of law to which we will generally defer if it is reasonable, that is only a part of the standard of review analysis required in administrative agency reviews. In West Bend, 121 Wis.2d at 12, 357 N.W.2d at 539-40, the court said: "Where a legal question is intertwined with factual determinations or with value or policy determinations or where the agency's interpretation and application of the law is of long standing, a court should defer to the agency which has primary responsibility for determination of fact and policy." (Citation and footnote omitted.)

LIRC was making a value or policy determination when it concluded that Hoff had a constructive wage loss. By using the word "constructive," LIRC recognized that Hoff did not have a wage loss. LIRC made a policy decision that despite a lack of wage loss, Hoff was eligible for temporary total disability benefits. See Thompson v. Dairyland Mut. Ins. Co., 30 Wis.2d 187, 192, 140 N.W.2d 200, 202-03 (1966) (constructive notice is neither notice nor knowledge but is a policy determination that under certain circumstances a person should be treated as if he had actual notice).

LIRC could reasonably have concluded that Hoff's retirement did not prevent him from obtaining other employment. That very conclusion was

reached by the Wisconsin Supreme Court in Kohler Co. v. ILHR Department, 42 Wis.2d 396, 403, 167 N.W.2d 431, 434 (1969):

Nor can we agree that accepting Social Security old age benefits moves one into a fixed class or category. The decision to cease working is not fixed or irrevocable. Many a person has started drawing his Social Security benefits, only to change his mind and re-enter the employment market.

We are bound by prior decisions of the Wisconsin Supreme Court. Livesey v. Copps Corp., 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct.App. 1979).

I do not think the majority is free to conclude that because Hoff was retired, he had no possibility of obtaining employment. Without that conclusion, it is difficult to criticize LIRC's determination that Hoff had a constructive wage loss, entitling him to temporary total disability benefits during his healing period.

I would conclude that LIRC's decision is intertwined with value or policy determinations, and could be reached by a reasonable interpretation of sec. 102.43(7), Stats. I would therefore defer to LIRC's conclusion, and reverse the trial court's judgment.