Appeal No. 2005AP544 **Cir. Ct. No. 2004CV722**

WISCONSIN COURT OF APPEALS
DISTRICT II

DAIMLERCHRYSLER C/O ESIS,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND GLENN MAY,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Snyder, P.J., Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61, this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether the Labor and Industry Review Commission (LIRC) may interpret WIS. ADMIN. CODE § DWD 80.32(4) (Sept. 2005)[1] to award a cumulative minimum permanent partial disability for multiple ligament repair procedures, where the resulting award is higher than the highest estimate of permanent partial disability in evidence?

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[1] All references to the Wisconsin Administrative Code are to the September 2005 register date.

BACKGROUND

The facts are straightforward. On April 19, 1999, Glenn May sustained a work-related left knee injury while employed at DaimlerChrysler. Dr. Ansari, an orthopedic surgeon, performed a meniscectomy and an arthroscopic reconstruction of May's anterior cruciate ligament (ACL) on May 5. May received temporary total disability benefits until his return to work date of July 19.

After returning to work, May experienced pain, swelling, and popping in his left knee. He continued working until April 2001 and then reported back to Dr. Ansari. At that time, Dr. Ansari opined that May's ACL was "incompetent," the graft had probably stretched out, and he had some "quadriceps atrophy on the left side." Dr. Ansari assessed a fifteen percent permanent partial disability (PPD) to the left knee.

On July 27, 2001, Dr. Ansari performed a second ACL reconstruction. Six months later, in his report dated January 29, 2002, Dr. Ansari stated that the knee appeared to be "fully stable" and that "no significant quadricep atrophy" remained. He reported that May's knee had reached a healing plateau and assigned a ten percent PPD due to the reconstruction. Dr. Ansari then added that May's PPD "has not changed due to redo of his anterior cruciate ligament."

May sought compensation for PPD totaling twenty-five percent, fifteen percent associated with the first surgical procedure plus ten percent for the second. DaimlerChrysler asserted that the compensation should be based on a ten percent PPD according to Dr. Ansari's final report. On September 29, 2003, a DWD administrative law judge (ALJ) held that Dr. Ansari's initial PPD rating of fifteen percent should be combined with his subsequent ten percent PPD rating. The ALJ explained:

> I am satisfied that the [LIRC's] decision in ***Hellendrung v. WalMart***, Claim No. 1999-039147 (2/23/01), supports the applicant's position that a minimum 25 percent PPD at the left knee is warranted. In Hellendrung, LIRC ruled that the preamble to Wisconsin Administrative Code Chapter 80.32—DWD 80.32(1), and its footnote support the proposition that the principles applicable to back surgeries are interchangeable with the other surgical procedures. Therefore, as the Administrative Code provides additional minimums for repeat spinal surgeries, it also provides additional minimums for repeat surgical procedures for the knee.

Upon DaimlerChrysler's petition for review, LIRC affirmed in part, and reversed in part, the ALJ decision. LIRC held that May was entitled to a minimum of ten percent disability for each ligament repair pursuant to WIS. ADMIN. CODE § DWD 80.32(4) and concluded that a twenty percent PPD was warranted. In its analysis, LIRC stated: "[W]hen an applicant must undergo the procedures listed in § DWD 80.32, the minimum amount should be awarded each time the applicant undergoes a listed procedure such as an ACL reconstruction, whether or not a physician assesses the minimum permanent disability."

DaimlerChrysler sought judicial review of the LIRC decision. The circuit court upheld LIRC's award of twenty percent PPD, and DaimlerChrysler appeals.

DISCUSSION

LIRC's decision is based on the minimum loss standard set forth for an ACL repair in WIS. ADMIN. CODE § DWD 80.32(4) and LIRC's view that minimum loss standards can be stacked where multiple procedures take place. The relevant administrative code language is as follows:

> **Permanent disabilities.** Minimum percentages of loss of use for amputation levels, losses of motion, sensory losses and surgical procedures.

> **(1)** The disabilities set forth in this section are the minimums for the described conditions. However, findings of additional disabling elements shall result in an estimate higher than the minimum. The minimum also assumes that the member, the back, etc., was previously without disability. Appropriate reduction shall be made for any preexisting disability.
>
> ….
>
> **(4)** Knee
>
> ….
>
> Anterior cruciate ligament repair Minimum of 10%

Section DWD 80.32. Interestingly, all of the events listed in the opening paragraph of this section can occur but once, except for surgical procedures. Once amputated, a limb cannot be amputated again. Once lost, motion or a sense cannot be lost again. Only surgical procedures are susceptible to repetition and thus give rise to the possibility of stacking minimum PPD assessments.

Because May had two ACL reconstruction surgeries, LIRC combined the ten percent minimum assessments, rather than giving Dr. Ansari's final assessment singular effect. LIRC asserts that the Worker's Compensation Advisory Council subcommittee contemplated such stacking when it adopted the disability schedule. LIRC suggests that the explanatory note accompanying WIS. ADMIN. CODE § DWD 80.32(11), which covers back injuries, is informative. There, the subcommittee noted its intent that "[e]ach … surgical procedure performed will qualify for a [minimum loss of use] rating." Note, § DWD 80.32(11). As indicated above, the ALJ relied in part on this footnote. The ALJ determined that the considerations related to back surgery and knee surgery are "interchangeable."

DaimlerChrysler argues that LIRC's stacking of the minimum loss of use ratings under WIS. ADMIN. CODE § DWD 80.32(4) results in a conflict with the language of WIS. STAT. § 102.18(1)(d) (2003-04), which states in relevant part: "Any award which falls within a range of 5% of the highest or lowest estimate of permanent partial disability made by a practitioner which is in evidence is presumed to be a reasonable award, provided it is not higher than the highest or lower than the lowest estimate in evidence." Furthermore, DaimlerChrysler argues, had the Worker's Compensation Advisory subcommittee intended minimum loss ratings for ACL repairs to accumulate, it could have inserted language similar to that used in the explanatory note for back injuries. *See* Note, § DWD 80.32(11). DaimlerChrysler asserts that, because the subcommittee did not indicate any intent to combine the minimum loss ratings for each ACL repair, and because the rule itself is silent on the issue of stacking, LIRC exceeded the bounds of its authority when it applied such an interpretation, particularly in light of an undisputed final PPD assessment of ten percent in evidence.

Whether LIRC may award cumulative minimum loss ratings under its interpretation of WIS. ADMIN. CODE § DWD 80.32, other than as specifically stated in § DWD 80.32(11), presents an issue of first impression. While courts generally afford "controlling weight" to an agency's interpretation of its own rules, *see* ***Plevin v. DOT***, 2003 WI App 211, ¶13, 267 Wis. 2d 281, 671 N.W.2d 355, § DWD 80.32(4) does not offer the clarity required to determine if a given interpretation is or is not consistent with the rule.

CONCLUSION

The Worker's Compensation Act was created to eliminate litigation and alleviate tensions between employers and employees in the area of

compensation for work-related injury. Without enunciation of a clear rule regarding LIRC's authority to award cumulative PPD ratings under WIS. ADMIN. CODE § DWD 80.32, there is a substantial likelihood that similar issues will continue to arise, litigation will increase, and employer-employee relations will suffer. Because the issue presents a question of substantial and continuing public interest, we respectfully request that the supreme court accept certification of this appeal.