

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**AUGUST 27, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

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

**No. 96-0805-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**BENJAMIN G. BENISHEK,**

**Plaintiff-Respondent,**

**v.**

**LABOR AND INDUSTRY  
REVIEW COMMISSION,**

**Defendant,**

**HOME INSURANCE COMPANY  
and W. H. TRANSPORT,**

**Defendants-Appellants.**

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. W. H. Transport and its insurer appeal a judgment reversing a decision of the Labor and Industry Review Commission.<sup>1</sup> Because the LIRC decision was based on an issue that was not properly before the commission, we conclude that LIRC exceeded its authority and we affirm the trial court's reversal of its decision.

Benjamin Benishek filed an application for a hearing with the Department of Industry, Labor and Human Relations alleging two separate injury dates. By stipulation, the hearing was limited to the injury date of June 19, 1991. W.H. Transport and its insurer filed an answer admitting that the accident occurred on or about the time claimed and that Benishek was performing a service growing out of and incidental to his employment and that the accident causing injury arose out of the employment. After the date the notice of hearing was mailed, W. H. Transport attempted to amend its answer to deny the assertions previously admitted. The administrative law judge (ALJ) sustained an objection because the amended answer was not timely. The only issue joined for the hearing was whether Benishek suffered a continuing disability. The ALJ found for Benishek on the only issue tried. LIRC reversed the ALJ's ruling that Benjamin Benishek sustained a work-related injury. LIRC's ruling, in effect, allowed the filing of an amended answer after the time set out in WIS. ADM. CODE § IND 80.08 and faulted Benishek for not presenting evidence on that issue after the ALJ struck the amended answer raising that issue.

Due process requires that the parties involved in an administrative proceeding be apprised of the issues involved in the proceeding. *Wisconsin Tele. Co. v. DILHR*, 68 Wis.2d 345, 354-60, 228 N.W.2d 649 654-57 (1975); *General Elec. Co. v. Wisconsin Employment Relations Bd.*, 3 Wis.2d 227, 241, 188 N.W.2d 691, 700 (1958). After the ALJ limited the issues by disallowing the amended answer, Benishek had no reason to present evidence on the allegations that were admitted in the initial answer. It would violate Benishek's due process rights to deny him compensation based on his failure to prove an issue that was conceded in the initial answer and that the ALJ declared not to be the subject of the hearing.

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

W. H. Transport argues that the medical records relating to all of the issues had been filed and served on all of the parties before the hearing, that the hearing was continued for five months after the amended answer had been served and that the issue was fully and fairly tried even though it was not officially joined. Benishek was specifically informed by the ALJ that the only issues to be tried were the nature and the extent of the disability and liability for medical expenses. Regardless of the information available to Benishek and the time he had to prepare for the continued hearing, he was not informed that he was required to present evidence on the question of whether the injury arose out of his employment. Regardless of the evidence presented at the hearing, the causation issue was not "fairly tried" because Benishek was never informed that he was required to present evidence on that issue. Neither LIRC nor the courts can speculate regarding the evidence Benishek would have presented had he known that he was required to present evidence on an allegation that the answer admitted.

*By the Court.*— Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.