

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2004AP3183

Cir. Ct. No. 2003CV2891

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TRAVELERS INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

ROBERT J. SCONZERT AND LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
MARK S. GEMPLER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Travelers Insurance Company has appealed from a circuit court order confirming a decision of the Labor and Industry Review Commission (LIRC), which ordered Travelers to pay penalties to Robert J.

Sconzert pursuant to WIS. STAT. § 102.18(1)(bp) (2003-04)¹ and WIS. STAT. § 102.22(1). We affirm the circuit court's order.

¶2 The material facts are undisputed. Sconzert sustained an injury to his foot and applied for worker's compensation benefits based on a claim of permanent partial disability. Travelers denied that a permanent partial disability existed, and a hearing was held before an administrative law judge (ALJ). On February 12, 2001, the ALJ issued a decision finding that Sconzert had suffered a seven percent permanent partial disability related to his foot, and ordering Travelers to pay disability benefits and other payments within twenty-one days.

¶3 On February 21, 2001, Sconzert petitioned LIRC for review of the ALJ's order, seeking additional benefits based on his claim that his permanent partial disability was greater than seven percent. Travelers did not file a petition for review of the ALJ's order. Instead, it contended that LIRC should sustain the order.

¶4 Although it filed no petition for review, Travelers ignored requests for payment by Sconzert and did not make the payments ordered by the ALJ until July 11, 2001, after LIRC affirmed the ALJ's order. Subsequently, Sconzert applied for penalty awards under WIS. STAT. § 102.18(1)(bp) and WIS. STAT. § 102.22(1). The ALJ awarded penalties under both statutes on January 14, 2003.

¶5 Travelers petitioned for review of the ALJ's order imposing the penalties. On October 28, 2003, LIRC issued a decision adopting and affirming

¹ Except as otherwise noted, all references to the Wisconsin Statutes are to the 2003-04 version.

the ALJ's order. LIRC imposed a penalty under WIS. STAT. § 102.22(1) based on its determination that Travelers inexcusably delayed making the payments ordered by the ALJ on February 12, 2001. It ordered an additional penalty under WIS. STAT. § 102.18(1)(bp) based on its determination that Travelers acted in bad faith as defined in WIS. ADMIN. CODE § DWD 80.70(2) (Sept. 1982)² when it delayed making the payments.

¶6 The circuit court confirmed LIRC's decision and order. On appeal, our review is of LIRC's decision rather than the decision of the circuit court. *Langhus v. LIRC*, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996). Our scope of review is the same as that of the circuit court. *C.W. Transport, Inc. v. LIRC*, 128 Wis. 2d 520, 525, 383 N.W.2d 921 (Ct. App. 1986).

¶7 WISCONSIN STAT. § 102.18(1)(bp) permits LIRC to include a penalty in an award to an employee if it determines that an insurance carrier's failure to make payments resulted from malice or bad faith. An insurance company is deemed to have acted with malice or bad faith if it unreasonably fails to make a compensation payment or to pay reasonable and necessary medical expenses without credible evidence which demonstrates that the claim for the payments is fairly debatable. WIS. ADMIN. CODE § DWD 80.70(2). To demonstrate bad faith under these provisions, the claimant must show that the insurer had no reasonable basis for denying benefits and knew or recklessly disregarded that there was no reasonable basis for denying benefits. *Brown v. LIRC*, 2003 WI 142, ¶23, 267 Wis. 2d 31, 671 N.W.2d 279.

² All references to WIS. ADMIN. CODE § DWD 80.70(2) are to the September 1982 version of this administrative code provision.

¶8 A determination of bad faith under WIS. STAT. § 102.18(1)(bp) and WIS. ADMIN. CODE § DWD 80.70(2) presents a mixed question of fact and law. *Brown*, 267 Wis. 2d 31, ¶10. The parties' conduct presents a question of fact. *Id.* LIRC's factual findings will be upheld if they are supported by credible and substantial evidence. *Id.*

¶9 LIRC's conclusion that an insurer acted in bad faith is a conclusion of law. *Id.*, ¶11. Because LIRC, through its rule-making process and cases, has developed specialized experience, expertise and knowledge concerning bad faith, its conclusion that an insurer has acted in bad faith is entitled to great weight deference. *Id.*, ¶¶17-18.

¶10 When an agency's conclusions of law are entitled to great weight deference, this court will refrain from substituting its view of the law for that of the agency and will sustain the agency's conclusion of law if it is reasonable. *Id.*, ¶19. "Thus a court should sustain an agency's conclusion of law even if an alternative view of the law is just as reasonable or even more reasonable." *Id.* An agency's conclusion is unreasonable if it directly contravenes the words of the statute, if it is clearly contrary to the legislative intent, history or purpose of the statute, or if it is without a rational basis. *Id.*

¶11 It is undisputed that on February 12, 2001, the ALJ ordered Travelers to make payments to Sconzert within twenty-one days, and that it did not do so until July 11, 2001. LIRC's determination that Travelers acted in bad faith in delaying the payments is reasonable and is therefore sustained by this court.

¶12 When the ALJ made the award to Sconzert on February 12, 2001, WIS. ADMIN. CODE § DWD 80.15 (July 1996) was in effect, and provided:

Except for a stipulation or compromise, unless a party has filed a petition for review under s. 102.18(3), Stats., that party shall pay an administrative law judge's order awarding compensation within 21 days after the department mails a copy of the administrative law judge's finding and order to that party's last known address.

¶13 LIRC reasonably determined that WIS. ADMIN. CODE § DWD 80.15 (July 1996) requires a party to pay an award within twenty-one days of the ALJ's order unless *that* party files a petition for review. Based on the plain language of the rule and because only Sconzert, and not Travelers, filed a petition for review, LIRC reasonably determined that Travelers was required to make the payments ordered by the ALJ within twenty-one days of February 12, 2001.

¶14 LIRC also reasonably determined that Travelers' duty to make the payments within twenty-one days of February 12, 2001 was not fairly debatable. The "fairly debatable" test is an objective one, which asks whether a reasonable insurer under similar circumstances would have denied or delayed payment. *Brown*, 267 Wis. 2d 31, ¶24.

¶15 As noted by LIRC, the language of WIS. ADMIN. CODE § DWD 80.15 (July 1996) is clear. Based upon it, a reasonable insurer would have understood that it had no basis to delay payment if it did not file a petition for review.

¶16 Travelers argues that it had a reasonable basis for delaying the payments because the potential existed that LIRC would reverse the ALJ's decision. It relies on WIS. STAT. § 102.18(3), which provides that LIRC may affirm, reverse or modify an ALJ's order based on a review of the evidence submitted at the hearing. Because the record on review included a medical report submitted by Travelers at the hearing before the ALJ, which opined that Sconzert

had suffered no permanent disability, Travelers contends that LIRC could have reversed the ALJ's decision or reduced the award.

¶17 Regardless of the scope of LIRC's authority under WIS. STAT. § 102.18(3), it does not change the plain provisions of WIS. ADMIN. CODE § DWD 80.15 (July 1996), which require a party to pay an award within twenty-one days unless that party files a petition for review.³ As already noted, based upon the clear language of the rule, no reasonable insurer would have delayed payment.

¶18 In contending that it had a reasonable basis to delay the payments, Travelers also relies upon the modifications made to the language of WIS. ADMIN. CODE § 80.15 (July 1996) in WIS. ADMIN. CODE § DWD 80.15 (Nov. 2002, eff. Dec. 1, 2002).⁴ However, these changes were not in effect in February 2001 when the ALJ's award of disability payments to Sconzert was made. Travelers was subject to the rule in effect at the time of the ALJ's order and was required to pay the award within twenty-one days when it did not file a petition for review. LIRC therefore properly concluded that Travelers had no reasonable basis for delaying the payments, and knew or recklessly disregarded that it had no reasonable basis for doing so.

³ In affirming the penalty award, LIRC relied on the plain language of WIS. ADMIN. CODE § DWD 80.15 (July 1996) and Travelers' failure to file a petition for review of the ALJ's February 12, 2001 order. However, it also noted that in the prior proceedings before LIRC, Travelers had argued that the ALJ's award of seven percent permanent disability should be sustained, not that it should be reversed or reduced under WIS. STAT. § 102.18(3).

⁴ WISCONSIN ADMIN. CODE § DWD 80.15 (Nov. 2002, eff. Dec. 1, 2002), states: "[I]f 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.) This is consistent with the language of WIS. STAT. § 102.18(1)(e) (2001-02), which was created by 2001 Wis. Act 37, § 22, effective Jan. 5, 2002, more than ten months after the February 12, 2001 ALJ order.

¶19 LIRC also imposed a penalty under WIS. STAT. § 102.22(1), which provides for a penalty if an employer or its insurer inexcusably delays making a payment due to an employee. Like the determination of bad faith, LIRC's application of § 102.22(1) is entitled to great weight deference. *Beverly Enters., Inc. v. LIRC*, 2002 WI App 23, ¶¶24, 250 Wis. 2d 246, 640 N.W.2d 518 (Ct. App. 2001).

¶20 LIRC's determination that Travelers inexcusably delayed making the payments to Sconzert was based on the same facts and reasoning as its determination that Travelers acted in bad faith. Because we have already concluded that LIRC's determination as to bad faith was reasonable, it follows that LIRC reasonably determined that the delay in payment was inexcusable. *See id.*

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

