

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 30, 2002**

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. 01-2935  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-139**

**IN COURT OF APPEALS  
DISTRICT III**

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**BRENDA ROBINSON,**

**PLAINTIFF-RESPONDENT,**

**v.**

**LABOR AND INDUSTRY REVIEW COMMISSION,**

**DEFENDANT-APPELLANT,**

**HILLHAVEN EASTVIEW MANOR AND NATIONAL UNION  
FIRE INSURANCE COMPANY OF PITTSBURG,**

**DEFENDANTS-CO-APPELLANTS.**

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

Before Cane, C.J, Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Labor and Industry Review Commission, Hillhaven Eastview Manor and National Union Fire Insurance Company of Pittsburgh (collectively LIRC) appeal from a judgment reversing LIRC's decision to set aside the administrative law judge's order awarding limited worker's compensation benefits to Brenda Robinson. LIRC argues that Robinson waived her right to challenge consideration of Dr. David Zeman's medical report by failing to raise the issue before either the ALJ or LIRC. We agree. Accordingly, we reverse the judgment.

### **BACKGROUND**

¶2 The relevant facts are undisputed. In August 1997, Robinson, a nursing assistant employed by Hillhaven Eastview Manor, injured her lower back as she was assisting a resident to a bedside commode. As a result of her injury, Robinson applied for temporary total, permanent partial disability benefits and more than \$11,000 in medical expenses. In addition to treatment from various doctors, including a chiropractor and a neurologist, Robinson was evaluated by Zeman, an independent medical examiner and orthopedic surgeon. Zeman diagnosed Robinson with a back strain and opined that Robinson had not suffered any structural or anatomic tearing or breakage. Ultimately, Zeman concluded that Robinson had not sustained permanent disability from the work injury.

¶3 A hearing on Robinson's application was held in April 2000. Although Zeman's report was not formally marked as an exhibit at the hearing, the ALJ specifically referred to it in his decision. The ALJ awarded Robinson certain permanent partial disability benefits, as well as additional treatment expenses.

¶4 Upon petition for review by Hillhaven and its insurer, LIRC reversed the ALJ's findings and order, basing its decision in part on Zeman's report.

Robinson filed a complaint with the circuit court for judicial review of LIRC's decision. Arguing that Zeman's report had never been admitted into evidence at the initial hearing before the ALJ, Robinson challenged LIRC's consideration of the report.

¶5 The circuit court concluded that if LIRC had properly considered Zeman's report, the court would not have the authority to set aside or modify LIRC's decision. The circuit court nevertheless determined that although Zeman's report was timely filed with the Department of Workforce Development,<sup>1</sup> the report was not admitted into evidence and was therefore not a part of the record available for LIRC's review. The circuit court consequently reversed LIRC's decision, concluding that without Zeman's report, LIRC had no basis to reverse the ALJ's decision. Thus the sole issue on appeal is whether LIRC could properly consider Zeman's report.

#### ANALYSIS

¶6 LIRC argues that Robinson waived her right to challenge consideration of Zeman's medical report by failing to raise the issue before either the ALJ or LIRC. We agree. On appeal, we review LIRC's decision, and not that of the circuit court. *Knigh t v. LIRC*, 220 Wis. 2d 137, 147, 582 N.W.2d 448 (Ct. App. 1998). It is well-settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency. *State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶55, 251 Wis. 2d 484, 628 N.W.2d 376.

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<sup>1</sup> Pursuant to WIS. STAT. § 102.17(1)(d), "[t]he department may not admit into evidence a certified report of a practitioner or other expert or a record of a hospital or sanatorium that was not filed with the department and all parties in interest at least 15 days before the date of the hearing."

Ordinarily a reviewing court will not consider issues beyond those properly raised before the administrative agency, and a failure to raise an issue generally constitutes a waiver of the right to raise the issue before the reviewing court. *Id.*

¶7 Here, it is undisputed that Robinson did not challenge consideration of Zeman’s report until her initial brief to the circuit court. At her hearing before the ALJ, Robinson did not object to her employer’s reference to Zeman’s report. There, the employer specified, “Our defense is that it is based upon Dr. Zeman’s [report] that there is no disability as a result of this injury.” Likewise, upon her employer’s appeal to LIRC, Robinson did not object to LIRC’s consideration of Zeman’s report, nor did she challenge its use by the ALJ. Robinson’s failure to challenge consideration of Zeman’s report at either the initial hearing before the ALJ or on appeal to LIRC constitutes waiver of the issue. Therefore, we reverse the judgment.<sup>2</sup>

*By the Court.*—Judgment reversed.

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

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<sup>2</sup> Because our resolution of the waiver issue is dispositive of the appeal, we need not address LIRC’s alternative arguments. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

