

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 14, 2012**

Diane M. Fremgen  
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. 2011AP2722**

**Cir. Ct. No. 2011CV184**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**BESSE FOREST PRODUCTS, INC.,**

**PETITIONER-APPELLANT,**

**V.**

**MICHAEL C. LOPEZ AND LABOR AND INDUSTRY REVIEW COMMISSION,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Marinette County:  
TIM A. DUKET, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Besse Forest Products, Inc., appeals a judgment affirming a Labor and Industry Review Commission decision concluding that Michael Lopez sustained a permanent total disability. Because Besse failed to name its worker's compensation insurer as a party in the circuit court proceedings,

the court lacked competency to adjudicate the matter. Accordingly, we reverse the judgment and, on remand, direct the circuit court to dismiss Besse's complaint.

### BACKGROUND

¶2 In February 2007, Lopez, a Besse employee, suffered a back injury while at work. Lopez sought worker's compensation benefits and, after a hearing, an administrative law judge found that Lopez was permanently and totally disabled as a result of the injury. On appeal, the Commission affirmed and adopted the ALJ's decision. Besse then filed an action for circuit court review of the Commission's decision, naming only Lopez and the Commission as defendants. Although named in the proceedings before LIRC, Besse did not name its worker's compensation insurer, First Liberty Insurance Corporation, as a party to the circuit court action. The circuit court affirmed LIRC's decision and this appeal follows.

### DISCUSSION

¶3 The Commission argues the circuit court lacked competency to proceed because Besse failed to name its worker's compensation insurer as a party to the matter. We agree. WISCONSIN STAT. § 102.23(1)(a)<sup>1</sup> requires that a party seeking judicial review of a worker's compensation decision must join the adverse party. "This requirement travels to the circuit court's competency to proceed because it addresses a threshold requirement which must be satisfied before the circuit court may act." *Xcel Energy Servs., Inc. v. LIRC*, 2012 WI App 19, ¶8,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

339 Wis. 2d 413, 810 N.W.2d 865 (citing *Brandt v. LIRC*, 160 Wis. 2d 353, 367, 466 N.W.2d 673 (Ct. App. 1991) (internal quotations omitted)).

¶4 “An adverse party for worker’s compensation actions in circuit court includes any party bound by the Commission’s order or award granting or denying compensation to the claimant,” and an employer’s worker’s compensation insurer is “unquestionably an adverse party.” *Xcel Energy*, 339 Wis. 2d 413, ¶¶11-12. Besse’s failure to name First Liberty deprived the circuit court of its competency, and a judgment rendered by a court lacking competency is invalid. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶14, 273 Wis. 2d 76, 681 N.W.2d 190. We must therefore reverse the judgment and remand the matter to the circuit court with directions to dismiss Besse’s complaint. Because the circuit court lacked competency to adjudicate the action, we need not reach the merits of Besse’s appeal.<sup>2</sup>

¶5 In its reply brief, Besse contends we should refuse to consider the Commission’s competency argument because it was raised for the first time on appeal. Generally, we do not consider arguments not raised in the circuit court. *See Gibson v. Overnite Transp. Co.*, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388. Forfeiture, however, is a rule of judicial administration, and whether we apply the rule is a matter addressed to our discretion. *See Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987). Given the important interests underlying WIS. STAT. § 102.23(1)(a)’s joinder requirement,

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<sup>2</sup> Had we reached the merits, we would have affirmed based on the arguments set forth in Lopez’s and the Commission’s briefs.

*see Selaiden v. Columbia Hospital*, 2002 WI App 99, ¶8, 253 Wis. 2d 553, 664 N.W.2d 690, we decline to apply the forfeiture rule to this matter.

*By the Court.*—Judgment reversed and cause remanded with directions.

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

