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**DISTRICT IV**

September 23, 2015

*To:*

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Circuit Court Judge  
Dane County Courthouse  
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You are hereby notified that the Court has entered the following opinion and order:

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2015AP417

Robertha White v. Wisconsin Labor and Industry Review  
Commission, Madison Metropolitan School District and  
Wausau Business Insurance Company (L.C. # 2014CV1465)

Before Higginbotham, Sherman and Blanchard, JJ.

Robertha White appeals a circuit court order affirming a Labor and Industry Review Commission (LIRC) decision that adopted the order of an administrative law judge (ALJ), denying her bad faith claim in this worker's compensation case. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup>

White was a custodian for the Madison Metropolitan School District from 1999 to 2011. She filed a worker's compensation claim against the district and its insurer, Wausau Business Insurance Company (WBIC), for an injury to her left knee. WBIC denied the claim, relying on the report of an independent medical examiner, Dr. Thomas O'Brien, who opined that White's restrictions to her left knee were not work-related but, rather, were a result of trauma to the knee at age thirteen, the normal aging process, and obesity.

White sought a hearing before an ALJ with the Department of Workforce Development's Worker's Compensation Division. She submitted a report from her own medical expert, who opined that White's work was at least a material contributory causative factor to her left knee condition. The ALJ concluded that White had sustained an occupational disease causing injury, and that she was entitled to compensation. White then filed a claim under WIS. STAT. § 102.18(bp), alleging that WBIC denied her claim in bad faith when it relied on O'Brien's opinion. An ALJ denied the bad faith claim. White appealed, and LIRC affirmed the ALJ's conclusion that WBIC did not act in bad faith, adopting the ALJ's decision. White sought judicial review, and the circuit court affirmed LIRC's decision. This appeal follows.

On appeal, this court reviews LIRC's decision, not that of the circuit court. *City of Kenosha v. LIRC*, 2011 WI App 51, ¶7, 332 Wis. 2d 448, 797 N.W.2d 885. Whether the WBIC acted in bad faith under WIS. STAT. § 102.18(1)(bp) when it denied White's claim presents a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

mixed question of fact and law. *Bosco v. LIRC*, 2004 WI 77, ¶18, 272 Wis. 2d 586, 681 N.W.2d 157. LIRC’s factual determination as to the parties’ conduct will be upheld if they are supported by credible and substantial evidence, but we determine de novo whether the conduct rises to the level of bad faith under § 102.18(1)(bp). *Id.*, ¶¶18-19.

Regarding the question of law as to whether WBIC acted in bad faith, the respondents argue that LIRC is entitled to great weight deference. White, on the other hand, asserts that LIRC is entitled to no deference. We agree with the respondents that LIRC is entitled to great weight deference on the issue of whether WBIC acted in bad faith.

Our supreme court applied the great weight deference standard within the context of a worker’s compensation bad faith claim in *Brown v. LIRC*, 2003 WI 142, ¶18, 267 Wis. 2d 31, 671 N.W.2d 279. There, the court acknowledged that LIRC was authorized by the legislature to adopt a rule governing bad faith and that, “through its rulemaking process and through its cases, LIRC has developed specialized experience, expertise, and knowledge concerning bad faith.” *Id.* We conclude in this case, as did the court in *Brown*, that LIRC employed experience, expertise, and knowledge, such that LIRC’s legal conclusions are entitled to great weight deference. *See id.* When applying the great weight deference standard, we will sustain a reasonable agency conclusion even if an alternative conclusion is more reasonable. *Id.*, ¶19.

On appeal, White does not contest any specific factual findings made by LIRC. Rather, she argues that LIRC erred in concluding that WBIC acted reasonably, and not in bad faith, when it relied on O’Brien’s opinion in denying her claim. White asserts that O’Brien’s opinion conflicts with existing worker’s compensation law in Wisconsin. Specifically, she argues that, under the “as is” rule, employers take their employees as they come, and the fact that the

employee may be susceptible to injury because of a pre-existing condition does not relieve the employer from liability for worker's compensation benefits. See *Semons Dep't Store v. DILHR*, 50 Wis. 2d 518, 528, 184 N.W.2d 871 (1971). White concedes that her obesity and her knee problem are causally connected. However, she asserts that there was also a causal connection between her work, which she performed while obese, and her knee condition. She asserts that WBIC had an obligation, under *Brown*, 267 Wis. 2d 31, ¶25, to properly investigate her claim and subject the results of the investigation "to a reasonable evaluation and review," but that WBIC did not do so, relying instead solely on O'Brien's report.

Determining bad faith in the worker's compensation context involves a two part test. *Id.*, ¶23. First, an employee must show that the insurer had no reason for denying benefits. *Id.* In other words, the employee must show that the insurer had no "information that would lead a reasonable insurer to conclude that an employee's claim is fairly debatable." *Id.*, ¶24. Second, the employee must show that the insurer had knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. *Id.*, ¶26. We agree with the respondents that White fails to demonstrate that these criteria have been met.

In its decision, LIRC noted details from O'Brien's report that supported his opinion that White's knee problems were not work-related. O'Brien noted from his records review that White had sustained severe trauma to her left knee at age thirteen from an auto accident and was told as a teenager that she would have problems with her knee. He further noted that she had been diagnosed with osteoarthritis and was nearly 100 pounds overweight. O'Brien's report stated that he had reviewed White's job description and opined that her work did not play a material contributory causative role in the onset of her knee condition, nor did it cause a more

rapid progression of her long-standing, pre-existing osteoarthritis. Rather, O'Brien opined that White's obesity, past traumatic injury, and aging caused her symptoms.

LIRC also relied on the testimony given by Melissa Loyko at the initial worker's compensation hearing. Loyko, the insurance adjuster who handled White's claim, testified that every case is investigated on its own merits. Loyko testified that she relied upon O'Brien's opinion that White's work played no causal role in the progression of her knee condition. She also stated that she believed that, regarding any inconsistencies, the facts would be presented to the ALJ, who would review the record and determine whether the medical opinion was credible.

LIRC considered all of these facts in light of the question of whether WBIC's actions amounted to bad faith, and concluded that WBIC acted in a reasonable manner relying on O'Brien's report and by letting the ALJ assess the evidence and make credibility determinations regarding the expert opinions. We are satisfied, based on all of the above, that LIRC's conclusion was reasonable and supported by the record, such that it must be upheld under the great weight deference standard. *See id.*, ¶19.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*