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DISTRICT II

November 9, 2022

To:

Hon. Angelina Gabriele
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Paul V. Gagliardi
Electronic Notice

Steven C. Kilpatrick
Electronic Notice

David G. Ress
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2021AP2171 Scott Gabron v. LIRC (L.C. #2021CV93)

Before Gundrum, P.J., Neubauer and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gleason Rolloff and Recycling, Inc. and AMCO Insurance Co. (collectively, "Gleason") appeal from a circuit court order that reversed a Labor and Industry Review Commission (LIRC) decision on the grounds that LIRC exceeded its authority when it found a shorter temporary total disability period than that claimed by Scott Gabron for work-related back injuries suffered in June, 2017. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We reverse the circuit court order and remand with directions to reinstate LIRC's decision.

Following two hearings, an administrative law judge (ALJ) ruled that Gabron's injuries were work related[2] and that Gabron was entitled to the worker's compensation benefits he sought, which included temporary total disability (TTD) from August 9, 2017, to May 5, 2018, and from December 26, 2018, to September 3, 2019, "along with benefits for ongoing and future medical expenses." Gleason petitioned for review by LIRC, which agreed with the ALJ's determination that there was a work-related injury but held that it was only a temporary strain. Specifically, LIRC determined that "[a]ny disability or treatment beyond the date of March 1, 2018, with the exception of [certain] treatment up to the date of May 18, 2018, is found to have been attributable to a condition or conditions unrelated to the effects of the work injury of June 15, 2017."

Gabron sought judicial review by the circuit court pursuant to WIS. STAT. § 227.52. The circuit court held that LIRC had exceeded its authority under WIS. STAT. § 102.23(1)(e)1. in reaching the issue of time periods for TTD. The court's ruling was based, in part, on a stipulation between the parties, which it characterized as an agreement between the parties as to the dates of TTD once causation was established. Gleason appealed to this court.

We review de novo an appeal of a LIRC decision dealing with the scope of its own power. ***Wright v. LIRC***, 210 Wis. 2d 289, 293, 565 N.W.2d 221 (Ct. App. 1997). We review

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Gabron was employed by Gleason Rolloff and Recycling, Inc. from 2010 until the injury in June, 2017. It appears that he never returned to their employ.

the LIRC decision, not the circuit court decision, ***Jarrett v. LIRC***, 2000 WI App 46, ¶7, 233 Wis. 2d 174, 607 N.W.2d 326, but we do "not weigh the evidence or pass upon the credibility of the witnesses" because we do not act in a fact-finding capacity, ***Brakebush Bros., Inc. v. LIRC***, 210 Wis. 2d 623, 630, 563 N.W.2d 512 (1997); WIS. STAT. § 102.23(6). Pursuant to § 102.23(1)(e), we set aside LIRC's findings only under certain circumstances, including when LIRC acts "without or in excess of its powers." Sec. 102.23(1)(e)1.

The answer to the key question of whether LIRC exceeded its authority when it concluded that Gabron's work injury caused only a temporary strain is found in the introductory paragraph of the ALJ's April 23, 2020 Decision:

> Jurisdictional matters are conceded. The parties stipulate to an average wage of $880.00 for purposes of worker's compensation benefits. The issues in dispute are whether the applicant sustained injuries arising out of employment while performing services incidental to or growing out of such employment, and if so, *the nature and extent of disability and related medical expense.*

(Emphasis added.)

Because the "nature and extent of disability and related medical expense" was on the table at the initial administrative law hearing, *see* WIS. STAT. § 102.17(1)(a), it was one of the issues within LIRC's authority when it took the appeal of the ALJ Decision, *see* WIS. STAT. § 102.18(3). It was also properly considered by the circuit court on appeal. *See* WIS. STAT. § 227.52.

Gabron did not complain or seek to limit the ALJ's statement of the issues in the initial administrative hearings, and he cannot do so with respect to LIRC at this time. *See* ***Omernick v. DNR***, 100 Wis. 2d 234, 248, 301 N.W.2d 437 (1981) ("[P]arties to an administrative proceeding must raise known issues and objections and … all efforts should be directed toward developing a

record that is as complete as possible in order to facilitate subsequent judicial review of the record under [WIS. STAT. § 227.52].”); ***State v. Outagamie Cnty. Bd. of Adjustment***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376 (“It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.”). Because the circuit court erred when it determined that LIRC exceeded its authority, we reverse.

We disagree with Gabron’s interpretation of the stipulation between the parties. The stipulation was only to be utilized “if liability is found”—in other words, if the ALJ found that a work injury occurred and that all of Gabron’s injuries were related to the work incident. The stipulation took only one issue—Gabron’s time away from work—out of those that were contested. The ALJ read the stipulation on the record over the course of the two hearings leading up to his decision. At the first hearing, on October 17, 2019, the ALJ stated without challenge by the parties as follows:

> The respondents do not challenge the existence of a problematic condition with the applicant’s back, but they do challenge any relationship to the applicant’s work. They challenge whether or not the problems with the applicant’s back arose out of or whether the applicant was performing services incidental to the employment at the time of the injury. The *respondents challenge any liability on their part for the applicant’s disability, and they also challenge any liability for medical expense.*
>
> We tentatively have the period of temporary total disability set for June 16th, 2017 through May 5th, 2018 and then a subsequent period January 2nd, 2019 through September 3rd, 2019 with the understanding that those may be—those dates may be changed as things develop. *No portion of this is conceded by the respondents.* Permanent partial disability is to be determined, and there is no concession of any amount of permanent partial disability on the part of the respondents.

(Emphasis added.) And at the second hearing, on February 3, 2020, the ALJ further elaborated on the issues:

> There is a—There is no agreement as to the existence of a work injury. It's disputed whether or not that any injury to the applicant arose out of or applicant was performing services incidental to that employment at the time of the injury. *There also is a dispute as to the extent of disability and the liability for medical expense.*
>
> All right. At this point it does appear that there is going to be surgical revision necessary, so that—that will remain open. There is no assessment at this point as to the permanent partial disability. As to the temporary total disability, the parties have agreed that if liability is found, the period of temporary total disability will be from August 9th, 2017 until May 5th of 2018 and from December 26th, 2018 to September 3rd of 2019.

(Emphasis added.) Gleason made clear at both hearings before the ALJ that it disputed everything other than the noted date ranges, including that the injury bore "any relationship to [Gabron's] work," "the extent of disability," and "liability for medical expense."

Parties in litigation may stipulate to one issue while contesting others. ***Roberts Premier Design Corp. v. Adams***, 2021 WI App 52, ¶12, 399 Wis. 2d 151, 963 N.W.2d 796. Thus, because the "interpretation of a stipulation must, above all, give effect to the intention of the parties," ***Stone v. Acuity***, 2008 WI 30, ¶67, 308 Wis. 2d 558, 747 N.W.2d 149 (citation omitted), the circuit court erred when it utilized the stipulation as a basis to conclude LIRC had exceeded its authority. As the numerous statements on the record reflecting the disputed issues show, Gleason never agreed that in the event of a determination that Gabron suffered any work injury—even a temporary strain that did not account for the full extent of his missed work—Gabron would be entitled to TTD for the entire period of missed work.

Simply put, the ALJ outlined the issues to be heard at the initial hearings. These included both "the nature" and "the extent" of Gabron's disability. The parties did not dispute this statement of issues before the ALJ or LIRC, nor did they stipulate to the extent of any work-related injury that might be found by the ALJ or LIRC. Thus, LIRC's conclusions, after a full and fair hearing on the nature and extent of Gabron's injury, do not constitute action without or

in excess of LIRC's powers. Accordingly, we reverse the circuit court and remand with directions to reinstate LIRC's decision.

IT IS ORDERED that the order of the circuit court is summarily reversed and remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals