

Appeal No. 2006AP2695

Cir. Ct. No. 2006CV233

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

COUNTY OF DANE,

PLAINTIFF-APPELLANT,

FILED

V.

May 31, 2007

**LABOR AND INDUSTRY REVIEW COMMISSION
AND GLORIA N. GRAHAM,**

David R. Schanker
Clerk of Supreme Court

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Dykman and Vergeront, JJ.

This appeal arises from a decision by the Wisconsin Labor and Industry Review Commission (LIRC) to award a disfigurement allowance under the Worker's Compensation Act to a woman whose knee was injured during the course of her employment. The central dispute between the parties is whether LIRC properly interpreted the term "disfigurement" under WIS. STAT. § 102.56(1) (2005-06)¹ to include a noticeable limp. As we will explain, the case also raises a significant threshold issue about the proper standard of review to apply after an agency has changed its position on the proper interpretation of a statute. Because we believe that this threshold issue may require clarification or modification of the

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

oft-cited standard for reviewing agency decisions, we certify the appeal to the Wisconsin Supreme Court for its review and determination pursuant to WIS. STAT. RULE 809.61.

The underlying facts are undisputed for the purposes of the appeal. Gloria Graham underwent knee surgery due to an injury she suffered during the course of her employment. The surgery left tiny scars not visible to a prospective employer. However, Graham continues to limp and uses a cane, and the ALJ found that her legs “looked imperfect and asymmetrical.” As a result of this knee injury, LIRC awarded Graham \$15,000 as a disfigurement allowance under WIS. STAT. § 102.56(1), in addition to her permanent partial disability benefits. The disfigurement statute applies when “an employee is so permanently disfigured as to occasion potential wage loss,” taking into consideration “those areas of the body that are exposed in the normal course of employment.” Section 102.56(1).

LIRC contends that its interpretation of the disfigurement statute to encompass a noticeable limp is entitled to great-weight deference, citing the well-established four factors that: (1) the agency has been charged by the legislature with the duty of administering the statute at issue; (2) the agency’s interpretation of the statute is one of long standing; (3) the agency employed its expertise or specialized knowledge in interpreting the statute; and (4) the agency’s interpretation will provide uniformity and consistency in the application of the statute. *See, e.g., Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995). LIRC’s assertion that its interpretation is one of long standing is based on its decision in *Jorgenson v. DVA*, WC Claim No. 84-27383 (LIRC, Oct. 10, 1986) (awarding a disfigurement allowance to an applicant who was required to wear a brace or elevated heel and walked with a noticeable limp). Accordingly, LIRC claims its decision here should be upheld so long as it is

reasonable, even if another interpretation might be more reasonable. *See UFE Inc. v. LIRC*, 201 Wis. 2d 274, 287-88 n.3, 548 N.W.2d 57 (1996).

Dane County disagrees that LIRC's current interpretation has been one of long standing. It argues that LIRC has historically interpreted "disfigurement" to refer to such visible injuries as amputations, scarring and burns. *See Spence v. POJA Heating and Sheet Metal Co. Inc.*, WC Claim No. 88-018562 (LIRC, Jan. 20, 1994), 1994 WL 30998 (Wis. Lab. Ind. Rev. Com.) (holding that an applicant's limp and need to wear a leg brace was compensated by disability benefits and did not constitute disfigurement). Because LIRC's conclusion here and in *Jorgenson* that a disfigurement award may be based on a noticeable limp conflicts with LIRC's prior conclusion in *Spence* and its alleged historical interpretation of the term disfigurement up to the time of the *Spence* decision,² Dane county argues that the current decision should be subject to de novo review. *See UFE Inc.*, 201 Wis. 2d at 285 (noting that de novo review is appropriate, *inter alia*, "when an agency's position on an issue has been so inconsistent so as to provide no real guidance").

LIRC does not dispute that *Jorgenson* and *Spence* reached different results on essentially the same issue. It contends, however, that *Spence* was wrongly decided because the statutory definition of disfigurement does not contain any reference to amputations, scarring and burns, and it was proper to abandon that limited interpretation in *Jorgenson*. LIRC then points out that administrative

² The parties have not supplied this court with citations to any of the prior administrative cases dealing with disfigurement to which *Spence* appears to refer. Because LIRC does not dispute this characterization of its past rulings, we have not independently researched those past decisions.

agencies generally have the authority to change their positions. *See Nick v. State Highway Comm’n*, 21 Wis. 2d 489, 495, 124 N.W.2d 574 (1963) (noting an agency is not bound by its prior determinations).³ While that may be true, it does not answer the question of what level of deference is due to an agency’s new interpretation of a statute after the agency has changed its position.

Dane County appears to argue that de novo review is warranted anytime an agency changes its position on the meaning of a statute. It suggests that an agency “forfeits” the great-weight deference which would otherwise be due to a long-standing interpretation when it issues a new decision which is inconsistent with that prior interpretation. On its face, Dane County’s contention would appear to have support in the language of the current formulations for when to apply great deference, due weight deference or de novo review, which we have cited above. *See Harnischfeger Corp.*, 196 Wis. 2d at 659-60, and *UFE Inc.*, 201 Wis. 2d at 284-88.

The problem we see with this approach, however, is that it may be an agency’s very experience with a subject matter that leads the agency to conclude that an old interpretation is not working as intended by the legislature. Does it matter whether the more recent decision deliberately deviated from the prior decision, explaining why it was overruling or failing to follow the prior interpretation, as opposed to reaching a contrary result without apparent reference

³ LIRC also cites *Stoughton Trailers, Inc. v. LIRC*, 2006 WI App 157, ¶27, 295 Wis. 2d 750, 721 N.W.2d 102, for the proposition that “administrative agencies may deviate from prior agency policy and practice as long as a satisfactory explanation is provided.” However, the quoted passage in that case refers to WIS. STAT. § 227.57(8), which ostensibly refers to an agency’s exercise of discretion, rather than its conclusions of law. We are therefore not persuaded that that authority applies here.

or awareness of the other decision? If we acknowledge that an agency has experience and expertise in a particular area of law over a long period of time, why should we not also defer to its evolving position on the interpretation of the relevant statute throughout that time period? In other words, it is not apparent why an agency's considered change in position detracts from what appear to be the key reasons the courts grant deference to agencies, namely expertise and experience. Moreover, the question of how far LIRC wants to go in compensating individuals who have conditions that might arguably be considered disfiguring, but are not necessarily so, seems to be a particularly policy-driven decision of the type to which we typically afford some degree of deference.

On the other hand, we have construed a recent Wisconsin Supreme Court decision as requiring de novo review in a situation where due weight deference might once have been accorded. See *Dettwiler v. DOR*, 2007 WI App 125, ¶4, ___ Wis. 2d ___, ___ N.W.2d ___ (discussing *DOR v. River City Refuse Removal, Inc.*, 2007 WI 27, ___ Wis. 2d ___, 729 N.W.2d 396). It may be that the current trend in Wisconsin law is to give less deference to administrative decisions than has been the case in the past. If that is the situation, it may call for a more explicit explanation of the status of the law from the Wisconsin Supreme Court.

In sum, we see several logical reasons for according at least some degree of deference to LIRC's decision in this case. We are uncertain, however, whether such deference is allowed or required under the current case law stating that de novo review is appropriate when an agency has changed its interpretation over time. Given the number of agency review cases that come before this court and the circuit courts, we believe clarification of the standard for de novo review under these circumstances is necessary. We therefore certify this appeal to the Wisconsin Supreme Court for its review and determination.

