

Appeal No. 2008AP3135

Cir. Ct. No. 2008CV449

**WISCONSIN COURT OF APPEALS
DISTRICT II**

SOCIETY INSURANCE AND JAMES MEYER, INC.,

PLAINTIFFS-RESPONDENTS,

V.

**LABOR & INDUSTRY REVIEW COMMISSION
AND GARY LISKA,**

DEFENDANTS,

WORK INJURY SUPPLEMENTAL BENEFIT FUND,

DEFENDANT-APPELLANT.

FILED

OCT 14, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Anderson and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2007-08)¹ this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

ISSUE

Whether retroactive application of WIS. STAT. §§ 102.17(4) and 102.66(1), as amended effective April 1, 2006, is unconstitutional.

BACKGROUND

On June 25, 1982, Gary Liska sustained a work-related injury to his right leg that required amputation below the knee. Society Insurance paid temporary total disability benefits intermittently from June 25, 1982, through June 12, 1990. It also paid permanent partial disability benefits for each week that Liska did not receive temporary disability. Society paid the permanent disability benefits in advance on February 18, 1983.

According to the worker's compensation law as it read at the time, specifically the twelve-year statute of limitations, Society's liability for Liska's medical claims would have expired in 2002, twelve years after the last disability payment, and subsequent payments would have been paid from the Work Injury Supplemental Benefit Fund (WISBF). *See* WIS. STAT. § 102.17(4) (2003-04).²

On February 25, 2004, Liska filed a claim for additional medical expenses in excess of \$14,000. An administrative law judge (ALJ) determined

² WISCONSIN STAT. § 102.17(4) (2003-04) reads in relevant part:

In the case of ... a traumatic injury resulting in the loss or total impairment of ... a foot or any part of the rest of the leg proximal to the foot ... there shall be no statute of limitations, except that benefits or treatment expense becoming due after 12 years from the date of injury or death or last payment of compensation shall be paid from the work injury supplemental benefit fund

that Society was liable for the ongoing expenses in light of the revised statute of limitations, which shifts liability for expenses accruing after twelve years to the worker's compensation insurer unless those expenses derive from an "occupational disease." *See* WIS. STAT. § 102.17(4).³

Society appealed the ALJ decision to the Labor and Industry Review Commission (LIRC), which affirmed and adopted the ALJ decision as its own. Society then sought review in the circuit court, arguing that retroactive application of the statute of limitations was unconstitutional. The circuit court agreed, holding that retroactive application violates due process and the contract clause. WISBF appeals.

DISCUSSION

A statute may be applied retroactively if (1) by express language or necessary implication, the statutory language reveals legislative intent for retroactive application or (2) the statute is remedial or procedural rather than substantive. *Snopek v. Lakeland Med. Ctr.*, 223 Wis. 2d 288, 294, 588 N.W.2d 19 (1999). Wisconsin courts view statutes of limitations as substantive statutes because they create and destroy rights. *Bethhauser v. Med. Protective Co.*, 172 Wis. 2d 141, 149, 493 N.W.2d 40 (1992). However, the parties agree that by the express language of 2005 Wis. Act 172, the legislature intended retroactive

³ This revision, enacted under 2005 Wis. Act 172, §15, took effect April 1, 2006. The ALJ determined that the legislature intended retroactive application by relying on the following language: "The treatment of [WIS. STAT. §§] 102.17 (4) and 102.66(1) and (2) of the statutes first applies to benefits or treatment expenses that are payable on the effective date of this subsection, *regardless of the date of injury.*" 2005 Wis. Act 172, §74 (2) (emphasis added). Society concedes, for purposes of appeal, that the legislature intended retroactive application of the revised statute.

application. The issue on appeal is whether retroactive application results in a violation of Society's constitutional right to due process and protections under the contract clause.⁴

Prior to April 1, 2006, the worker's compensation law directed that:

The right of an employee ... to proceed under this section shall not extend beyond 12 years from the date of the injury or death or from the date that compensation, other than treatment or burial expenses, was last paid, or would have been last payable if no advancement were made, whichever date is latest. In the case of ... a traumatic injury resulting in the loss or total impairment of ... a foot or any part of the rest of the leg proximal to the foot ... there shall be no statute of limitations, *except that benefits or treatment expense coming due after 12 years from the date of injury or death or last payment of compensation shall be paid from the work injury supplemental benefit fund* under [WIS. STAT. §] 102.65 and in the manner provided in [WIS. STAT. §] 102.66.

WIS. STAT. § 102.17(4) (2003-04) (emphasis added). The legislature revised the emphasized text to state that "there shall be no statute of limitations" for benefits "except that benefits or treatment expense *for an occupational disease* becoming due 12 years after the date of injury ... or last payment of compensation shall be paid from the [WISBF]." Sec. 102.17(4) (emphasis added).

Recent case law confirms that under certain circumstances, a revised statute of limitations may apply retroactively where the prior statute of limitations has not run. *See State v. Haines*, 2003 WI 39, ¶8, 261 Wis. 2d 139, 661 N.W.2d 72. Moreover, "once a statute of limitations has run, the party relying on the statute has a vested property right in the statute-of-limitations defense, and new

⁴ Neither the ALJ nor LIRC addressed the constitutionality issue.

law which changes the period of limitations cannot be applied retroactively to extinguish that right.” *Id.*, ¶13 (citation omitted). As Society emphasizes, the twelve-year statute of limitations applicable to Liska’s claim ran in 2002, four years prior to the effective date of the revised statute; therefore, under *Haines*, retroactive application is unconstitutional.

However, retroactive legislation is presumed constitutional. *Neiman v. American Nat’l Prop. and Cas. Co.*, 2000 WI 83, ¶16, 236 Wis. 2d 411, 613 N.W.2d 160. It is the challenger’s burden to overcome that presumption. *Martin v. Richards*, 192 Wis. 2d 156, 200, 531 N.W.2d 70 (1995). The *Martin* court set forth a balancing test for determining whether the presumption is overcome: “[W]e must balance the public interest served by the retroactive application of the [statute] against the private interests that are overturned by it, including any unfairness inherent in such application.” *Id.* at 211. The court included a caution, stating that retroactive legislation “often unsettles important rights” and “is viewed with some degree of suspicion.” *Id.* at 201.

The constitutional protections implicated here are due process and the prohibition on laws “impairing the obligation of contracts.” See U.S. CONST. amend. XIV, §1; U.S. CONST. art. I, §10; see also WIS. CONST. art. I, §§ 1 and 12. The test for constitutionality is similar in both analyses. Case law provides a balancing test for the due process inquiry, first asking whether the legislation affects a vested right and then whether there is a countervailing public interest served. See *Neiman*, 236 Wis. 2d 411, ¶¶9, 14-15. “[A] right is vested when it has been so far perfected that it cannot be taken away by statute.” *Id.*, ¶14 (citation omitted). Similarly, the legislature may not impair contracts by enacting retroactive laws that create new obligations with respect to past transactions unless the nature and strength of the public interest outweighs any unfairness created by

the retroactivity. *Chappy v. LIRC*, 136 Wis. 2d 172, 186-87, 401 N.W.2d 568 (1987). To determine the extent of an impairment of contract, the reasonableness of the complaining party's reliance and the potential liability imposed as a result of retroactive application must be considered. *Id.* at 187.

Here, Society relied on a statutorily created limitation on its liability for disability payments, which allowed Society to calculate its exposure and set premiums accordingly. As the circuit court found, "[T]he law in effect at the time of injury would have ended Society's obligation 12 years after.... But now with the change in the law, they're on the hook for all of Mr. Liska's medical expenses from [April 1, 2006] onward. Again, until he passes away." The court also observed, "[T]his is just one individual and one insurance company and ... potentially there are numerous traumatic [injuries to] employees and numerous insurance companies."

Accepting, for purposes here, that there is a substantial impairment of Society's contract rights, there must be a significant and legitimate public purpose to sustain the legislature's decision on retroactivity. See *Martin*, 192 Wis. 2d at 211; *Chappy*, 136 Wis. 2d at 187. Any public purpose cited to support retroactivity must be intended to remedy "a broad and general social or economic problem." *Chappy*, 136 Wis. 2d at 188. WISBF suggests that the legitimate public purpose of retroactive application is to maintain the solvency of the fund. The circuit court rebuffed that suggestion, stating that there was "nothing in the record from which to draw that conclusion.... [T]hat's purely speculative. When I looked, I didn't find anything in the legislative history that would indicate that."

The Wisconsin Insurance Alliance⁵ observes that the only purpose of the revised statute of limitations is to shift liability for ongoing disability benefits from a state agency to an insurance company. The injured employee will receive compensation regardless of who pays. Furthermore, the Alliance notes that the legislature did not offer any purpose served by retroactivity and cautions that where the state, here WISBF, is a contracting party, decisions about retroactivity should be viewed skeptically. “Otherwise, states would be free to pass retroactive laws at will simply to dissolve their contractual obligations.”

CONCLUSION

The bottom line is whether the legislature has violated the constitutional rights of employers and their worker’s compensation carriers by retroactively shifting the burden of ongoing disability compensation from the state to the insurer. It is undisputed that retroactive legislation enjoys a presumption of constitutionality. *See Neiman*, 236 Wis. 2d 411, ¶16. Furthermore, case law supports the proposition that a statute of limitations may be applied retroactively. *See Haines*, 261 Wis. 2d 139, ¶8. Here, however, the risk of substantial, unanticipated exposure for worker’s compensation insurers will have a widespread financial impact on Wisconsin employers and insurers alike. Moreover, the lack of any express legislative public purpose for retroactivity presents a dilemma when balancing competing interests. Given the potential for significant financial liability to insurers and employers, this case is one of statewide concern and continuing public interest. We respectfully certify the issue.

⁵ The Wisconsin Insurance Alliance submitted an amicus curiae brief.

