

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-3711-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN W. McDONOUGH, D.O.,

PLAINTIFF-APPELLANT,

v.

**STATE OF WISCONSIN DEPARTMENT OF WORKFORCE
DEVELOPMENT, LABOR & INDUSTRY REVIEW
COMMISSION, WAUSAU BUSINESS INSURANCE, AND CITY
OF WISCONSIN RAPIDS,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Wood County:
DENNIS D. CONWAY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. John W. McDonough, D.O., appeals from a judgment dismissing his action against respondent Wausau Business Insurance on

the grounds that Wausau had not been timely served. Because we agree Wausau was not timely served, we affirm.

ISSUE

The only issue presented by this appeal is whether timely substituted service was accomplished on Wausau Business Insurance, when appellant served the Labor and Industry Review Commission (LIRC) with copies of his certified summons and complaint.¹ Preliminarily, the parties agree that Wausau was a necessary party, and that failure to timely serve Wausau is a jurisdictional defect.² Thus, the issue of substituted service is whether appellant's timely service on LIRC constitutes timely service on Wausau³ under §§ 102.16, and 102.23, STATS.

BACKGROUND

Appellant performed medical services for a worker's compensation client. Thereafter, he sought reimbursement from Wausau, the worker's compensation insurer. Wausau refused to pay, and appellant eventually applied to the Department of Workforce Development (DWD)⁴ for a determination as to whether the treatment was medically necessary. *See* § 102.16(2m), STATS., and

¹ This is an expedited appeal under RULE 809.17, STATS.

² Respondent makes this argument explicitly, citing §§ 102.16(2m) and 102.23, STATS. Appellant implicitly accepts this position, by failing to challenge the circuit court's holding on this ground, and by failing to object to the respondent's position in his reply brief. *See Schlieper v. DNR*, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994).

³ Appellant served Wausau directly, but that service was not timely.

⁴ Formerly, Department of Industry, Labor and Human Relations (DILHR). *See* 1995 Wis. Act 289 § 275, authorizing DILHR to use the name "Department of Workforce Development" for all official purposes.

WIS. ADM. CODE § DWD 80.73. By final decision dated March 31, 1997, DWD determined that the treatment was not medically necessary.

Appellant appealed to the circuit court and attempted to serve Wausau by serving LIRC. The circuit court dismissed the appeal because Wausau was not timely served.

STANDARD OF REVIEW

Section 102.16(2m)(e), STATS., proscribes that a review of the agency's decision is to the circuit court as provided in § 102.23, STATS. Our review of the circuit court's interpretation of a statute is a question of law that we review *de novo*. *Blackbourne v. School Dist. of Onalaska*, 174 Wis.2d 496, 499, 497 N.W.2d 460, 461 (Ct. App. 1993).

ANALYSIS

Appeal from an adverse DWD determination of medical necessity is controlled by §§ 102.16(2m)(e) and 102.23, STATS. The appeal scheme requires a direct appeal to the circuit court “not under ch. 227 or [§] 801.02,” but rather by filing a summons and complaint in the circuit court within thirty days of the adverse decision, making “adverse part[ies]” defendants. Section 102.23(1)(a).

The confusion in this appeal arises because § 102.16(2m)(e), STATS., directs that appeals from medical necessity determinations made by the “department” (defined by § 102.01, STATS., as the Department of Workforce Development, DWD) are to be made “in the same manner” as set forth in § 102.23, STATS. Yet, § 102.23 refers to decisions by the “commission,” which is defined in § 102.01, STATS., as the Labor and Industry Review Commission. The

evident intention of the statutes, when read *in pari materia*,⁵ is that DWD medical necessity decisions are to be appealed just as LIRC's final decisions in other matters are: directly to the circuit court under § 102.23. Therefore, DWD shall be read in place of LIRC throughout § 102.23, when it is used for a § 102.16(2m)(e) review. To hold otherwise would negate the plain intention of providing for an appeal from DWD directly to the circuit court without first appealing the decision and implicating LIRC (i.e.: it would negate the provision for an appeal "not under ch. 227" *See* § 102.23(1)(a)).

In a direct appeal to the circuit court under § 102.23, STATS., pursuant to § 102.16(2m)(c), STATS., if substituted service⁶ under § 102.23(1)(b), is attempted, DWD must be served with sufficient copies of the summons and complaint intended for all other defendants, as well as a copy for DWD. Section 102.23(1)(b). Thus, appellants erred in serving LIRC, rather than Wausau directly, or DWD.

By the Court.—Judgment affirmed.

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

⁵ Sections of statutes relating to the same subject matter must be construed *in pari materia*. **Gottfried Inc. v. Wisconsin Dept. of Revenue**, 145 Wis.2d 715, 720, 429 N.W.2d 508, 510 (Ct. App. 1988), *rev. denied* 146 Wis.2d 876, 430 N.W.2d 919.

⁶ Section 102.23(1)(b), STATS., contemplates service on a "commissioner." When read with § 102.16(2m)(e), it is not apparent who at DWD would serve the function of a "commissioner" for the purposes of substituted service. Nevertheless, we are not called upon to answer this question here: it is undisputed that appellants served DWD with only one copy of their summons and complaint. Section 102.23(1)(b) makes clear, however, that sufficient copies would have to be served for each defendant, so that the copies may be distributed by the agency. Since only one copy was served, no argument can be made that DWD failed to properly serve the other defendants under § 102.23(1)(b), STATS.

