

**COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION**

Case No.: 2017AP59

Complete Title of Case:

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND PREFERRED
METAL PRODUCTS,**

PLAINTIFFS-APPELLANTS,

V.

ROBERT HAAS AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

Opinion Filed: November 8, 2017
Submitted on Briefs: September 26, 2017
Oral Argument:

JUDGES: Neubauer, C.J., Reilly, P.J., and Gundrum, J.
Concurred:
Dissented:

Appellant
ATTORNEYS: On behalf of the plaintiffs-appellants, the cause was submitted on the briefs of *James C. Ratzel of Ratzel, Pytlik and Pezze, LLC*, Brookfield.

Respondent
ATTORNEYS: On behalf of the defendant-respondent (Robert Haas), the cause was submitted on the brief of *Steven G. Kmiec of Kmiec Law Offices, S.C.*, Milwaukee.

On behalf of the defendant-respondent (LIRC), the cause was submitted on the brief of *Steven C. Kilpatrick*, assistant attorney general, and *Brad D. Schimel*, attorney general.

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP59

Cir. Ct. No. 2016CV3494

STATE OF WISCONSIN

IN COURT OF APPEALS

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND PREFERRED
METAL PRODUCTS,**

PLAINTIFFS-APPELLANTS,

v.

ROBERT HAAS AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. In this worker's compensation case, American Family Mutual Insurance Company and Preferred Metal Products (hereinafter, American Family) challenge the admissibility of Dr. Cully White's WKC-16-B

(16-B) certified practitioner’s report filed pursuant to WIS. STAT. § 102.17(1)(d)1. (2015-16)¹ and WIS. ADMIN. CODE § DWD 80.22 (Sept. 2017). American Family argues that while White was licensed to practice medicine at the time he filed his report, he was not so licensed when the hearing took place, and, therefore, his report was not admissible. We find that the plain language of § 102.17(1)(d)1. and DWD 80.22 clearly and unequivocally make the report admissible. American Family’s argument goes to the weight of White’s opinion, not its admissibility. We affirm.

BACKGROUND

¶2 Robert Haas received a work injury on March 1, 2001, which required surgery. Haas’ worker’s compensation benefits were not contested. The current dispute involves three subsequent surgeries that were performed on Haas by White in 2011. White completed form 16-B, the certified practitioner’s report on accident or industrial disease, on both May 4, 2011, and October 3, 2013.² In the reports, White opined that each of the three surgeries he performed on Haas were necessitated due to the “failure of prior surgery and injury” that was “deemed work related by a prior decision of the worker’s compensation division.” In November 2013, White’s ability to practice medicine was limited by order of the

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

² Medical reports are certified on WC-16-B forms. *See* WIS. ADMIN. CODE § DWD 80.22(4) (Sept. 2017). According to the Department of Workforce Development (DWD), the WKC-16-B form “will be made a part of the record at a worker’s compensation hearing” and “was devised to provide competent medical testimony without the necessity of having doctors take time off from their schedules to appear at hearings.” DEPARTMENT OF WORKFORCE DEVELOPMENT, GUIDE FOR WISCONSIN DOCTORS: USING THE WKC-16B FOR WORKER’S COMPENSATION (2003), <https://dwd.wisconsin.gov/dwd/publications/wc/wkc-7760-p.pdf>.

State of Wisconsin Medical Examining Board (MEB), and on December 17, 2013, the MEB accepted the voluntary surrender of White's license to practice medicine and surgery in Wisconsin.³

¶3 On January 26, 2015, the ALJ held a hearing regarding the nature and extent of Haas' injury. American Family objected to the admission of White's reports, arguing that the reports were inadmissible as White was no longer licensed to practice medicine. American Family did not subpoena White to testify at the hearing. The ALJ overruled the objection and allowed White's 16-B reports into evidence and found White's opinion more credible than the expert's written report filed by American Family. American Family appealed. LIRC upheld the decision of the ALJ, the circuit court upheld the decision of LIRC, and we now affirm the decision of LIRC.

DISCUSSION

¶4 Whether White's 16-B reports were admissible under the Worker's Compensation Act requires our interpretation of WIS. STAT. § 102.17(1)(d)1. and WIS. ADMIN. CODE § DWD 80.22. We review the application of a statute and an administrative rule to undisputed facts de novo. *Wisconsin Dep't of Revenue v. Menasha Corp.*, 2008 WI 88, ¶44, 311 Wis. 2d 579, 754 N.W.2d 95. We review

³ We recognize that the parties attempt to make a distinction between the terms physician and doctor, arguing that physician means "an individual possessing the degree of doctor of medicine ... and holding a license granted by the medical examining board," WIS. STAT. § 448.01(5), while a doctor is someone who possesses an advanced medical degree but may not necessarily be licensed to practice medicine. The distinction in this case is a red herring as the undisputed fact is that White was licensed at the time he submitted his 16-B report.

LIRC’s decision, not the circuit court’s. *Milwaukee Cty. v. LIRC*, 2014 WI App 55, ¶13, 354 Wis. 2d 162, 847 N.W.2d 874.

¶5 Three levels of deference exist as to an administrative agency’s interpretation of a statute: great weight, due weight, and de novo review. *Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 2006 WI 86, ¶12, 292 Wis. 2d 549, 717 N.W.2d 184; *see also Milwaukee Cty. v. LIRC*, 354 Wis. 2d 162, ¶¶14-16 (citation omitted). “An administrative agency’s interpretation of its own rules or regulations is controlling unless ‘plainly erroneous or inconsistent with the regulations.’”⁴ *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶11, 299 Wis. 2d 1, 727 N.W.2d 311 (citation omitted). “If [LIRC’s] interpretation is reasonable, it is entitled to controlling weight even if an alternative interpretation is just as reasonable or even more reasonable.” *Madison Gas & Elec. v. LIRC*, 2011 WI App 110, ¶8, 336 Wis. 2d 197, 802 N.W.2d 502 (citing *Menasha Corp.*, 311 Wis. 2d 579, ¶54).

¶6 We need not reach the issue of what level of deference we must afford LIRC’s decision as we conclude that no matter what level of deference we apply, we reach the same conclusion as LIRC.⁵ Both WIS. STAT. § 102.17(1)(d)1.

⁴ We recognize that DWD, not LIRC, developed the rule at issue in this case, but our legislature authorized LIRC to review DWD’s decisions and its interpretations are likewise entitled to controlling deference. *DaimlerChrysler v. LIRC*, 2007 WI 15, ¶22, 299 Wis. 2d 1, 727 N.W.2d 311.

⁵ American Family argues for due weight deference and also suggests that de novo may be appropriate given the issue is one of first impression. American Family, however, fails to address the standard of review for administrative rules. We also observe that American Family’s briefs fail to comply with WIS. STAT. RULE 809.19(1)(d). American Family cites to the appendix, rather than to the record, which is unhelpful as the appendix does not include corresponding record citations and the appendix is not the record. *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

and WIS. ADMIN. CODE § DWD 80.22 are clear that a 16-B report is admissible if it is certified by a doctor licensed in the State of Wisconsin, regardless of the doctor's status at the time of the hearing.

¶7 WISCONSIN STAT. § 102.17(1)(d)1. states, in pertinent part:

The contents of certified medical and surgical reports by physicians ... licensed in and practicing in this state ... presented by a party for compensation constitute *prima facie evidence as to the matter contained in those reports*, subject to any rules and limitations the division prescribes. Certified reports of physicians ... if the practitioner or expert consents to being subjected to cross-examination, also constitute *prima facie evidence as to the matter contained in those reports*. Certified reports of physicians ... are admissible as evidence of the diagnosis, necessity of the treatment, and cause and extent of the disability. (Emphasis added.)

WISCONSIN ADMIN. CODE § DWD 80.22 provides, in pertinent part: “(2) Use of reports shall be permitted in any case in which claim for compensation is made, provided the reporting doctor is available for cross examination.”

¶8 Read together, WIS. STAT. § 102.17(1)(d)1. and WIS. ADMIN. CODE § DWD 80.22 permit a 16-B report to serve as prima facie evidence at a hearing as to “the matter contained in those reports” so long as the doctor consents to and is available for cross-examination. LIRC found that “[t]he most reasonable reading is that the licensure requirement applies when the report is certified” and that “any opinion stated in the report should be viewed as given when the practitioner certifies the written report, rather an arbitrary date of hearing, or hearings, that occur at some future point.” LIRC explained that “[t]o hold otherwise would mean that a party who obtains a report from a licensed doctor in good faith could risk having the report rejected due to acts totally beyond the party's control, such as a long delay in the hearing date or the physician's decision to stop practicing in

the interim.” In addition to the plain reading of § 102.17 and DWD 80.22, we agree with LIRC’s rationale and application of the statute and rule.

¶9 We find no support for American Family’s position that WIS. STAT. § 102.17(1)(d)1. or WIS. ADMIN. CODE § DWD 80.22 requires that a physician who properly certified a 16-B report be licensed at the time of a worker’s compensation hearing. Section 102.17(1)(d)1. explicitly provides that “[c]ertified reports of physicians ... *are admissible* as evidence of the diagnosis, necessity of the treatment, and cause and extent of the disability.” (Emphasis added.) No language in either § 102.17(1)(d)1. or DWD 80.22 excludes the admission of a properly filed 16-B report if the doctor is no longer practicing or licensed to practice medicine. The plain language of the statute requires only that “the practitioner or expert consents to being subjected to cross-examination.” Sec. 102.17(1)(d)1.; *see also* DWD 80.22(2). American Family did not subpoena nor seek to cross-examine White, and there is no dispute that at the time White filed the 16-B reports, he was both licensed and practicing medicine.⁶ LIRC properly upheld the ALJ’s decision to admit White’s 16-B reports.

¶10 American Family argues that despite their failure to subpoena him, White could not have testified at the hearing as without a medical license he was no longer qualified to give medical opinions.⁷ American Family’s argument goes

⁶ There is no evidence in the record that White did not consent to being cross-examined or that he was otherwise unavailable.

⁷ American Family also argued before LIRC and the circuit court that because White did not have a medical license, allowing him to testify at the hearing would constitute an unauthorized practice of medicine. It appears that American Family has abandoned this argument on appeal; thus, we do not address it.

to the weight of White's opinion evidence rather than its admissibility, to the extent it can be shown to be relevant. The statutes expressly make the contents of a properly filed 16-B report "prima facie evidence as to the matter contained in those reports." WIS. STAT. § 102.17(1)(d)1. The relevant time frame for the matters contained in the reports is when they were written. To the extent American Family sought to discredit White's credentials and opinions as a result of his later loss of licensure, they may be entitled to do so via cross-examination, but they chose not to. The only requirement of § 102.17(1)(d) and WIS. ADMIN. CODE § DWD 80.22 is that the doctor consent to and be available for cross-examination. *See* § 102.17(1)(d)1.; DWD 80.22(2). The cause of the lack of licensure at the time of the hearing may be relevant to the doctor's earlier opinions, but that evidence goes to weight, not admissibility.

CONCLUSION

¶11 A 16-B report properly and timely filed is admissible and "constitutes prima facie evidence as to the matter contained in those reports" so long as the doctor is available for cross-examination at a worker's compensation hearing. WIS. STAT. § 102.17(1)(d)1.; WIS. ADMIN. CODE § DWD 80.22. Any change in the doctor's licensure status post-16-B goes to the weight of the evidence "contained in those reports."

By the Court.—Order affirmed.

