

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 28, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0951

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**STRATFORD AREA FIRE DEPARTMENT AND EMPLOYERS
MUTUAL CASUALTY CO.,**

PLAINTIFFS-APPELLANTS,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND JOHN
KRAUSE,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Stratford Area Fire Department and its insurer appeal a judgment affirming a decision of the Labor and Industry Review Commission. The commission affirmed an administrative law judge's

interlocutory order increasing John Krause's temporary total disability benefits and dismissing his application for permanent partial disability benefits without prejudice. The ALJ found that Krause's claim for loss of earning capacity benefits was premature because, although Krause sustained "unscheduled" injuries, he had not completed vocational retraining and the evidence submitted to the ALJ was inadequate to determine whether those injuries resulted in permanent partial disability. Stratford argues that the commission improperly calculated Krause's weekly wage and that it lacked authority to dismiss Krause's claim without prejudice after he failed to present sufficient evidence at the hearing. We reject these arguments and affirm the judgment.

¶2 Krause was injured when he was struck by a car while working as a part-time firefighter for \$8 per hour. WISCONSIN STAT. § 102.11¹ and WIS. ADM. CODE § DWD 80.30 create a presumption that a volunteer firefighter is entitled to the average maximum weekly earnings of a full-time firefighter. *See City of Elroy v. LIRC*, 152 Wis. 2d 320, 326, 448 N.W.2d 438 (Ct. App. 1989). That presumption may be rebutted by a "specific showing ... made in an individual case that such wage is not proper." *See* WIS. ADM. CODE § DWD 80.30. Relying on *Elroy*, LIRC correctly concluded that Stratford could rebut the presumption of maximum earnings, but only to the extent that there is a disparity between the maximum earnings figure and the "usual going earnings" paid to full-time firefighters. Stratford could overcome the presumption by showing a lower rate for full-time firefighters in the area, not by showing that Krause was paid less than the rate for a full-time firefighter. Because Stratford had not submitted any proof

¹ All references to the Wisconsin Statutes are to the 1997-98 version.

of the “usual going earnings” of full-time firefighters in the area, LIRC correctly concluded that the presumption had not been rebutted.

¶3 WISCONSIN STAT. § 102.18(1)(b) gives LIRC discretion to issue interlocutory orders and does not restrict the type of order that may be interlocutory. The statute allows reservation of jurisdiction where the effect of injury may be uncertain or the medical evidence is considered inadequate. *See* Legislative Reference Bureau Analysis of 1973 Assembly Bill 952.

¶4 LIRC properly exercised its discretion when it issued an interlocutory order regarding Krause’s claim for permanent partial disability benefits. Because this matter is committed to agency discretion, the scope of our review is narrow and LIRC’s reservation of jurisdiction will be upheld unless Stratford can establish a flagrant abuse of discretion. *See Appleton Electric Co. v. Minor*, 91 Wis. 2d 825, 831, 284 N.W.2d 99 (1979). Based on a report from the Department of Vocational Rehabilitation, LIRC found that there was a possibility Krause suffered permanent partial disability. It reasonably retained authority to compensate Krause for that disability because the evidence presented at the hearing was inadequate to make a final determination. *See Vernon County v. DILHR*, 60 Wis. 2d 736, 740, 211 N.W.2d 441 (1973).

By the Court.—Judgment affirmed.

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

