

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

AUGUST 28, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**CEMENTATION COMPANY
OF AMERICA and
LUMBERMENS MUTUAL
CASUALTY COMPANY,**

Plaintiffs-Appellants,

v.

**LABOR AND INDUSTRY
REVIEW COMMISSION
and WILLIE T. SEBREE,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Waukesha County:
PATRICK L. SNYDER, Judge. *Affirmed.*

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

ANDERSON, P.J. Cementation Company of America and
its insurer, Lumbermens Mutual Casualty Company (collectively Cementation),
appeal from the trial court's order affirming the Labor and Industry Review

Commission's (LIRC) interlocutory order awarding Willie T. Sebree compensation for permanent total disability and medical expenses resulting from his compensable back injury on February 2, 1986. Cementation maintains that LIRC did not have jurisdiction to decide Sebree's claims for permanent total disability and related medical expenses. Cementation further argues that the doctrines of claim preclusion and issue preclusion prohibit litigation of the disability issue which was allegedly adjudicated at the August 18, 1988, hearing. We conclude that under § 102.18(1), STATS., LIRC had authority to issue the 1988 interlocutory order preserving the issue of additional disability and jurisdiction to issue the 1994 interlocutory order awarding permanent total disability benefits and medical expenses to Sebree. We also conclude that the doctrines of claim and issue preclusion are not applicable.

The facts are undisputed. Sebree was employed as a construction worker/miner at Cementation. On February 3, 1986, Sebree sustained an injury to his back while working in an underground tunnel. He was hospitalized for eighteen days, at which time he was treated by Joseph Armah, D.O. The CT scan taken during his hospitalization showed no evidence of definite spinal disc herniation.

Following his release from the hospital, Sebree was referred to Lee M. Tyne, M.D., for his persistent back pain. An X-ray taken in September 1986 showed evidence of degenerative disc disease. The CT scan and myelogram taken in October 1986 showed a herniated intervertebral disc with spinal instability. Rather than undergoing surgery, as recommended by Tyne, Sebree

returned to Armah for physical therapy, diathermy, manipulation and ultrasound treatments.

Cementation obtained a report dated March 27, 1986, from its independent medical examiner, Gerald Zupnik, M.D. Zupnik described the injury as trivial and concluded that it did not result in permanent disability. Rather, Zupnik determined that Sebree should not lift more than fifty or sixty pounds based upon Sebree's preexisting condition—a 1974 injury which resulted in disc fusion and a 1984 back strain.

Nevertheless, Cementation admitted liability and paid temporary total disability benefits from February 4, 1986, to April 9, 1986, totaling \$3070.67 and medical expenses of \$1524.38. On June 10, 1986, Sebree filed an application for a hearing seeking continued temporary total disability benefits.

On August 17, 1988, a formal hearing was held before an administrative law judge (ALJ). Sebree asserted that as a result of the 1986 back injury, he was permanently and totally disabled. LIRC entered an interlocutory order awarding Sebree certain medical expenses. However, because Sebree could "be in need of additional medical treatment and [could] be entitled to additional disability," jurisdiction was reserved for "such further findings and orders as may be warranted."¹

¹ On January 27, 1989, LIRC affirmed the 1988 interlocutory order without modification.

Cementation appealed to the circuit court contending that the ALJ and LIRC committed an misuse of discretion by making the order interlocutory instead of final as to additional disability and medical expenses. The court concluded that the 1986 myelogram report and Sebree's continued treatment provided a reasonable basis for reserving jurisdiction. The court of appeals, in an unpublished summary disposition, affirmed and adopted the trial court's decision as "a proper analysis of the law and a correct application of the law to the facts of the case."

A new application for a hearing was filed on September 30, 1992, and was heard on December 22, 1993.² Additional medical reports and records were introduced by both parties. LIRC determined that Tyne's opinion was most credible and adopted his finding that "[Sebree] sustained an additional 2 percent compared to disability to the body as a whole, caused by the February 3, 1986 work injury."³ LIRC further concluded that Sebree "sustained permanent total disability as a result of the compensable back injury of February 3, 1986, and the disability began on March 4, 1993, when Dr. Tyne first set out the applicant's permanent restrictions." Accordingly, Sebree was awarded permanent total disability benefits and medical expenses incurred as a result of the work injury. LIRC reserved jurisdiction with respect to future medical expenses.

² On December 22, 1994, LIRC modified and, as modified, affirmed the ALJ's findings and order of March 24, 1994.

³ Cementation paid permanent partial disability at ten percent compared to disability to the body as a whole for the 1974 injury and fusion surgery. Tyne's opinion resulted in an additional two percent rating attributable to the 1986 injury.

Cementation sought judicial review of the 1994 interlocutory order. Cementation argued that LIRC only had jurisdiction to hear the issue of additional medical benefits and was prohibited by the doctrines of res judicata and estoppel from litigating the disability issue which was previously decided at the 1988 hearing. The trial court concluded that: (1) claim preclusion was inapplicable because the interlocutory order was a temporary order and not a final decision of the whole controversy, (2) the interlocutory order preserved jurisdiction until Sebree's injuries were resolved and the application of issue preclusion under these circumstances would be fundamentally unfair and (3) there was substantial evidence presented at the hearing to support LIRC's determination that Sebree was permanently and totally disabled. Cementation appeals.

We first address the appropriate standard of review. Cementation does not contest the sufficiency of the evidence; rather, it challenges the jurisdiction of the ALJ to hold the December 22, 1993, hearing. Whether jurisdiction was retained is a question of law. It is not an issue requiring specialized knowledge or technical competence which only the agency can provide. Nor does it involve an agency interpretation which is the result of a course of uniform interpretation over a period of time. *See Local No. 695 v. LIRC*, 154 Wis.2d 75, 84, 452 N.W.2d 368, 372 (1990). We owe no deference to LIRC's determination when this court is as competent as the agency to determine a question of law. *Schachtner v. DILHR*, 144 Wis.2d 1, 4, 422 N.W.2d 906, 908 (Ct. App. 1988).

On appeal, Cementation argues that: (1) despite the interlocutory order, LIRC did not have jurisdiction to hear and decide Sebree's claims which were litigated at the 1988 hearing; (2) Sebree has but one cause of action for benefits and may not litigate claims which have already been adjudicated under *Lisney v. LIRC*, 171 Wis.2d 499, 493 N.W.2d 14 (1992) and (3) the doctrines of claim preclusion and issue preclusion prohibit this second litigation. We will address each issue separately.

The central issue is whether LIRC had jurisdiction to hear and decide Sebree's 1992 application for permanent total disability. Cementation concedes that the Department of Industry and Human Relations (DILHR) has the power and authority to issue interlocutory orders under § 102.18(1), STATS., and that these orders are not subject to claim preclusion. Cementation contends however that the issue of permanent total disability was adjudicated at the 1988 hearing. Cementation maintains that claim preclusion applies to those issues which have been adjudicated (permanent total disability), but not to portions of the order which were interlocutory (medical expenses).

At the August 1988 hearing, the ALJ made the following comments:

[T]he record speaks for itself, Mr. Silver. There is no evidence in the record that Mr. Sebree has any permanent disability from the '86 injury. I accept his representations about what he can do and what he can't do. But there is no medical evidence to support his claim. I don't - I don't doubt it may exist somewhere, but it's not here.

There is nothing to say there is aggravation on a temporary or permanent basis. ... It's my medical opinion that Mr. Sebree has an occupational back. But my medical opinion isn't worth anything. We don't have any evidence in the record to support your claim. The only alternative I'm going to have is to dismiss the application. I can't make a finding based on this record.

[T]he motion for additional time ... to obtain additional evidence is denied. You'll receive a written order.

Although the inference is that the ALJ dismissed the application, this is not clearly stated. Rather, the ALJ indicated that he believed Sebree's testimony and that he believed Sebree had "an occupational back." Only the motion for additional time was plainly denied. The oral pronouncement by the ALJ is ambiguous as to Sebree's application for permanent disability.

In contrast, the 1988 interlocutory order provided:
[N]o evidence was submitted by [Sebree] ... suggesting permanent partial disability or the imposition of restrictions. Consequently no loss of earning capacity can be assessed without medical evidence of permanency or restrictions. ... Because [Sebree] may be in need of additional medical treatment and may be entitled to additional disability, jurisdiction is reserved for such further findings and awards as may be warranted.

Clearly the order reserved jurisdiction for a hearing and a determination regarding additional disability in the future.

The comments made by the ALJ at the hearing are ambiguous and they conflict with the written interlocutory order. When there is a conflict between an ambiguous oral pronouncement and the written judgment, the intent of the judge

controls the determination. See *State v. Lipke*, 186 Wis.2d 358, 364, 521 N.W.2d 444, 446 (Ct. App. 1994). “[W]here the oral pronouncement is ambiguous, it is proper to look at the written judgment to ascertain the court’s intention.” See *id.* (quoted source omitted). Here, the written order is unambiguous. The order clearly expresses the ALJ’s intent that jurisdiction be reserved for such further findings as may be warranted, *i.e.*, additional medical treatment and additional disability. We so hold.

Moreover, this issue was previously addressed by this court. Although Cementation does not cloak its argument on this appeal as an abuse of discretion, it makes the same argument under the guise of jurisdiction. In Cementation’s first appeal, it argued that LIRC misused its discretion because the order should have been final as to disability, *i.e.*, the issue was adjudicated at the hearing. On this appeal, Cementation argues that LIRC did not have jurisdiction because the claim for disability was previously litigated at the 1988 hearing. Clearly it is the substance of a party’s argument which is controlling, not the labels affixed to it. We have already determined that LIRC properly reserved jurisdiction for further findings and awards, including additional disability. It is a long-standing rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal. *Univest Corp. v. General Split Corp.*, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989). Accordingly, we affirm the trial court’s conclusion that LIRC had jurisdiction to hear and decide Sebree’s claims for additional disability and medical expenses.

Citing *Lisney*, Cementation maintains that Sebree is precluded from filing this application for benefits because it has already been adjudicated. This argument is equally unpersuasive. We have twice determined that LIRC properly reserved jurisdiction if Sebree applied for additional disability and medical expenses.

Lisney holds that an employer is required “to pay medical expenses even after a *final order* has been issued.” *Lisney*, 171 Wis.2d at 503, 493 N.W.2d at 15 (emphasis added). Here, the order is interlocutory, not final. Moreover, the *Lisney* holding is based on an interpretation of § 102.42(1), STATS., 1989-90, and has no application here.

Cementation’s final argument is that the doctrines of claim preclusion and issue preclusion prohibit Sebree’s second application.⁴ The application of preclusion doctrines to a given set of facts is a question of law which this court reviews without deference to the trial court. *Lindas v. Cody*, 183 Wis.2d 547, 552, 515 N.W.2d 458, 460 (1994).

Under claim preclusion, “a *final judgment* is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceeding.” *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995) (emphasis added; quoted source omitted).

⁴ Although Cementation refers to the doctrine of estoppel by record in its brief, the argument is undeveloped. Accordingly, we decline to consider it. *Fritz v. McGrath*, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988) (appellate court does not consider arguments “broadly stated but never specifically argued.”).

Issue preclusion limits “the relitigation of issues that have been actually litigated in a previous action.” *Lindas*, 183 Wis.2d at 558, 515 N.W.2d at 463. Issue preclusion does not require an identity of parties. *Id.* Rather, courts must conduct a “fundamental fairness” analysis which requires consideration of an array of factors in deciding whether issue preclusion is equitable in a particular case. *Id.* at 559, 515 N.W.2d at 463.

We need only address whether the doctrine of issue preclusion applies to the 1988 interlocutory order.⁵ The “fundamental fairness” analysis requires consideration of some or all of the following factors:

- (1) could the party against whom preclusion is sought, as a matter of law, have obtained judicial review of the judgment;
- (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
- (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;
- (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or
- (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Michelle T. v. Crozier, 173 Wis.2d 681, 688-89, 495 N.W.2d 327, 330 (1993).

Under § 102.18(1)(b), STATS., “the department may in its discretion after any hearing make interlocutory findings, orders and awards which may be enforced

⁵ Obviously the doctrine of claim preclusion does not apply as the order in question was interlocutory, not final. Accordingly, we need not address this argument.

in the same manner as final awards.” In addition, “[i]f the record before the commission indicates that a definite determination cannot then be made that the employee will not sustain a greater percentage of disability in the future, the commission should reserve jurisdiction by making its award interlocutory.” *Vernon County v. DILHR*, 60 Wis.2d 736, 740, 211 N.W.2d 441, 443 (1973) (quoting *Larsen Co. v. Industrial Comm'n*, 9 Wis.2d 386, 392, 101 N.W.2d 129, 132 (1960)).

This was exactly what occurred here. LIRC specifically found that there was no evidence submitted by Sebree suggesting permanent partial disability or the imposition of restrictions which prevented the assessment of earning capacity. However, LIRC determined that Sebree may be in need of additional medical treatment and may be entitled to additional disability in the future. In circumstances such as this, the supreme court has mandated that LIRC reserve jurisdiction by making its award interlocutory. We are bound by the precedent of our supreme court. *Livesey v. Copps Corp.*, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979). Based upon the individual circumstances of this case, it would be fundamentally unfair to apply the doctrine of issue preclusion. Accordingly, we affirm LIRC’s interlocutory order awarding Sebree permanent total disability and medical expenses.

By the Court. – Order affirmed.

Not recommended for publication in the official reports.