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DISTRICT II

April 13, 2022

To:

Hon. Teresa S. Basiliere
Circuit Court Judge
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Colin Hector
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Matthew Frederick
136 S. Lyons St.
Marquette, WI 53947

You are hereby notified that the Court has entered the following opinion and order:

2021AP175

Menasha Packaging Co., LLC v. LIRC (L.C. #2020CV348)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in Wis. Stat. Rule 809.23(3).

Menasha Packaging Co., LLC and Lumbermens Mutual Ins. Co. (collectively “Menasha”) appeal the circuit court order affirming the Labor and Industry Review Commission’s (“LIRC”) decision that set aside the Division of Hearings and Appeals’s (“the Division”) two decisions dated August 16, 2019, and that concluded Menasha is liable for Matthew Frederick’s claimed medical expenses, reasonable required future medical expenses related to the injury, and additional disability compensation Frederick may be entitled to resulting from his injury. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).¹ We affirm.

Frederick suffered a work-related traumatic eye injury on July 17, 2001,² while working for Menasha and thereafter received worker's compensation benefits. Due to the injury, he has an increased risk of developing glaucoma and requires regular follow-ups as well as eye drop medication. Menasha last paid disability compensation on October 10, 2005. As a result, pursuant to WIS. STAT. § 102.17(4) (2001-02), the statute of limitations was to expire on October 10, 2017, absent the filing of a hearing application. After the statute of limitations expired, Frederick could pursue a claim for the work-related injury with the Work Injury Supplemental Benefit Fund ("WISBF").³

Frederick filed a hearing application with the Division on July 8, 2016. The application did not list a specific claim or request a specific remedy. At the time Frederick filed the application, the Division allowed claimants to file a hearing application for the sole purpose of tolling the statute of limitations. Pursuant to that policy, the Division thereafter kept the hearing

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² In its May 8, 2020 decision, LIRC found that Frederick sustained a work-related eye injury on July 21, 2001, while employed by Menasha. In that same decision, LIRC also identified the injury date as July 16, 2017. Numerous documents throughout the record, including Frederick's July 2016 and March 2018 hearing applications, identify July 17, 2001, as the injury date. Because the date of injury is not dispositive, we need not resolve this discrepancy and will use July 17, 2001, as the date of injury. In the future, LIRC should be mindful of the importance of ascertaining the correct date an event occurred—and remaining internally consistent in doing so—in its decisions.

³ *See* WIS. STAT. § 102.66(1).

application open for approximately five years.⁴ On October 3, 2016, a Division administrative law judge (ALJ) informed Frederick by letter that his July 2016 hearing application would be held open for five years.

The Division thereafter issued a hearing notice in January 2017 identifying “primary compensation” as the sole issue for a March 13, 2017 hearing. However, Division ALJ Stanley H. Michelstetter ultimately dismissed Frederick’s July 2016 hearing application without prejudice on February 15, 2017, after receiving communication from Menasha’s attorney that the purported payment issue had been resolved and confirming with Frederick via email that Frederick did not dispute Menasha’s position and it would therefore be unnecessary to conduct the hearing. Although the ALJ’s email requested that Frederick indicate whether he agreed to the dismissal of his July 2016 application, Frederick’s response was silent as to dismissal.

Frederick filed a second hearing application on March 8, 2018, and after Frederick eventually submitted additional supporting documentation, a hearing was scheduled for May 23, 2019, to address medical expenses and a potential statute of limitations issue. On August 16, 2019, ALJ Michelstetter issued two orders: the first order set aside the February 15, 2017 order dismissing Frederick’s July 2016 hearing application because ALJ Michelstetter concluded the dismissal had been “improperly issued,” and the second order found Menasha liable for

⁴ The policy stated: “The department will serve an application for hearing that is filed for the purpose of tolling the statute of limitations. In general, we place a five-year follow-up on these files.” The Division purportedly revised that policy, effective March 1, 2017, to require that a hearing application state a current or future claim with supporting medical documentation, and pursuant to this revised policy, it would no longer serve hearing applications filed for the sole purpose of tolling the statute of limitations. Because that purported change in policy does not impact our decision in this matter, we do not address it further.

Frederick's current medical expense claims and for future medical expenses. Menasha filed a motion for reconsideration on August 28, 2019, which ALJ Michelstetter denied.

In early September 2019, Menasha petitioned LIRC for review of ALJ Michelstetter's August 16 orders, as well as his August 28 denial of Menasha's motion for reconsideration. LIRC issued its findings and order in May 2020 and set aside ALJ Michelstetter's two August 16, 2019 decisions and substituted its decision in place of the ALJ's. Among other things, LIRC concluded the February 2017 dismissal order was "null and void" based on its finding that the February 2017 dismissal order "was not a legally competent order" because it had not been issued in compliance with the Division's statutory authority and because it had been issued in violation of Frederick's due process rights.⁵ Having set aside the February 2017 dismissal order, LIRC determined that Frederick's July 2016 hearing application, which tolled the statute of limitations, remained open. It therefore concluded Menasha is liable for current medical expenses, "reasonably required future medical expense, and ... any additional disability compensation to which the applicant may become entitled" as a result of the work-related eye injury.

Menasha sought judicial review pursuant to Wis. Stat. § 102.23, asserting that: (1) LIRC "acted without or in excess of its powers" in vacating the Division's February 2017 order and in concluding Menasha is liable for Frederick's medical expenses; (2) LIRC's factual findings "do not support the order or award;" and (3) LIRC's factual findings "are not supported

⁵ LIRC also found the dismissal violated the Work Injury Supplemental Benefit Fund's (WISBF) due process rights. Because we conclude Frederick's March 2018 hearing application was timely, we do not address the WISBF further.

by credible and substantial evidence.” In a one-page written decision, the circuit court affirmed LIRC’s decision in its entirety. On appeal to this court, Menasha argues that LIRC did not have authority to set aside the February 2017 dismissal order, that neither Frederick nor WISBF were denied due process when the Division dismissed Frederick’s July 2016 hearing application, and that WIS. STAT. § 102.17(4) (2001-02) bars Frederick’s claim for additional medical expenses.

On appeal, we review LIRC’s “factual findings and legal conclusions, rather than those of the circuit court.” *Mueller v. LIRC*, 2019 WI App 50, ¶17, 388 Wis. 2d 602, 933 N.W.2d 645. We will defer to LIRC’s factual findings “if they are supported by credible and substantial evidence.” *Id.*; WIS. STAT. § 102.23(6). We review LIRC’s legal conclusions *de novo*, but “in evaluating the persuasiveness of an administrative agency’s arguments, we give ‘due weight’ to the agency’s experience, technical competence, and specialized knowledge.” *Mueller*, 388 Wis. 2d 602, ¶17 (citing *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶3, 84, 382 Wis. 2d 496, 914 N.W.2d 21).

“[I]n the absence of fraud,” LIRC’s factual findings are conclusive. WIS. STAT. § 102.23(1)(a)1. If LIRC’s order or award depends on its factual findings, “the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact.” Sec. 102.23(6). However, the court may “set aside [LIRC’s] order or award … if the … order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.” *Id.*

On appeal, the parties, and Menasha in particular, focus largely on the question of whether LIRC exceeded its authority in setting aside the February 2017 dismissal. However, it is unnecessary to resolve that question because, even assuming LIRC did not have the authority to

do so, and the February 15, 2017 dismissal order was therefore a final order, Frederick's March 8, 2018 hearing application was nevertheless timely based on the application of basic tolling principles.

In its appellate brief, LIRC argues that the Division's tolling policy in effect when Frederick filed his July 8, 2016 hearing application tolled the statute of limitations and that the statute of limitations therefore did not run until after October 10, 2017, the date upon which the statute of limitations would have otherwise run based upon application of WIS. STAT. § 102.17(4) (2001-02). We agree.

Although WIS. STAT. § 893.13, the general tolling statute, may not specifically apply to this matter, it nevertheless provides guidance for applying general tolling principles to the statute of limitations at issue here. Section 893.13(2) provides that:

A law limiting the time for commencement of an action is tolled by the commencement of the action to enforce the cause of action to which the period of limitation applies. The law limiting the time for commencement of the action *is tolled for the period from the commencement of the action until the final disposition of the action.*

(Emphasis added.) Section 893.13(1) defines "final disposition" as:

the end of the period in which an appeal may be taken from a final order or judgment of the trial court, the end of the period within which an order for rehearing can be made in the highest appellate court to which an appeal is taken, or the final order or judgment of the court to which remand from an appellate court is made, whichever is latest.

Sec. 893.13(1).

Applying that framework here, when Frederick filed his July 8, 2016 hearing application, the twelve-year statute of limitations stopped running from that date until the time of "final

disposition,” which in this case was March 8, 2017—twenty-one days after the Division dismissed the July 2016 hearing application and no appeal had been taken within the appeal period. *See* WIS. STAT. § 102.18(3); *see also Johnson v. County of Crawford*, 195 Wis. 2d 374, 380-81, 536 N.W.2d 167 (Ct. App. 1995) (explaining how to determine that period of time tolled pursuant to WIS. STAT. § 893.13). The twelve-year statute of limitations period that would have otherwise run on October 10, 2017, was therefore extended by 243 days—the length of time between July 8, 2016, and March 8, 2017—and therefore did not expire until June 10, 2018.⁶ Because Frederick filed the March 8, 2018 hearing application prior to that date, that application was timely.⁷ Accordingly, we agree with LIRC’s conclusion that Frederick’s claim is not time barred, albeit on different grounds.⁸

Therefore,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

⁶ LIRC asserts that the July 8, 2016 filing extended the twelve-year statute of limitations period by 459 days—the amount of time left between that filing date and October 10, 2017, when the statute of limitations would have otherwise run based on Menasha’s last payment date. In calculating the tolled period, it appears that LIRC failed to account for the statutory limitation period beginning to run again upon the expiration of the twenty-one day appeal period.

We also note that to the extent Menasha argues that LIRC made a “finding” as to when the statute of limitations ran absent the filing of a hearing application (October 10, 2017) or that LIRC has already decided the statute of limitations issue, whether the statute of limitations has run is a legal question—not a factual one—and we are not bound by LIRC’s conclusion.

⁷ LIRC has likewise acknowledged the logic of applying WIS. STAT. § 893.13 in the context of a worker’s compensation matter. *See Arvanites v. GP Constr.*, WC Claim No. 1998-056392 (LIRC Sept. 8, 2014).

⁸ Because we conclude the March 8, 2018 hearing application was timely, we need not address the parties’ additional arguments. *See State v. Lickes*, 2021 WI 60, ¶33 n.10, 397 Wis. 2d 586, 960 N.W.2d 855 (only dispositive issues need be addressed).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

*Sheila T. Reiff
Clerk of Court of Appeals*