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STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 34

MILWAUKEE COUNTY

CITY OF WEST ALLIS,

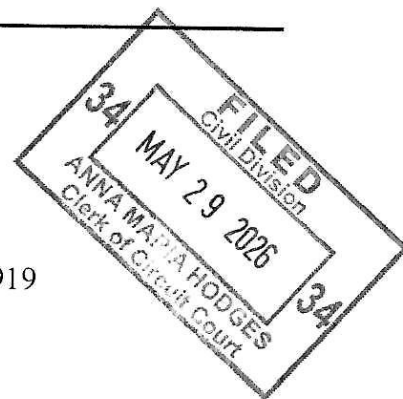
Plaintiff,

v.

Case No. 25-CV-8919

LABOR & INDUSTRY
REVIEW COMMISSION, ET AL.,

Defendants.



**DECISION AND ORDER AFFIRMING
LABOR AND INDUSTRY REVIEW COMMISSION**

The City of West Allis brought this action to set aside a compensation award issued by the Labor and Industry Review Commission (LIRC) to Robert Gendrich for occupational deafness. The City argues that LIRC acted without or in excess of its powers when it determined that Robert Gendrich was entitled to compensation for occupational hearing loss he sustained during two separate periods of employment with the City. This court affirms.

BACKGROUND

Gendrich worked for the City in noisy environments for many years. Between 1969 and 1986, he was exposed to loud engines and hydraulic equipment, as well as jackhammers, while working in the sanitation department. For the bulk of his time, he did not wear any hearing protection. When he left, he “could no longer hear well.” However, he did not seek treatment at the time.

In 2011, during a gap in employment with the City, Gendrich received an audiogram, which showed bilateral hearing loss.

Gendrich again worked for the City as a lawn mower between 2016 and 2019. He wore hearing protection approximately 50% of the time.

On November 16, 2023, Gendrich filed an application for worker's compensation benefits based on his hearing loss, with an "injury date" of May 17, 2019. In addition to submitting his medical records, Gendrich provided the medical opinion of Dr. Matthew Ubell, who determined that Gendrich had mixed loss in the low frequencies and sensorineural loss in the high frequencies. He noted that "there is something causing the conductive component of his overall mixed hearing loss that is not due to noise exposure, but the sensorineural component of component of his hearing loss is consistent with noise exposure." Dr. Ubell concluded that Gendrich's occupational exposure was likely to be a "material contributory causative factor" in the onset or progression of his high frequency sensorineural hearing loss, based in part on a "noise notch," which was typical in occupational hearing loss cases. He rated Gendrich's work-related sensorineural loss at a 46% permanent partial disability.

The City retained their own expert, Dr. Steven Dankle. While Dr. Dankle agreed that Gendrich had mixed hearing loss, he provided a conflicting opinion that occupational noise exposure had no contribution to either the onset or progression of Gendrich's hearing loss. Dr. Dankle theorized that the hearing loss was instead the manifestation of otosclerosis, based in part on the existence of "large air bone gaps" in Gendrich's ears.

Both parties submitted rebuttal opinions. Dr. Ubell disagreed with Dr. Dankle's diagnosis of otosclerosis, noting that Gendrich began experiencing hearing loss at approximately nineteen years old, opining that it was "extremely rare" for otosclerosis to affect someone that young. He

also noted that Gendrich's audiograms contained a "completely flat tympanogram," which was not typical in otosclerosis cases. Dr. Dankle responded by conceding that Gendrich's tympanogram was atypical in otosclerosis cases, but that it did not preclude Gendrich from suffering from that condition.

On June 19, 2024, a hearing was held before Administrative Law Judge (ALJ) Samuel Weinberg. On September 30, 2024, ALJ Weinberg awarded Gendrich permanent partial disability benefits.

On September 18, 2025, LIRC affirmed.

STANDARD OF REVIEW

LIRC's factual findings are conclusive as long as they are supported by credible and substantial evidence. *Morgan v. Lab. & Indus. Rev. Comm'n*, 2024 WI App 39, ¶ 11, 413 Wis. 2d 42, 49, 10 N.W.3d 414, 418. LIRC's legal conclusions are reviewed de novo. *Id.*

1. Gendrich's an award for occupational deafness is not materially impacted by the existence of any hearing loss sustained before 2011.

The City claims it is not responsible for any benefits that accrued before 2016, when Gendrich returned to work for the City, because Gendrich's 2011 audiogram revealed preexisting hearing loss. To support its assertion, the City relies on Wis. Stat. § 102.555(8), which provides:

An employer is liable for the entire occupational deafness to which his or her employment has contributed; but if previous deafness is established by a hearing test or other competent evidence, whether or not the employee was exposed to noise within the 2 months preceding such test, the employer is not liable for previous loss so established nor is the employer liable for any loss for which compensation has previously been paid or awarded.

At the administrative level, LIRC rejected the City's argument:

Such an interpretation would allow an employer to avoid liability any time it conducted a hearing test during the pendency of employment. Because [the City] was the only source of noise exposure in this case, the hearing test simply established hearing loss during the

course of [Gendrich's] various periods of employment with [the City]. It did not establish "previous deafness" that occurred prior to any employment with the [City].

The court agrees with LIRC. Consistent with LIRC's implicit assertion that statutes must be interpreted in such a way as to avoid an absurd or unreasonable result, the court must construe Wis. Stat. § 102.555(8) in a sensible manner. Simply stated, "previous deafness" within the meaning of this statute refers to hearing loss that existed before an employee's exposure to noise in a particular employer's workplace, as established by a hearing test or other competent evidence. This provision limits an employer's liability for occupational deafness by excluding any hearing loss that predated the employee's employment or that has already been compensated. In this case, Gendrich's audiogram reflected deafness attributed to *working for the City*, as there was no evidence of other sources of noise exposure. LIRC did not err in its interpretation of Wis. Stat. § 102.555(8).

2. The applicable twelve-year statute of limitations set forth in Wis. Stat. § 102.17(4) does not operate to preclude Gendrich's occupational-deafness claim.

The City argues that Gendrich is time-barred from seeking benefits for occupational deafness to the extent such deafness was incurred during his employment from 1969 to 1986. To support its assertion, the City relies on Wis. Stat. § 102.17(4)(b), which provides that "benefits or treatment expense for an occupational disease becoming due 12 years after the date of injury . . . shall be paid from the work injury supplemental benefit fund under s. 102.65 and in the manner provided in s. 102.66."

The court agrees with the City that the statute of limitations sets forth a twelve-years time period that is triggered by the "date of injury." However, it is imperative to point out that Wis. Stat. § 102.555(4) provides a special definition of "date of injury" for occupational deafness that

differs from the general definition set forth in Wis. Stat. § 102.01(g).¹ In particular, under Wis. Stat. § 102.555(4), the employee has the option to choose the date of injury from among several triggering events: (a) transfer to nonnoisy employment by an employer whose employment caused the occupational deafness; (b) layoff or termination from employment; (c) voluntary resignation; or (d) retirement. Wis. Stat. § 102.555(4). Accordingly, the twelve-year limitations period under § 102.17(4) runs from whichever triggering event the employee selects as the date of injury under Wis. Stat. § 102.555(4).

LIRC correctly determined that Gendrich's "date of injury" was May 17, 2019, based on Genrich's election of the termination date of the employer-employee relationship. As added support for its conclusion, LIRC noted that pursuant to *North River Ins. Co. v. Manpower Temp. Services*, 212 Wis. 2d 63, 71, 568 N.W.2d 15 (Ct. App. 1997), "[t]he last employer whose employment contributed to the disability is responsible for the entire occupational claim," regardless of any prior exposure. This "no apportionment rule" reflects a legislative choice to place the entire burden on the employer at risk when disability manifests, even though prior employers may have contributed to the disease's development. *See, e.g., Travelers Ins. Co. v. Dep't of Indus., Lab. & Hum. Rels.*, 85 Wis. 2d 776, 271 N.W.2d 152 (Ct. App. 1978)

The court agrees with LIRC. Because Gendrich elected May 17, 2019, as the injury date, the twelve-year statute of limitations set forth in Wis. Stat. § 102.17(4) does not operate to preclude his claim. Based on the plain language of Wis. Stat. § 102.555(4) and the rationale set forth in *North River* and related cases, the City's argument to the contrary must be rejected.

¹ Wis. Stat. § 102.01(g) provides that the "date of injury" means "[i]n the case of a disease, the date of disability or, if that date occurs after the cessation of all employment that contributed to the disability, the last day of work for the last employer whose employment caused disability."

3. The City has not met its burden of persuasion regarding how LIRC's award is impacted by gap in Gendrich's employment with the City.

The City argues that LIRC's award erroneously compensated Gendrich for occupational deafness sustained between 1968 and 1986. According to the City, there were "two separate bona fide employer-employee relationships" based on the thirty-year gap in Gendrich's stints with the City.

To support its assertion that the initial employer-employee relationship terminated in 1986, the City relies on the "right to control" test and the four subsidiary considerations adopted by our supreme court in *Kretz Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182 (1973), to determine the existence of an employer-employee relationship under Wisconsin's Worker's Compensation Act. However, contrary to the City's implicit assertion, Gendrich's award was not predicated on the existence of an employer-employee relationship between the City and Gendrich during the thirty-year gap in Gendrich's employment with the City. *Kretz* is inapposite because LIRC actually found that Gendrich worked for other employers during this timeframe.

The City also relies on *Bradley v. DaimlerChrysler*, WC Claim No. 2002-044843 (LIRC Aug. 3, 2006), to support its assertion that when an employee has separate periods of employment with the same employer, those periods should be evaluated as if they were with separate employers. In *DaimlerChrysler*, an employee worked in a noisy environment for JeepEagle through December 1988, until JeepEagle was acquired by DaimlerChrysler in 1989. At the time of the corporate acquisition, JeepEagle conceded and paid the employee compensation for occupational hearing loss, based on an audiogram conducted in 1979. When the employee retired from DaimlerChrysler in 2002, he filed an occupational hearing loss claim

for the additional hearing loss sustained after 1989. LIRC calculated the employee's entire occupational hearing loss, but gave him a credit for the previous payment.

At the administrative level, LIRC rejected the City's reliance on *DaimlerChrysler* because Gendrich did not previously receive any compensation for occupational hearing loss in his previous employment. Indeed, unlike in *DaimlerChrysler*, where an employee previously received a compensation award from another distinct, corporate entity, Gendrich did not receive any award from the City or any other employer until after he filed his claim in 2023.

DaimlerChrysler is readily distinguishable.

4. It is immaterial whether Gendrich was an active employee of the City when he received his audiogram.

Without citing any legal support for its position, the City argues that Gendrich's occupational deafness award is materially impacted by the fact that the 2011 audiogram, which revealed hearing loss, was conducted during a break in Gendrich's employment with the City. However, Wis. Stat. § 102.555(8) establishes that an employer is liable for the entire occupational deafness to which its employment contributed, regardless of when the hearing loss was discovered or measured. The statute's provision regarding previous deafness established by hearing tests serves to protect employers from liability from pre-existing conditions, not to limit liability for hearing loss caused during actual employment periods. The statutory language is critical because it explicitly states that the timing of noise exposure relative to a hearing test does not affect the employer's liability for hearing loss caused by its employment. The statutory phrase "whether or not the employee was exposed to noise within the 2 months preceding such test" demonstrates that hearing tests can establish baseline hearing loss even when conducted

during periods of non-exposure. The City's legally unsupported argument to the contrary must be rejected.

CONCLUSION

Because LIRC's factual findings are supported by substantial evidence, and it adopted the most reasonable interpretations of the applicable law, this court **AFFIRMS**.

SO ORDERED.

THIS IS A FINAL DECISION FOR PURPOSES OF APPEAL.