COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP239 **Cir. Ct. No. 2008CV4703**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

GREENFIELD PONTIAC-BUICK, INC. AND FEDERATED MUTUAL INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, CHRIS H. WERDIN, ABRA AUTO BODY & GLASS AND CONNECTICUT INDEMNITY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 KESSLER, J. Greenfield Pontiac-Buick, Inc., and its insurer, Federated Mutual Insurance Company (collectively, "Greenfield"), appeal from an

order affirming a Labor and Industry Review Commission (LIRC) decision requiring Greenfield to pay two-thirds of injured employee Chris H. Werdin's worker's compensation benefits. Greenfield argues that Werdin's claim is barred by WIS. STAT. § 102.12 (2007-08)[1] because he did not file a claim for benefits or provide notice to his employer within two years of the date of injury.[2] In the alternative, Greenfield argues that even if the deadline for filing a claim or providing notice to his employer was two years "from the date the employee … knew or ought to have known the nature of the disability and its relation to the employment," *see* ***id.***, Werdin's claim is barred under the undisputed facts of this case. We decline to address Greenfield's first argument because it was not raised before LIRC. With respect to the second argument, we affirm LIRC's decision that Werdin's claim is not barred by § 102.12. Therefore, the circuit court's order is affirmed.

BACKGROUND

¶2 The facts are not at issue on appeal. Werdin sought worker's compensation benefits for back injuries he suffered on two occasions, occurring five years apart. An administrative law judge (ALJ) awarded him benefits and Greenfield, one of his two employers, appealed. LIRC issued a written decision

[1] The 2007-08 version of WIS. STAT. § 102.12 is the same as the version in effect at the time Werdin was injured in 2003. For ease of reference, all references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] Greenfield does not argue that Werdin's claim was barred for failure to give notice within thirty days. *See* WIS. STAT. § 102.12. Failure to give notice to the employer within thirty days bars recovery only if it is found that the employer was misled by the absence of notice. *See* ***id.***; *see also* Thomas M. Domer and Charles F. Domer, 17 WIS. PRAC., WORKERS' COMP. LAW § 23.1 (2009) (A defense based on the thirty-day notice requirement found in § 102.12 "is rarely used, as demonstration of being misled or prejudiced would be an extremely difficult task for a respondent employer or carrier.").

affirming in part and reversing in part. The following facts are taken from LIRC's decision.

¶3 Werdin was first injured on July 27, 1998, while an employee at ABRA Auto Body and Glass. His supervisor told him to climb over an eight-foot wall and jump down into a room to unlock a door. The fall to the ground injured his back. To remedy his back pain, Werdin had fusion surgery. He continued to experience low back and leg pain. His doctor released him effective December 22, 2000, with a ten percent permanent partial disability rating. As of mid-April 2001, Werdin was released for medium duty for eight-hour days. In June 2001, Werdin worked for two weeks at an auto body business, but quit "because the work bothered his back too much."

¶4 In August 2001, Werdin began working as an auto body repairman for Greenfield. According to LIRC's findings, Werdin "wore a back brace and did not tell Greenfield about his preexisting back problems." On January 22, 2003, Werdin was bending while riveting nails into a mini-van and "felt 'something tear loose' in his low back." LIRC, accepting the credibility determinations made by the ALJ, found that Werdin "credibly testified" as follows concerning the events of January 22:

> A I was doing a lot of bending. I was spot riveting these steel nails onto the right quarter panel to make a repair….
>
> Q And what did you feel when it tore loose?
>
> A Like my tailbone was waging all of a sudden.
>
> Q What do you mean it was wagging?
>
> A It was loose.
>
> Q You actually felt something moving?

A Something had tore loose back there.

Q Had anything been tearing loose like that before?

A No.

….

Q So did you ever tell your boss at Greenfield regarding the wagging of your back that had occurred, was it the day before [you were fired on January 23, 2003]?

A It was the day before.

Q And why didn't you tell him?

A Because I have had something moving and rocking and clicking in my back prior, ever since the first surgery.

Q Was there a difference between the rocking and clicking that you had since the first surgery and the rocking and clicking you had when this happened at Greenfield?

A Yes.

Q What's the difference?

A This one was really moving and I was in a great deal of pain.

Q And that's more pain than you had been in before?

A Oh, yes.

Q More rocking and clicking?

A Oh, yes.

(Spacing and quotation marks omitted; second set of ellipses added.)

¶5 LIRC found that Werdin did not immediately tell Greenfield about the incident. LIRC further found:

> The next day, January 23, 2003, [Werdin] was "in a great deal of pain" at work, and he was performing spot welding

> when he accidentally started a fire in a van. This resulted in the employer discharging him that same day. Within a couple of days, [Werdin] contacted [the insurer for his former employer, ABRA Auto Body and Glass] and began requesting renewed medical care for his back. He did not know what was causing his problem at that time, but he noted that "something wasn't right all along" with the result of the April 2000 fusion surgery.

¶6 In June 2003, Werdin received medical care authorized by ABRA's insurer. Over the next year, he worked a variety of jobs but was terminated from one job due to a slowdown in business and from another job because his back problems made it difficult for him to perform his job.

¶7 In 2004 and 2005, Werdin continued to seek medical care for his back pain. Werdin underwent a second surgery in November 2005. His doctor told Werdin's attorney that the initial fusion had never healed and that Werdin's current back problems were related to the original surgery. Werdin's doctor also opined that Werdin's "episodes" in 2003 may have aggravated the problem. Ultimately, the doctor concluded as follows, as quoted in LIRC's decision: '"Both traumatic events [the injuries sustained on July 27, 1998, and January 22, 2003] contributed to [the] injury for which [Werdin] underwent surgery [in November 2005]. Suspect latter injury 2/3; former injury 1/3, in need for surgery.'"

¶8 A different doctor examined Werdin in July 2006 at ABRA's request. That doctor opined:

> I think the work [Werdin] did at … Greenfield Pontiac was a material contributory causative factor in the progression of his back condition, as he had healed from his previous fusion. I also want to point out that the heavy lifting he did at [Greenfield] could cause the problems not being seen, and there also was a specific incident in January of 2003, when he felt his back loosen.

¶9 According to LIRC's findings, a third doctor opined "that there was no causal connection to the January 2003 incident…. [W]ork exposure at Greenfield had not been causative of [Werdin's] current back condition."

¶10 LIRC found, "[o]ut of this complicated and conflicting set of medical opinions," that the "facts support the inference that at least a substantial portion of the low back problem the applicant continued to experience on January 22, 2003, was attributable to the July 1998 work injury and resulting failed fusion." However, LIRC rejected the opinion of one of the doctors "that there was no work injury on January 22, 2003." LIRC explained:

> [Werdin] credibly testified that "something tore loose" in his back while performing his work duties for Greenfield on that date, and that this incident caused a substantial change in his low back symptoms. His credible testimony and the record of his medical treatment support the inference that the January 2003 work incident constituted a causative, traumatic work injury in the form of a precipitation, aggravation, and acceleration of the applicant's preexisting back condition beyond normal progression.

¶11 LIRC ultimately found that Werdin was "temporarily totally disabled from May 7, 2004, through the date of the hearing on April 18, 2007." LIRC found ABRA one-third responsible and Greenfield two-thirds responsible.

¶12 LIRC also addressed Greenfield's argument that Werdin's claim for benefits was barred by WIS. STAT. § 102.12,[3] because Werdin did not report his January 22, 2003 injury to Greenfield until June 29, 2005.[4] LIRC concluded:

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[3] WISCONSIN STAT. § 102.12 provides in relevant part:

> **Notice of injury, exception, laches.** No claim for compensation may be maintained unless, within 30 days

(continued)

> [Section] 102.12 requires notice to the employer within two years "from the date the employee … knew or ought to have known the nature of the disability and its relation to the employment." [Werdin] was understandably confused as to the cause or causes of his low back/leg pain as of January 22, 2003. He is not a physician, and it was never his responsibility to fix medical causation for his condition. He initially guessed that his symptoms were attributable to

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> after the occurrence of the injury or within 30 days after the employee knew or ought to have known the nature of his or her disability and its relation to the employment, actual notice was received by the employer…. Absence of notice does not bar recovery if it is found that the employer was not misled thereby. Regardless of whether notice was received, if no payment of compensation, other than medical treatment or burial expense, is made, and no application is filed with the department within 2 years from the date of the injury or death, or from the date the employee or his or her dependent knew or ought to have known the nature of the disability and its relation to the employment, the right to compensation therefor is barred, except that the right to compensation is not barred if the employer knew or should have known, within the 2-year period, that the employee had sustained the injury on which the claim is based….

[4] Throughout this case, both Greenfield and LIRC assert that Werdin failed to give notice of the injury to his employer within two years of the January 22, 2003 event. Yet, WIS. STAT. § 102.12's language concerning a two-year deadline does not explicitly require an employee to give notice to an employer within two years. Rather, the language requires an employee to *file an application* with the Department of Workforce Development within two years "from the date the employee or his or her dependent knew or ought to have known the nature of the disability and its relation to the employment." *See* ***id.*** However, the statute provides an exception to filing an application within that two-year period: "[T]he right to compensation is not barred if the employer knew or should have known, within the 2-year period, that the employee had sustained the injury on which the claim is based." *See* ***id.*** Thus, an employee can satisfy the two-year notice requirement referenced in § 102.12 by filing an application *or* by making sure that the employer knows about the injury.

In this case, the parties have not identified the date Werdin's application was filed. It appears undisputed, however, that the application was not filed until after Werdin told his employer about his January 2003 injury in a telephone conversation and then sent a follow-up letter to his employer; both of those events occurred in June 2005. Thus, the issue in this case is whether Werdin's communications with his employer occurred within two years of the date Werdin "knew or ought to have known the nature of the disability and its relation to the employment." *See* ***id.***

> a recurrence of problems stemming from the 1998 injury, as evidenced by his contact with [ABRA's insurer] almost immediately subsequent to January 2[2], 2003. Since nobody at the hearing [before the ALJ] asked the applicant why he waited until June of 2005 to notify Greenfield that he believed he had sustained a work injury on January 2[2], 2003, the record does not reveal precisely what it was that prompted him to conclude at that time that the January 2003 incident had been causative. However, the reasonable inference is that after seeking medical care and considering the matter, in June of 2005 the applicant reached this conclusion. Given the complicated nature of the causation issue, as evidenced by the ongoing controversy before [LIRC], it is inferred that the applicant delayed so long in reporting a work injury to Greenfield because he was simply uncertain as to what had been and had not been causative. Accordingly, the commission finds that the applicant satisfied the notification requirement as set forth in [] § 102.12.

¶13 Greenfield sought review of LIRC's decision in the circuit court.[5] The circuit court affirmed[6] and this appeal follows.

[5] Although ABRA and its insurer were found liable for one-third of the claim, they did not seek review of LIRC's decision. Indeed, they urged the circuit court to affirm it in its entirety.

At the circuit court, Greenfield challenged both Werdin's notice of the injury and the apportionment of responsibility of two-thirds to Greenfield and one-third to ABRA. On appeal, Greenfield has not pursued its objection to the apportionment of responsibility and, therefore, we do not address it. *See* ***State v. Young***, 2009 WI App 22, ¶15 n.6, 316 Wis. 2d 114, 762 N.W.2d 736 (where party abandoned argument raised at circuit court, court of appeals would not address it).

[6] Because we review LIRC's decision and not that of the circuit court, we decline to summarize the circuit court's reasoning. However, we appreciate the circuit court's careful and detailed analysis of the issues presented.

DISCUSSION

I. Application of WIS. STAT. § 102.12 to injuries caused by accidents.

¶14 Greenfield's first argument is that the two-year notice provision of WIS. STAT. § 102.12 applies differently to injuries caused by accidents and to injuries caused by occupational disease. Specifically, it argues that employees who suffer *accidental injuries* must file an application or notify an employer within two years from the date of the injury, but an employee with an *occupational disease* claim must act within two years "from the date the employee … knew or ought to have known the nature of the disability and its relation to the employment." *See* ***id.*** Greenfield's argument is based on the legislative history of § 102.12 and case law interpreting that statute.

¶15 As a threshold matter, we must address the fact that Greenfield has raised this particular argument for the first time on appeal.[7] When Greenfield appealed the ALJ's decision to LIRC, it asserted that WIS. STAT. § 102.12 "places a firm requirement on [Werdin] that he provide to his employer notice of the fact that he sustained an injury within two years of when he [ought] to have known he was injured, and known that it was related to his employment." Greenfield elaborated:

> To start counting the two years for Applicant to provide notice, the statute *only requires that he knew or ought to have known about the disability and its relation to his employment.* There cannot be any question, if Applicant's testimony is found to be credible, that he did not immediately know he had suffered disability…. [H]e felt immediate pain, a tearing, a loosening and a wagging.

[7] At oral argument, LIRC acknowledged that Greenfield had not raised before LIRC the issue of different notice requirements for occupational disease and accidental injury cases.

(Emphasis added.) Greenfield did not argue before LIRC that under § 102.12, Werdin was absolutely required to file an application or notify his employer about his injury within two years of the date of injury, and it did not argue that the legislative history of § 102.12 and subsequent case law support a distinction between the notice requirements for accidental injury and occupational disease claims.

¶16 LIRC rejected Greenfield's argument that Werdin immediately knew about the disability resulting from the January 22, 2003 incident and its relation to his employment. *See* WIS. STAT. § 102.12. LIRC was not asked to address, and did not address, whether accidental injury claims are barred outright if an employee fails to act within two years of the date of injury. LIRC did not discuss the legislative history of § 102.12 or the cases that Greenfield cites for the first time on appeal.[8] This is problematic because we normally offer some level of deference in review of LIRC's interpretation of a statute with which it frequently deals. *See* ***County of Dane v. LIRC***, 2009 WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571 ("[D]epending on the circumstances, an agency's interpretation of a statute is entitled to one of the following three levels of deference: great weight deference, due weight deference or no deference."). If we were to consider Greenfield's argument concerning the application of § 102.12 to accidental

[8] The legislative history and case law that Greenfield cites on appeal also were not included in its arguments to the circuit court.

injuries and occupational diseases, we would be considering that issue without having allowed LIRC to consider it as part of its decision-making process.[9]

¶17 "It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency." ***State v. Outagamie County Bd. of Adj.***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376. Greenfield failed to raise before LIRC the issue of whether the WIS. STAT. § 102.12 language "knew or ought to have known" applies to accidental injuries. As a result of not having been asked to consider whether there is a statutory difference in reporting requirements for injuries caused by accidents and injuries caused by occupational disease, LIRC did not address the issue at all. We conclude that because Greenfield failed to raise this issue before LIRC, it cannot raise the issue for the first time on appeal. *See* ***Outagamie County Bd. of Adj.***, 244 Wis. 2d 613, ¶55.

¶18 At oral argument, Greenfield urged this court to nonetheless consider the issue. It admitted that its argument before LIRC was not fully developed, but argued that it had discussed the difference between occupational disease and accidental injury cases. We are not persuaded. We have carefully examined Greenfield's briefs to LIRC. It never argued that the "knew or ought to have known" language of WIS. STAT. § 102.12 applies only to occupational disease cases. Rather, Greenfield's discussion of occupational disease concerned

[9] At oral argument, the parties could not provide this court with references to cases where LIRC has addressed the issue Greenfield raises. Rather, the parties debated the proper interpretation of two Wisconsin Supreme Court cases from the 1950s. *See* ***Boyle v. Industrial Comm'n***, 8 Wis. 2d 601, 99 N.W.2d 702 (1959); ***Zabkowicz v. Industrial Comm'n***, 264 Wis. 317, 58 N.W.2d 677 (1953). The alleged lack of recent cases on this issue makes it even more troubling that we would consider this issue before LIRC has had an opportunity to fully explore the issue at the administrative level.

its argument that Werdin should not be able to assert that he had suffered injury caused by occupational disease, rather than by an accident.

¶19 For the foregoing reasons, we decline to address on the merits Greenfield's argument that Werdin was required to take action within two years of the date his accidental injury occurred, regardless of when he "knew or ought to have known the nature of the disability and its relation to the employment." *See* ***id.***

II. Review of LIRC's finding that Werdin notified Greenfield about the injury within two years of when Werdin knew the nature of his disability and its relation to his employment.

¶20 Greenfield argues that even if the proper inquiry under WIS. STAT. § 102.12 is whether Werdin "knew or ought to have known the nature of the disability and its relation to the employment," *see* ***id.***, Werdin's claim still should have been denied because he knew this information on January 22, 2003, the day he felt a tearing in his back while working at Greenfield's auto shop. Greenfield explains:

> When making factual determinations LIRC at no point determined that Werdin was unaware that he injured himself on January 22, 2003. In its decision, LIRC indicated that "[Werdin] credibly testified that 'something tore loose' in this back while performing his work duties for Greenfield on [January 22, 2003], and that this incident caused a substantial change in his low back symptoms."
>
> Instead, LIRC found that Wis. Stat. § 102.12 did not bar Werdin's claim because he did not know that the traumatic injury … when combined with the effects of [his 1998] injury, was a causative factor in his condition…. This is not the proper application of the "knew or ought to have known" standard for any type of injury, including occupational disease.

(Some bracketing in original.) We begin our analysis of Greenfield's argument by considering the appropriate standards of review.

A. Standards of review.

¶21 Greenfield does not challenge LIRC's factual findings, and this court will not disturb them. *See* ***Milwaukee Bd. of Sch. Dirs. v. WERC***, 2008 WI App 125, ¶7, 313 Wis. 2d 525, 758 N.W.2d 814 ("An agency's findings of fact are conclusive on appeal if they are supported by credible and substantial evidence," which is "that evidence which excludes speculation or conjecture."). With respect to LIRC's application of WIS. STAT. § 102.12, it is well-established that although the "construction of a statute and its application to undisputed facts are questions of law that we generally review independently," we will apply one of three levels of deference to an administrative agency's interpretation of a statute: great weight deference, due weight deference or no deference. *See* ***County of Dane***, 315 Wis. 2d 293, ¶14.

¶22 Here, Greenfield contends that great weight deference is not appropriate because LIRC's interpretation of the statute is not long-standing since "the majority of cases interpreting the pertinent portion of [WIS. STAT.] § 102.12 date from decades ago" and "the current interpretation of LIRC is inconsistent with the prior interpretation of the Industrial Commission and the courts which had limited the applicability of § 102.12 to occupational disease cases." Greenfield also contends that LIRC's decision does not provide uniformity and consistency in the application of the statute because it is "wholly inconsistent with the legislative history and judicial analysis of the statutory provision at issue." In light of this inconsistency, Greenfield contends, not even due weight deference is appropriate; rather, it argues, this court should interpret § 102.12 *de novo*. In the

alternative, Greenfield argues that if any deference is accorded, it should be due weight deference.

¶23 We are challenged to fully address Greenfield's argument concerning the appropriate standard of review because it is unclear if Greenfield's arguments concerning the long-standing nature of LIRC's interpretation of WIS. STAT. § 102.12 have to do with Greenfield's first issue (interpreting § 102.12 differently for occupational disease and accidental injury cases) or its second issue (application of the "knew or ought to have known language" to the facts in this case). Indeed, Greenfield's reference to occupational disease in its argument on the standard of review suggests the thrust of its challenge to affording LIRC's decision deference is based on Greenfield's first argument, which we have declined to address.

¶24 LIRC does not provide detailed argument on the deference issue, but notes that regardless of whether great weight or due weight deference is applied, the result is the same: LIRC's decision should be affirmed.

¶25 We agree with LIRC. Certainly LIRC has been interpreting WIS. STAT. § 102.12 for a long time. Greenfield has not provided compelling examples of instances where LIRC has inconsistently or improperly applied the statutory language "knew or ought to have known the nature of the disability and its relation to the employment." We are unconvinced that *de novo* review is appropriate. *See* ***County of Dane***, 315 Wis. 2d 293, ¶18 (Courts "give no deference to an agency's interpretation of a statute when 'the issue before the agency is clearly one of first impression … or when an agency's position on an issue has been so inconsistent as to provide no real guidance.'") (citation omitted). Furthermore, because our conclusion would be the same regardless of whether due weight or great weight

deference were applied, we decline to decide which of those two levels of deference is most appropriate. *See* ***Aldrich v. LIRC***, 2008 WI App 63, ¶5, 310 Wis. 2d 796, 751 N.W.2d 866 (noting that courts "need not determine what level of deference might be appropriate" where "the result would be the same regardless").

B. Reasonableness of LIRC's interpretation and application of WIS. STAT. § 102.12.

¶26 As noted, Greenfield does not challenge the facts found by LIRC. What Greenfield challenges is LIRC's conclusion that even though Werdin credibly testified that "something tore loose" in his back when he was performing his work duties on January 22, 2003, this does not establish that Werdin then "knew or ought to have known the nature of the disability and its relation to the employment." *See* WIS. STAT. § 102.12. Greenfield cites ***Larson v. Industrial Commission***, 224 Wis. 294, 271 N.W. 835 (1937), in support of its argument that LIRC misapplied the statutory language. In ***Larson***, a worker's compensation case involving a gunshot wound, the court observed that the "knew or ought to have known" language of § 102.12 was "intended to cover cases where there might be some factual basis for ignorance of the character of the disability, and its causal relation to the work in which applicant was engaged." ***Larson***, 224 Wis. at 297. ***Larson*** continued:

> In nearly every accident case this will immediately be apparent, and the provision was directed primarily to cases of industrial disease where it was factually possible for some time after the onset of the disease for the applicant to be in doubt or ignorant, (1) as to what the disease was, and (2), whether it had in fact any relation to his employment.

Id. Greenfield contends that in Werdin's case, the injury was "immediately apparent to Werdin by his own admission."

¶27 Although LIRC did not discuss ***Larson*** in its written decision, we conclude that LIRC's decision is consistent with ***Larson***. ***Larson*** recognized that there are certain accident cases where the employee will be in doubt of "the nature of the disability and its relation to the employment." *See* ***id.***; *see also* WIS. STAT. § 102.12. LIRC found such was the case here, noting that Werdin was "understandably confused as to the cause or causes of his low back/leg pain as of January 22, 2003" due to the fact he had suffered an injury in 1998 and had continued to suffer pain from that injury. LIRC explained that Werdin "initially guessed that his symptoms were attributable to a recurrence of problems stemming from the 1998 injury, as evidenced by his contact with [ABRA's insurer] almost immediately subsequent to January 2[2], 2003." LIRC found that in light of the "complicated nature of the causation issue, as evidenced by the ongoing controversy before [LIRC]," it could be inferred that Werdin "delayed so long in reporting a work injury to Greenfield because he was simply uncertain as to what had been and had not been causative."

¶28 LIRC's application of WIS. STAT. § 102.12 was reasonable. Under the unique facts of this case, where Werdin had a previous injury that had continued to bother him and doctors offered differing opinions as to whether his continuing back problems were caused by the 1998 injury, the 2003 injury or both, it was reasonable to conclude that Werdin did not immediately know, and need not have immediately known, "the nature of the disability and its relation to the employment." *See* ***id.*** As our supreme court noted in ***Trustees v. Industrial Commission***, 224 Wis. 536, 272 N.W. 483 (1937):

> What an employee may think as to the nature of his disability and its relation to his employment is not alone sufficient to start the running of the two-year statute of limitations. To so hold would be to adopt an unthinkably harsh rule. What an employee thinks must be based on

> something more than suspicion and conjecture in order to start the running of the statute of limitations. Such thought must be based upon knowledge of, or upon reliable information regarding the nature of his disability and its relation to his employment….
>
> ….
>
> In our opinion, the compensation law does not put upon an employee the duty of knowing the nature of his disability and its relation to his employment before those things are reasonably ascertainable by the medical profession.

Id. at 541-43. LIRC's decision in this case was consistent with ***Trustees***. Whether we apply due weight deference or great weight deference to LIRC's interpretation and application of § 102.12, we conclude that its decision should be affirmed.

¶29 For the foregoing reasons, we affirm the circuit court order affirming LIRC's decision.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.