COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP649 **Cir. Ct. No. 2013CV760**

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

THE BOLDT COMPANY,

PLAINTIFF-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION, ROGER G. HOLLISTER, THE SAMUEL'S GROUP, INC. AND ACUITY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. The Boldt Company appeals a circuit court judgment affirming a decision of the Labor and Industry Review Commission concerning liability to pay worker's compensation benefits. The employee entitled to compensation, Roger Hollister, worked for The Samuel's Group, Inc.,

and subsequently for Boldt. Hollister had a progressive knee condition that worsened over his career as a result of occupational exposure as a carpenter. LIRC held that Boldt bore the liability for the occupational disease because Hollister first suffered a wage loss caused by the medical condition only after working for Boldt. We affirm.

¶2 Hollister worked as a seasonal carpenter for over thirty years. Hollister went to work for Samuel's in May 2007. During the winter layoff of 2007-08, Hollister saw Dr. Joseph Hebl, who advised Hollister that his knees were such that he should not return to carpentry work without significant work restrictions of sedentary to light duty with no kneeling, squatting or crouching, ladder climbing, and only rare bending, twisting and step climbing.

¶3 However, Hollister returned to work after the seasonal layoff and said nothing about Hebl's restrictions. On February 22, 2008, Hebl opined that Hollister had a 15% permanent partial disability to his knees, but again Hollister did not bring that to his employer's attention. Hollister continued working as before, and did so without requesting medical restrictions, wage loss or making a worker's compensation claim.

¶4 Hollister stopped working for Samuel's at the conclusion of the 2009 construction season. Hollister went to work for Boldt on March 2, 2010, again without medical restrictions. Hollister retired when his job for Boldt ended on October 15, 2010. He concluded he could no longer perform his carpenter's duties because of his knees. Hebl's medical opinion was that the seven-month stint at Boldt caused significant worsening of the knees, and resulted in an overall disability rating for each knee of 20%, an increase of 5% from his previous rating. Hollister filed a worker's compensation claim.

¶5 LIRC held the relevant date of injury/disability for purposes of assigning worker's compensation liability was October 15, 2010. LIRC concluded that where there is a progressive condition culminating in a claim, the relevant date of disability "has consistently been interpreted by courts to be the first wage loss through lost work time attributable to the effects of occupational disease." LIRC emphasized that "in order to recover compensation in a case of occupational disease, there must be actual physical incapacity to work, not a mere medical disability." Summing up the case law, LIRC quoted as follows from ***Virginia Surety Co. v. LIRC***, 2002 WI App 277, ¶15, 258 Wis. 2d 665, 654 N.W.2d 306: "There can be no 'date of disability' unless there is a 'disability' and 'evidence of disability' is the inability to work and resulting non-compensation." Because October 15, 2010 was Hollister's first wage loss from the occupational disease, LIRC assigned liability to Boldt. The circuit court affirmed and Boldt now appeals.

¶6 Liability for an occupational disease is determined by the date of injury. WISCONSIN STAT. § 102.01(2)(g)2.[1] states that "date of injury," in the case of occupational disease, is 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."

¶7 Where there is a continuum of impairment that slowly ripens into a barrier to further work, this court has interpreted WIS. STAT. § 102.01(2)(g) to raise a conclusive presumption that the date of disability is when the employee

[1] References to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

first suffers a wage loss due to that condition. *See* ***Virginia Surety***, 258 Wis. 2d 665, ¶15.

¶8 ***Virginia Surety*** was based upon long-standing principles and resolves this matter. In that case, an employee began work in 1956 and he slowly developed symptoms of silicosis over time beginning in the 1980s. Contrary to doctors' advice, he continued to work without restrictions and there is no indication he ever sought worker's compensation while continuing to work. ***Id.***, ¶¶2-8. The employee ultimately ceased work on August 25, 1997, because of his silicosis, which was the first time that he lost wages because of his condition. ***Id.***, ¶¶2-8. He later made a worker's compensation claim.

¶9 Although Virginia Surety assumed the worker's compensation risk on July 1, 1997, it was liable for the payments to the employee because liability for a progressive condition is not apportioned under Wisconsin law; rather, if a single employer has had successive insurers, liability is imposed upon the insurer whose policy was in force at the time the disability occurred, without contribution from prior employers whose employment was also a cause of the disease. *See* ***id.***, ¶¶15-20.

¶10 In the present case, Hollister returned to work as a carpenter with Samuel's, despite the medical opinions, on January 13, 2008. He neither made a request for restrictions nor brought a worker's compensation claim, and he was able to work. He later began working for Boldt and did not tell Boldt about his work restrictions either. His last day of work was October 15, 2010, when he took his doctor's advice and retired from carpentry work.

¶11 Boldt was the employer whose employment preceded the first loss of wages attributable to the effects of the occupational disease. Hollister lost no

wages due to his progressive knee condition until he had to retire from Boldt on October 15, 2010. Prior to that time, he continued to work seasonally and earn wages as he always had. LIRC therefore correctly concluded Boldt bore the worker's compensation liability.[2]

¶12 Boldt seeks to avoid liability by advocating for a date of disability that predates its employ of Hollister. According to Boldt, worker's compensation liability was triggered on December 13, 2007, when Hollister worked for Samuel's. On that date, Hollister was told that he should have work restrictions because of his knees, which Boldt takes to mean that Hollister was temporarily disabled for a period beginning on December 13, 2007.

¶13 Boldt relies on WIS. STAT. § 102.43(9), which addresses "[t]emporary disability, during which compensation shall be payable for loss of earnings." It explains that the amount "shall include the period during which an employee could return to a restricted type of work during the healing period." It provides compensation schedules that apply when "the injury causes disability," and provides ways of computing the compensation based on total, partial or temporary disability scenarios.

¶14 However, WIS. STAT. § 102.43(9) does not address how to determine a date of injury/disability in the first instance. Rather, it explains how compensation is structured given a date of injury/disability. The operative date of injury/disability is found in the general definition section of WIS. STAT. ch. 102, under WIS. STAT. § 102.01(2)(g), and case law interpreting it. In addition, LIRC

[2] Boldt is self-insured.

correctly recognized that because Hollister did not leave work and sustain a wage loss from his occupational disease before October 15, 2010, he was not entitled to temporary disability compensation.[3] *See* WIS. STAT. § 102.43.

¶15 Boldt also contends that WIS. STAT. § 102.43(9) was amended after our ***Virginia Surety*** decision, but this makes no difference as there is nothing in § 102.43(9) that changes the meaning of "date of injury/disability" in WIS. STAT. § 102.01(2)(g). Boldt's attempts to avoid ***Virginia Surety*** are therefore unpersuasive.

¶16 As an alternative, Boldt proposes February 22, 2008, as a date of permanent partial disability, which is again while Hollister worked for Samuel's. On that date, Hebl opined that Hollister had finished what healing would occur, and was left with a 15% disability to his knees, meaning he should not continue work as a carpenter. Boldt argues that two different statutes, WIS. STAT. §§ 102.52(11) and 102.55(3), support the idea that the statutory date of injury/disability was February 22, 2008.

¶17 However, those two statutes have nothing to do with how to determine Hollister's initial date of injury/disability for his progressive condition. Specifically, WIS. STAT. § 102.52 provides a "permanent partial disability

[3] Boldt insists WIS. STAT. § 102.43(9) "does not say that the loss of earnings must be due to the work injury." Remarkably, Boldt argues Hollister was not employed between the date of Hebl's December 13, 2007 report and his return to work for Samuel's on January 13, 2008, "so he had the required loss of earnings." As mentioned previously, however, ***Virginia Surety Co. v. LIRC***, 2002 WI App 277, 258 Wis. 2d 665, 654 N.W.2d 306, is binding and resolves the issue here. For purposes of assigning worker's compensation liability, the relevant date of injury/disability is when an employee first suffers a wage loss through lost work time *attributable to the effects of the occupational disease*. ***Id.***, ¶¶15-19 (emphasis added). Hollister's seasonal layoff was not lost work time due to his knee condition. Here, October 15, 2010, was Hollister's first wage loss attributable to his knee condition and LIRC correctly assigned liability to Boldt.

schedule," which sets out the formula for determining payments in various circumstances. WISCONSIN STAT. § 102.55(3) adds nuance to the computation process, explaining how to apply the payment schedule to permanent disabilities where the body function is not severed or totally lost. These statutes explain how to calculate payments, but neither statute addresses the date of injury/disability for triggering Hollister's worker's compensation in the first place.

¶18 Boldt also insists that liability should have been apportioned between itself and Samuel's, because only 5% of the 20% disability occurred while Hollister worked for Boldt. Boldt fails to come to terms with the fact that this argument is foreclosed by ***Virginia Surety***. Where there is a progressive condition and successive employers, the last employer/insurer before the wage loss caused by the condition bears the entire liability.[4] *See* ***Virginia Surety***, 258 Wis. 2d 665, ¶20. LIRC properly found that the final one-fourth of the injury (a 5% overall reduction in use) occurred while Hollister worked for Boldt. That is consistent with the factual evidence and Boldt's own summary of it. However, the reason Boldt bore the liability was not because of a fact-finding, but by operation of law. Boldt was the last employer before a wage loss attributable to the effects of the occupational disease.

[4] Boldt also argues WIS. STAT. § 102.18(1)(d) requires apportionment of liability. LIRC responds that Boldt failed to raise this argument until its reply brief before the circuit court, and the issue should therefore be considered forfeited. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. Boldt does not reply to LIRC's argument in this regard, and we thus consider the issue forfeited. In any event, LIRC complied with § 102.18(1)(d), stating Hollister "is entitled to permanent partial disability rated at 20 percent compared to a loss of the leg at both knees."

¶19 As a result, we agree with LIRC's conclusion:

> Before October 2010, the applicant had a "medical disability" of the kind referred to by the court in ***Odanah Iron***, ***North End Foundry*** and ***Virginia Surety***, and was subject to seasonal or economic layoffs for lack of work. However, because he neither followed the work restrictions set by his doctors nor missed work or suffered a wage loss to seek treatment, his occupational bilateral knee condition did not cause a physical incapacity to work resulting in wage loss until he retired. In sum, the commission concludes the applicant's date of injury is October 15, 2010, based on his last day of employment with the last employer, Boldt, whose employment caused his disability. Boldt is therefore liable on this claim.

By the Court.—Judgment affirmed.

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