

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2014AP205
2014AP635
2014AP636**

**Cir. Ct. Nos. 2013CV719
2013CV1216
2013CV751**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2014AP205

**CENTRAL CONTRACTORS CORP. AND HAWKEYE SECURITY INSURANCE
COMPANY,**

PLAINTIFFS-APPELLANTS,

v.

JOHN BLASIUS AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

No. 2014AP635

CPL INDUSTRIES AND WAUSAU UNDERWRITERS INSURANCE,

PLAINTIFFS-APPELLANTS

v.

LABOR AND INDUSTRY REVIEW COMMISSION AND JOHN R. PESZKO,

DEFENDANTS-RESPONDENTS

No. 2014AP636

**JOE DANIELS CONSTRUCTION AND LIBERTY MUTUAL INSURANCE
COMPANY,**

PLAINTIFFS-APPELLANTS

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND TERRY E.
GRUENBERG,**

DEFENDANTS-RESPONDENTS

APPEAL from orders of the circuit court for Waukesha County:
LEE S. DREYFUS, JR. and JAMES R. KIEFFER, Judges. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated worker compensation cases, Central Contractors Corporation and its insurer, Hawkeye Security Insurance Company, CPL Industries and its insurer, Wausau Underwriters Insurance, and Joe Daniels Construction and its insurer, Liberty Mutual Insurance Company,

appeal orders of the circuit court affirming decisions of the Labor and Industry Review Commission (LIRC). We affirm.

¶2 The relevant facts are undisputed. John Blasius, John Peszko, and Terry Gruenberg suffered work-related injuries. Blasius injured his knee, Peszko his shoulder, and Gruenberg his hip. Each man underwent surgical replacement of his affected joint. Persistent problems necessitated revisions of their prostheses.

¶3 The insurers conceded that the injuries were compensable, but disputed the amount of permanent partial disability (PPD) owed. The minimum percentage for loss of use due to a knee or shoulder prosthesis is 50%; for a hip prosthesis it is 40%. WIS. ADMIN. CODE § DWD 80.32(3), (4), (7). Because two surgeries were required to address their injuries, the respondents filed applications for hearings with the Department of Workforce Development (DWD) in which Blasius and Peszko sought 100% PPD and Gruenberg sought 80%.

¶4 In Blasius's and Gruenberg's cases, the administrative law judges (ALJ) awarded the 100% and 80% PPD. They reasoned that, under *DaimlerChrysler v. LIRC*, 2007 WI 15, 299 Wis. 2d 1, 727 N.W.2d 311, and *Madison Gas & Electric v. LIRC (MG&E)*, 2011 WI App 110, 336 Wis. 2d 197, 802 N.W.2d 502, an injured worker is entitled to stack the minimum PPD ratings for each surgical procedure necessitated by the same injury.

¶5 The ALJ in Peszko's case saw it differently. He concluded that WIS. ADMIN. CODE § DWD 80.32(7) provides a minimum of 50% for a prosthesis, not for every surgical procedure connected to it. Pointing out that Peszko has but one prosthesis despite the surgical revision, the ALJ limited Peszko's award to 50%.

¶6 Appellants petitioned LIRC to review the Blasius and Gruenberg decisions; Peszko petitioned for review of his case. LIRC affirmed the decisions in Blasius's and Gruenberg's cases. In Peszko's case, it reversed the ALJ's findings of fact and interlocutory order on grounds that Peszko is entitled to stack the minimum PPD due for each surgical procedure necessitated by the conceded work injury. The circuit court affirmed the LIRC decisions. This appeal followed.

¶7 Judicial review of worker compensation decisions is limited in scope. *See* WIS. STAT. § 102.23 (2011-12).¹ On appeal, this court reviews LIRC's findings of fact and conclusions of law, not those of the circuit court. *See United Parcel Serv., Inc. v. Lust*, 208 Wis. 2d 306, 321, 560 N.W.2d 301 (Ct. App. 1997). Its findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. *See Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995).

¶8 We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. *Begel v. LIRC*, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. Its interpretation of its own rules is controlling unless plainly erroneous or inconsistent with the language of the rule. *Marder v. Bd. of Regents*, 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110. Although DWD, not LIRC, developed the rules at issue, the legislature authorized LIRC to review DWD's decisions and LIRC regularly does so, such that its interpretation is entitled to controlling deference. *DaimlerChrysler*, 299 Wis. 2d 1, ¶22. The party seeking to overturn the decision has the burden of showing LIRC's interpretation

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

is unreasonable. *Painter v. Dentistry Examining Bd.*, 2003 WI App 123, ¶9, 265 Wis. 2d 248, 665 N.W.2d 397.

¶9 The issue is whether LIRC reasonably interpreted WIS. ADMIN. CODE § DWD 80.32 (3), (4), and (7) to allow for “stacking.” Appellants’ argument that that interpretation is unreasonable has been put to rest by our supreme court, *see DaimlerChrysler*, 299 Wis. 2d 1, ¶44, and by this court, *see MG&E*, 336 Wis. 2d 197, ¶34. “[I]nterpret[ing] ... WIS. ADMIN. CODE § DWD 80.32 to allow for additional minimum PPD percentages for ‘multiple or repeat’ surgical procedures ... is reasonable and consistent with the language of the regulation and its intended purpose.” *MG&E*, 336 Wis. 2d 197, ¶15 (citing *DaimlerChrysler*, 299 Wis. 2d 1, ¶32).

¶10 Appellants also contend that LIRC’s interpretation conflicts with WIS. STAT. § 102.55(3).² They misread it to say that 100% disability is permitted only in the case of amputation. Actually, the statute simply directs that compensation for individual injuries be proportional to the disability. As the supreme court observed, “LIRC’s conclusion that additional minimum PPD percentages are allowable for repeat surgical procedures ... is an entirely reasonable one” because “repeat or multiple surgeries have a cumulative, negative

² WIS. STAT. § 102.55(3) provides:

For all other injuries to the members of the body or its faculties which are specified in this schedule resulting in permanent disability, though the member be not actually severed or the faculty totally lost, compensation shall bear such relation to that named in this schedule as disabilities bear to the disabilities named in this schedule.

effect on [the] function of the body part upon which they are performed.”
DaimlerChrysler, 299 Wis. 2d 1, ¶32 n.14.

¶11 Appellants’ last argument is that WIS. ADMIN. CODE § DWD 80.32 does not allow for stacking of prosthesis procedures because a prosthesis is not a surgical procedure. This argument also fails.

¶12 While *DaimlerChrysler* did not involve a prosthesis, it permitted stacking for successive anterior cruciate ligament reconstruction surgeries, both necessitated by the same work injury. *DaimlerChrysler*, 299 Wis. 2d 1, ¶¶1, 4, 5, 44. *MG&E* expanded on that holding and allowed stacking after a second surgery—a total knee replacement. *MG&E*, 336 Wis. 2d 197, ¶1. LIRC’s conclusion that the respondents are entitled to “stack” the PPD percentages for the two surgical procedures necessitated by the injury, even where the procedures involve a prosthetic joint, therefore is reasonable. *DaimlerChrysler* and *MG&E* teach that we must give controlling weight to LIRC’s decisions.

By the Court.—Orders affirmed.

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

