

SUPREME COURT OF WISCONSIN

Beecher v. Labor & Industry Review Commission, 2004 WI 88, 273 Wis. 2d 136

682 N.W.2d 29 (2004) · No. 02-1582 · Decided June 29, 2004

SUMMARY

The Wisconsin Supreme Court held that a claimant seeking permanent total disability benefits under the odd-lot doctrine is not required to present evidence of a reasonable post-injury job search as part of the prima facie case. Once the claimant shows that injury, age, education, capacity, and training make continuing gainful employment unavailable, the burden shifts to the employer to demonstrate employability and the existence of suitable jobs. The court affirmed the court of appeals' reversal of LIRC's decision and rejected LIRC's expansion of the doctrine based on an uncited portion of the Larson treatise.

CASE DETAILS

COURT	Supreme Court of Wisconsin
WRITING FOR THE COURT	Diane S. Sykes
JURISDICTION	Wisconsin
DECIDED	June 29, 2004
DOCKET	02-1582
DISPOSITION	affirmed
PROCEDURAL POSTURE	Review of a court of appeals decision reversing the Labor and Industry Review Commission's denial of permanent total disability benefits on an odd-lot basis and remanding to the agency for rebuttal proceedings.
STANDARD OF REVIEW	The court reviews the agency's decision rather than the circuit court's decision. Whether a claimant has established a prima facie odd-lot case is a question of law. The court reviewed LIRC's interpretation of the judicially adopted Balczewski doctrine de novo because the agency's decision did not purport to interpret a statute or administrative rule.
PRECEDENTIAL VALUE	published precedential opinion of the Supreme Court of Wisconsin
PARTIES	Ralph E. Beecher v. Labor & Industry Review Commission, Outokumpu Copper Kenosha, Inc., Fremont Indemnity Co., Insurer,

TOPICS

workers compensation

administrative law

appellate procedure

standard of review

statutory interpretation

PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether a claimant seeking permanent total disability benefits under Wisconsin's odd-lot doctrine must present evidence of a reasonable post-injury job search as part of the prima facie case.
2. Whether Wis. Stat. § 102.17(7)(a) or DWD § 80.34 requires modification of the Balczewski odd-lot burden-shifting framework.
3. Whether LIRC's conclusion that Beecher failed to establish a prima facie odd-lot case because of an inadequate job search was legally proper.
4. What burden shifts to the employer once a claimant establishes a prima facie odd-lot case.

HOLDINGS

1. A claimant is not required to present evidence of a post-injury job search as part of a prima facie case of odd-lot unemployability, so long as the claimant shows that, because of the industrial injury and factors such as age, education, training, and capacity, the claimant cannot secure continuing and gainful employment.
2. Once the claimant establishes a prima facie odd-lot case, the employer must rebut it by showing that the claimant is employable and that suitable work is regularly and continuously available.
3. In Wisconsin, a prima facie case in this context is generally evidence sufficient to shift the burden of producing or persuading on the relevant issue, rather than merely evidence sufficient to survive a directed verdict.
4. LIRC legally erred by treating the adequacy of Beecher's job search as part of his prima facie odd-lot burden; the agency's decision must be set aside and the matter remanded for rebuttal and further proceedings consistent with the opinion.

KEY QUOTATIONS

"We disagree, and hold that a claimant is not required to present evidence of a job search as part of prima facie case of odd-lot unemployability, provided the claimant shows that because of his injury and the other Balczewski factors such as age, education, capacity, and training, he is unable to secure continuing, gainful employment." (146-147)

"This evidence need not include evidence of a post-injury job search. Once a prima facie odd-lot case is made, it falls to the employer to prove that there is continuous and regular work available to the claimant in order to rebut the prima facie case of odd-lot unemployability." (172-173)

FACTUAL BACKGROUND

Ralph Beecher, born in 1942 with a ninth-grade education, worked for Outokumpu Copper Kenosha or its predecessors for 29 years in strenuous foundry work. He developed serious lower-back pain in 1997 and underwent a third back surgery; after briefly returning to light-duty work in 1998, he stopped working and did not return. Beecher's vocational expert concluded that, given his injury, age, education, training, and limited retraining prospects, no stable labor market existed for the work he could perform, while LIRC relied in part on the absence of a sufficiently extensive job search to deny permanent total disability benefits.

PROCEDURAL HISTORY

A DWD administrative law judge found Beecher permanently and totally disabled on a vocational basis and awarded benefits. LIRC reversed the permanent-total-disability award, concluding in part that Beecher had not made a sufficient post-injury job search. The Kenosha County Circuit Court affirmed LIRC, but the Wisconsin Court of Appeals reversed and remanded, holding that a job search was not required to establish a *prima facie* odd-lot case. The Wisconsin Supreme Court affirmed the court of appeals and remanded to LIRC.

DISPOSITION

affirmed

REMAND INSTRUCTIONS

Set aside LIRC's decision and remand to the agency to permit the employer to present rebuttal evidence concerning whether suitable employment exists and to conduct any further proceedings consistent with the opinion.

CASES CITED

- *Balczewski v. DILHR*, 76 Wis. 2d 487, 251 N.W.2d 794 (1977)
- *Beecher v. LIRC*, 2003 WI App 100, 264 Wis. 2d 394, 663 N.W.2d 316
- *Marshfield Electric & Water Commission v. WERC*, 2002 WI App 68, 252 Wis. 2d 656, 643 N.W.2d 122
- *Petrowsky v. Krause*, 223 Wis. 2d 32, 588 N.W.2d 318 (1998)
- *Burg v. Miniature Precision Components*, 111 Wis. 2d 1, 330 N.W.2d 192 (1983)
- *Brown v. LIRC*, 2003 WI 142, 267 Wis. 2d 31, 671 N.W.2d 279
- *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995)
- *Lisney v. LIRC*, 171 Wis. 2d 499, 493 N.W.2d 14 (1992)
- *American Manufacturers Mutual Insurance Co. v. Hernandez*, 2002 WI 76, 252 Wis. 2d 155, 642 N.W.2d 584
- *Local 60, American Federation of State, County & Municipal Employees v. WERC*, 217 Wis. 2d 602, 579 N.W.2d 59 (Ct. App. 1998)
- *State v. LIRC*, 136 Wis. 2d 281, 401 N.W.2d 585 (1987)
- *Mireles v. LIRC*, 2000 WI 96, 237 Wis. 2d 69, 613 N.W.2d 875
- *Northern States Power Co. v. Industrial Commission*, 252 Wis. 70, 30 N.W.2d 217 (1947)

- Advance Die Casting Co. v. LIRC, 154 Wis. 2d 239, 453 N.W.2d 487 (Ct. App. 1989)
- Walter Kassuba, Inc. v. Bauch, 38 Wis. 2d 648, 158 N.W.2d 387 (1968)
- Leist v. LIRC, 183 Wis. 2d 450, 515 N.W.2d 268 (1994)
- Cardiff Corp. v. Hall, 1 K.B. 1009 (K.B. 1911)
- United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983)

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