

## ANOTHER DISABILITY ANALYSIS

It seems as if my articles lately have had a very consistent theme – disability discrimination, reasonable accommodation, FMLA leave, etc. Could that be because these topics are actually unclear mine fields that the courts are trying to sort out? Let's see if our latest analysis provides us with any additional insight.

The case we will analyze this month is *Szleszinski v. LIRC*, 2007 WI 106, \_\_\_ Wis.2d \_\_\_, 736 N.W.2d 111 (July 18, 2007). The employer in this case was a commercial trucking company, Transhield, which leased drive equipment to a company called Midwest. The employee at issue was a truck driver for 15 years for this company prior to his death. The employer required its over the road drivers to be medically certified pursuant to federal motor carrier safety regulations. At the time that Szleszinski was hired, he disclosed that he had Wilson's disease and provided documentation demonstrating he had passed a medical examination and was certified to drive per the DOT.

However, in March 1996, the company received reports from two different sources that Szleszinski was driving erratically. Both reports alleged that this employee's truck was weaving in traffic and one allegation included forcing another vehicle onto the shoulder of the highway. The company worked with Occupational Health Associates of South Dakota to provide medical evaluations of its drivers. After receiving these reports, Szleszinski was scheduled for an examination by a neuro-oncologist at the Marshfield Clinic. This hired expert from the company concluded in a written report that Wilson's disease existed and there was mild demonstrated deficit found from the neurological exam. This physician recommended an MRI exam and a DOT road test. However, this physician concluded that this diagnosis would not prevent Szleszinski from operating a motor vehicle.

What happened next is very interesting. Another physician through OHA's Department of Occupational Medicine, reviewed Szleszinski's records but did not personally examine him. Two days after the initial physician report from Marshfield Clinic, this new doctor issued a report that recommended Szleszinski not be certified for DOT licensure. This recommendation alleged to be based upon the recommendation of the Department of Transportation Conference on Neurological Disorders and Commercial Drivers from 1988, which states, disqualification for individuals with confirmed diagnosis of Wilson's disease without exception. This physician further stated that regardless of the results of additional testing he would not change his recommendation. In the back drop there was debate as to whether the DOT ever actually adopted the report that this physician used to assert this opinion at the time of litigation.

The company proceeded to inform Szleszinski that he would not be allowed to drive equipment leased by Midwest, which essentially was their only client and thus he was left without a job.

Szleszinski had another medical evaluation within less than a month by a neurologist at the Minnesota Clinic of Neurology, regarding employment with another trucking company. This physician also concluded that the diagnosis of Wilson's should not affect Szleszinski's employment as a truck driver. His driver's certification was never revoked despite the one physician's adverse recommendation from OHA.

Szleszinski filed an ERD claim alleging disability discrimination against both Transhield and Midwest. Szleszinski died while his claim was pending so his estate was substituted as the Complainant. The Hearing Examiner ruled in favor of Szleszinski. LIRC reversed the decision, stating that the adverse medical evaluation of the physician who recommended disqualifying Szleszinski was sufficiently "individualized" under Wis. Stat. sec. 111.34(2)(b) and (c) of the WFEA, and that Szleszinski could have challenged this medical evaluation under a dispute resolution procedure contained in the United States Department of Transportation (DOT) regulations.

The Circuit Court affirmed LIRC so this case proceeded to the Court of Appeals. The Court of Appeals reversed, stating that the WFEA does not require individuals to exhaust other administrative remedies before filing a complaint and the DOT procedure was inapplicable to this case because it applies only in disputes between the driver's physician and the carrier's physician, both of whom in this case were hired by Midwest (each had an opposing opinion). The Court of Appeals also concluded as a matter of law that the medical evaluation upon which Midwest relied was not individualized pursuant to the WFEA.

This case then proceeded on to the Supreme Court. The Supreme Court granted review only on the issue of whether or not Szleszinski was required to seek a determination regarding his medical qualifications to be a commercial driver under 49 C.F.R. sec. 391.47 before filing his ERD claim.

Ultimately the Supreme Court reversed the decision of LIRC and remanded LIRC to deal with the underlying DOT issue. Basically, the Supreme Court found that where a dispute over a driver's medical qualifications cannot be resolved by the direct application of the DOT regulations, the Hearing Examiner must give the carrier the opportunity to seek a determination from the DOT regarding the driver's medical qualifications. The Hearing Examiner must stay the proceedings pending the resolution by the DOT of the medical qualification dispute. However, the Supreme Court then went on to conclude that in this case the DOT dispute resolution never applied because the expert the employer, Midwest, relied on had an opinion that was not supported under the DOT regulations and Midwest failed to seek a review of this expert's opinion. The Court also pointed out that the remaining two expert opinions, another from an expert retained from Midwest, concluded he was qualified to drive.

I believe the moral of this story is that if you have two expert opinions that conflict, look into getting a third before you use the one most favorable to you.

Happy St. Patrick's Day to all. Hopefully Spring is around the corner soon!!!