



RIEDEL LAW, S.C.

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June 28, 2021

VIA ELECTRONIC MAIL -

Attn: Mr. Steve Peters, Chair
Workers Compensation Advisory Council
201 East Washington Avenue
Madison, WI 53702

RE: Milwaukee Brewers Baseball Club
Request for Modification of Wisconsin Statute Section 102.11(1)(am)(2), Stats.

Dear Mr. Peters:

I am writing to you as the administrator for the WCAC on behalf of the Milwaukee Brewers Baseball Club (Milwaukee Brewers). The Milwaukee Brewers have over 1,800 employees covered by a policy of workers compensation insurance through ACE American Insurance Company. Of the 1,800 employees, 750 are part-time seasonal stadium employees. The vast majority of those 750 employees are retirees including retired police officers, sheriff deputies, firefighters and teachers. The part-time seasonal employees work at the stadium for baseball games from the beginning of April through October. They are hired as part-time employees, they request part-time work, and they work a part-time schedule.

Upon investigation, I have discovered that all professional sports teams in the State of Wisconsin utilize some part-time seasonal employees for their games and matches. These part-time seasonal employees choose to work part-time and set their schedules based on their preference for which games and matches they want to work.

In particular for the Milwaukee Brewers, the employees are provided a game schedule for each month the Brewers will be playing games at American Family Field. The employees pick the games they want to work, and seniority dictates the schedule. If there are an insufficient number of employees who select a specific game, requests are sent out for an additional sign up.

Major League Baseball determines the schedule of home games at American Family Field, and the games to be played on the road. The Milwaukee Brewers do not control the schedule, nor do they control which games will be played at home and which will be played on the road. Accordingly, the part-time seasonal employees do not work regular schedules. The 750 stadium employees for the Milwaukee Brewers work a schedule dictated by Major League Baseball and by their own selection of the games they want to work.

Under Wisconsin Statute §102.11(1)(am)(2), Stats. these employees will never qualify as part-time employees. The number of hours worked in the 13 weeks preceding any potential work-

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related injury will always vary by more than five hours per week. This variance is beyond the control of the Milwaukee Brewers. It is controlled by Major League Baseball and by the employees themselves as they sign up for selected games.

As an example of the hardship that this creates for the Milwaukee Brewers, attached is the most recent decision from the Office of Workers Compensation Hearings regarding the payroll and average weekly wage the Milwaukee Brewers are required to utilize when addressing both temporary total disability and permanent partial disability payments for part-time seasonal employees. Note that even though the employee was not interested in pursuing anything more than a part-time wage, the Statute mandates the wage be escalated to full-time status.

While this creates a hardship for the Milwaukee Brewers and any other professional sports team in the State of Wisconsin utilizing part-time seasonal stadium workers, it can also create a hardship for the employees. Many of the employees working at the stadium for the Milwaukee Brewers receive retirement benefits from various sources including their Unions and the State, County and Municipal retirement systems. Escalating the average weekly wage for these employees could negatively impact their retirement benefits and potentially their Social Security income.

The Milwaukee Brewers specifically request the Advisory Council review this Statutory section and consider an amendment to exclude part-time seasonal stadium employees for professional sports teams in the State of Wisconsin. A small amendment to this statutory section will solve a significant problem for the professional sports teams in the State of Wisconsin and for their part-time seasonal employees.

I would be happy to address any questions regarding this request at the next meeting of the Workers Compensation Advisory Council.

Very truly yours,

RIEGEL LAW, S.C.

A large, stylized handwritten signature in black ink, appearing to read 'Paul R. Riegel', is written over the printed name and firm name.

Paul R. Riegel

Enclosure

cc: Ms. Vicki Martin, Sedgwick (*via email*)
Mr. Matthew Tricomi, ARM, AIC, Fairly Group (*via email*)
Mr. Darius Anderson, Brewers (*via email*)

PRR/tao

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
OFFICE OF WORKER'S COMPENSATION HEARINGS
P.O. BOX 7922
MADISON, WISCONSIN 53707-7922
(608) 266-7709

[REDACTED]

Employee,

vs.

PLEASE SEE ENCLOSURE

MILWAUKEE BREWERS BASEBALL CLUB
ONE BREWERS WAY
WEST ALLIS WI 53214-3651

Employer,

ACE FIRE UNDERWRITERS INSURANCE CO
C/O SEDGWICK CLAIMS MANAGEMENT SERVICES
11000 PRAIRIE LAKES DR STE 400
PO BOX 46999
EDEN PRAIRIE MN 55344-6999

Insurance Carrier.

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A hearing in this matter was held by video in Madison, Wisconsin, on March 1, 2021, before
Administrative Law Judge Bronwyn M. Baldwin.

APPEARANCES: The employee did not appear. The employer and
its insurance carrier, the reverse-applicants,
appeared by Attorney Paul Riegel.

I N T R O D U C T I O N

This matter arises from a "reverse" application filed by the Milwaukee Brewers Baseball Club (MBBC) and its insurer (collectively, the reverse applicants) who contend that the Department of Workforce Development (the department) miscalculated the employee's average weekly wage by accelerating his workweek to fulltime. The reverse applicants concede that the employee suffered a compensable injury to his left knee on May 8, 2019. They also concede jurisdictional facts and an hourly wage of \$10.35. The reverse applicants paid temporary total disability (TTD) payments in the amount of \$3,097.76 for the time period of May 8, 2019 to September 17, 2019, based on a part-time average weekly wage of \$248.40. The department subsequently determined that the employee's hours should be based on 40 hours per week resulting in a higher average weekly wage of \$414.

At issue is the amount of the employee's average weekly wage. The reverse applicants contend that the employee restricted his availability in the labor market to part-time work within the meaning of Wis. Stat. § 102.11(1)(f)2 and that he was a member of a regularly scheduled class of part-time employees within the meaning of Wis. Stat. § 102.11(1)(am).

Upon these issues, the Administrative Law Judge makes the following:

F I N D I N G S O F F A C T A N D C O N C L U S I O N S O F L A W

The testimony of MBBC's vice president of human resources, Cas Castro, established the following. The employee, [REDACTED], began his employment with MBBC with an application for employment filled out and signed by him on January 11, 1994. He was a recent retiree from the [REDACTED]. He specifically applied for part-time seasonal employment and indicated that he would be available for opening day. Between 1994 and the date of his injury, May 8, 2019, [REDACTED] was a valued employee working at the stadium for the MBBC on a part-time basis during baseball season. He typically earned less than \$5,500 annually while working for MBBC between March 1 and October 1.

MBBC regularly sends out an availability schedule one month in advance to its part-time seasonal employees who then sign up for games when they are available. Signing up for games is

based on seniority guidelines and senior staff is given priority. MBBC finalizes the schedule after seeing all staff's availability. In effect, ██████████ chose his own work schedule.

On May 8, 2019, ██████████ fell while working for MBBC damaging his left knee. As a result, he underwent a total knee replacement on July 24, 2019. He returned to work for MBBC in the final weeks of the 2019 playing season after he was released back to work by his surgeon.

On December 11, 2019, ██████████ completed the department's "Statement of Self-Restriction to Part-Time Work" (form WKC-12698-E) (Exhibit 4). On this form, ██████████ indicated that, at the time of his injury, he limited his availability in the labor market to part-time work because MBBC "only offers part-time work during MLB season." He further indicated that, at the time of his injury, he also worked for ██████████ in ██████████ Wisconsin; however, "since then no longer works for them due to injury," ██████████ was scheduled to begin his normal season in 2020 until the COVID-19 pandemic prevented MBBC from offering him work.

The reverse applicants contend that ██████████ average weekly wage calculation should be based on part-time hours because he voluntarily restricted his availability to part-time hours. This argument ignores the second condition of the self-restriction provision. Wis. Stat. § 102.11(1)(f)2 explicitly states: "The weekly temporary benefits for a part-time employee who restricts his or her availability in the labor market to part-time work and is not employed elsewhere may not exceed the average weekly wages of the part-time employment." (Emphasis added). The form completed by ██████████ clearly indicates that he was employed elsewhere while working for MBBC. The reverse applicants did not dispute this at the hearing. As such, ██████████ wage cannot be limited as provided in Wis. Stat. § 102.11(1)(f)2.

The reverse applicants next argue that ██████████ was a member of a regularly-scheduled class of part-time employees and therefore his average weekly wage should be based on his part-time hours. Wis. Stat. § 102.11(1)(am) provides:

In the case of an employee who is a member of a regularly-scheduled class of part-time employees, average weekly earnings shall be arrived at by the method prescribed in par. (a), except that the number of hours of the normal working day and the number of hours and days of the normal workweek shall be the hours and days established by the employer for that class. An employee is a member of a regularly-scheduled class of part-time employees if all of the following conditions are met:

1. The employee is a member of a class of employees that does the same type of work at the same location and, in the case of an employee in the service of the state, is employed in the same office, department, independent agency, authority, institution, association, society, or other body in state government or, if the department or the division determines appropriate, in the same subunit of an office, department, independent agency, authority, institution, association, society, or other body in state government.
2. The minimum and maximum weekly hours regularly scheduled by the employer for the members of the class during the 13 weeks immediately preceding the date of the injury vary by no more than 5 hours. Subject to this requirement, the members of the class do not need to work the same days or the same shift to be considered members of a regularly-scheduled class of part-time employees.
3. At least 10 percent of the employer's workforce doing the same type of work are members of the class.
4. The class consists of more than one employee.

According to Mr. Castro, MBBC employs approximately 1800 people, 750 of whom are in the "part-time seasonal worker pool" with [REDACTED]. Their work is performed at the stadium on game days and includes ushers, gate screeners, ticket takers, and security. [REDACTED] worked as an usher as did 30 percent of the pool. According to payroll records (Exhibit 2), [REDACTED] weekly hours varied by more than five hours during the 13 weeks immediately preceding his date of injury. He worked as follows: 3.5 hours during the two-week period of February 17, 2019 to March 2, 2019; 18.77 hours during the two-week period of March 17, 2019 to March 30, 2019; 30.17 hours during the two-week period of March 31, 2019 to April 13, 2019; 47.43 hours during the two-week period of April 14, 2019 to April 27, 2019; and 59.11 hours during the two-week period of April 28, 2019 to May 11, 2019. MBBC has not shown that "the minimum and maximum weekly hours regularly scheduled by the employer for the members of the class during the 13 weeks immediately preceding the date of the injury vary by no more than 5 hours." Wis. Stat. § 102.11(1)(am)2. The statute requires that all four conditions be met. As a result, [REDACTED] average weekly wage may not be determined under Wis. Stat. § 102.11(1)(am). The department correctly determined [REDACTED] average weekly wage under Wis. Stat. § 102.11(1)(a) to be \$414.00 based on a 40-hour week.

The "reverse" application must therefore be dismissed. The reverse applicants shall pay [REDACTED] benefits based on the average weekly wage of \$414.00 as calculated by the department. At the weekly rate of \$276.00 (two-thirds the average weekly wage of \$414.00),

according to department records the amount due in temporary total disability is \$8,326.00 and the amount due in permanent partial disability (212.5 weeks) is \$58,650.00, for a total of \$66,976.00. The reverse applicants are entitled to a credit for the amount previously paid.

NOW, THEREFORE, this:

ORDER

The "reverse" application is dismissed. Within 21 days, the employer and its insurance carrier shall pay [REDACTED] indemnity benefits based on an average weekly wage of Four hundred fourteen dollars (\$414.00).

Dated and mailed at Madison, Wisconsin

this 11th day of May, 2021.


Bronwyn M. Baldwin, Administrative Law Judge

[REDACTED]

cc:
ATTORNEY PAUL R RIEGEL
C/O RIEGEL LAW S C
W67N222 EVERGREEN BLVD STE 225
CEDARBURG WI 53012