

No. 96-1070

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

**CITY OF MENASHA
PUBLIC WORKS and
WAUSAU UNDERWRITERS
INSURANCE COMPANY,**

Plaintiffs-Appellants,

v.

ERRATA SHEET

**KRISTIN J. ERICKSON and
LABOR AND INDUSTRY
REVIEW COMMISSION,**

Defendants-Respondents.

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PLEASE TAKE NOTICE that the attached opinion is to be substituted for the above-caption opinion which was released on November 5, 1996.

Dated this 14th day of December, 2006.

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 5, 1996

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

NOTICE

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

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APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The City of Menasha Public Works and its insurer appeal a judgment affirming a Labor and Industry Review Commission decision. LIRC modified and affirmed an administrative law judge's decision awarding Kristin Erickson temporary disability benefits. Menasha argues that

LIRC violated the doctrine of collateral estoppel by ignoring its own findings in prior related proceedings, Erickson should have been judicially estopped from presenting inconsistent or conflicting testimony, LIRC should not have considered or relied on Erickson's medical reports and the ALJ was biased against Menasha. We reject these arguments and affirm the judgment.

Erickson sustained an ankle injury in the work place. The ALJ found her 25% permanently disabled based on testimony that she had reached a healing plateau. LIRC affirmed that finding. Erickson submitted a second application for a hearing claiming that her condition had improved and Menasha had unreasonably refused to rehire her. The ALJ rejected that claim and LIRC sustained that decision. At the request of Menasha's insurer, LIRC reopened the first case based on the newly discovered evidence that Erickson's ankle had healed. LIRC remanded the matter for a new hearing "on the issues of causation of disability, nature and extent of disability, and liability for medical treatment and expenses." The ALJ ruled that Erickson was not permanently disabled, but was partially disabled for a longer time. The ALJ ordered additional payment for the partial disability, less the amount previously paid for the permanent disability. LIRC slightly modified the ALJ's decision, reducing the award for temporary disability, and affirmed the decision as modified. Menasha and its insurer challenge this decision by LIRC.

The doctrine of collateral estoppel does not prevent LIRC from reaching the decision to extend Erickson's temporary disability benefits. Upon receiving newly discovered evidence that Erickson was not permanently disabled, LIRC exercised its authority under § 102.18(4)(c), STATS., to reopen the disability award. That statute allows the commission to set aside its previous award and remand the case to the department for further proceedings. LIRC remanded the matter specifically to consider the nature and extent of the disability. Nothing in the statutes or in LIRC's order limits the authority of the ALJ to grant recovery consistent with the findings that arise from the new

hearing. To apply collateral estoppel to these proceedings, forcing LIRC to abide by its earlier rulings, would defeat the purpose of allowing the case to be reopened for newly discovered evidence. When faced with newly discovered evidence casting doubt on its earlier decision, LIRC may vacate that decision and is not precluded by collateral estoppel from changing its findings.

Erickson was not judicially estopped from submitting a medical report establishing that her ankle had healed. Menasha views this case as one where Erickson presents inconsistent evidence at the various hearings as it suits her interests. This cynical view is not necessitated by the evidence and is inconsistent with LIRC's findings. Rather, the evidence is consistent with a good-faith error in the prognosis for Erickson's ankle that was corrected by Erickson and her doctors upon discovery.

The evidence submitted at the final hearing was sufficient to support LIRC's findings. The weight and credibility of testimony are decided by LIRC. *E.F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 636-37, 264 N.W.2d 222, 224 (1978). LIRC had the right to believe the evidence presented at the most recent hearing that showed Erickson's ankle healed better than the doctors expected and that she suffered only a temporary disability. LIRC could reasonably view the medical reports as an update or correction rather than a true inconsistency.

Finally, the record does not establish any bias by the ALJ. Menasha has not overcome the presumption of honesty and integrity of those who serve as adjudicators in state administrative proceedings. See *Guthrie v. WERC*, 111 Wis.2d 447, 455, 331 N.W.2d 331, 335 (1983). After one of the earlier proceedings, counsel for Menasha's worker's compensation insurer accused the ALJ of being "lazy." The ALJ responded by letter. This incident does not establish any bias by the ALJ. In addition, LIRC, not the ALJ, makes the

ultimate findings of fact and conclusions upon which the award is based. Menasha does not argue that LIRC was biased.

By the Court. – Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.