COURT OF APPEALS
DECISION
DATED AND FILED

May 23, 2018

Sheila T. Reiff
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 No. 2017AP1263 **Cir. Ct. No. 2016CV1169**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WILLIAM HYDE,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, DAIMLER CHRYSLER MOTORS COMPANY, LLC AND LIBERTY MUTUAL FIRE INS. CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: CHAD G. KERKMAN, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. William Hyde appeals from an order confirming a decision of the Labor and Industry Review Commission (LIRC) that he is capable of working eight-hour days, with certain restrictions on his physical activities. As credible and substantial evidence supports LIRC's finding, we affirm.

¶2 Hyde worked at DaimlerChrysler Motors Company from 1979 through 1988 when, like many others, he was laid off. He was rehired in 1998. It is undisputed that he suffered an accidental on-the-job injury to his low back in 2003. A dispute arose over whether the work injury caused a temporary or permanent aggravation of his acknowledged preexisting degenerative lumbar spine condition at L4-5 and L5-S1.[1] The matter went to a hearing before the Worker's Compensation Division of the Department of Workforce Development (DWD).

¶3 A DWD Administrative Law Judge (ALJ) found that the 2003 injury precipitated, aggravated, and accelerated his preexisting condition beyond normal progression. A treating physician and the surgeon who performed Hyde's low-back surgery both opined that Hyde could work an eight-hour day with some change-of-position and weight-lifting accommodations. The treating physician later opined that Hyde is capable of working only a four-hour day. Hyde's pain management specialist agreed with a functional capacity evaluation (FCE) performed by ATI Physical Therapy that permanently restricted Hyde to a four-hour day.

¶4 The ALJ found those opinions more credible than that of Dr. Mark Aschliman, the independent medical examiner DaimlerChrysler retained, who

[1] "L4-5 and L5-S1" refers to the fourth and fifth lumbar vertebrae and fifth lumbar and first sacral vertebrae.

opined that Hyde could work an eight-hour day. The ALJ ordered DaimlerChrysler to pay various medical expenses and the cost of a proposed posterior L4-5 and L5-S1 interbody fusion.

¶5 Another dispute developed regarding the extent of Hyde's loss of earning capacity as a result of the work injury.[2] A hearing begun in 2010 was delayed by two more surgeries Hyde underwent and was completed in 2015. This time, the ALJ adopted the work restrictions Dr. Aschliman recommended over more stringent limitations some of Hyde's physicians offered. Hyde's and DaimlerChrysler's vocational experts found a loss of earning capacity of seventy to seventy-five percent and forty-five to fifty-five percent, respectively.

¶6 Assessing Hyde's degree of permanent disability on a loss-of-earning-capacity basis, DWD's ALJ found that Hyde was capable of working an eight-hour day doing light to medium work. She concluded that he sustained a fifty-five percent loss of earning capacity.

¶7 Hyde petitioned LIRC to review DWD's loss-of-earning-capacity finding. LIRC found that Hyde could work eight hours a day and affirmed the fifty-five percent loss of earning capacity.

¶8 Hyde filed for judicial review in the circuit court, seeking a reversal of LIRC's decision. After a hearing, the court found that LIRC's conclusions were based on credible and substantial evidence, and confirmed LIRC's order. This appeal followed.

[2] There were other issues relating to past and prospective medical expenses and various disability determinations. Hyde limits his appeal to the loss-of-earning-capacity issue.

¶9 We review LIRC's decision, not that of the circuit court. ***Patrick Cudahy Inc. v. LIRC***, 2006 WI App 211, ¶5, 296 Wis. 2d 751, 723 N.W.2d 756. Our review is limited to a determination of whether there is sufficient credible evidence in the record to support its findings. ***Bumpas v. DILHR***, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). We may set aside the order or award only if LIRC acted without or in excess of its powers; the award was procured by fraud; or LIRC's findings of fact do not support the order or award. WIS. STAT. § 102.23(1)(e) (2015-16);[3] ***Patrick Cudahy***, 296 Wis. 2d 751, ¶5.

¶10 The determination of the extent of an applicant's disability is a question of fact. ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975). We "shall not substitute [our] judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact." WIS. STAT. § 102.23(6). Rather, we search the record to locate credible and substantial evidence to support that determination, rather than weighing any opposing evidence. ***Vande Zande***, 70 Wis. 2d at 1097. The evidence in support of the finding need not comprise a preponderance or the great weight of the evidence; it need only be sufficient to exclude speculation or conjecture. ***Bumpas***, 95 Wis. 2d at 343.

¶11 Our highly deferential standard of review notwithstanding, Hyde dissects, compares, and contrasts the physicians' and other experts' testimonies and reports, suggesting that we might, or should reevaluate the evidence. He also

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

argues that DWD's determination on Dr. Aschliman's opinion became final and binding upon LIRC when it was not appealed. Hyde is mistaken on both grounds.

¶12 The record amply supports LIRC's conclusions. Its findings were based on Dr. Aschliman's professional opinion that Hyde is capable of working full-time, eight-hour days, with restrictions, in part because Dr. Aschliman perceived that Hyde's pain complaints were "exaggerated" and "not concordant with diagnostic or physical findings," but instead were "consistent with secondary gain" and "symptom magnification."

¶13 LIRC acknowledged that Hyde's treating physician, Dr. Michael Didinsky, stepped back from his initial conclusion that Hyde was capable of working eight-hour days, with restrictions, and later deemed him able to work only four-hour days. LIRC found Dr. Didinsky's later opinion less credible than his earlier endorsement of eight-hour days, however, because he did not adequately explain his changed opinion.

¶14 LIRC also expressed skepticism about ATI's conclusion that Hyde was unable to work an eight-hour day. LIRC did not think the ATI evaluator satisfactorily connected the four-page technical analysis of Hyde's physical capabilities to its conclusion that Hyde could work only half days.

¶15 Finally, Hyde's own testimony informed LIRC's decision. He testified he had not looked for work in the past year but that he "might" be able to work eight-hour days if he took his medication. As the sole arbiter of witness credibility, LIRC reasonably could have viewed Hyde's statements as self-serving.

¶16 As noted, Hyde argues that LIRC was bound by the ALJ's initial ruling favoring other experts' opinions over Dr. Aschliman's. LIRC is not bound

by the ALJ's decision. ***Xcel Energy Servs. v. LIRC***, 2013 WI 64, ¶56, 349 Wis. 2d 234, 833 N.W.2d 665. We review LIRC's findings, not those of the ALJ. *See* ***id.*** We find credible and substantial evidence in the record to support LIRC's decision.

¶17 Finally, to the extent Hyde contends LIRC should have evaluated certain evidence differently, we disagree. "It is not LIRC's role to evaluate every individual premise upon which an expert's opinion is based," nor is it ours "to reevaluate the weight and credibility of every piece of evidence upon which LIRC relied." ***Id.***, ¶52. Rather, our role is "to examine the record to ensure that evidence of record supports the findings LIRC actually reached." ***Id.*** We have done so and are satisfied that record evidence credibly and substantially supports LIRC's findings.

By the Court.—Order affirmed.

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