COURT OF APPEALS
DECISION
DATED AND FILED

May 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2027 **Cir. Ct. No. 2004CV542**

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

THOMAS LATZL,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, PERLICK CORPORATION AND UNITED WISCONSIN INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Thomas Latzl appeals from an order affirming the determination of the Labor and Industry Review Commission (LIRC) denying

Latzl's claim for additional worker's compensation benefits. He argues that certain medical records should have been excluded because they were not timely filed, that the answer to his claim should have been struck because it was not signed, and that the determination is contrary to the evidence. We reject his claims and affirm the circuit court's order.

¶2 Latzl was employed by Perlick Corporation as a maintenance worker. He sought additional benefits for a back injury which occurred April 22, 2002, while lifting a case of bathroom tissue. Latzl treated with his family physician, Dr. Bauer, who returned Latzl to work with light duty restriction the day after the injury occurred. Latzl then treated with his chiropractor, Dr. Thomas Meske. Dr. Meske removed Latzl from work until June 5, 2002, when Latzl returned to work without any restrictions.

¶3 On August 27, 2002, Latzl suffered a back injury while mowing his lawn at home. He sought emergency treatment from Dr. Meske. He was then seen by Dr. Richard Karr. An MRI in September revealed a herniated disk. Latzl applied for additional worker's compensation benefits based on Dr. Karr's opinion that Latzl sustained a 2% permanent partial disability (PPD) as a result of the April 22, 2002 work injury. Latzl also sought temporary total disability (TTD) benefits for the period from September 5 through October 19, 2002, and payment of all medical expenses incurred. The final determination was that Latzl's work injury was compensable but that only medical expenses up to August 26, 2002, were due. There was no award for TTD or PPD. The circuit court affirmed LIRC's determination and Latzl appeals.

¶4 We quickly dispose of Latzl's contention that he was entitled to a default judgment because Perlick's worker's compensation insurer, United

Wisconsin Insurance Company, failed to sign its answer to Latzl's December 20, 2002 application for a hearing. Latzl relies on WIS. STAT. § 802.05(1)(a) (2003-04),[1] which requires that every pleading filed in the circuit court be signed by an attorney or the litigant and provides that an unsigned pleading may be stricken. He contends that just as the failure to sign the complaint was deemed a fundamental defect in ***Schaefer v. Riegelman***, 2002 WI 18, ¶38, 250 Wis. 2d 494, 639 N.W.2d 715, United Wisconsin's failure to sign its answer was a fundamental defect depriving LIRC of any jurisdiction. He believes that his claim for benefits should have been treated as if no answer had been filed.

¶5 Reliance on WIS. STAT. § 802.05(1)(a), and ***Schaefer*** is simply misplaced. Latzl's application for a hearing did not commence a civil action in a circuit court. "The rules of civil procedure apply to the courts of this state but are not applicable to administrative agency proceedings." ***Verhaagh v. LIRC***, 204 Wis. 2d 154, 161, 554 N.W.2d 678 (Ct. App. 1996). As LIRC observed, nothing in the worker's compensation act or corresponding administrative provisions mandates that the answer be personally signed. We defer to LIRC and conclude that it did not erroneously exercise its discretion in denying Latzl's request for a default order. *See* ***id.*** at 160 (whether to issue a default order is addressed to LIRC's discretion, we defer to discretionary determinations by administrative agencies).

¶6 The hearing on Latzl's application for benefits was held July 21, 2003. Latzl objected to all the medical records that United Wisconsin sought to

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. Supreme Court order 03-06 repealed and recreated WIS. STAT. § 802.05. S. Ct. Order, 2005 WI 38, 2005 WI 86 (eff. July 1, 2005). The changes are not relevant to this appeal.

admit into evidence as not timely filed.[2] *See* WIS. STAT. § 102.17(1)(d)3 ("department may not admit into evidence a certified report of a practitioner or other expert that was not filed with the department and all parties in interest at least 15 days before the date of the hearing"); WIS. ADMIN. CODE § DWD 80.22(5) ("[r]eports not filed … 15 days prior to the date of hearing shall not be acceptable as evidence"). Latzl indicated that the records had not been provided to him until July 16 and 18, 2003. Latzl argues the records should have been excluded.

¶7 Without citation to any authority, Latzl contends that this court reviews untimeliness de novo. Latzl ignores that both WIS. STAT. § 102.17(1)(d)3, and WIS. ADMIN. CODE § DWD 80.22(5), allow reports not timely filed to be admitted if the department is satisfied that there is good cause for the failure to file the report. The department has discretion to exclude medical reports unless good cause is shown for the failure to timely submit the report. "[D]iscretionary procedural decisions in worker's compensation matters are upheld unless there has been a flagrant misuse of discretion."[3] ***Baldwin v. LIRC***, 228 Wis. 2d 601, 613, 599 N.W.2d 8 (Ct. App. 1999). Our review is whether the

[2] Latzl did not object to the December 23, 2002 report regarding the independent medical examination conducted by Dr. Sean Keane.

[3] Even if we were to view the issue as presenting a question of statutory interpretation, we would give "great weight deference" to LIRC's determination to admit the medical records because LIRC has long standing experience and expertise regarding the propriety of admitting or excluding medical evidence or fashioning a remedy for the late filing of reports. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996) (which of the three distinct levels of deference granted to agency decisions applies "'depends on the comparative institutional capabilities and qualifications of the court and the administrative agency.'" (Citation omitted)). *See also* ***City of Elroy v. LIRC***, 152 Wis. 2d 320, 324, 448 N.W.2d 438 (Ct. App. 1989) (an administrative agency's interpretation of its own regulations is entitled to controlling weight unless inconsistent with the regulation or clearly erroneous).

exercise of discretion was based on the relevant facts by applying a proper standard of law and represents a determination that a reasonable person could reach. ***Verhaagh***, 204 Wis. 2d at 160. Latzl bears the burden to show that the decision should be overturned on appeal. *See* ***Baldwin***, 228 Wis. 2d at 613.

¶8 When asked why the records were filed late, counsel for United Wisconsin indicated that the file had just been sent to him and that United Wisconsin was not aware that Latzl had a prior worker's compensation back injury. United Wisconsin also explained that Latzl's prior medical records were relevant to Dr. Sean Keane's independent medical examination which was initially based on a less than complete medical history. The administrative law judge admitted the old medical records as well as Dr. Keane's supplemental report dated July 18, 2003. Latzl was given two weeks after the hearing to submit any additional responsive material.

¶9 The admission of the records was not a flagrant erroneous exercise of discretion. The ALJ inquired about the reason for the late filing and confirmed that the records included Latzl's own treatment records and information that had been produced in a 1997 worker's compensation matter. The records did not bring forth new information or information unavailable to Latzl himself. Even Dr. Keane's supplemental report did not alter his prior opinion. It merely stated that the additional medical history reinforced his opinion that the April 22, 2002 work injury was minor. Additionally, Latzl has the burden of showing he was prejudiced by LIRC's action. *See* ***Weibel v. Clark***, 87 Wis. 2d 696, 704, 275 N.W.2d 686 (1979). Latzl declined the opportunity to submit anything in response to the medical records. We are left to wonder what prejudice he suffered by the production of his own medical records.

¶10 The final issue is whether LIRC's determination is supported by sufficient evidence. LIRC's findings of fact are conclusive if there is any credible evidence to support those findings. ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 117-18, 438 N.W.2d 823 (1989). Moreover, we cannot substitute our judgment for that of LIRC in respect to the credibility of a witness or the weight to be accorded to the evidence supporting any finding of fact. ***Id.*** at 118. The "any credible evidence" test applies. ***Id.***

¶11 Latzl argues the evidence was that he continued to seek treatment for low back pain after the April 22, 2002 injury until the lawn mower incident on August 27, 2002. LIRC recognized that Latzl required some periodic chiropractic maintenance treatment after returning to work after the April 22, 2002 injury.[4] It found those treatments to be similar to the maintenance treatment in Latzl's long history of back problems.

¶12 LIRC's findings depend on credibility determinations. It specifically rejected the credibility Latzl's treating physician regarding PPD. It accepted the conclusion of the two IMEs that the April 22, 2002 incident caused only a minor injury and did not result in permanent disability. The record establishes that Latzl had a history of back problems and a degenerative condition. LIRC's findings are supported by credible evidence.

By the Court.—Order affirmed.

[4] LIRC adopted the administrative law judge's order as its own, including the ALJ's findings.

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