COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2006

Cornelia G. Clark
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. 2006AP1008-FT Cir. Ct. No. 2005CV724

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

HARTER'S QUICK CLEAN UP, INC. AND AMCOMP ASSURANCE CORPORATION,

PLAINTIFFS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND DAVID TIRADO,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM.[1] Harter's Quick Clean Up, Inc., and AmComp Assurance Corporation appeal an order affirming a worker's compensation decision of the Labor and Industry Review Commission. We affirm.

¶2 As found by the commission, applicant David Tirado suffered a wrist injury that was conceded by the employer to be compensable. The issue before the commission related to Tirado's claim that he suffered a herniated disc in his back while doing a stretch that was recommended by a treating physical therapist for back and leg stiffness due to work-hardening therapy ordered for his wrist injury after he had become deconditioned by time off work because of the wrist injury. The administrative law judge found the back injury compensable, and the commission agreed. On appeal, we review the decision of the commission, not the circuit court. ***Stafford Trucking, Inc. v. DILHR***, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981).

¶3 On appeal, the appellants concede that if an employee is being treated for a compensable injury, an employer is liable for compensation for a subsequent injury sustained in the course of that treatment. The appellants' first argument is that the record fails to support the commission's finding that Tirado's stretching was "treatment." The appellants do not appear to dispute the general proposition that stretching can be considered a form of treatment. Instead, they focus on a more specific point. The appellants argue that because there was no evidence

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

that the stretching Tirado did was, in some sense, "prescribed" by a medically competent provider, there has been no showing that the stretching was medically necessary treatment. In making this argument, the appellants acknowledge that Tirado testified that his physical therapist gave him instructions for these stretches, but argue that Tirado's testimony is not competent to show that the stretches were "prescribed" because that evidence must be given by a competent medical provider of the type described in WIS. STAT. § 102.17(1)(d). We reject this argument for two reasons.

¶4 First, the appellants appear to be assuming, but do not actually argue, that a subsequent injury occurring during treatment for a work-related injury is compensable only if the treatment provided was medically necessary. In other words, they appear to believe that a hearing on the compensability of the subsequent injury presents an opportunity to second guess and litigate the necessity or medical correctness of the treatment actually provided. We do not make that assumption and, in the absence of any actual argument on the point, do not address it further. Therefore, we do not accept that the medical necessity of recommendations by Tirado's physical therapist is an issue relevant to his claim. Instead, it is simply a factual question of whether those recommendations were, in fact, made in the course of treatment for the original work injury, and whether Tirado's action in following those recommendations caused the subsequent injury.

¶5 Second, even if it is true that some evidence of a "prescription" is necessary to show medical necessity, Tirado's own testimony—that the recommendation was made by his physical therapist—is competent

evidence to establish that point. The appellants argue that Tirado's testimony was not competent because WIS. STAT. § 102.17(1)(d)1. limits the type of witnesses who can provide that evidence. The appellants misread the statute. The text of the statute provides no limit on who may testify about the nature of treatment that was given. Instead, the statute describes the use that can be made, and the legal effects, of certified reports by certain providers. It does not say that only those types of providers can testify.

¶6 The appellants next argue that, even if evidence by a medical provider is not required, some other evidence is necessary to show that Tirado's home-based stretching exercises were performed pursuant to a prescription or other medical directive. Specifically, they argue that even though Tirado testified that his physical therapist had provided him with written instructions to perform the stretches, he presented no such documentary evidence to corroborate his testimony. The appellants apparently misunderstand the applicable legal standard. In our judicial review, it is the finding of the commission, not the testimony of the applicant, that must be supported by credible evidence. WIS. STAT. § 102.23(6). Tirado's testimony is itself evidence and, because it was deemed credible by the commission, it is sufficient to support the commission's finding.

¶7 The appellants further argue that there is no credible evidence to support Tirado's testimony that he developed low back stiffness after beginning work-hardening therapy, and before the stretching incident on November 5, 2003, that led to his claim of a second injury. Again, the appellants note Tirado's own testimony, but fail to acknowledge that the

applicant's testimony is itself evidence, even without corroboration. On this issue, the appellants argue that Tirado's testimony was not credible in light of other evidence. The appellants acknowledge that we are not permitted to substitute our judgment for the commission's as to the weight or credibility of evidence on any finding of fact, *see* WIS. STAT. § 102.23(6), but they are nonetheless arguing for us to do exactly that. We decline to do so.

By the Court.—Order affirmed.

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