COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2830 **Cir. Ct. No. 2006CV211**

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

KOHLER COMPANY,

PLAINTIFF-APPELLANT,

V.

THOMAS J. GUTOSKI AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 PER CURIAM. Kohler Company appeals from an order affirming a determination by the Labor and Industry Review Commission (LIRC) that

Thomas Gutoski is permanently totally disabled as a result of a June 1998 work injury. Kohler argues that it met its burden of proving under the odd-lot doctrine[1] that jobs exist that Gutoski could perform on a regular basis. We affirm the LIRC's determination that Kohler only demonstrated the range of jobs Gutoski could perform and not the availability of any such jobs in Gutoski's job market. We affirm the circuit court's order.

¶2 Gutoski went to work for Kohler right after graduating from high school in 1976 and neither worked any where else nor received education or job training other than on-the-job training at Kohler. Gutoski sustained work-related injuries to his left knee, both shoulders, and neck during his employment with Kohler. A 1998 work-related neck injury created chronic pain for Gutoski and led to several years of treatment. Treatment revealed degenerative changes and bulging discs in Gutoski's spine and led to several surgeries, including fusions. Despite pain management efforts, Gutoski continues to experience pain in his neck, shoulders, arm, and hands, and he suffers from headaches. He has a limited range of motion. He is on a high dosage of pain medications and anti-depressants. Although he continued to work for Kohler during treatment, he stopped working in February 2001. When he tried to return to work in June 2002, Kohler had no work available for him with his physical restrictions.

[1] The odd-lot doctrine is a burden-shifting framework that permits an injured employee to demonstrate that despite some earning capacity, the employee is permanently totally disabled because injury, age, education, and capacity prevent the employee from securing any continuing and gainful employment and the employee is fit only for the odd lot job that appears occasionally and for a short time. *See* ***Beecher v. LIRC***, 2004 WI 88, ¶¶31-32, 273 Wis. 2d 136, 682 N.W.2d 29. Where the claimant makes a prima facie case, the burden of showing that the claimant is in fact employable and that jobs do exist for the claimant shifts to the employer. ***Id.***, ¶44.

¶3 The administrative law judge found that Gutoski's testimony about his pain and limitation on his activities was somewhat incredible. The ALJ determined that Gutoski was seventy percent permanently disabled and that he could return to work in a sedentary capacity. On review, the LIRC found that despite negative inferences on Gutoski's credibility, there was overwhelming medical evidence that Gutoski was seriously disabled with severe physical restrictions, chronic and substantial pain, ongoing depression, and committed to a narcotic medication regimen for pain management. It found reasonable the opinion of Gutoski's vocational expert that Gutoski falls within the odd-lot doctrine as totally and permanently disabled. It also found that Kohler's presentation of ten general job titles or job categories that Gutoski could perform fell "far short" of demonstrating actual jobs available to Gutoski.[2] The LIRC concluded that as a result of the June 1998 work injury, Gutoski became permanently and totally disabled on February 5, 2001. The circuit court upheld the LIRC determination.

¶4 We review the LIRC's decision, not that of the circuit court. ***Langhus v. LIRC***, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996). Kohler does not dispute that Gutoski established a prima facie case for odd-lot disability. *See* ***Beecher v. LIRC***, 2004 WI 88, ¶44, 273 Wis. 2d 136, 682 N.W.2d 29. Kohler argues that it satisfied its burden to demonstrate that Gutoski is "actually employable and that there are actual jobs available to him [or her]." *See* ***id.*** The determination of whether a party has satisfied the requisite burden of

[2] Although the LIRC's decision does not use the term "odd-lot," its adoption of the opinion of Gutoski's vocational expert and reference to Kohler's inability to show actual jobs available demonstrates its application of the odd-lot doctrine. We reject Gutoski's suggestion that he was found 100% disabled without regard to the odd-lot doctrine.

proof is a question of law. ***Currie v. State***, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997). *See also* ***Keeler v. LIRC***, 154 Wis. 2d 626, 632, 453 N.W.2d 902 (Ct. App. 1990) (although the LIRC's determination is ordinarily a mixed question of fact and law, the determination that a party failed to bear his [or her] burden of proof is a conclusion of law when the facts are uncontradicted; the LIRC's conclusions of law are reviewed independently). In ***Beecher***, the Wisconsin Supreme Court determined that it did not owe deference to the LIRC's determination of whether Beecher had established a prima facie odd-lot case because the odd-lot doctrine is a judge-made exception to the required proof of total loss of earning capacity and the court need not defer to agency interpretations of its own decisions. ***Id.***, 273 Wis. 2d 136, ¶26. Similarly, the determination of whether the employer has met its rebuttal burden under the standard set forth in ***Beecher*** is a determination we make without deference to the LIRC's determination. *But see* ***id.***, ¶79 (Abrahamson, C.J., concurring) (great weight deference is owed to the LIRC's determination regarding the odd-lot doctrine because (1) the agency is charged with administration of the particular statute at issue; (2) its interpretation is one of long standing; (3) it employed its expertise or specialized knowledge in arriving at its interpretation; and (4) its interpretation will provide uniformity and consistency in the application of the statute at issue). However, to the extent the determination is based on an evaluation of the weight and credibility of the evidence presented by the employer, we afford the LIRC's determination the appropriate deference. *See* ***Langhus***, 206 Wis. 2d at 501 (the LIRC, not this court, weighs the evidence and determines the credibility of the witnesses).

¶5 An employer cannot satisfy the burden to show that the odd-lot claimant is continuously employable by simply showing that the claimant is

capable of light duty work and then adding a presumption that such work is available. ***Balczewski v. ILHR Department***, 76 Wis. 2d 487, 495, 251 N.W.2d 794 (1977). ***Beecher*** is clear in the requirement that the employer must "demonstrate that the injured employee is actually employable and that there are actual jobs available to him [or her]." *See* ***id.***, 273 Wis. 2d 136, ¶44.

¶6 What evidence did Kohler offer to rebut Gutoski's prima facie case? The vocational report of its expert examined the various employment restrictions placed on Gutoski by several physicians and concluded that Gutoski would be able to perform a "full range of Sedentary and a selection of Light work." The report described the definitions of "Sedentary" and "Light" work. It then listed ten categories of jobs that Gutoski would be qualified for and able to perform with work restrictions: production helpers, bindery workers, station attendants, security workers, stock clerks, hand packagers, desk clerks, retail salespersons, cashiers, and counter attendants. It charted the numbers of people employed in such jobs in Gutoski's employment market and suggested that even expanding the market to a 25 to 30 mile radius would more than double the actual employment numbers. We agree with the LIRC that the list of job types that Gutoski could perform did little to meet the burden of showing actual jobs available to Gutoski.

¶7 Kohler's vocational expert also included an "Employment Market Survey," which listed seventeen employers by name and address with job descriptions fitting into the ten categories identified in the expert's report. The LIRC's discussion did not specifically address why the survey failed to satisfy the burden to show actual jobs available. Implicit in its finding that Kohler's proof fell "far short" is the LIRC's determination that the survey was insufficient to demonstrate Gutoski's ability to perform the advertised jobs or the employer's ability to accommodate Gutoski's restrictions. That determination is based on the

weight and credibility of the evidence. The determination is reasonable and supported by the evidence. All the physicians agreed that Gutoski must be able to alternate between sitting and standing at any job. None of the advertised job descriptions in the survey reflect that such an alternating stance is possible. At least one of the jobs included a weight lifting requirement outside Gutoski's range. Given the wide range of restrictions placed on Gutoski with regard to lifting, pushing, pulling, standing, sitting, squatting, kneeling, climbing, twisting, shoulder level, and operating power equipment or machinery, the job descriptions in the survey are inadequate to determine if they represent jobs actually available to Gutoski.

¶8 We acknowledge, as the LIRC does in its brief, that the articulated burden is not easily met by an employer. *See* Neal & Danas, WORKER'S COMPENSATION HANDBOOK, § 5.31 at 21 (5th ed., Wis. State Bar, 2006). However, that does not mean it is an impossible burden or, as Kohler projects, the employer is required to secure employment for the claimant in one of the available jobs located by the employer. We summarily reject Kohler's contention that the LIRC's rejection of the job survey as sufficient in this case imposes an impossible or impractical burden on employers to identify available jobs. We need not explore what it takes to meet the employer's burden.

By the Court.—Order affirmed.

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