COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP597 **Cir. Ct. No. 2006CV1204**

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

AGRILINK FOODS, INC., N/K/A BIRDS EYE FOODS AND LUMBERMENS MUTUAL CASUALTY CO.,

PETITIONERS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND ROBYN VAN LAANEN,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Agrilink Foods, Inc., and its insurer, Lumbermens Mutual Casualty Company, appeal an order affirming the Labor and Industry Review Commission's award of worker's compensation benefits to Robyn Van Laanen. Agrilink argues there is insufficient evidence to support the Commission's decision. We conclude Agrilink's argument goes to the credibility

of witnesses rather than the sufficiency of the evidence. Because assessing credibility is within the Commission's province as fact-finder, we reject Agrilink's argument and affirm the order.

Background

¶2 The relevant background facts are largely undisputed. Van Laanen began working for Agrilink as a general factory worker in 1981. Approximately two years later, she was certified as a licensed practical nurse and became a safety and health coordinator for the company. During Agrilink's peak season, lasting three to six months each year, Van Laanen was sedentary approximately forty percent of the time and on her feet approximately sixty percent of the time. During the six to nine months of off-peak work, Van Laanen was sedentary approximately eighty percent of the time.

¶3 In 1990, Van Laanen injured both knees in a car accident. She developed bilateral patellofemoral degenerative arthrosis. Arthroscopic surgery was performed on her left knee in December 1991 and on her right knee in January 1992. In 1990, Van Laanen weighed between 220 and 230 pounds; between 1992 and 2000, her weight fluctuated between 250 and 300 pounds.

¶4 On May 17, 2000, Van Laanen slipped and fell while walking through the Agrilink plant. She did not advise Agrilink of the incident or report it in the accident logs. Van Laanen also did not immediately consult a physician for any pain and, between May 2000 and June 2003, there is only one notation in her medical records indicating she sought treatment for knee pain.

¶5 Van Laanen eventually completed an incident report form about her fall on February 12, 2003, shortly after learning her job was being eliminated. She

filed the form with her supervisor in late April 2003, just before her last day on April 30.

¶6 When Van Laanen visited her physician in June 2003 for knee pain, she attributed the pain solely to her May 2000 fall. She was diagnosed with severe arthrosis of both knees and was advised to pursue total knee replacements. Her right knee was replaced in September 2003 and her left knee was replaced in February 2004.

¶7 Van Laanen sought worker's compensation benefits for her knee replacements on two theories. The first is irrelevant to the appeal; the second was that her employment activities at Agrilink as a safety and health coordinator were a "material contributory causative factor" in the onset or progression of her knee problems and necessitated the knee replacements. The administrative law judge in the case granted benefits on this second theory, and both parties sought review by the Commission.

¶8 The Commission initially remanded the case for submission of additional medical evidence on the question of occupational causation. Van Laanen submitted a form signed by James Grace, her treating physician and orthopedic surgeon. The form asked him:

> Given the above information, do you believe that Robyn Van Laanen's work as described above, in conjunction with her weight, was a material contributory causative factor in the onset or progression of her knee condition to the point where bilateral knee replacements were required?

The form gave Grace an option to check yes or no; he selected yes.

¶9 On June 2, 2006, the Commission awarded Van Laanen compensation for her knee replacements based on occupational disease. Agrilink

petitioned the circuit court for review. The circuit court affirmed the Commission, and Agrilink appeals.

Discussion

¶10 On appeal, we review the Commission's decision, not the circuit court's. ***White v. LIRC***, 2000 WI App 244, ¶12, 239 Wis. 2d 505, 620 N.W.2d 442. We uphold the Commission's factual findings, provided they are supported by credible and substantial evidence in the record. ***Id.*** We give varying degrees of deference—great weight deference, due weight deference, or de novo review—to the Commission's legal conclusions, depending on multiple factors. ***Id.***, ¶13.

¶11 Agrilink does not seriously challenge any of the Commission's factual findings. Instead, it contends that the Commission improperly awarded worker's compensation benefits to Van Laanen because the Commission "erroneously relied on the medical opinion" provided by Grace. Agrilink asserts the opinion was not rendered to the appropriate degree of medical certainty and was premised on the wrong legal standard.

¶12 We start with the requisite degree of certainty. A medical opinion is inadmissible if it is based on speculation or conjecture. ***Drexler v. All Am. Life & Cas. Co.***, 72 Wis. 2d 420, 432, 241 N.W.2d 401 (1976). Rather, a medical opinion must be given to a reasonable degree of medical probability. ***Pucci v. Rausch***, 51 Wis. 2d 513, 518-19, 187 N.W.2d 138 (1971).

¶13 "No particular words of art are necessary to express the degree of medical certainty required to remove an expert opinion from the realm of mere possibility or conjecture." ***Drexler***, 72 Wis. 2d at 432. The test is whether the

expert's words may be reasonably interpreted as demonstrating he or she was expressing an expert medical opinion. ***Id.***

¶14 Here, Grace's opinion was given as a written response to a question which asked: "do you believe" Van Laanen's employment activities, in conjunction with her weight, contributed to her disability? Grace answered affirmatively. The supreme court has held expressions such as "I believe," and even "likely" or "probably," are sufficient to find an expert has given an opinion to the requisite degree of probability or certainty. ***Id.*** at 432-33. Grace's opinion, although written rather than given as live testimony, amounts to an "I believe" statement and was therefore given to the necessary degree of medical probability.

¶15 The more substantive part of Agrilink's argument is that Grace applied the wrong legal standard in forming his opinion, and failed to opine that Van Laanen's employment activities were a materially contributory causative factor in the onset or progression of her disability. Agrilink asserts that Grace only opined Van Laanen's employment activities *in conjunction with her weight* were a factor. This, Agrilink contends, is only evidence of dual causation. To be eligible for benefits, Agrilink argues Van Laanen had to show her employment activities, not those activities *plus* something else, were a material contributory causative factor in her disability.

¶16 Agrilink argues Grace's opinion can be read to mean that but for Van Laanen's weight problem, her employment was not a factor in her disability. Because Agrilink believes Grace's opinion is premised on the wrong legal standard, it argues the opinion should be stricken, thereby leaving Van Laanen with no evidence to support her claim and mandating reversal as a matter of law.

¶17 We reject Agrilink's interpretation. First, Agrilink concedes that Van Laanen's employment activities need not be the sole cause of her claimed disability. Second, both Grace and Agrilink's medical expert, R. Dale Blasier, agreed that Van Laanen's weight was a factor in her knee problems. As the ALJ noted, however, "weight isn't a factor to knees unless the worker is upright" and Van Laanen spent nearly twenty years at a job that required her to be on her feet anywhere from twenty to sixty percent of the time.

¶18 Further, employers take their employees "as is." That an employee may be susceptible to injury by reason of a pre-existing physical condition does not relieve the employer from worker's compensation liability if the employee becomes injured, even though a normal individual may not have suffered such a disability. ***Semons Dept. Store v. DILHR***, 50 Wis. 2d 518, 528, 184 N.W.2d 871 (1971). In other words, that an Agrilink employee without a weight issue might not have needed knee replacements in this situation is not a valid defense. We read Grace's opinion as mere recognition of the ***Semons*** rule, not application of a different legal standard.[1]

¶19 Ultimately, Agrilink simply disagrees with Grace's opinion and believes Blasier's opinion should have been accepted instead. Credibility determinations, however, are not for this court to review. ***White***, 239 Wis. 2d 505, ¶12. The ALJ and the Commission both considered Blasier's opinion incredible.[2]

[1] Agrilink also argues there is no credible evidence in the record to support the conclusion that Van Laanen's employment activities were a material contributory causative factor in the onset of her disability. This argument, however, is premised on our rejection of Grace's opinion, which we decline to do.

[2] Blasier opined that Van Laanen's excessive weight and her arthrosis caused her to need knee replacements. As the Commission explained, however:

(continued)

Thus, the ALJ concluded that the only evidence of any link between Van Laanen's employment activities and her disability came from Grace. Because Grace's opinion constituted the only credible medical evidence in the record, the ALJ and the Commission properly concluded Van Laanen was entitled to worker's compensation payments for her knee replacements.

By the Court.—Order affirmed.

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

> Dr. Blasier fails to explain how [Van Laanen's] excessive weight could be causative unless the force of that weight was transferred to [her] knees by walking, stair climbing, or other activities while on her feet. His reference to an aggravation "by this excessive weight on a nonindustrial basis" could only be reasonably interpreted to refer to activities the applicant undertook while on her feet. There is no evidence that the applicant did anything unusual while off work…. It is not credible that the [Van Laanen's] nonindustrial ambulation and injury were causative, but that her industrial ambulation and injury were not causative.

In other words, the Commission refused to believe Blaiser's apparent opinion that Van Laanen's activities on her feet while she was off work were responsible for her injury but activities on her feet at work were not.