

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2002

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. 01-1203
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-974

**IN COURT OF APPEALS
DISTRICT III**

KEVIN W. MCCRARY,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION, SUPER
VALU INC. AND LIBERTY MUTUAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Kevin McCrary appeals from an order dismissing his complaint challenging a Labor and Industry Review Commission (LIRC) decision. LIRC concluded that although McCrary was entitled to temporary disability

payments for a back injury he suffered in March 1998, he was not entitled to permanent partial disability. We affirm the order.

STATEMENT OF FACTS

¶2 McCrary worked for Super Valu Inc. from 1985 through March 18, 1998. His primary work consisted of filling orders, which required him to repeatedly lift heavy boxes. In total, he lifted 40,000 to 80,000 pounds a day.

¶3 Before he was hired, McCrary underwent a pre-employment physical. The doctor determined that McCrary had spondylolysis of one vertebra.¹ In a written report, the doctor indicated that this condition made McCrary more likely to have back problems associated with lifting and bending. The report indicated that although McCrary said he never had back problems, he was more likely than the average person to have back problems because of this congenital condition. Therefore, the report suggested McCrary should be very careful in his lifting activities. McCrary was hired despite his condition.

¶4 Over the years, McCrary injured himself on approximately fourteen occasions while lifting boxes at his job. It is the final injury, which occurred on March 18, 1998, that is at issue in this appeal.

¶5 McCrary returned to work on March 18 after a two-month absence caused by an earlier back injury that occurred on January 28. McCrary testified that he again injured his back on his first day back on the job. He said that while he was lifting a product from the pallet to his waist, he felt a sharp pain in his

¹ Spondylolysis is the disintegration or dissolution of the vertebra. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 413 n.2, 280 N.W.2d 142 (1979).

lower back. He completed an accident report for this incident and went to the hospital, where he was given painkillers for back pain.

¶6 McCrary did not return to work. He testified that he continued to experience low back pain and saw numerous doctors. A CT scan revealed that McCrary has congenital spondylolysis, with minimal spondylolisthesis.² Dr. Richard Harrison, a neurosurgeon, examined McCrary. In a written report, Harrison opined that McCrary will have significant problems with his back if he keeps doing heavy work. He wrote, “The repeated injuries are liable to worsen his condition. I suspect that he should be on some type of permanent light duty restriction.”

¶7 Harrison ordered a functional capacity assessment, which McCrary underwent on May 28. The functional capacity report concluded that McCrary could not perform his former work with the lifting capacities required for that job. However, the report also stated that McCrary demonstrated inconsistent exertion in the high lift evaluations and that therefore the results probably underestimated his safe and functional abilities.

¶8 At his employer’s request, McCrary underwent two independent medical evaluations by Dr. Richard Lemon, an orthopedic surgeon. Lemon first examined McCrary on March 11 to determine whether he was able to return to work. In a written report, Lemon concluded that McCrary suffers from chronic low back pain and that he experienced aggravation of his low back pain when he was injured on January 28. Lemon further concluded that the aggravation was

² “Spondylolisthesis involves the displacement of one of the vertebra over one of its fellow below, usually in the lower lumbar area.” *Bucyrus-Erie Co.*, 90 Wis. 2d at 413 n.1.

temporary and that as of March 11, McCrary had no permanent disability and was fully capable of working full time without restrictions. However, Lemon also noted that McCrary had a long history of low back pain and was at high risk for reinjuring his back.

¶9 Lemon examined McCrary for a second time on May 29. In a written report, Lemon noted that McCrary continued to complain of middle and low back pain and that “his right side and left side both hurt him.” Lemon concluded that McCrary has spondylolysis with spondylolisthesis, and that this is a pre-existing condition. He concluded that the condition is a congenital or developmental abnormality and “not due to any lifting injury on the job.” Lemon’s written report states:

I believe that he has recovered fully with no permanent partial disability. I do not believe that he needs any further medical care, chiropractic care, physical therapy, injections, diagnostic studies or surgery related to his work injury of March 18

I believe that Mr. McCrary’s ongoing symptomatology and continued repeat episodes of low back pain are due to his pre-existing spondylolysis and spondylolisthesis. ...

Mr. McCrary does seem to take an unusually long time to recover from his simple aggravations of his chronic low back pain. I think it is reasonable to have Mr. McCrary under a permanent 20 pound lifting restriction to try and avoid further problems in the future. Again, this lifting restriction is not related to the work injury of March 18, 1998, nor is it related to his previous work injury of January 28, 1998. ...

I believe that Mr. McCrary’s care from March 18, 1998 to May 29, 1998, has been appropriate and necessary due to his on-the-job injury of March 18, 1998. I believe that this injury of March 18, 1998 caused a temporary aggravation of his pre-existing spondylolysis and spondylolisthesis. I believe as of May 29, 1998 he is back to baseline level with no permanent partial disability.

¶10 McCrary was denied worker's compensation benefits effective June 18. He filed a request for a hearing. McCrary and two Super Valu employees offered testimony. The remainder of the evidence, including doctors' reports, was provided in writing. The administrative law judge (ALJ) concluded that McCrary suffered a permanent injury and assigned a two percent permanent partial disability rating. Super Valu appealed. LIRC set aside the ALJ's findings of fact and dismissed McCrary's application for permanent partial disability.³ McCrary appealed, and the circuit court affirmed LIRC's decision. This appeal followed.

STANDARD OF REVIEW

¶11 In reviewing a LIRC determination, this court's scope of review, both as to facts and the law, is the same as the circuit court. *C.W. Transp., Inc. v. LIRC*, 128 Wis. 2d 520, 525, 383 N.W.2d 921 (Ct. App. 1986). The circuit court's decision is not at issue because the task of this court is merely to determine whether LIRC's decision was correct. *See Langhus v. LIRC*, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996). Because the scope of our review of LIRC's decision in this case varies with the issue presented, additional legal standards will be addressed below.

DISCUSSION

¶12 McCrary presents three issues on appeal: (1) whether he was denied a fair hearing when Super Valu improperly supplemented the record with a copy

³ LIRC did not overturn the payment of temporary disability benefits through May 29, 1998.

of an adverse decision from one of McCrary's previous applications for worker's compensation benefits; (2) whether LIRC erred by failing to accord the ALJ's credibility determinations special deference; and (3) whether there is sufficient and credible evidence to support LIRC's decision. We reject McCrary's challenges and affirm.

I. Supplementation of the record

¶13 When Super Valu appealed the ALJ's decision, it filed a brief with LIRC. Arguing that McCrary's testimony was incredible, Super Valu referred to a 1998 decision by the same ALJ denying McCrary benefits for a 1997 back injury. In the decision, which Super Valu attached to its brief, the ALJ concluded that McCrary's testimony on several issues was incredible.

¶14 In his reply brief to LIRC, McCrary argued that the 1998 decision was irrelevant and outside the scope of the record. McCrary's entire argument stated:

Supervalu points to other factors which it insists undermine McCrary's veracity. First, it notes that [the ALJ] had denied benefits and made a credibility determination August 13, 1998 in another claim that McCrary brought against Supervalu. If the prior administrative record was before the ALJ [in this case], he saw little value in it because he found McCrary's testimony credible and because he appropriately ignored the prior decision in his decision here. It goes without saying that McCrary's claim for this injury should be evaluated upon the evidence presented at this hearing, not evidence presented over a claim that occurred more than a year earlier.

In a footnote, McCrary added, "Review of the Transcript does not show that the Administrative Law Judge received the prior decision into evidence or adopted it

by Administrative Notice into this record. Supervalu's reference to McCrary's prior case is therefore completely inappropriate and should be disregarded."

¶15 In its written decision, LIRC made no reference to the 1998 decision or McCrary's argument that the decision should be disregarded. On appeal, McCrary argues, "LIRC's decision was tainted when Super Valu went outside the record and placed matters before LIRC that were both irrelevant and prejudicial to McCrary's case." McCrary contends:

Super Valu's tactics were intended to poison the proverbial well. There was strong objection to these tactics on reply brief, but LIRC did not strike the attachment or that portion of Super Valu's brief which described it. In fact, LIRC did not disclose whether it considered or ignored this irrelevant material. It is no small coincidence, however, that LIRC ultimately decided this case based on McCrary's credibility.

McCrary argues that if LIRC considered evidence "after the record [was] closed and without any comment or explanation from McCrary in response, [then he] has been denied his right to due process."

¶16 Whether LIRC's procedures denied McCrary a full and fair hearing involves questions of constitutional fact that this court reviews without deference to LIRC's decision. See *Zimbrick v. LIRC*, 2000 WI App 106, ¶9, 235 Wis. 2d 132, 613 N.W.2d 198. However, the scope of permissible judicial review is limited; McCrary must establish a denial of due process constituting prejudicial

error under WIS. STAT. § 102.23(2).⁴ See *Weibel v. Clark*, 87 Wis. 2d 696, 704, 275 N.W.2d 686 (1979).

¶17 Even if providing LIRC with a copy of the 1998 ALJ decision was improper, we conclude that McCrary has failed to establish that he was denied due process constituting prejudicial error. We must assume that LIRC knows what is not evidence and performed its duty here to consider only evidence properly admitted. See *Unruh v. Industrial Comm’n*, 8 Wis. 2d 394, 401, 99 N.W.2d 182 (1959). In another worker’s compensation case, we considered whether an *ex parte* communication prejudiced a party. See *Dane County Hosp. & Home v. LIRC*, 125 Wis. 2d 308, 317-18, 371 N.W.2d 815 (Ct. App. 1985). We observed:

DILHR is presumed impartial and insulated from the improper influence of an *ex parte* communication. In *General A.F. & L. Assur. Corp. v. Industrial Comm.*, 223 Wis. 635, 652-53, 271 N.W. 385, 392 (1937), the court stated in regard to the Industrial Commission’s receipt of an *ex parte* communication in a worker’s compensation case that: “The commission constitutes a body of expert triers of fact—not a lay tribunal. It is supposed that it will not be swayed by *ex parte* communications, and that it will be able to protect itself against importunities and requests that might bias a juror.” The employee must show to overcome this supposition that the error was probably prejudicial to a material degree in order to prove a violation of due process.

Id. at 317.

¶18 Applying this standard, McCrary must show that LIRC’s receipt of the 1998 decision “was probably prejudicial to a material degree.” See *id.* We

⁴ WISCONSIN STAT. § 102.23(2) provides: “Upon the trial of any such action the court shall disregard any irregularity or error of the commission or the department unless it is made to affirmatively appear that the plaintiff was damaged thereby.” All statutory references are to the 1999-2000 version.

conclude that McCrary has failed to satisfy this standard. There is no evidence that LIRC considered the 1998 decision or allowed the decision to influence its review of the most recent ALJ opinion. McCrary can only speculate that LIRC improperly used the 1998 decision.

¶19 Moreover, if McCrary believed that submission of the 1998 decision was so prejudicial as to deny him a fair hearing, he should have sought a remedy from LIRC. McCrary complains that LIRC failed to “strike the attachment or that portion of Super Valu’s brief which described it.” However, McCrary never asked LIRC to do so. Rather, his reply brief urged LIRC to disregard the 1998 decision. That LIRC did not comment on the decision suggests LIRC followed McCrary’s advice, not that LIRC improperly used the decision. Where all indications are that LIRC did as McCrary requested, he cannot now be heard to complain that LIRC should have acted differently.

II. Whether LIRC should have accorded the ALJ’s credibility determinations special deference

¶20 McCrary argues that LIRC erred when it failed to accord the ALJ’s credibility findings “special deference.” McCrary explains, “Special deference means a credibility decision may be reversed only when the findings are arbitrary and irrational. ... Therefore, unless the ALJ’s credibility assessment is so irrational that it does not deserve special deference, LIRC must respect it.” In support of this statement, McCrary cites *Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996).

¶21 McCrary’s argument is misplaced. *Kuklinski* addressed the appropriate scope of review of a jury verdict in a medical malpractice case. We observed, “Special deference is given to a jury verdict that is approved by the trial

court.” *Id.* The scope of review employed when LIRC reviews a decision of one of its hearing examiners is significantly different from the standard we employ when reviewing jury verdicts in medical malpractice cases.

¶22 McCrary’s reliance on *Transamerica Ins. Co. v. DILHR*, 54 Wis. 2d 272, 195 N.W.2d 656 (1972), is more reasonable. In *Transamerica*, our supreme court addressed how LIRC should approach credibility assessments when the ALJ, rather than LIRC, has had the benefit of live testimony. The court stated:

This court has held that, where credibility of witnesses is involved, it is a denial of due process for an administrative agency to make a finding on credibility without the benefit of “... the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing...” ... In another case, this court reversed commission findings because “... the instant record does not show that the commission, in making its findings, had the benefit of the examiner’s impressions of the material witnesses on which he grounded his conclusions of credibility” Where the question is one of credibility, we have stated that “... *special deference* is to be paid [by the agency setting aside an examiner’s findings] to the face-to-face examiner or fact-finder.”

Id. at 282-83 (emphasis added; footnotes omitted; brackets in original). *Transamerica* concluded that before LIRC can set aside a hearing examiner’s findings of fact, it must review the record and consult with the hearing examiner. *Id.* at 283-84.

¶23 Additionally, *Transamerica* held due process requires that when LIRC rejects its examiner’s findings and makes its own findings involving credibility of witnesses, it must provide a written opinion stating why it has rejected the examiner’s findings and why it has made its own and differing findings. *Id.* at 285.

¶24 Although *Transamerica* imposes specific requirements on LIRC, we disagree with McCrary's assertion that LIRC must affirm any ALJ decision "which is reasonable, even if another decision would be equally reasonable." McCrary fails to recognize that LIRC, not the hearing examiner, is vested with the responsibility of making credibility determinations and finding facts. See *Hakes v. LIRC*, 187 Wis. 2d 582, 589, 523 N.W.2d 155 (Ct. App. 1994); *UPS, Inc. v. Lust*, 208 Wis. 2d 306, 313, 560 N.W.2d 301 (Ct. App. 1997). The hearing examiner may make initial determinations on witness credibility, but these determinations are subject to the commission's independent review. *Hakes*, 187 Wis. 2d at 589.

¶25 Therefore, because the commission is ultimately responsible for making credibility determinations and because *Transamerica* established the procedure the commission must follow to provide a claimant with due process, the only remaining issue is whether LIRC satisfied this procedure here. This presents a question of constitutional fact that we review de novo. *Zimbrick*, 2000 WI App 106 at ¶9.

¶26 McCrary does not argue that LIRC failed to review the record, communicate with the ALJ and cite its reasons for its contrary findings, as due process requires. See *Transamerica*, 54 Wis. 2d at 282-83. However, we will briefly review LIRC's decision to illustrate that McCrary was provided due process. LIRC's decision states that it carefully reviewed the entire record and consulted with the ALJ concerning his assessment of the witnesses' credibility. LIRC also explains why it rejected the facts found by the ALJ and why it made its own and differing findings of fact. Its decision provides:

The [ALJ] indicated that he found the applicant to be credible in his version of the nature and onset of his back

pain on March 18, 1998 and his continuing pain and restrictions as a result of his injury. However, the commission notes that the applicant's functional capacity evaluation on May 28, 1998 found that the applicant gave inconsistent exertion in high lift evaluation and a lack of exertion in the low lift evaluations. The functional capacity evaluation stated that the applicant demonstrated pain behavior such as grimacing and guarded movements when performing various activities, and the report noted that pain behaviors and pain reports were selective. The functional capacity report states that individuals tend to have pain behaviors and/or pain reports that are consistent with an area of injury and nonselective behavior may be an indication of gross symptom magnification and/or exaggerated pain amplification.

The commission finds that the applicant's inconsistent evaluation and pain behavior as well as lack of exertion undercuts the credibility of his claim of continuing pain restrictions as a result of his work injury.

Based on our review of LIRC's decision, we are convinced that LIRC followed the procedures required by *Transamerica*, thereby providing McCrary with due process.

III. Whether credible and substantial evidence supports LIRC's findings

¶27 McCrary challenges LIRC's factual finding that he has no permanent disability.⁵ LIRC's findings of fact are conclusive as long as they are supported by credible and substantial evidence. See *Brakebush Bros. v. LIRC*, 210 Wis. 2d 623, 629-30, 563 N.W.2d 512 (1997). The weight and credibility of evidence is determined by LIRC. *Id.* at 630. We must consider conclusive any LIRC finding

⁵ McCrary also contends that LIRC erred when it concluded that even if McCrary's claims of ongoing pain and restrictions as a result of his work injury are credible, any ongoing disability is due to McCrary's pre-existing spondylolysis and spondylolisthesis. Because we affirm LIRC's finding that McCrary does not suffer from a permanent partial disability, we need not address LIRC's alternative conclusion that any remaining problems have been caused by McCrary's pre-existing condition.

that is based upon a reasonable inference from the credible evidence. *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 570, 579 N.W.2d 668 (1998). Conflicts in the testimony of medical witnesses are to be resolved by LIRC, and LIRC's acceptance of the testimony of one qualified medical witness over another is conclusive. *E. F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978).

¶28 In its written decision, LIRC rejected McCrary's claim that he suffers from a permanent work-related injury, finding that McCrary's reports of continuing pain were incredible based on his performance on the functional capacity assessment. LIRC also found Lemon's opinion that McCrary had recovered from the March 18 injury was the most credible. The decision states, "The commission credits Dr. Lemon's assessment that the applicant reached a healing plateau as of May 29, 1998 for his March 18, 1998 work injury."

¶29 LIRC was free to accept Lemon's testimony that McCrary's injury constituted only a temporary disability and not a permanent partial disability, and that choice is conclusive. *See id.* The only remaining issue is whether credible and substantial evidence supports LIRC's findings. *See Brakebush Bros.*, 210 Wis. 2d at 629-30. We conclude that Lemon's opinion constitutes credible and substantial evidence to support LIRC's decision.⁶

¶30 Lemon opined that McCrary had reached a healing plateau and was "back to baseline level with no permanent partial disability." Lemon indicated that when he examined McCrary, McCrary complained of pain in his middle and

⁶ McCrary argues that LIRC erroneously relied on the functional capacity assessment in support of its conclusion. Because we conclude that Lemon's report provides sufficient substantial and credible evidence to support LIRC's decision, we need not consider whether LIRC erred when it also based its conclusion on the functional capacity assessment.

lower back. However, Lemon also noted that McCrary denied experiencing any leg pain, numbness or tingling in his legs, increase in his symptoms when he coughs or sneezes or change in his bowel or bladder habits. The report states, “Mr. McCrary states that his pain is worse when lifting, bending, squatting and vacuuming. It is better with rest, swimming and ice.”

¶31 McCrary argues that Lemon fails to connect these facts to his conclusion that McCrary suffered no permanent injury. Although we agree with McCrary that Lemon could have been more explicit in his reasoning, we are satisfied that Lemon’s report provides support for his conclusion. Lemon examined the relevant medical records, which he summarized in his report. He met with McCrary on two occasions. He also noted all reports of pain. Based on the information provided, Lemon’s opinion that McCrary’s healing had reached a plateau and that he was “back to baseline” is supported by his report.

¶32 McCrary’s own testimony is consistent with Lemon’s conclusions. He testified, “[M]y back has been really good, really good ... especially this last summer. I was having some back problems in the springtime associated with the knee injury that I had. But other than that, I have been really having a good time.” We recognize that McCrary’s testimony comes after he discontinued work at Super Valu. This only underscores Lemon’s conclusions that the March 18 injury did not cause permanent injury and that McCrary’s pre-existing back condition makes him prone to injury. When he ceased working at Super Valu, he stopped temporarily injuring his back and, according to his testimony, no longer experiences back pain.

¶33 We are convinced that there is credible and substantial evidence in the record to support LIRC’s decision. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

