

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2009AP103

Cir. Ct. No. 2008CV5333

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**AURORA HEALTH CARE METRO, INC. AND SENTRY INSURANCE A
MUTUAL CO.,**

PLAINTIFFS-APPELLANTS,

v.

**LABOR & INDUSTRY REVIEW COMMISSION AND BERNADETTE MORGAN,
DEFENDANTS-RESPONDENTS.**

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 Kessler, J. Aurora Health Care Metro, Inc., and Sentry Insurance A Mutual Co. (collectively, “Aurora”) appeal from a circuit court order affirming a decision of the Labor and Industry Review Commission (“LIRC”) that awarded worker’s compensation benefits to Bernadette Morgan. Aurora argues:

(1) LIRC's findings should be reversed because they are not supported by credible and substantial evidence; and (2) LIRC's award of temporary total disability was excessive. We reject Aurora's arguments and affirm.

BACKGROUND

¶2 Morgan worked as a nursing assistant for fourteen years, the final seven years at Aurora. Her work activities included: "lifting and moving patients, moving furniture and other equipment, pushing beds, carrying laundry and other heavy lifting."¹ Her claim for worker's compensation stems from a rotator cuff tear. At the time she first received treatment for the tear, she was forty-eight years old.

¶3 Aurora challenged Morgan's application for benefits, arguing that Morgan's injuries did not arise out of her employment. Aurora also questioned the nature and extent of Morgan's disability. An administrative law judge ("ALJ") heard testimony from Morgan in June 2006 and January 2007. The medical evidence was submitted in writing. The ALJ in its written decision found Morgan to be a "very credible" witness who "adhere[d] to accuracy even when some of the details being discussed did not appear to be favorable to the success of her claim." The ALJ found in Morgan's favor and awarded her ongoing temporary total disability benefits, which the ALJ said would continue until Morgan returned to work or permanent partial disability was assessed. The ALJ reserved jurisdiction to make further findings concerning permanent disability.

¹ Unless otherwise noted, quoted language is taken from LIRC's written decision.

¶4 Aurora appealed to LIRC, challenging both the determination that Morgan's injury was related to her work and the decision to continue temporary total disability benefits beyond July 2006. On appeal, LIRC summarized the evidence. LIRC described the nature of Morgan's work and noted that she "denied that she had any left shoulder pain or problems or need for treatment prior to February 2005." On February 4, 2005, Morgan worked at Aurora. Two days later, she was admitted to the hospital for a "stroke-like event." While Morgan was in the hospital, she rolled onto her left side and experienced "an intense pain in her left shoulder." LIRC elaborated:

The applicant testified that her left shoulder symptoms and pain came on insidiously while she was in the hospital for a nonwork-related incident.... [H]er treating physicians were not interested in her shoulder symptoms at that time since they were concentrating on her stroke-like event.... The applicant's left shoulder symptoms continued and worsened subsequent to her release from the hospital ... and she sought treatment with ... her family physician.

Ultimately, Morgan had surgery to repair her shoulder.

¶5 LIRC also noted that Morgan in her testimony denied that "there was any occurrence at work which injured her left shoulder on February 4, 2005." LIRC acknowledged that Morgan had previously filled out an incident report in March 2005 concerning her work on February 4, 2005. In that incident report, Morgan said she injured her left shoulder and indicated in the narrative description that "she was moving a patient and the patient pulled back from her, and was not cooperative in helping her." LIRC acknowledged Morgan's explanation for filling out the incident report: "[W]hen she went to report her left shoulder symptoms to the employer's health department they insisted that she describe her last day of work which she did in the work incident report."

¶6 On April 28, 2005, Morgan underwent repair surgery for her left rotator cuff tear with Dr. William Pennington, an orthopedic surgeon. Dr. Pennington offered written opinions concerning the cause of Morgan's injury, both in correspondence and in the medical records. LIRC said that in Dr. Pennington's most recent opinion, the doctor noted that there had been confusion concerning the cause of Morgan's injury. LIRC explained:

Dr. Pennington noted the applicant was a young individual who did not participate in any physical activities other than work and she had a full thickness tear which was significant for a person of her age. Dr. Pennington noted the onset of the applicant's shoulder pain while she was in the hospital for a nonrelated issue. Dr. Pennington stated that she had previously offered a letter stating it was difficult to ascertain a direct cause of her shoulder pain due to the fact that she just immediately started complaining of this pain while she was in the hospital. Dr. Pennington said that in reviewing the applicant's history that she has provided in the past, as well as reviewing her previous notes, the applicant by history states that she told her physicians that there was pain in her shoulder but she never had anyone pay any attention to it.

Dr. Pennington stated the applicant did not have any trauma to cause her left shoulder pain. She did not participate in any physical activities other than her employment and she was responsible for lifting multiple patients and this happened over a period of time. Dr. Pennington stated that at the applicant's young age to have a full-thickness rotator cuff tear it was certainly medically probable that an injury had to have occurred in the absence of any other real trauma, and it would be his medical opinion [that] certainly the rotator cuff tear likely occurred due to the repetitive type of injuries she was being exposed to during the course of her occupation.

¶7 The evidence LIRC summarized also included a report from Dr. Hardeep S. Ahuja, another of Morgan's physicians. Dr. Ahuja "indicated the applicant suffers from limited use of the left shoulder which limits her daily activities, and the disability was due to an aggravation, acceleration and

precipitation of her preexisting condition beyond its normal progression with a date of injury of February 7, 2005.”

¶8 LIRC also reviewed the opinion of Aurora’s independent medical expert, Dr. Mark Aschliman, an orthopedic surgeon. He opined that Morgan “has a condition of the left shoulder rotator cuff ... which was not related in any way to her work activities” and instead “relates to her intrinsic physiology.” Dr. Aschliman concluded that Morgan’s work activities “were not a cause or a significant contributory causative factor in the development and progression of her left rotator cuff tear.”

¶9 LIRC affirmed the ALJ’s determination, noting that it agreed with the ALJ that Morgan was a credible witness. LIRC summarized its findings:

Given the applicant’s long history of strenuous work as a nursing assistant and given the applicant’s credible testimony of the nature and onset of her shoulder pain on February 7, 2005, and based on Dr. Ahuja’s report as well as Dr. Pennington’s reports[,] the evidence was sufficient to establish that the applicant suffered a work-related shoulder injury and is entitled to worker’s compensation benefits.

¶10 LIRC also addressed Aurora’s challenge to the award of ongoing temporary total disability benefits. LIRC stated:

Dr. Pennington opined ... [that] the applicant will need further treatment. Dr. Pennington indicated that the applicant will continue to be treated as needed ... [and] seen as needed.

The applicant testified that she continues to have problems with her shoulder.... [S]he had been terminated by the employer in July 2006. The evidence does not indicate that the applicant has worked for any other employer since February 2005. The commission finds that the applicant is still convalescing[,] suffering from her work injury and submitting to treatment.... Based on the record presented the commission is unable to determine that the applicant

has reached the healing plateau and is no longer eligible for temporary total disability benefits.

¶11 Aurora sought review of LIRC's decision in the circuit court. In a thorough and well-reasoned written opinion, the circuit court affirmed. This appeal follows.

STANDARD OF REVIEW

¶12 On appeal, we review LIRC's decision, rather than the circuit court's. See *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477. At issue in this case are LIRC's findings of fact. "An agency's findings of fact are conclusive on appeal if they are supported by credible and substantial evidence. Credible evidence is that evidence which excludes speculation or conjecture. Evidence is substantial if a reasonable person relying on the evidence might make the same decision." *Milwaukee Bd. of Sch. Dirs. v. WERC*, 2008 WI App 125, ¶7, 313 Wis. 2d 525, 758 N.W.2d 814 (citations omitted).

DISCUSSION

¶13 Aurora argues: (1) LIRC's findings should be reversed because they are not supported by credible and substantial evidence; and (2) LIRC's award of temporary total disability was excessive. We examine each issue in turn.

I. LIRC's finding concerning the cause of Morgan's injury.

¶14 Aurora argues that "LIRC's finding that Morgan sustained a work-related left shoulder injury is not supported by credible and substantial evidence." Aurora explains:

To be clear, this is not an argument that the court should reverse LIRC's findings based on a determination that the great weight and clear preponderance of the evidence contradicts those findings, nor is it an argument that a reviewing court should weigh conflicting credible evidence to determine which evidence should be believed. Instead, the court should examine the evidence upon which LIRC relies for its findings, within the context of the entire record, and determine whether such evidence is credible, relevant, evidentiary in nature, and not merely conjecture or speculation.

¶15 With this in mind, Aurora contends that the “undisputed facts in this case completely discredit the evidence upon which LIRC relies in holding that Morgan sustained a work-related shoulder injury.” Specifically, Aurora presents three challenges to the factual findings:

LIRC essentially bases its finding on three evidentiary factors, each of which are either obviously speculative or clearly in error. These are: the nature and onset of Morgan's shoulder pain; Morgan's history of strenuous work as a nursing assistant; and Dr. Ahuja's and Dr. Pennington's medical reports.

¶16 First, Aurora disputes LIRC's determination that Morgan's pain “came on ‘insidiously.’” Aurora asserts that Morgan's testimony “plainly indicates that her injury occurred suddenly.” Therefore, Aurora reasons, Morgan has failed to prove that repetitive work over time caused an occupational disease.

¶17 LIRC disagrees. In its brief on appeal it reasons that “[a]lthough Morgan's work duties over the years were causing damage and injury to her shoulder, she was not aware of that damage or injury until it manifested itself in the hospital when she simply rolled over in bed.” LIRC further explains:

[M]erely because Morgan did not exhibit symptomatology that was significant enough to warrant treatment, or failed to appreciate the condition of her shoulder, does not mean that there was nothing wrong with her shoulder. Many conditions develop and progress “insidiously” without any outward signs or indications of their existence. Simply

because the onset of pain happened while away from work does not mean that Morgan's work duties did not play a material contributory role in the condition's onset or progression.

¶18 We agree with LIRC. An applicant can only testify to what she experiences. Whether her shoulder was actually injured, and the cause of that injury, are questions for the medical experts. Here, as LIRC aptly notes, Dr. Pennington clearly believed that the condition was present due to Morgan's work duties.

¶19 Next, Aurora argues that "Morgan's history of strenuous work is not credible evidence that she sustained a work-related injury." (Some capitalization omitted.) Aurora asserts that "merely engaging in strenuous work does not mean that any medical problem of an orthopedic nature is the result of a work related injury or condition." That may be true. But LIRC did not find that Morgan's injury was caused by her work simply because she engages in strenuous work. Rather, LIRC relied on the medical opinion expressed by Morgan's surgeon that Morgan had a "full thickness tear which was more significant than most people of her age" and that "in the absence of any other real trauma, it [was his] medical opinion ... certainly that this did likely occur due to the repetitive type of injuries that she was being exposed to during the course of her occupation." This constitutes credible and substantial evidence that supports LIRC's findings. Like LIRC, we reject Aurora's assertion that Dr. Pennington's opinion is merely conjecture or speculation.

¶20 Finally, Aurora argues that the medical opinions on which LIRC relies—those of Dr. Pennington and Dr. Ahuja—"are completely discredited by incontrovertible facts." Aurora points out that Dr. Pennington offered different opinions on the cause of Morgan's injury in his opinion letters and treating notes.

However, LIRC resolved the inconsistency in the reports, finding “that in some instances Dr. Pennington was responding to the employer’s inquiries when [Dr. Pennington] indicated a traumatic injury, when in fact the applicant’s application for [a] hearing clearly indicates that she suffered a repetitive type injury.” LIRC ultimately accepted the opinion Dr. Pennington expressed in his final letter, where he indicated that he was attempting to address confusion concerning the cause of Morgan’s injury and had reviewed Morgan’s history again before reaching his final conclusion. This resolution of the inconsistencies in medical testimony was within LIRC’s authority. See *Valadzie v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 598, 286 N.W.2d 540 (1979) (Where there are inconsistencies or conflicts in medical testimony, LIRC reconciles the inconsistencies and conflicts.).

¶21 Aurora also takes issue with Dr. Ahuja’s opinion “that Morgan had a pre-existing condition that was exacerbated by her work activities.” Aurora argues that because Morgan said she had not experienced problems with her shoulder prior to February 2005, Dr. Ahuja’s opinion “is based on facts that do not exist.” As noted above, the fact that Morgan did not experience or recognize pain in her shoulder is not determinative of whether she was injured; pain is but one piece of the puzzle. LIRC was free to accept Morgan’s testimony that she did not previously experience pain and, at the same time, conclude that her shoulder was being injured over a period of time as she worked as a nursing assistant.

¶22 In summary, we reject Aurora’s specific challenges to LIRC’s findings. Further, having reviewed the evidence and LIRC’s decision, we conclude that there is credible and substantial evidence supporting LIRC’s findings. Thus, LIRC’s findings are conclusive on appeal. See *Milwaukee Bd. of Sch. Dirs.*, 313 Wis. 2d 525, ¶7.

II. LIRC's finding concerning Morgan's ongoing temporary total disability.

¶23 Aurora asserts that an “applicant is only entitled to temporary disability benefits while he or she remains in the healing period.” Aurora, citing *Larsen Co. v. Industrial Commission*, 9 Wis. 2d 386, 101 N.W.2d 129 (1960), explains that such benefits are payable where the employee is: (1) submitting to treatment; (2) convalescing; (3) still suffering from the effects of the injury; and (4) unable to work, at least in part, because of the injury. See *id.* at 392; see also *ITW Deltar v. LIRC*, 226 Wis. 2d 11, 21, 593 N.W.2d 908 (Ct. App. 1999) (“[T]he healing period is that period during which ‘the employee is submitting to treatment, is convalescing, still suffering from his injury, and unable to work because of the accident. The interval may continue until the employee is restored so far as the permanent character of his injuries will permit.’”) (citation omitted). Morgan and LIRC do not dispute that these are the appropriate standards. Thus, the parties’ dispute is whether these factors are present here.

¶24 LIRC specifically found that all four of the factors outlined above were met. However, Aurora takes issue with the first factor: continuing medical treatment. Aurora notes that there is no evidence that Morgan saw Dr. Pennington after July 2006, and notes that at the January 2007 hearing, Morgan said she was no longer being treated by Dr. Pennington. Aurora argues that because there was no evidence of treatment after July 2006, LIRC erred by awarding Morgan temporary total disability benefits after July 2006.

¶25 We conclude there is credible and substantial evidence in the record to sustain LIRC’s finding that Morgan “will need further treatment” and “will continue to be treated as needed.” First, Dr. Pennington explicitly offered those opinions and LIRC found his opinion credible. Second, although LIRC did not

discuss it in its opinion, Morgan testified that she did follow up with Dr. Pennington by telephone sometime “between the fall and winter” of 2006. She said she called him “[b]ecause that’s my doctor and I needed to talk with him about the little ache[s] and pains that I’m still having. And they’re not severe but they’re noticeable.” Finally, the legal standard does not require that Morgan continue to see the same doctor; it requires only that she is submitting to treatment and convalescing. LIRC’s determination is adequately supported by the record.

¶26 For the foregoing reasons, we affirm the circuit court order affirming LIRC’s decision awarding Morgan worker’s compensation benefits.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

