COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1130 **Cir. Ct. No. 2008CV5731**

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

GREGORY C. MALLETT,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND BRIGGS & STRATTON CORPORATION,

DEFENDANTS-RESPONDENTS.

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

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

¶1 BRENNAN, J. Gregory C. Mallett appeals a circuit court judgment, affirming the Labor and Industry Review Commission's decision to deny him permanent total disability benefits under the Worker's Compensation Act. The Commission found that Mallett had already been paid in full for any

December 1983 injury. Mallett raises three claims on appeal: (1) whether the Commission's findings of fact were based on credible and substantial evidence; (2) whether the Commission correctly determined that it was without jurisdiction to review a claim based on an injury occurring in 1981; and (3) whether he was deprived of due process. We affirm.

BACKGROUND

¶2 On April 8, 1981, while employed with Briggs & Stratton Corporation, Mallett sustained a work-related back injury. Mallett sought compensation, and a hearing examiner with the Department of Workforce Development rendered a decision in favor of Mallett.[1] The hearing examiner's order was final, with no reservation of jurisdiction. The Commission affirmed the hearing examiner's decision on April 6, 1984.

¶3 Mallett filed for judicial review, arguing "that the Commission should have entered an interlocutory order concerning the permanent disability and should have retained jurisdiction over that matter." The circuit court held that the Commission correctly issued a final order rather than an interlocutory order. Mallett appealed to this court. We affirmed, finding that (1) "[a]n interlocutory order is appropriate … when the record before the [C]ommission indicates that the extent of the claimant's disability[] may increase in the future"; but that (2) "[t]here was no evidence in the record that Mallett's condition was likely to change in the future." ***Mallett v. LIRC***, No. 85-0929, unpublished slip op. at 1-2

[1] Mallett was awarded medical expenses, temporary total disability, and five percent permanent partial disability.

(Wis. Ct. App. Jan. 10, 1986). The Wisconsin Supreme Court rejected Mallett's petition for review.

¶4 Mallett did not work for a sustained period of time for two years following his 1981 back injury. He returned to work at Briggs on light duty, as a cam gear inspector in May 1983. According to the Commission, Mallett's duties as a cam gear inspector included "us[ing] a gauge to measure teeth in gears. He would pull the gear from a basket with his left hand, and then use pressure with his right hand to adjust the gauge to measure the teeth." Mallett performed the job until September 1983, when he went on strike and was off of work for three months. He returned to the cam gear inspector job at the beginning of December 1983 and worked until December 17, 1983, when he injured his right arm and wrist on the job. He was diagnosed with a right arm strain and right wrist tendinitis. After his injury, Mallett returned to work on January 24, 1984, and then worked until his last day at Briggs on April 24, 1984. Briggs paid Mallett temporary total disability for the right arm and wrist injury, totaling $27,000 for various periods of time until June 1986; Briggs also paid permanent partial disability at one percent for limited use of the right arm.

¶5 In 1987, Mallett filed a hearing application, claiming thoracic myositis and tendinitis of the right upper extremities, and listed both the April 1981 and December 1983 dates of injury. Following a hearing in March 1991, a hearing examiner for the Department dismissed Mallett's claim for additional medical expenses based on the 1981 injury; the hearing examiner held that because the Commission's 1984 order reviewing the 1981 injury claim was final, the hearing examiner lacked jurisdiction to review the current claim as it related to the 1981 injury. However, Mallett's claim as it related to the 1983 injury remained viable. The Commission affirmed. In May 1993, the circuit court

dismissed Mallett's appeal of the Commission's decision because it was untimely filed; we affirmed.

¶6 In response to an inquiry from Mallett, the Department wrote a letter to Mallett in October 2004, explaining that the filing of the 1987 hearing application had tolled the statute of limitations on his 1983 injury claim and that the claim was still viable. Therefore, Mallett proceeded with his 1983 injury claim, asserting that his work exposure was a material contributory causative factor in the onset of cervical myelopathy of the neck and right arm.

¶7 A hearing before a hearing examiner was held on May 3, 2007. At the beginning of the hearing, the hearing examiner set forth the following issue:

> In dispute are the nature and extent of disability and liability for medical expenses as well as whether or not [Mallett]'s claim for a cervical myelopathy and any additional right arm condition or right upper extremity condition is *related to and arises out of a December 17, 1983, date of injury*.
>
> Is that a correct statement of what's been conceded and what's at issue?

(Emphasis added.) Mallett confirmed that the hearing examiner's recitation of the issue before him was correct. During the hearing, Mallett relied on the opinions of two of his treating physicians: Drs. Dennis Maiman and Mohan Dhariwal. In rebuttal, Briggs submitted the report of an independent medical examiner, Dr. Richard Karr.

¶8 The hearing examiner denied Mallett's claim for additional disability benefits, crediting Dr. Karr's opinion and rejecting Dr. Dhariwal's opinion. The Commission, adopting the hearing examiner's findings, noted that Dr. Karr clearly stated that neither the 1981 nor the 1983 injury caused Mallett's current condition,

while Dr. Dhariwal seemed unclear on the issue of causation. Further, the Commission noted that although the hearing examiner did not address Dr. Maiman's report, the Commission found that report favored denying additional benefits because Dr. Maiman assigned causation to the April 1981 accidental injury and admitted that it would be difficult to assign causation to one of those injuries eighteen years after they occurred. The circuit court affirmed the Commission, and Mallett now appeals.

DISCUSSION

¶9 On appeal, we review the Commission's decision, rather than the circuit court's decision. ***ITW Deltar v. LIRC***, 226 Wis. 2d 11, 16, 593 N.W.2d 908 (Ct. App. 1999). Mallett claims the Commission erred by: (1) failing to base its findings of fact on credible and substantial evidence; (2) incorrectly determining that it could not consider the effects of Mallett's 1981 injury; and (3) depriving Mallett of his right to due process. We will address each claim in turn.

A. Findings of Fact

¶10 Mallett argues that the Commission improperly credited the opinion of the independent medical examiner, Dr. Karr, over the opinions of Mallett's treating physicians, Drs. Maiman and Dhariwal. Mallett asserts that the opinions of his treating physicians should be credited over that of the independent medical examiner because: (1) Wisconsin recognizes the treating physician rule; and (2) his treating physicians based their opinions on well-recognized medical principles. We disagree.

¶11 As an initial matter, Mallett asserts that the Commission erred in discrediting his treating physicians in favor of the independent medical examiner because "Wisconsin has a de facto treating physician rule" (capitalization omitted), requiring the Commission to give more weight to a treating physician's opinion than a non-treating physician's opinion. That is simply not true. *See* ***Conradt v. Mt. Carmel Sch.***, 197 Wis. 2d 60, 63, 539 N.W.2d 713 (Ct. App. 1995). To the contrary, Wisconsin explicitly chose not to adopt the treating physician rule, holding that it contradicted the statutory requirement that the Commission be "the 'sole judge of the weight and credibility' of medical witnesses." ***Id.*** at 68 (citation omitted); *see also* WIS. STAT. § 102.23(6) (2007-08).[2] We are duty-bound to abide by that decision. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶12 Next, Mallett argues that the Commission's decision that the independent medical examiner was more credible than the treating physicians is not based on substantial and credible evidence. When reviewing the Commission's findings of fact, we must find the Commission's findings "'conclusive … so long as they are supported by credible and substantial evidence.'" ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995) (citation omitted). Credible evidence is that which excludes speculation or conjecture. *See* ***Bumpas v. DILHR***, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). Evidence is substantial if a reasonable person relying on the evidence might make the same decision. *See* ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶13 Mallett devotes a great deal of time and attention on appeal to shoring up the reports of Drs. Maiman and Dhariwal in an attempt to persuade us that the Commission erred in finding them not credible. Mallett notes that both doctors based their opinions on "well-recognized scientific and medical principles deduced from facts … sufficiently established [and] which have gained general acceptance[] in the medical field of neurosurgery." He further stresses that there is substantial evidence in the record that supports his theory that his cervical myelopathy was caused by his work conditions in 1983. In choosing this line of argument, however, Mallett fails to recognize our limited ability to review the Commission's decision.

¶14 Medicine is not an exact science; multiple physicians, looking at the same set of facts, and applying well-established principles of medicine, can arrive at different opinions regarding a patient's diagnosis. The Commission has been charged with the responsibility of determining which of those opinions is more credible. ***Conradt***, 197 Wis. 2d at 68-69; *see also* WIS. STAT. § 102.23(6). We must find the Commission's findings of fact conclusive if there is *any credible evidence* in the record to support those findings. *See* ***Briggs & Stratton Corp. v. DILHR***, 43 Wis. 2d 398, 403, 168 N.W.2d 817 (1969); *see also* § 102.23(6). Further, we are not permitted to "substitute [our] judgment for that of the [C]ommission as to the weight or credibility of the evidence on any finding of fact." *See* § 102.23(6). "'The question is not whether there is credible evidence in the record to sustain a finding the [C]ommission did not make, but whether there is any credible evidence to sustain the finding the [C]ommission did make.'" ***Briggs***, 43 Wis. 2d at 403 (quoting ***Unruh v. Industrial Comm'n***, 8 Wis. 2d 394, 398, 99 N.W.2d 182 (1959)). Therefore, we turn to the Commission's decision and review the basis for its finding.

¶15 The Commission credited the opinion of Dr. Karr over the opinions of Drs. Maiman and Dhariwal. In finding Dr. Karr more credible, the Commission noted that Dr. Karr clearly stated that he did not believe that the 1983 accident was a cause of Mallett's current injury based upon the benign nature of Mallett's duties for Briggs in 1983 and Mallett's limited exposure to those activities (approximately four months). Dr. Karr also doubted causation because Mallett's current condition is neurological and an examination by a neurologist in late 1986, three years after Mallett injured his right arm and wrist, showed no evidence of neurological injury. Such evidence is substantial and credible and properly supports the Commission's decision to credit Dr. Karr's report.

¶16 Further, the Commission cited valid reasons for disregarding Dr. Maiman's and Dr. Dhariwal's reports. The Commission rejected Dr. Maiman's report because "Dr. Maiman assigned causation to the now-final April 1981 accidental injury," as opposed to the 1983 injury—and the Commission did not have jurisdiction over the 1981 claim. Similarly, the Commission rejected Dr. Dhariwal's report, finding that it "was not entirely clear on whether [Dr. Dhariwal] viewed work exposure measuring cam gears, basically from May to December 1983 (with several weeks off work due to a labor strike) to be causative." A reasonable person construing the doctors' reports could come to these same conclusions. *See* ***Bucyrus-Erie***, 90 Wis. 2d at 418. Consequently, we find that the Commission's decision is properly supported by substantial and credible evidence.

B. Jurisdiction Over the 1981 Injury

¶17 Mallett next asserts that he timely requested, pursuant to WIS. STAT. § 102.18(5), that the Commission reopen its 1984 order and consider a claim

based on his 1981 injury. But not only did Mallett fail to timely file any such request, he failed to raise this issue before the hearing examiner and the Commission—thereby forfeiting his ability to raise the issue now.[3] And even if he had properly raised the issue below, we find the Commission's 1987 decision, which dismissed the 1981 claim, finally disposed of the matter.

¶18 Pursuant to WIS. STAT. § 102.18(5), "the [C]ommission has three years to set aside a final order if it appears that a mistake was made in treating the matter as an accident, when in fact the employee suffers from an occupational disease." ***Kwaterski v. LIRC***, 158 Wis. 2d 112, 119, 462 N.W.2d 534 (Ct. App. 1990). Here, on April 6, 1984, the Commission entered its final order, based on the assumption that an accident caused Mallett's 1981 injury; thereafter, the Commission had until April 7, 1987 to set aside its final order if it believed that Mallett instead suffered an occupational disease. *See* WIS. STAT. § 801.15(1)(b) ("[I]n computing any period of time, … the day of the act … from which the designated period of time begins to run shall not be included."). It did not do so.

¶19 Mallett asserts that he properly and timely requested that the Commission reopen its 1984 order under WIS. STAT. § 102.18(5) when he filed his application for benefits in December 1987. At that point in time, however, the deadline to make such a request had long since passed. Regardless, in 1987 the Commission considered whether to reopen the 1984 order, but determined that it had correctly found in 1984 that the 1981 injury arose from an accident and not an occupational disease. Based on that decision, the Commission dismissed Mallett's current claim for benefits for cervical myelopathy to the extent he claimed that his

[3] Because the Commission did not consider the issue, we address the issue *de novo*.

injury arose from the 1981 accident. We did not review the Commission's decision because Mallett did not make a timely request for us to do so. Consequently, the Commission's decision was a final one. *See* ***Kwaterski***, 158 Wis. 2d at 118 ("[A]fter the [C]ommission makes a final order and the period of review has expired, the [C]ommission's determination is final for all purposes."). And the claim preclusion doctrine prohibits us from readdressing that claim now.[4] *See* ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶22, 302 Wis. 2d 41, 734 N.W.2d 855. ("'[A] final judgment is conclusive in all subsequent actions between the same parties … as to all matters which were litigated or which might have been litigated in the former proceedings.'" (citation and one set of quotation marks omitted)).

¶20 We are similarly unpersuaded by Mallett's attempt to assert that his 1983 injury was aggravated by his 1981 injury, and that this required that the Commission consider the effects of the 1981 injury on his cervical myelopathy claim. The Commission relied on Dr. Karr's report, which found that neither the 1981 or 1983 accidents caused Mallett's cervical myelopathy. So even if we were to accept Mallett's premise as true—that the Commission could consider the 1981 injury as it related to the 1983 injury—Mallett still does not succeed in convincing us to overturn the Commission's decision.

[4] In April 2007, Mallett did, again, ask the court to reopen its 1984 order pursuant to WIS. STAT. § 102.18(5). At that time, Mallett wrote a letter to the hearing examiner, notifying him that he "inten[ded] to make an application pursuant to [WIS. STAT. § 102.18(5)] for the Department to reopen my February [sic] 1984 order and award … due to [a] mistake made by the Department in determining whether I suffered from an occupational disease." We need not address Mallett's new request because, as we have established, the deadline for making such a request has come and gone.

C. Due Process

¶21 Finally, Mallett asserts that the Commission lost both of his administrative records, placing him at a disadvantage amounting to a deprivation of due process. More specifically, he asserts that because the administrative records were lost he was deprived of the opportunity to challenge the Commission's 1987 decision dismissing his 1981 injury claim.

¶22 The circuit court dismissed Mallett's due process claim because he failed to raise the claim before either the hearing examiner or the Commission. Likewise, "this court will not consider issues beyond those which were properly before the court below." *See* ***Goranson v. DILHR***, 94 Wis. 2d 537, 545, 289 N.W.2d 270 (1980); *see also* ***Behnke v. DHSS***, 146 Wis. 2d 178, 182 n.2, 430 N.W.2d 600 (Ct. App. 1988) (holding that the agency forfeited the right to raise a legal argument in court that was not advanced in the administrative proceedings under review). Because our review of the record confirms the circuit court's finding that Mallett did not raise his due process claim before either the hearing examiner or the Commission, we will not address his claim on appeal.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.