COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2843 **Cir. Ct. No. 2008CV17400**

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

FRANK ARMS,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRIAL REVIEW COMMISSION,
ACTION EXPRESS, INC. AND UNITED WISCONSIN INSURANCE CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Frank Arms appeals a circuit court order affirming a decision of the Labor and Industry Review Commission. Arms contends that the Commission erred in concluding that he did not sustain a compensable low back injury arising out of his employment on July 25, 2005. We affirm.

¶2 When an appeal is taken from a circuit court's order affirming or reversing an order of the Commission, we review the decision of the Commission, not the decision of the circuit court. *See* ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 117, 438 N.W.2d 823, 827 (1989). Our scope of review is identical to that of the circuit court. ***Id.***, 149 Wis. 2d at 117, 438 N.W.2d at 826–827. Both the circuit court and this court "owe deference to the fact findings of the [C]ommission [and its] findings of fact are conclusive if there is any credible evidence to support those findings." ***Id.***, 149 Wis. 2d 117–118, 438 N.W.2d at 827. Both the circuit court and this court decide questions of law *de novo*. ***Id.***, 149 Wis. 2d at 118, 438 N.W.2d at 827.

¶3 We have reviewed the Commission's decision. We agree with the circuit court's conclusion that there is credible evidence to support the Commission's findings of fact. The circuit court's legal conclusions express our view of the law. Accordingly, we adopt the attached reasoning of the circuit court as our own and affirm. *See* WIS. CT. APP. IOP VI(5)(a) (Oct. 14, 2003) (court of appeals may adopt circuit court's opinion).

By the Court.—Order affirmed.

This opinion will not be published.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

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 1** **MILWAUKEE COUNTY**

FRANK ARMS,

Petitioner,

vs. Case No: 2008 CV 17400

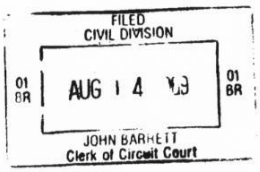
LABOR AND INDUSTRY REVIEW COMMISSION,

ACTION EXPRESS, INC.,

and

UNITED WISCONSIN INSURANCE CO.,

Respondents.



DECISION AND FINAL ORDER

INTRODUCTION

Petitioner Frank Arms (Petitioner) appeals to this Court a decision of the Labor and Industry Review Commission dated November 6, 2008. That decision affirmed Administrative Law Judge Nancy L. Schneider's findings and order of May 19, 2008, denying Petitioner's application for benefits related to an asserted back injury.

THIS CAUSE coming before the Court on the Review of Order of Labor and Industry Review Commission (LIRC or Commission), a timely Summons and Complaint having been filed, and the parties having presented their respective positions through written briefs, the Court entered a Decision and Final Order August 14, 2009.

SUMMARY OF FACTS

Petitioner was employed by Action Express as a truck driver from April 2, 2003, until May or June 2006. Hr'g Tr. at 11. Petitioner asserts that he injured his back on July 25, 2005, when the back of the semi truck he was driving jammed as he was opening it. The door of the trailer was a roll-up door, similar to what is frequently used on garages, and had to be manually operated from the bottom. There was a manual latch on the bottom with rollers on each side and a spring that helped the door roll up. Hr'g Tr. at 14-15.

The incident that underlies this claim occurred at Gilles' Ice Cream in Germantown. Petitioner backed into the dock and locked the trailer to the dock. Then he opened the door and attempted to roll it up. When it got approximately one foot off the bottom of the trailer, the door jammed. Hr'g Tr. at 34. Petitioner asserts that his body was moving in an upward direction at the time the door jammed and he felt immediate pain in his back from the door being jammed. Prior to this incident, Petitioner had a long history of lower back problems. He testified that the pain he experienced during the door jam incident was in the same area his back had previously been injured and the area in which he received medical treatment, yet the pain this time was greater than he ever felt before and it shot down his legs. Hr'g Tr. at 34, 35. Petitioner's medical history shows that he suffered back pain and received medical treatment for it beginning in 1988.

Petitioner sustained a back injury in 2000 when he was a machine operator for a different employer. He received physical therapy and missed time from work but did not have surgery at that time. Petitioner returned to work after the 2000 injury with occasional low back pain but without medical restrictions. Hr'g Tr. at 21. He was awarded 2% permanent partial disability.

An MRI performed in 2000 revealed degenerative disc disease at the L3-4 and L4-5, and a small disc herniation and bulge at L5-S1.

Petitioner continued to have occasional back pain and continued to receive medication, occasional physical therapy, and conducted home exercises. He continued to see Dr. Vinluan and Dr. Maiman for his occasional back pains. Medical notes from October 10, 2003 indicate that Petitioner reported "intractable" back pain since the work injury in 2000. R. at 254. In 2002 and 2003 he would aggravate his back occasionally with activity but he did not have regular or daily pain. During this time Petitioner took prescribed medications for his back and performed the daily exercises that had been previously prescribed to him. In September 2003, Dr. Maiman ordered an MRI, which showed some disc herniation, but Dr. Maiman allowed Petitioner to continue to work unrestricted. In January 2004, Dr. Dennis Maiman recommended fusion surgery, but Petitioner declined. R. at 252.

Petitioner testified that in the spring of 2005 he did not have daily back pain and was not receiving regular treatment other than the medications. He was also physically active playing baseball and basketball. R. 23, 24. On March 20, 2005, Petitioner was examined by Dr. Stephen Robbins, an orthopedic surgeon, with regard to a workers compensation claim that had been filed arising from the 2000 injury. Dr. Robbins recommended anti-inflammatory medications and muscle relaxants. He did not recommend work restrictions or surgery.

Immediately after the incident on July 25, 2005, Petitioner first sought treatment with Dr. Vinluan, who prescribed physical therapy and medication, which was not helpful. Dr. Vinluan next prescribed steroid injections, which were also unhelpful. Petitioner then saw Dr. Maiman on October 27, 2005 and had X-rays taken. Dr. Maiman again recommended surgery. This

time, Petitioner complied and had the surgery on January 16, 2006. Since the surgery and hospitalization, Petitioner has returned to work with a different employer without restrictions.

Respondent Action Express, Inc. had Petitioner examined by Dr. Mark Aschliman following the incident on July 25, 2005. R. at 234-43. Dr. Aschliman noted that Petitioner had a preexisting condition documented as early as 2001. R. at 235. He concluded that Petitioner had discogenic and radicular low back pain. He noted that an MRI scan done after the July 2005 incident indicated no significant change that could reasonably be attributed to the work incident, and that there "is no question" from the review of the medical records that Petitioner's condition was unrelated to the industrial activity for Action Express, Inc. R. at 239.

In its May 19, 2008 decision, the ALJ concluded that the July 25, 2005 incident caused only a temporary aggravation of a preexisting degenerative lumbar condition and that the aggravation resolved as of September 5, 2005, without permanency or the need for further treatment. Petitioner appealed the ALJ's order and on November 6, 2008, the Labor and Industry Review Commission issued an order that affirmed the findings and order of the ALJ. Petitioner then filed the instant action to review LIRC's decision.

STANDARD OF REVIEW

This Court reviews the Commission's decision pursuant to Wis. Stat. § 102.23(1)(e). Accordingly, a decision of the LIRC may only be reversed upon the following grounds: (1) the LIRC acted without or in excess of its power; (2) the Commission's order was procured by fraud; or (3) the Commission's findings of fact do not support the order or award. Wis. Stat. § 102.23(1)(e). The Commission's findings of fact are binding on the court if they are supported by substantial and credible evidence on the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169, 173-174 (1983).

The Commission's findings of fact are conclusive if they are supported by credible and substantial evidence. *Nottelson v. DILHR*, 94 Wis. 2d 106, 114, 287 N.W.2d 763, 767 (1980). Credible and substantial evidence is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion. *Princess House*, 111 Wis. 2d at 54, 330 N.W.2d at 173 (1983). A reviewing court need only find that the evidence is sufficient to exclude speculation or conjecture. *L & H Wrecking Co. v. LIRC*, 114 Wis. 2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983).

The construction of a statute and the question of whether facts satisfy a statutory standard are questions of law. *Nottelson*, 94 Wis. 2d at 115-116, 287 N.W.2d at 768. A court is not bound by the Commission's determination on such questions, but rather accords the agency's interpretation differing degrees of deference based on a variety of factors. *State v. LIRC*, 113 Wis. 2d 107, 109, 334 N.W.2d 279, 280 (Ct. App. 1983). The court determines the appropriate level of deference by comparing the institutional qualifications and capabilities of the court and the agency by considering, for example, whether the legislature has charged the agency with administration of the statute, whether the agency has expertise, whether the agency interpretation is one of long standing, and whether the agency interpretation will provide uniformity and consistency." *Racine Harley-Davidson, Inc. v. State, Div. of Hearings and Appeals*, 2006 WI 86, ¶14, 292 Wis. 2d 549, 563, 717 N.W.2d 184, 190-191.

A court must give "great weight" deference to the agency where: (1) it is charged with administration of the statute being interpreted; (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." *Clean Wisconsin, Inc. v. Public Service Com'n of Wisconsin*, 2005 WI 93, ¶ 39, 282 Wis.2d 250, 700

N.W.2d 768. A court must also accord great weight deference to any agency's decision if it is intertwined with value and policy decisions. *See id* at ¶ 41. "In other words, when a legal question calls for value and policy judgments that require the expertise and experience of an agency, the agency's decision, although not controlling, is given great weight deference." *Brown v. Labor & Indus. Review Comm'n*, 2003 WI 142, ¶ 16, 267 Wis. 2d 31, 671 N.W.2d 279.

ANALYSIS

The issue before this Court is whether Petitioner's injury was due to the July 25, 2005 work related incident or whether the incident caused no more than a temporary aggravation of Petitioner's preexisting condition. In accordance with the principles stated above, LIRC's order must be sustained if it is supported by credible and substantial evidence. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169, 173-174 (1983). Petitioner asserts that Dr. Aschliman's "independent medical examination cannot be considered substantial in view of the totality of the evidence in this case." Pet.'r Br. at 3. Petitioner argues that the reports of Drs. Maiman and Vinluan should be given more weight than Dr. Aschliman's medical conclusions.

The Court is limited in its review of the persuasiveness and credibility of witness testimony, as this area is within the province of LIRC. "Conflicts in the testimony of medical witnesses are to be resolved by LIRC, and a determination made by LIRC that the testimony of one qualified medical witness rather than another is to be believed is conclusive." *Bretl v. Labor & Indus. Review Comm'n*, 204 Wis. 2d 93, 101, 553 N.W.2d 550 (Ct. App. 1996). LIRC relied on the medical reports of Dr. Aschliman and not the reports by Dr. Maiman and Dr. Vinluan, and that decision is within LIRC's ability to make credibility determinations in assessing medical reports and testimony. *Conradt v. Mt. Carmel School*, 197 Wis. 2d 60, 67-68, 539 N.W.2d 713 (Ct. App. 1995). Dr. Aschliman's conclusion, which LIRC ultimately gave more weight to than

Drs. Maiman and Vinluan, opined that Petitioner "suffered a temporary aggravation of his preexisting degenerative disc disease on July 25, 2005, but had not suffered any permanent disability as a result of the work incident, and had returned to a healing plateau by September 4, 2005 without the need for further treatment for the work incident." In addition to Dr. Aschliman's assessment, the Commission relied on Petitioner's "objective tests which did not reveal any further breakage or disc herniation following the work incident on July 25, 2005" and the extensive medical history of prior low back pain in reaching its decision to affirm the ALJ's order.

The Court is convinced that the Commission's findings are supported by credible and substantial evidence. While there is some evidence supporting a contrary conclusion, "[i]f the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. Wis. Stat. § 102.23(6). The Court will not second guess the Commission's findings of fact or the weight or credibility that was given to the witnesses and their respective testimony.

CONCLUSION AND ORDER

Based on a review of the record and the parties' brief, this Court finds that the Commission's findings of fact and order are supported by credible and substantial evidence. Accordingly, **IT IS HEREBY ORDERED** that the decision of the Labor and Industry Review Commission is **AFFIRMED**, for the reasons stated in this Decision and Final Order.

This is a final order that disposes of the entire matter in litigation and is intended by the Court to be an appealable order under Wis. Stat. § 808.03(1). *See Tyler v. The Riverbank*, 2007 WI 33, ¶ 25, 299 Wis.2d 751, 762-63, 728 N.W.2d 686.

Dated this 14th day of August 2009, in Milwaukee, Wisconsin.

BY THE COURT:

Judge Maxine A. White
Milwaukee County Circuit Court, Branch 1