

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2011

A. John Voelker
Acting 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. 2010AP1811

Cir. Ct. No. 2009CV1159

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ACUITY INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

T. J. ELECTRIC, INC.,

INVOLUNTARY-PLAINTIFF,

v.

LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

KYLE J. ZWIEFELHOFER,

DEFENDANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TERENCE T. BOURKE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Acuity Insurance Company appeals a judgment confirming a decision of the Labor and Industry Review Commission (LIRC) awarding worker’s compensation benefits to Kyle J. Zwiefelhofer. Acuity argues that LIRC’s factual findings are based on speculation and do not support the award made. We disagree and affirm.

¶2 LIRC adopted the following facts as found by the administrative law judge (ALJ). Zwiefelhofer is an electrician for T.J. Electric, Inc. In June 2005, while descending a ladder after performing a wiring task, Zwiefelhofer’s foot slipped off a rung and he twisted his right knee. Despite pain and swelling, Zwiefelhofer continued working.

¶3 About two weeks later, Zwiefelhofer sought medical attention from orthopedic surgeon Dr. John Drawbert. An MRI revealed “fairly severe” osteoarthritis of the medial compartment, an extensive degenerative medial meniscus tear and a partial tear of the anterior cruciate ligament (ACL). Dr. Drawbert described a “bone-to-bone deformity” with a “varus ACL[-]deficient knee” and recommended a high tibial osteotomy (HTO). Zwiefelhofer’s other treating physician, orthopedic surgeon Dr. Robert Meisterling, also noted the medial compartment osteoarthritis and concurred in the recommended treatment.

¶4 Zwiefelhofer has a history of knee problems. In 1991 he suffered a probable ACL tear in the same knee for which Dr. Drawbert initially recommended surgical repair. When the knee became asymptomatic, Zwiefelhofer opted to forgo surgery. Zwiefelhofer also had ACL tears in his left knee, and had surgery by Dr. Meisterling in 1989 and Dr. Drawbert in 1993.

Zwiefelhofer missed no work due to his right knee between the 1991 or 2005 injury and none after the 2005 injury until September of 2008.

¶5 Zwiefelhofer filed a worker's compensation claim. Acuity, T.J. Electric's worker's compensation carrier, denied the claim based upon the examination and report of Dr. Gordon Clark, a physician Acuity retained to perform an independent medical examination (IME). After a hearing, the ALJ concluded that Zwiefelhofer suffered a traumatic injury while performing service growing out of and incidental to his employment. The ALJ ordered temporary disability benefits and the payment of all treatment expenses associated with the HTO. LIRC affirmed the ALJ's decision and adopted the ALJ's findings and order as its own. The circuit court affirmed LIRC's decision.

¶6 On appeal, Acuity argues that LIRC acted in excess of its authority by making findings not based on credible and substantial evidence and that its findings do not support the award. More specifically, Acuity contends that Zwiefelhofer's right knee problems are "solely the result of his longstanding, progressively worsening degenerative condition," such that LIRC acted in excess of its authority by "inexplicably" ordering Acuity to pay worker's compensation benefits for a surgery the "medical experts unanimously agree" would address only the underlying condition, not any acute ACL injury.

¶7 We review LIRC's decision, not the circuit court's. *Brakebush Bros., Inc. v. LIRC*, 210 Wis. 2d 623, 629, 563 N.W.2d 512 (1997). LIRC's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. WIS. STAT. § 102.23(6) (2009-10)¹; *Ide v. LIRC*, 224

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

Wis. 2d 159, 165, 589 N.W.2d 363 (1999). The evidence need only be enough to exclude speculation or conjecture. *Ide*, 224 Wis. 2d at 165. The burden is on the party seeking to overturn an agency's action, not on the agency to justify it. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995).

¶8 The ALJ listed its reasons for concluding that the treating physicians' medical opinions were more compelling and credible than those of Dr. Clark, the IME physician. One or both of the treating physicians found that Zwiefelhofer's right knee was asymptomatic for years prior to his fall; his ACL tear was due at least in part to the work injury; the acute injury "rapidly accelerated the demise of the knee from an arthritic perspective"; Zwiefelhofer's underlying condition was unrelated to the acute ACL rupture; and an HTO is necessary to properly treat Zwiefelhofer's knee.

¶9 Dr. Clark, by contrast, "misrepresented [Zwiefelhofer's] statements, medical history, and treating practitioner opinions" and "drew unreasonable inferences from [Zwiefelhofer's] medical records." Dr. Clark suggested that the ACL tear may have coincided with his earlier medial meniscal tear and that Zwiefelhofer denied any pre-existing condition in the knee. He opined that Zwiefelhofer's post-injury symptoms were "only a temporary aggravation" and manifestation of a pre-existing degenerative condition and criticized the treating physicians' recommendations to address the pre-existing condition rather than the ACL issue.

¶10 Zwiefelhofer, the only witness to testify, testified that he injured his right knee in 1991, diagnosed as a probable ACL disruption, experienced no on-going symptoms, sought no further treatment and missed no work due to it. He also testified his right knee was otherwise asymptomatic before this injury, but

that he had surgery for left knee problems. The ALJ implicitly found Zwiefelhofer to be credible. We may not substitute our judgment for that of LIRC as to the weight and credibility of the evidence on any finding of fact. *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989); WIS. STAT. § 102.23(6). The ALJ also expressly found the opinion of the treating physician more credible than that of the employer’s retained physician. When the opinions of qualified medical witnesses conflict, LIRC’s acceptance of one over the other is conclusive. *See E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978).

¶11 Acuity argues that credible evidence supports a different conclusion about the nature of Zwiefelhofer’s work injury. The question before this court, however, is not whether there is credible evidence in the record to support a finding LIRC did not make, but whether there is any credible evidence to support the one it did. *Appleton Elec. Co. v. Minor*, 91 Wis. 2d 825, 829, 284 N.W.2d 99 (1979).

¶12 Upon reviewing the record, and in construing the evidence in a light most favorable to LIRC’s findings of fact, we conclude that credible and substantial evidence supported LIRC’s finding that Zwiefelhofer’s injury caused an acceleration of a pre-existing degenerative arthritic condition “beyond its normal progression” and that an HTO was necessary to correct it. Zwiefelhofer’s injury therefore is compensable. *See Lewellyn v. DILHR*, 38 Wis. 2d 43, 58-59, 155 N.W.2d 678 (1968).

By the Court.—Judgment affirmed.

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

