COURT OF APPEALS
DECISION
DATED AND RELEASED

August 8, 1995

No. 95-0212

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

HARNISCHFEGER CORPORATION,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and STEVEN DZENZEOL,

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County: JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Harnischfeger Corporation appeals from an order of the circuit court affirming a decision by the Labor and Industry Review Commission which awarded worker's compensation benefits to Steven Dzenzeol. The order of the circuit court confirming the decision of the Commission is affirmed.

Dzenzeol was employed by Harnischfeger as a milling machine operator. He had been employed in that capacity since February, 1975. In 1987 and 1988, Dzenzeol began to experience numbness in his legs. He received treatment for his problem and lost several weeks of work in 1988. On February 2, 1989, Dzenzeol sustained a back injury at work while lifting a heavy carton. He immediately experienced pain and left leg numbness. He reported the injury to his employer and sought treatment from Dr. Dale Bauwens. X-rays, CT scans and MRI tests were ordered and revealed grade II degenerative changes of the L5-S1 disc, minimal retrolisthesis at L5-S1 and posterior osteophytes at the L5-S1 level. There was no evidence of disc herniation.

On May 10, 1989, Dr. Bauwens indicated in a report that the work-related injury caused a temporary aggravation of an underlying degenerative disc disease. Therefore, Dr. Bauwens recommended that Dzenzeol be on temporary restrictions. On June 21, 1989, Dr. Bauwens recommended that the restrictions remain for another two months. In September, 1989, Dr. Bauwens issued a permanent restriction of lifting no more than 20 pounds. In a report dated May 21, 1991, Dr. Bauwens assigned a 5% disability rating to Dzenzeol, of which 3% was due to the pre-existing degenerative disc disease and 2% was due to the work-related injury. On May 31, 1991, Dr. Bauwens assessed additional permanent restrictions which included only occasional bending, squatting, crawling, climbing, and reaching; no sitting, standing, and walking for more than two hours at a time; and, no sitting, standing, and walking for more than four hours during an eight hour day.

At Harnischfeger's request, Dzenzeol was examined by Dr. Dennis Brown on August 13, 1992. Dr. Brown also diagnosed low back pain due to a degenerative disc condition but diagnosed the work-related injury as a lumbarsacral strain with no indication of the underlying degenerative disease. He opined that Dzenzeol reached a healing plateau in September, 1989, and did not need any further medical treatment. He also opined that although Dzenzeol did not have a permanent injury, he should restrict himself to function at a medium work level with no repetitive bending.

Dzenzeol and Harnischfeger each introduced reports from vocational experts who opined about Dzenzeol's loss of earning capacity. Dzenzeol's expert estimated a 65% to 75% loss of earning capacity. Harnischfeger's expert estimated a 45% loss of earning capacity. The

Commission found Dr. Bauwens's opinions to be more credible than Dr. Brown's but adopted Harnischfeger's expert determination of a 45% loss of earning capacity.

On appeal, this court reviews the decision of the administrative agency not that of the circuit court. ***Wisconsin Pub. Serv. Corp. v. Public Serv. Comm.***, 156 Wis.2d 611, 616, 457 N.W.2d 502, 504 (Ct. App. 1990). The determination of the nature and extent of permanent partial disability attributable to loss of earning capacity are questions of fact, and the Commission's findings in this regard are conclusive if supported by credible and substantial evidence. ***Manitowoc County v. DILHR***, 88 Wis.2d 430, 437, 276 N.W.2d 755, 758 (1979); *see* ***Nottelson v. DILHR***, 94 Wis.2d 106, 114, 287 N.W.2d 763, 767 (1980). The drawing of one of several reasonable inferences from undisputed facts also constitutes fact finding. ***Vande Zande v. DILHR***, 70 Wis.2d 1086, 1094, 236 N.W.2d 255, 259 (1975). Any legal conclusion drawn by the Commission from its findings of fact, however, is a question of law subject to independent judicial review. ***Nottelson***, 94 Wis.2d at 114-115, 287 N.W.2d at 767. Thus, in examining the Commission's findings here, this court's role is to review the record for credible and substantial evidence that supports the Commission's determination rather than to weigh opposing evidence. ***Vande Zande***, 70 Wis.2d at 1097, 236 N.W.2d at 260.

Under ***Lewellyn v. DILHR***, 38 Wis.2d 43, 155 N.W.2d 678 (1968), an applicant for compensation benefits must establish the nature and existence of a pre-existing condition of a progressively deteriorating nature that the work-related incident is claimed to have precipitated, aggravated, and accelerated beyond normal progression. Harnischfeger insists that there is no medical testimony that the low back sprain precipitated, aggravated, and accelerated beyond normal progression a pre-existing degenerative disc disease. Therefore, according to Harnischfeger, the evidence is insufficient to hold it liable for a benefits award of partial disability in favor of Dzenzeol. We disagree.

The evidence in the record and applicable law amply support the Commission's determination. We first observe that the Commission chose to discount the significance of the reports prepared by Dr. Brown, the physician hired by Harnischfeger to examine Dzenzeol. As the Commission is the judge of the credibility of the witnesses, we cannot say that its rejection of Dr. Brown's findings was in error. *See* ***Bucyrus-Erie Co. v. DILHR***, 90 Wis.2d 408, 418, 280

N.W.2d 142, 147 (1979). It is reasonable to infer from Dr. Bauwens's reports and letters that the work-related injury precipitated, aggravated, and accelerated beyond normal progression Dzenzeol's underlying degenerative condition. A letter by Dr. Bauwens on April 19, 1989, to Wausau Insurance Company states: "My impression is that of pre-existent underlying degenerative disc disease that was greatly exacerbated with a back sprain." On May 18, 1989, Dr. Bauwens reported to Harnischfeger: "I think that his lifting injury at work has caused temporary aggravation of his underlying degenerative disc disease. He needs to be on temporary restrictions. These may be permanent in the future, only time will tell." In another report to Harnischfeger dated June 29, 1989, Dr. Bauwens wrote: "Follow-up for back pain secondary to degenerative disc disease with work exacerbation.... There is a distinct possibility that we may recommend permanent lifting restrictions to avoid exacerbation or recurrence of his problems." Further, on May 21, 1991, Dr. Bauwens reported to Harnischfeger:

> Final diagnosis is that Steven has degenerative disc disease. He has suffered some permanent impairment as a result of the sprain that was an aggravation of his pre-existent condition. By way of estimation of permanent impairment, patient has 5% permanent impairment of his lower back. Of this, I would estimate 3% was pre-existent and 2% to be exacerbation from his work related lumbar sprain.

Finally, on July 29, 1992, Dr. Bauwens replied to Harnischfeger's attorney's inquiry that he placed restrictions on Dzenzeol "because he has degenerative disc disease and I wished to avoid the potential for new injury."

The Commission interpreted the July 29, 1992, letter as referring to Dzenzeol's condition at the time the restrictions were imposed. In other words, according to the Commission, Dr. Bauwens was referring to the degenerative condition as aggravated, accelerated, or precipitated beyond its normal progression by the work-related injury. The Commission did not construe the statement to refer to only the pre-existing portion of Dzenzeol's degenerative disease. Similarly, the Commission determined that the June 29, 1989, note meant exacerbation or recurrence of Dzenzeol's problems after the February, 1989, work-related injury caused additional permanent disability, not his pre-

existing condition unaffected by the work-related injury. Further, the Commission determined the fact that Dzenzeol was able to work as a millworker without restriction before the February, 1989 work-related injury suggested that all or nearly all of his restrictions were attributable to the permanent change. Finally, the Commission determined that, "Dr. Bauwens finds 3% permanent partial disability due to the pre-existing degenerative disc disease."

Harnischfeger argues that reversal is required because Dr. Bauwens did not use the words "precipitates, aggravates[,] and accelerates beyond normal progression." We disagree. No magic words are required if the Commission can fairly and reasonably conclude from the doctor's reports that the underlying degenerative condition was precipitated, aggravated, and accelerated beyond its normal progression by the work-related injury. This is true even when the physician, as was the case here, did not check either of the "yes" or "no" boxes on the WC-16B forms asking whether the work-related injury caused an aggravation of the underlying injury beyond its normal course. As noted, Dr. Bauwens found "permanent impairment as a result of the sprain that was an aggravation of his pre-existent condition." Once the work-related accident occurred on February 2, 1989, Dr. Bauwens opined that of the 5% disability, 3% was from the existing condition and 2% was from the accident. It was reasonable for the Commission to have concluded from Dr. Bauwens's letters and reports that the work-related injury was such that it precipitated, aggravated, and accelerated Dzenzeol's underlying degenerative condition beyond normal progression.

By the Court.—Order affirmed.

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