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**DISTRICT IV**

July 26, 2017

*To*:

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You are hereby notified that the Court has entered the following opinion and order:

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2016AP1605 Lisa Colley v. LIRC (L.C. # 2015CV2773)

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Lisa Colley appeals a circuit court order that affirmed a worker's compensation decision made by the Wisconsin Labor and Industry Review Commission (LIRC). After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] Although we review LIRC's decision rather than the circuit court's, we conclude that the circuit court's order identified and applied the proper legal standards to the relevant facts to reach the correct conclusion in reviewing LIRC's decision. We therefore adopt the circuit court's order as we further explain below.

Specifically, we agree with the circuit court's analysis that the report of expert Dr. Richard Karr constituted substantial evidence supporting LIRC's determination as to the compensable period for Colley's work-related injury—including its findings that Colley had fully healed by six weeks after the injury and that treatments Colley obtained after her injury had healed were related to a "pain disorder associated with psychosocial factors" *unrelated to*, i.e., not caused by, the actual work injury. Colley's arguments that other evidence in the record would support a finding that the healing date was later or that Colley's pain disorder was caused by the back strain she suffered at work essentially boil down to credibility challenges.

Unless an expert's testimony is incredible as a matter of law, a factfinder may accept the expert's opinion notwithstanding conflicting testimony from other witnesses. ***State v. Lombard***, 2003 WI App 163 ¶21, 266 Wis. 2d 887, 669 N.W.2d 157. Testimony is not incredible as a matter of law unless it is inherently or patently unbelievable or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269 (citation omitted). That is not the case here. We therefore incorporate into this order the circuit court's

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

decision, which we attach, and summarily affirm on that basis. *See* Wis. Ct. App. IOP VI(5)(a) (Feb. 24, 2016).

IT IS ORDERED that the circuit court order affirming LIRC's decision is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*

STATE OF WISCONSIN CIRCUIT COURT BRANCH 14 DANE COUNTY



LISA COLLEY,
Petitioner,

VS.

LABOR AND INDUSTRY REVIEW COMMISSION, BECTON DICKINSON & COMPANY, AND ACE AMERICAN INSURANCE COMPANY,
Respondents.

Case No. 2015-CV-2773

# MEMORANDUM DECISION

## BACKGROUND

This case is before me on a Wis. stat. § 102.23 petition for review of the Labor and Industry Review Commission's September 30, 2015 Decision and Order denying worker's compensation to Petitioner Lisa Colley. It is undisputed that the incident leading to this Petition occurred during Ms. Colley's employment as a media prep floater for Becton Dickinson & Co. On April 21, 2013, Ms. Colley sat down at work to complete paperwork and, upon rising, experienced severe mid and low back pain. (Oct. 29, 2014 Hrg. Tr., "Tr. I," 44-45.) She left Becton in an ambulance and remained in a hospital receiving pain treatment for two days. (Tr. I 56.)

Ms. Colley began treatment for her lower back injury with Dr. Praygan Patro on April 29, 2013. Between that date and September 29, 2014, she received a myriad of treatments and evaluations provided by Doctors Patro, Bender, Cheung, and Faull, two psychologists, and a

physical therapist. In sum, these treatment providers supplied conflicting diagnoses of Ms. Colley's condition and its source, resulting in an extensive medical history that need not be detailed here in full; the relevant aspects are discussed below as needed. It is undisputed, however, that Ms. Colley did suffer a work-related back injury on April 21, 2013.

A bifurcated hearing was held before an administrative law judge (ALJ) on October 29, 2014, and February 3, 2015, to determine the extent of worker's compensation Ms. Colley should receive. The ALJ considered testimony from Ms. Colley, her daughter, three Becton employees, and written reports from the following experts:

- Dr. Thomas H. Faull, an osteopathic doctor who had treated Ms. Colley on several occasions. Faull diagnosed "chronic lower back pain due to myofascial pain syndrome exacerbated by anxiety/depression following her injury and loss of her employment." (R. 333, 615.) He estimated a total body disability of 5-10% due to the lumbar spine injury. (R. 334, 616.) The report is dated September 29, 2014.

- Dr. William R. Stewart, a licensed clinical psychologist who diagnosed "pain disorder associated with psychosocial factors and a general medical condition." (R. 332, 639.) His report is dated June 25, 2014.

- Dr. Calvin J. Langmade, a licensed psychologist, who opined that Ms. Colley's pain disorder was caused by psychological distress, which was not work-related. (R. 654.) His report is dated October 1, 2014.

- Dr. Richard K. Karr, an orthopaedic surgeon, who issued an expert report for Respondents on September 29, 2014. He made four conclusions:

    - "1. Workplace minor low back strain 4/21/13. No structural spinal or neurological damage sustained. MMI reached within six weeks (6/2/13) with 0% PPD and no alteration in working capability…" (R. 624.)

    - "2. Physical deconditioning…unrelated to #1." (R. 625.)

    - "3. Behavioral factors influencing subjective complaints (including a 'pain disorder associated with psychosocial factors')…unrelated to #1." (*Id.*)

    - "4. Claims of disabling low back pain and sciatica after 6/2/13…are principally due to #3. Number 1 is not a causative factor…To whatever extent Ms. Colley pursues any or all of this treatment, #1 will not be a causative factor." (*Id.*)

The ALJ issued his decision on February 16, 2016, concluding that Ms. Colley did sustain a compensable back injury on April 21, 2013, arising out of her employment with Becton, but adopting Dr. Karr's opinion that the injury was minor and fully healed within six weeks of the incident with no permanent damage. (R. 66-69.) The ALJ found that she had been temporarily and totally disabled between April 21 and June 2 of 2013, but that because Dr. Karr had not identified a date upon which the treatment was no longer compensable, all treatment and services incurred up to September 29, 2013, would be awarded. (R. 69.)

Ms. Colley and Becton Dickinson both petitioned for LIRC review. LIRC affirmed the ALJ's finding that Dr. Karr's opinion was the most credible, that Ms. Colley had a low back strain from which she recovered fully in six weeks, that her pain disorder associated with psychosocial factors was unrelated to the work injury, and that she had no permanent work restrictions related to the injury. (R. 4.) However, it reversed the ALJ's conclusion that Respondents were responsible for Ms. Colley's medical expenses until September 29, 2014, ordering instead that they pay only reasonable treatment expenses incurred through June 2, 2013. (R. 5.)

Ms. Colley petitioned this court for judicial review, asserting LIRC did not rely on substantial evidence in rendering its decision and made a mistake of law in determining that her treatment after June 2 was non-compensable. (Oct. 27, 2015 Pet.)

## STANDARD OF REVIEW

This Petition requires me to review LIRC's interpretation of the Worker's Compensation Act, Wisconsin chapter 102. I must accord great weight deference to LIRC's decision because the legislature charged LIRC with the duty of administering the chapter, LIRC's interpretation of

the chapter is one of long-standing, it employed its expertise or specialized knowledge in forming the interpretation; and the interpretation will provide uniformity and consistency in the application of the chapter. *See Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 650, 660, 539 N.W.2d 98, 102 (1995).

I may set aside LIRC's decision if it acted without or in excess of its powers, procured the decision by fraud, or if its findings of fact are not supported by substantial evidence. Wis. Stat. § 102.23(1)(e); *Currie v. DIHLR*, 210 Wis.2d 370, 387, 565 N.W.2d 253, 257 (Ct. App. 1997). Substantial evidence is more than mere conjecture, speculation, or a scintilla of evidence, *Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, 48,278 Wis.2d 111, 692 N.W.2d 572, but less than a preponderance of the evidence, *Farmers Mill of Athens, Inc. v. Dep't of Indus., Labor & Human Relations*, 97 Wis. 2d 576, 579, 294 N.W.2d 39, 41 (Ct. App. 1980). Applying the substantial evidence test, I must uphold LIRC's factual findings if reasonable minds could arrive at the same conclusion. *Farmers Mill*, 97 Wis. 2d 576, 579. The test "is not the same as…weighing conflicting credible evidence to determine what shall be believed." *Id.* I may not substitute my own judgment for LIRC's in determining the credibility of the evidence. Wis. Stat. § 102.23(6); *Princess House, Inc. v. Dep't of Indus., Labor & Human Relations of State*, 111 Wis. 2d 46, 54, 330 N.W.2d 169, 173 (1983).

## ANALYSIS

### I. Substantial evidence supports the ALJ's adoption of Dr. Karr's testimony.

The ALJ relied chiefly on the testimony of Dr. Karr to find that Ms. Colley sustained a work-related back injury, that she was temporarily and totally disabled for six weeks following

the incident, that she sustained no permanent disability, and that her pain disorder was unrelated to the work injury. (R. 66-70.) Specifically, he concluded

> Ms. Colley's claims of disabling lumbar symptoms after 6/2/13 (including her current nonorganic presentation) are *unrelated* to the 4/21/13 minor strain. Personal behavioral issues are seemingly the principal culprit, given the absence of any obvious organic underpinning. The benign workplace circumstances on or about 4/21/13 are *not* a causative factor.

(R. 626.) (Emphasis in original.) The ALJ adopted his opinions, finding they "interface reasonably with the applicant's medical records and the office notes that were generated…" (R. 69.) On appeal, LIRC upheld that determination, stating, "Like the ALJ, the commission finds the opinion of Dr. Karr more credible than that of Dr. Faull." (R. 3.) Ms. Colley now argues that that reliance is not supported by substantial evidence because Dr. Karr did not evaluate Ms. Colley until 18 months after the injury and because he gave no reason for his selection of June 2, 2013, as the end of healing. (Pet's Br. 19-20.)

The question is really one of credibility: whether a reasonable mind could find Dr. Karr's opinion more credible than the other expert testimony, as LIRC did, despite the two deficiencies Petitioner alleges. I hold that one could. The ALJ faced conflicting reports from medical experts, all of whom had evaluated Ms. Colley. He had to choose whom to believe. Though he didn't treat Ms. Colley right away, he reviewed her extensive medical record and MRI and x-ray images. (R. 618-623.) The 18-month delay between the incident and his examination was certainly a factor the ALJ considered in weighing Dr. Karr's opinion against others, but he nonetheless found Dr. Karr most credible. And while Petitioner asserts that Dr. Karr arbitrarily chose the end of healing date, it is more reasonable to deduce that Dr. Karr, as an expert, chose that date based on his years of experience as an orthopedic surgeon. Experts may use their experience to formulate their opinions, and any deficiency in their theory or methods is an issue

for the parties to argue before the fact-finder. The ALJ could have discounted Dr. Karr's end of healing date in favor of the providers who treated Ms. Colley earlier and more frequently, but he was persuaded that the opinion of Dr. Karr was more accurate. I believe a reasonable mind, faced with the same facts and conflicting medical testimony, could conclude the same. I therefore uphold LIRC's reliance on Dr. Karr as supported by substantial evidence.

## II. LIRC did not err in ruling that Colley's medical treatment after June 2 was non-compensable.

The ALJ adopted Dr. Karr's opinions, but ordered Respondents to compensate Ms. Colley for all reasonable treatment expenses incurred from the incident until September 29, 2014—the date of Dr. Karr's expert report—because "Dr. Karr failed to identify the date by which any further treatment would not be compensable." (R. 69.) The ALJ concluded "all of the treatment and services that were incurred…up to September 29, 2014…were intended to cure or relieve the applicant from her work-related back injury." *Id.* (Emphasis in original.)

LIRC reversed that portion of the order, declaring the end of compensable treatment was June 2, 2013—the date Dr. Karr opined Ms. Colley had been cured and relieved of the effects of the work injury. (R. 5.) It did not discuss specifically why it overturned the ALJ's original determination, but stated

> The commission also credits Dr. Karr's opinion that within six weeks of the date of injury, the applicant recovered from the low back strain fully, without permanent disability, and without the need for permanent work restrictions related to the injury. The commission further credits Dr. Karr's conclusion that the diagnosis of a pain disorder associated with psychosocial factors is unrelated to the workplace minor low back strain. (R. 4.)

The statutes relevant to compensability of medical treatment for work injuries read as follows:

> § 102.42(1) TREATMENT OF EMPLOYEE. The employer shall supply such medical, surgical, chiropractic, psychological, podiatric, dental, and hospital treatment, medicines, medical and surgical supplies…as may be reasonably required to cure and relieve from the effects of the injury… The obligation to furnish such treatment and appliances shall continue as required to prevent further deterioration in the condition of the employee or to maintain the existing status of such condition whether or not healing is completed.
>
> § 102.42(1m) LIABILITY FOR UNNECESSARY TREATMENT. If an employee who has sustained a compensable injury undertakes in good faith invasive treatment that is generally medically acceptable, but that is unnecessary, the employer shall pay disability indemnity for all disability incurred as a result of that treatment. An employer is not liable for disability indemnity for any disability incurred as a result of any unnecessary treatment undertaken in good faith that is noninvasive or not medically acceptable…

Wisconsin courts have been faced before with interpreting these statutes in cases of conflicting medical testimony. In *Spencer v. Dep't of Indus., Labor & Human Relations,* 55 Wis. 2d 525, 200 N.W.2d 611 (1972), an injured employee received conflicting medical treatment opinions for his work-related knee injury. The first doctor's treatment rendered him 15% disabled; the second doctor performed a surgery to ease pain, with which the first doctor disagreed, and which rendered the employee 40% disabled. The LIRC deemed the second surgery non-compensable as unreasonable and unnecessary, but the Supreme Court reversed, asking, "is [the employee] to be faulted because he chose to follow erroneous medical advice? We do not think so, as long as he did so in good faith… The employer is responsible for the consequences not only of the injury, but the treatment." *Id.* at 532.

The Court of Appeals applied *Spencer* in *Honthaners Restaurants, Inc. v. Labor & Indus. Review Comm'n,* 2000 WI App 273, 240 Wis. 2d 234, 621 N.W.2d 660, where an employee suffered an elbow injury at work. She underwent extensive treatment with one provider, who concluded she reached an end of healing two years after the incident. *Id.* at 5. During that time, a second doctor assessed the employee three times and concluded that she should have healed

within one month of the incident. *Id.* at ¶ 6. The employee continued treatment with the first doctor despite the opinion of the second. *Id.*

An ALJ reviewed the conflicting medical reports, found the employee's testimony not credible, and ruled she was not permanently disabled and therefore not entitled to further compensation.[1] LIRC reversed. While it agreed with the ALJ that the employee hadn't suffered a permanent disability, it found that she had been "overdiagnosed and over-treated [by the first doctor], that she believed herself to be permanently disabled, and that she engaged in her prolonged medical treatment with [the first doctor] in good faith." *Id.* at ¶ 7. The Court of Appeals agreed, explaining why *Spencer* applied:

> We agree that the statute ordinarily permits compensation only when medical treatment and expenses are reasonably required and necessary. However, *Spencer* creates an exception to the general rule. In *Spencer*, the supreme court allowed recovery for medical treatment and expenses that were incurred when the injured employee followed what, in hindsight, appeared to be erroneous medical advice. *Spencer* teaches that as long as the claimant engaged in the unnecessary and unreasonable treatment in good faith, the employer is responsible for payment…
>
> As in *Spencer*, here we have two conflicting medical opinions concerning a claimant's injury. [One doctor] believed Stanislowski suffered a permanent injury and needed prolonged treatment. On the other hand, [the second doctor] felt the injury had healed and that Stanislowski was exaggerating her medical condition…[T]he pertinent issues here and in *Spencer* are identical. Both cases involve no dispute that the claimants suffered a compensable injury. Both deal with differing medical opinions on diagnosis and treatment. Both cases have a claimant who continued the unnecessary treatment in good faith. Thus, we conclude the Commission properly relied on *Spencer* and Stanislowski is entitled to additional benefits…

*Id.* at ¶¶ 15, 22.

A crucial difference between this case and *Honthaners* is the fact that the second doctor in *Honthaners* did not identify a conflicting *source* of the symptoms; he merely concluded that

[1] The employee had received some compensation through an initial workers compensation application undisputed by the employer. *Honthaners Restaurants, Inc. v. Labor & Indus. Review Comm'n*, 2000 WI App 273, ¶ 3, 240 Wis. 2d 234, 238, 621 N.W.2d 660, 662.

the employee should have healed faster. Here, Dr. Karr specifically opined that Ms. Colley's back pain after June 2, 2013, was due exclusively to "behavioral factors influencing subjective complaints," including "a pain disorder associated with psychosocial factors." (R. 625.)

Respondents argue *City of Wauwatosa v. Labor & Indus. Review Comm'n*, 110 Wis. 2d 298, 328 N.W.2d 882 (Ct. App. 1982) clarified that *Spencer* only applies where all of the treatment is undisputedly linked to the work injury. (LIRC Br. 13.) In *Wauwatosa*, a police officer sustained a hip injury at work. *Id.* at 299. His first doctor determined the injury had aggravated a preexisting congenital condition, and performed surgery. A second doctor opined the surgery was not necessary for the work injury, but only the preexisting condition. *Id.* A circuit court, applying *Spencer*, agreed with LIRC that the injury had aggravated the preexisting condition, making the surgery compensable. *Id.* at 300. The Court of Appeals reversed, holding the circuit court had erred in applying *Spencer*, and explained

> In *Spencer*, it was undisputed that the injury was a compensable industrial injury. Here, however, there was a dispute in the medical testimony whether [the officer's] condition for which surgery was performed was even related to the compensable industrial injury. The hearing examiner found that the compensable industrial injury did not necessitate surgery. We conclude that the *Spencer* rationale applies only to cases involving treatment for an undisputed compensable industrial injury.

*Id.* at 301.

I am persuaded that *Wauwatosa*, and not *Honthaners*, is applicable here. It is undisputed that Ms. Colley had a work-related injury for which she received treatment from April 21, 2013, through June 2, 2013. After that date, the ALJ clearly adopted Dr. Karr's opinion that Ms. Colley suffered no effects from the work injury. He emphasized that any treatment after that date was not caused by the back strain, but instead by a pain disorder associated with psychosocial factors. Like in *Wauwatosa,* this was a second, conflicting source of symptoms and reason for treatment.

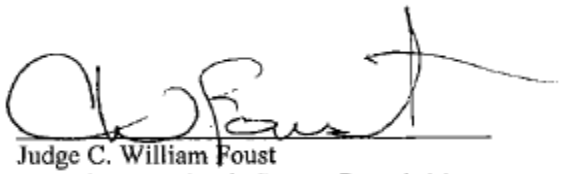
The source of injury after June 2 was therefore disputed, as it was in *Wauwatosa*, and LIRC did not make a error of law in determining that post-June 2 treatment was non-compensable once it adopted Dr. Karr's expert opinion. *Spencer* simply does not apply to these facts. I therefore affirm LIRC's determination that treatment after June 2, 2013, was non-compensable.

**CONCLUSION**

For the reasons stated above, I affirm LIRC's September 30, 2015 decision in full. This is a final order.

BY THE COURT:

Dated this 29th day of June, 2016.



Judge C. William Foust
Dane County Circuit Court – Branch 14