OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

December 15, 2020

To:

Hon. Jeffrey A. Conen
Circuit Court Judge
Safety Building
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room G-8
901 N. 9th Street
Milwaukee, WI 53233

Joshua B. Czuta
Assistant General Counsel
15200 W. Small Rd.
New Berlin, WI 53151

Anthony Russomanno
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Margaret Bach
10321 W. Manitoba St
West Allis, WI 53227

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

2019AP834 Margaret Bach v. Labor and Industry Review Commission (L.C. # 2018CV5294)

Before Dugan, Graham and Donald, 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).

Margaret Bach, *pro se*, appeals from a circuit court order affirming a Labor and Industry Review Commission (LIRC) decision that Bach was not entitled to worker's compensation benefits. Based upon our review of the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm the order.

BACKGROUND

Bach claims that on March 1, 2016, while working for Hospice Advantage, Inc. (Compassus), she slipped on ice in a parking lot and fell, injuring her left knee. In her application for worker's compensation benefits, Bach indicated that this fall resulted in "pain and numbness" necessitating surgery, and that the surgery would leave her with a permanent partial disability of five percent.

In support of her claim for benefits, Bach presented two medical reports in lieu of testimony.[2] One report was prepared by Dr. David Hamel, Bach's internist and primary care provider. Hamel's report indicated that Bach was dealing with "left knee pain, locking of knee, left knee giv[ing] way," causing temporary disability. He recommended "surgery for repair of meniscal tear," after which the disability would be alleviated. The other report was prepared and signed by Nurse Practitioner Katelyn Stange; this report was also signed by Dr. Nicholas Webber, an orthopedic surgeon to whom Hamel had referred Bach. The Stange/Webber report noted that Bach had "medial and lateral meniscus tears," as demonstrated on a May 2016 MRI. Stange and Webber recommended a left knee arthroscopy, after which it was anticipated that Bach would have an approximate five percent permanent partial disability. Both reports

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] "Certified reports of physicians … who have examined or treated the claimant … constitute prima facie evidence as to the matter contained in those reports[] … [and] are admissible as evidence of the diagnosis, necessity of the treatment, and cause and extent of the disability." WIS. STAT. § 102.17(1)(d)1.

indicated that the physicians thought it probable that Bach's fall in the parking lot "caused the disability by precipitation, aggravation and acceleration of a preexisting progressively deteriorating or degenerative condition beyond normal progression."

Compassus's insurer, Accident Fund Insurance Company of America, asked Bach to participate in an independent medical examination. This examination was performed by Dr. David Bartlett, an orthopedic surgery consultant, who also provided a report in lieu of testimony. Bartlett's report indicated that Bach had a loss of medial meniscus function, but he dated this issue back to June 13, 2011, not the March 1, 2016 fall. Bartlett's report also diagnosed tricompartmental degenerative arthritis and concluded that because Bach's arthritis and meniscal tears "are of long-standing nature, no specific injury is identified as having occurred on March 1, 2016."

Bach testified at the worker's compensation hearing and provided voluminous medical records. Following post-hearing briefing, the administrative law judge (ALJ) concluded that Bach had failed to prove her case beyond a legitimate doubt and dismissed the claim.

Bach sought LIRC review of the ALJ's decision. She requested penalties against Compassus and Accident Fund for delay and bad faith under WIS. STAT. § 102.18(1)(bp), and she also asked LIRC to allow her to supplement the record with post-surgical reports. LIRC denied the request to supplement the record, rejected the claim for penalties, and affirmed the ALJ's findings with modifications.

Bach next sought judicial review of LIRC's decision from the circuit court, *see* WIS. STAT. § 102.23, and requested a jury trial. The circuit court denied Bach's jury demand and affirmed LIRC's decision. Bach appeals.

DISCUSSION

On appeal, we review LIRC's decision, not the decisions of the ALJ or the circuit court. *See* ***Xcel Energy Servs., Inc. v. LIRC***, 2013 WI 64, ¶56, 349 Wis. 2d 234, 833 N.W.2d 665. Whether an employee has sustained an injury while performing services growing out of and incidental to employment is a question of fact. *See* ***Kowalchuk v. LIRC***, 2000 WI App 85, ¶7, 234 Wis. 2d 203, 610 N.W.2d 122; *see also* WIS. STAT. § 102.03(1) (specifying conditions under which employer is liable). "The findings of fact made by [LIRC] acting within its powers shall, in the absence of fraud, be conclusive." WIS. STAT. § 102.23(1)(a)1. We uphold LIRC's findings of fact if there is "credible and substantial evidence in the record on which reasonable persons could rely in reaching the same findings." ***Xcel Energy***, 349 Wis. 2d 234, ¶48.

The employee has the burden to prove all elements of a claim; the employee also has the burden on appeal to show that LIRC's decision should be overturned. *See* ***Kowalchuk***, 234 Wis. 2d 203, ¶8. "LIRC has a duty to deny compensation where the evidence raises a legitimate doubt as to the existence of facts essential to establish a claim." ***Id.***

This case turns on the conflicting opinions of medical experts regarding the cause of Bach's current knee issues and need for surgery: the March 1, 2016 fall, as opined by Hamel and Webber, or preexisting arthritis and prior knee injuries and issues, as opined by Bartlett. In its decision, LIRC noted that Bach had a documented history of complaints about her knee locking, causing her to fall. Thus, LIRC concluded it was "left with a legitimate doubt that [Bach's] fall on March 1, 2016, was caused by a slip and fall, as opposed to an idiopathic fall related to her prior medical condition (proclivity to left knee locking)." LIRC also determined that even if there had been a slip and fall—as opposed to her preexisting locking knee condition causing the

fall—Bartlett "credibly opined that the applicant's left knee symptoms subsequent to March 1, 2016, were attributed to her preexisting degenerative left knee condition, including a preexisting medial meniscus tear."

"Conflicts in testimony of medical witnesses are to be resolved by [LIRC], and a determination of [LIRC] that the testimony of one qualified medical witness rather than the testimony of another is to be believed is conclusive." ***E. F. Brewer Co. v. DILHR***, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). Nevertheless, Bach takes issue with LIRC's conclusions for two reasons.

First, Bach contends that Bartlett's conclusions are the result of fraud.[3] She bases this claim on the fact that Bartlett's report states that there were "no medical records or MRI reports available from 2011" when, in fact, there was a two-page MRI report from 2011 contained within a 266-page set of Bach's medical records. However, Bach points to no evidence supporting a claim of fraud, and the record is unclear as to what documents Bartlett actually had available for his review; while Bach cites to a single-page document in the record that confirms a records custodian prepared and sent 266 pages of records, there is no indication on the form of who those documents were sent to or what was included within the 266 pages. Even assuming that the 2011 MRI report was part of the records that Bartlett reviewed, there is nothing to indicate he did anything other than overlook the report. Neither negligence nor mistake

[3] We infer that Bach makes this argument because the standard of review specifies that LIRC's findings of fact "shall, *in the absence of fraud*, be conclusive," *see* WIS. STAT. § 102.23(1)(a)1. (emphasis added), not because Bach is accusing Bartlett of having committed a crime, *see* WIS. STAT. §§ 102.17(1)(d)1., 943.395.

constitutes fraud. *See* ***Humbird Cheese Co. v. Fristad***, 208 Wis. 283, 286, 242 N.W. 158 (1932).

Second, Bach asserts that LIRC misapplied the law regarding preexisting conditions. She quotes ***Lewellyn v. DILHR***, 38 Wis. 2d 43, 56, 155 N.W.2d 678 (1968) (citation omitted), for the proposition that "[a]n employer takes an employee 'as is,'" and that the employer is liable if the employee "is suffering from disease predisposing to 'breakage' and an exertion required by the employment causes the 'breakage' at the moment of exertion[.]" Bach acknowledges that she "had past knee pain due to a torn meniscus," but contends that her condition was stable, as she had "reported no pain in years," and asserts that this is her "as is" condition.

For the reasons we explain below, we conclude that LIRC's opinion is consistent with our supreme court's decision in ***Lewellyn***. In that case, Lewellyn was an assembly line worker who sought worker's compensation benefits in 1964 for back pain issues she attributed to a workplace injury from March 1963. *See* ***id.*** at 49. ***Lewellyn*** thus addressed "whether recovery should be allowed when a preexisting condition becomes manifest or symptomatic during normal activity where the activity bears some relationship to the manifestation." ***Id.*** at 54. The Court summarized three "factual situations which should determine whether or not the particular condition is recoverable:"

> (1) If there is a definite "breakage" (a letting go, a structural change etc. …), while the employee is engaged in usual or normal activity on the job, and there is a relationship between the breakage and the effort exerted or motion involved, the injury is compensable regardless of whether or not the employee's condition was preexisting and regardless of whether or not there is evidence of prior trouble.
>
> (2) If the employee is engaged in normal exertive activity but there is no definite "breakage" or demonstrable physical change occurring at that time but only a manifestation of a

> definitely preexisting condition of a progressively deteriorating nature, recovery should be denied even if the manifestation or symptomization of the condition became apparent during normal employment activity.
>
> (3) If the work activity precipitates, aggravates and accelerates beyond normal progression, a progressively deteriorating or degenerative condition, it is an accident causing injury or disease and the employee should recover even if there is no definite "breakage."

Id. at 58-59 (citations and footnotes omitted). The Industrial Commission[4] had rejected Lewellyn's application for benefits, concluding that the evidence presented "was sufficient to base a conclusion that the … 'breakage' did not occur at the time of the work incident, but the already 'broken' condition or disease merely became manifest at that time." ***Id.*** at 58. The Court sustained that determination. *See* ***id.*** at 59-60.

Similarly, the evidence here supports LIRC's conclusion that Bach's knee problems and surgical need were the manifestation of her preexisting meniscus injury and her arthritis, rather than a breakage or acceleration beyond normal progression of those preexisting conditions. Bach conceded that she had a prior meniscus tear; the medical records reflect she sustained that injury to her left knee in June 2011—the date to which Bartlett dated Bach's condition—and again in April 2014. The record also reflects that surgery for her left knee had been recommended as early as August 2011 and documents several prior instances of Bach's knee locking, resulting in a fall. "[E]vidence of prior trouble has high probative value on the question of extent of progression of a degenerative disease and the time *and extent of aggravation* or 'breakage' if

[4] The Industrial Commission was the predecessor of the Department of Industry, Labor and Human Relations, *see* ***Lewellyn v. DILHR***, 38 Wis. 2d 43, 47 n.1, 155 N.W.2d 678 (1968), and that Department is the predecessor of LIRC.

either is a question."[5] ***Id.*** at 60 (emphasis added). Further, while Bach disputes Bartlett's arthritis diagnosis, that condition appears consistent with her medical records: Bartlett described "degenerative changes" in the three compartments of the knee ("tricompartmental degenerative arthritis"), and Bach's 2014 MRI report notes that "[t]ricompartmental degenerative changes are identified[.]"

LIRC also noted that Bach did not seek treatment for her March 1, 2016 fall for nearly a month; she did not see Hamel until March 30, 2016. Hamel's clinic note for that date says, "Several times per year her knee will lock up or give out and cause her to fall. This happened again recently [on March 1, 2016]." Webber's treatment note from April 25, 2016, stated that Bach "is most concerned about the locking she has at times in the left knee since the first injury [in June 2011]. She states that she has had [three] major falls due to the locking of her knee, one resulting in a fracture." When Bach saw Hamel on June 8, 2016, for sleep issues, the clinic note did not refer to her fall, but assessed her knee pain as a "[p]ossible chronic meniscal tear. Last x-rays in 2014 during similar symptoms."

Additionally, Bach testified that her knee pain worsened in August or September of 2016, then subsided into continued but less severe pain. LIRC stated that this pathology is "much more consistent" with Bartlett's opinion of an ongoing degenerative condition, rather than with a traumatic knee injury on March 1, 2016.

[5] While Bach testified that she had never experienced a locking sensation, LIRC found her testimony in that regard incredible.

For all of these reasons, LIRC's findings of fact are supported by credible and substantial evidence. That is, based on the evidence presented, LIRC could conclude that Bach had failed to satisfy her evidentiary burden, leaving LIRC with a legitimate doubt as to whether the March 1, 2016 fall caused any of Bach's knee issues. Further, Bach has not satisfied us on appeal that LIRC's decision should be overturned. "The question is not whether there is credible evidence in the record to sustain a finding [LIRC] did not make, but whether there is any credible evidence to sustain the finding [LIRC] did make." *See* ***Lewellyn***, 38 Wis. 2d at 51 (citation omitted).

Having rejected Bach's arguments that she is entitled to worker's compensation benefits, we turn to three ancillary issues Bach raises in her briefs. First, Bach seeks imposition of a penalty against Compassus and its insurer under WIS. STAT. § 102.18(1)(bp) and WIS. ADMIN. CODE § DWD 80.70 (through November 2020). These provisions allow an award to an employee if the employer withholds payments in malice or bad faith.[6] However, because we uphold LIRC's determination that Bach is not entitled to payment of worker's compensation benefits, these provisions are inapplicable.

Second, Bach claims that LIRC erred when it denied her attempt to supplement the record with results of the successful knee surgery she finally had. Bach believes that because the surgery has alleviated her symptoms, that success proves her experts were right, so she asks to be allowed to present this "exculpatory evidence."[7] However, Bach cites no authority for the

[6] The ALJ and LIRC mistakenly treated Bach's claim for sanctions as a claim for refusal-to-rehire penalties under WIS. STAT. § 102.35(2). This misconstruction is, however, irrelevant, since we conclude as a matter of law that Bach is not entitled to recover any penalty under this section.

[7] "'Exculpatory evidence' is defined as '[e]vidence tending to establish a criminal defendant's innocence.'" ***State v. Harris***, 2004 WI 64, ¶12 n.9, 272 Wis. 2d 80, 680 N.W.2d 737 (quoting BLACK'S LAW DICTIONARY 577 (7th ed. 1999)) (alteration in ***Harris***).

proposition that she should be allowed to present additional evidence to LIRC following her hearing with the ALJ. In any event, Bach does not provide a basis for concluding that the success of the surgery is probative of the reason it was needed in the first place.

Finally,[8] Bach claims that due process entitled her to a jury trial. She is incorrect. "The law has been established by the United States Supreme Court since 1917 that worker's compensation acts may constitutionally serve as a substitute for the right to trial by jury." ***Oliver v. Travelers Ins. Co.***, 103 Wis. 2d 644, 651 n.5, 309 N.W.2d 383 (Ct. App. 1981).

Upon the foregoing, therefore,

IT IS ORDERED that the order appealed from is summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

[8] In her reply brief, Bach also asks us to strike LIRC's brief because it was late, despite her acknowledgement that this court granted LIRC's request for an extension. Granting filing extensions is within our discretionary authority. *See* WIS. STAT. RULE 809.82(2)(a). While Bach argues the extension should not have been granted, her opportunity to object was upon receipt of the motion or this court's order, see WIS. STAT. RULE 809.14(2), not in her reply brief, *see* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 (we do not consider arguments first raised in a reply brief).