

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

November 5, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3556

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**MIRON CONSTRUCTION COMPANY, INC., AND LIBERTY
MUTUAL INSURANCE COMPANY,**

PLAINTIFFS-APPELLANTS,

V.

**MERLE J. KAMPFER, C.D. SMITH CONSTRUCTION,
INC.,**

**WAUSAU UNDERWRITERS INSURANCE COMPANY, AND
LABOR AND INDUSTRY REVIEW COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County:
ROBERT A. HAASE, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Miron Construction Company, Inc., and Liberty Mutual Insurance Company appeal from an order affirming a decision of the Labor and Industry Review Commission (LIRC) determining that Merle J. Kampfer, a former Miron employee, sustained a new compensable injury in October 1993 and that Miron is liable for worker's compensation benefits. We affirm.

We review LIRC's decision, not that of the circuit court. *See Hoell v. LIRC*, 186 Wis.2d 603, 612, 522 N.W.2d 234, 238 (Ct. App. 1994). We will affirm LIRC's findings of fact if they are supported by any credible and substantial evidence in the record. *See id.* If reasonable minds could arrive at the same conclusion reached by LIRC, the credible evidence test is met. *See Farmers Mill of Athens, Inc. v. ILHR Dept.*, 97 Wis.2d 576, 579, 294 N.W.2d 39, 41 (Ct. App. 1980). We will affirm LIRC if there is credible evidence to support the finding regardless of whether there is evidence to support the opposite conclusion. *See Valadzic v. Briggs & Stratton Corp.*, 92 Wis.2d 583, 592-94, 286 N.W.2d 540, 544-45 (1979). The credibility of witnesses and the persuasiveness of testimony are also within the province of LIRC. *See* § 102.23(6), STATS.; *see also Goranson v. DILHR*, 94 Wis.2d 537, 554, 289 N.W.2d 270, 278-79 (1980). Conflicts in the testimony of medical witnesses are to be resolved by LIRC, and the acceptance by LIRC of the testimony of one qualified medical witness over another is conclusive. *See E. F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 637, 264 N.W.2d 222, 224 (1978).

Kampfer was originally injured on May 27, 1988, while employed by C.D. Smith Construction, Inc. (insured by Wausau Underwriters Insurance Company). He received worker's compensation benefits relating to that injury. The dispute in this case centers on whether Kampfer suffered another, separate

injury in October 1993 when he was working for Miron, or whether the October 1993 injury was merely an exasperation of the 1988 injury and therefore not compensable by Miron. C.D. Smith and its insurer sought LIRC review of the administrative law judge's (ALJ) decision that they were liable for worker's compensation benefits for the October 1993 injury which the ALJ found was an exasperation of the 1988 injury. The relevant facts follow.

C.D. Smith conceded a compensable injury to Kampfer's back in May 1988 and paid disability and medical expenses attributable to that injury. He had three back surgeries during the course of his employment with C.D. Smith and left that employment in the fall of 1992. Kampfer testified that as of his last day at C.D. Smith, he experienced leg pain once or twice a month and his treating physician at that time assessed a twenty percent permanent partial disability which C.D. Smith paid to Kampfer. From December 1992 until July 1993, Kampfer worked at Wichman Construction where he performed masonry layout work which was less strenuous than the cement finishing he did for C.D. Smith. Kampfer testified that while at Wichman, he suffered no injuries and his back pain did not worsen.

Kampfer began working for Miron in August 1993 and performed cement finishing work on sidewalks and steps. He began suffering increased back pain. On October 4, 1993, he experienced intense low back pain as he was getting out of bed. This was the same pain that had increased while he was working for Miron. He was diagnosed by Dr. Kevin Tadych as suffering from facet degenerative joint disease and ultimately had a fourth back surgery. The issue is

whether the fourth surgery and the attendant disability are attributable to the C.D. Smith 1988 injury or his later work for Miron.

In an undated WC-16-B, Dr. Michael Smith checked the direct causation box and listed the dates of injury as 1988 and 1993. With regard to the October 1993 injury, Smith stated that Kampfer had “continued problems with back and need for surgery due to aggravating of preexisting condition working at Miron Construction.” In his March 28, 1994, WC-16-B, Tadych checked the aggravated/accelerated causation box and listed May 1988 and October 1993 as the dates of injury. In a June 13, 1994 letter clarifying his WC-16-B, Tadych opined that Kampfer sustained a new injury in October 1993 and that Kampfer’s work with Miron would have contributed to deterioration and degeneration beyond normal progression of a portion of the spine above the previous fusion site. The area above the previous fusion site experienced increased motion to make up for the motion which normally would have occurred at the fused lumbar levels. Tadych’s response to a June 22, 1994 letter from Smith’s insurer’s counsel confirmed that Kampfer’s “work exposure as a cement finisher for Miron Construction aggravate[d], accelerate[d], and precipitate[d] Mr. Kampfer’s preexisting degenerative or deteriorating condition beyond normal progression so as to constitute a new injury.”

Dr. Tim O’Brien, an orthopedic surgeon retained by Miron, opined that none of Kampfer’s current problems were related to his work for Miron and

that he had reached a healing plateau in 1989 relating to the 1988 back injury. Dr. David Zeman, who also examined Kampfer, agreed with O'Brien that Kampfer reached a healing plateau in July 1989 and had a ten percent permanent partial disability. However, Zeman opined that Kampfer sustained a new injury at home in October 1993.

LIRC evaluated the experts' opinions. It accepted the opinions of Tadych and Smith that the October 1993 injury was a new injury "in the form of an aggravation, acceleration and precipitation of [Kampfer's] preexisting back condition beyond normal progression." LIRC rejected O'Brien's opinion as inconclusive because he attributed Kampfer's current back problems to "nonorganic factors" without elaboration. In view of the strenuous nature of the work Kampfer performed for Miron and the credible medical opinions of Tadych and Smith, LIRC found that Kampfer sustained a new injury in October 1993. Accordingly, LIRC held Miron and its insurer liable for Kampfer's temporary total disability from October 18, 1993 to April 5, 1995. LIRC noted that Kampfer remained in a healing period and future disability and medical expenses were possible.

In its memorandum opinion, LIRC stated that it consulted with the ALJ and did not disagree with the ALJ's assessment of the credibility of the witnesses. However, LIRC disagreed with the ALJ's interpretation of Tadych's opinion. LIRC ruled that the ALJ mistakenly inferred from Tadych's discussion

of the stressed areas of Kampfer's spine that the 1991 fusion surgery caused Kampfer's 1993 difficulties. Rather, LIRC interpreted Tadych's statements as opining that Kampfer sustained a new injury in October 1993 and that his work at Miron definitely contributed to the aggravation and acceleration of his back problems beyond normal progression. LIRC noted that Smith also found that Kampfer's Miron employment caused his October 1993 injury. LIRC agreed with the ALJ that O'Brien's opinion lacked credibility given his failure to definitively diagnose Kampfer's current back problems.

Merely because LIRC and the ALJ interpreted Tadych's opinion differently does not make the opinion incredible as a matter of law. It is for LIRC to resolve conflicts in the testimony of medical witnesses, and LIRC's acceptance of evidence from one medical witness over another is conclusive. *See E.F. Brewer Co.*, 82 Wis.2d at 637, 264 N.W.2d at 224.

Accordingly, we affirm LIRC because its interpretation of Tadych's opinion is entitled to conclusive effect. There is credible and substantial evidence to support LIRC's finding that Kampfer sustained a new injury in October 1993 in the form of an aggravation and acceleration of his preexisting back condition

beyond normal progression.¹ Although reasonable persons could interpret Tadych's report differently (as the ALJ and LIRC did), we must uphold LIRC's findings unless they are incredible as a matter of law. *State ex rel. Harris v. Annuity and Pension Bd.*, 87 Wis.2d 646, 659, 275 N.W.2d 668, 674-75 (1979). Kampfer's testimony regarding the strenuous nature of the work he did for Miron and the fact that such work increased his back pain supports LIRC's finding that he suffered a new injury in October 1993.

Miron asks this court to remand this matter to the ALJ for apportionment of liability for Kampfer's various disability related expenses among the various employers since 1988. LIRC made its order interlocutory because Kampfer was in a healing period and additional disability and medical expenses could arise. LIRC recognized that there may be an issue of apportionment of permanent disability and loss of earning capacity. Miron argues that such apportionment should also include temporary total disability, medical and other expenses in addition to permanent partial disability and loss of earning capacity. Miron asks us to remand for that purpose. We conclude that this request is premature. Apportionment issues have yet to be addressed in the administrative proceedings.

¹ Miron makes much of the fact that Kampfer apparently did not complain to Miron management or to fellow employees that he had been injured while working at Miron. The nature of Kampfer's injury is the subject of expert medical testimony, and Kampfer's assessment of his
(continued)

By the Court.—Order affirmed.

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

own situation is not conclusive in this regard. We note that Kampfer testified that his back and leg pain increased during his employment with Miron.

