

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 7, 2003

Cornelia G. Clark
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. 02-2101

Cir. Ct. No. 02-CV-2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**EXPRESS SERVICES, INC. AND NATIONAL UNION FIRE
INSURANCE COMPANY,**

PLAINTIFFS-APPELLANTS,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND DAVID
POTTS,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County:
ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Express Services, Inc., and its worker's compensation insurer, National Union Fire Insurance Company (collectively, ESI), appeal an order upholding the Labor and Industry Review Commission's

affirmance of an administrative law judge's award to David Potts. Specifically, ESI claims LIRC erred by accepting what ESI believes are erroneous findings of the ALJ. ESI contends that the ALJ erred when she accepted Potts' experts' analysis of his injury over ESI's expert and when she used those experts' opinions to interpret and apply WIS. ADMIN. CODE § DWD 80.32(7), resulting in an excessive award to Potts. Because LIRC properly upheld the ALJ's determination, we affirm the circuit court order.

Background

¶2 On June 3, 1999, Potts was injured while lifting a brine tank. Although he was working at Culligan Water Systems, he was employed by ESI, a temporary employment agency. Potts was taken to the hospital and treated by Dr. Charles Ihle, who diagnosed a ruptured biceps tendon. Potts needed surgery to repair the tendon, as well as subsequent physical therapy.¹ On Ihle's referral, Potts was also seen by Dr. Tuenis Zondag for a permanent partial disability rating. Zondag had previously treated Potts for injuries sustained in 1998.²

¶3 Potts applied for worker's compensation benefits from ESI, which paid certain temporary benefits. ESI also paid benefits for a 1% permanent partial disability as assessed by its physician, Dr. Stephen Weiss, following his

¹ We note that ESI did not mention Potts' surgery in its brief. This is a significant omission, considering we are asked to review facts and conclusions based on Potts' injury. *See* WIS. STAT. § 809.19(1)(a) (statement of case must include relevant facts); § 809.83(2) (failure to comply with these rules is grounds for dismissal or other penalties); SCR 20:3.3(a)(1) (a lawyer shall not knowingly make a false statement of fact to a tribunal). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² Following the 1998 injuries, Zondag assessed a 10% permanent partial disability of Potts' left shoulder.

independent examination of Potts. On March 1, 2000, Potts applied to the Worker's Compensation Division of the Department of Workforce Development, seeking additional benefits. He sought additional temporary benefits and benefits for a 10% permanent partial disability in his shoulder as assessed by Zondag.

¶4 Following the administrative hearing, the ALJ concluded that the injury required surgical intervention and, as a result, Potts suffered a permanent partial disability to the left shoulder. The ALJ accepted Potts' testimony regarding his abilities and conditions, finding it credible. She also found Ihle's and Zondag's opinions to be credible and adopted them as part of her order. She denied the request for temporary benefits, concluding that Potts had not been given limitations by a physician that would have prevented him from working. She did, however, award benefits for a 10% permanent partial disability, crediting ESI for the benefits it paid on its 1% assessment.³

¶5 ESI appealed to LIRC, which affirmed the ALJ. In its memorandum opinion, LIRC noted essentially the same facts recited by the ALJ in her decision and consulted the ALJ regarding credibility of the witnesses. With WIS. ADMIN. CODE § DWD 80.32(1) and (7) in mind, LIRC concluded that the record did not support Weiss' minimum award but better supported Zondag's disability rating.

¶6 ESI then appealed to the circuit court, arguing that the disability rating was impermissible as a matter of law under WIS. ADMIN. CODE § DWD 80.32(7). In what ESI characterizes as a grudging affirmance, the court determined that ESI was asking the court to substitute its judgment for LIRC's on

³ The 10% disability that the ALJ found in this case is in addition to the 10% disability Potts had in 1998 for a total disability rating of 20%.

an issue of fact, something prohibited by WIS. STAT. § 102.23(6).⁴ The court ultimately concluded: “It does appear from the record that Dr. Zondag’s flexion studies depart from the standards cited by the Wisconsin Administrative Code § DWD 80.32(7), but for whatever reason, the Administrative Law Judge and the LIRC saw it differently.” However, the court noted that there was a factual basis supported by credible and substantial evidence in the record for the ALJ’s and LIRC’s decisions and affirmed LIRC. ESI appeals.

Standard of Review

¶7 In administrative agency actions, we review the decision of the agency—here, LIRC—not the subsequent trial court decision. *See Target Stores v. LIRC*, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). A reviewing court shall not substitute its judgment for that of the agency and will not disturb factual findings that are supported by substantial evidence in the record. WIS. STAT. § 227.57(6). Interpretation and application of the administrative code, however, are questions of law we review de novo. *Bidstrup v. DHFS*, 2001 WI App 171, ¶12, 247 Wis. 2d 27, 632 N.W.2d 866.

¶8 While we are not bound by an administrative agency’s conclusions of law, we may defer to them. *Currie v. DILHR*, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997). There are three levels of deference to an agency contingent upon, among other things, the agency’s duty as charged by the legislature, the agency’s history of interpretation of a code provision, and the

⁴ WISCONSIN STAT. § 102.23 provides for judicial review in worker’s compensation cases. Section 102.23(6) states in relevant part: “If the commission’s order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact.”

agency's expertise. See *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). These levels are great weight deference, due weight deference, and de novo review. *Id.*

¶9 In this case, the parties dispute whether LIRC is entitled to great weight, as LIRC contends, or due weight, as ESI argues. We conclude that we need not determine which standard is appropriate here because even if we were to give LIRC only due weight deference, we would still affirm its decision.

¶10 Under due weight deference, “we will not overturn a reasonable agency decision ... unless we determine that there is a more reasonable interpretation under the applicable facts than that made by the agency.” *DOR v. Caterpillar, Inc.*, 2001 WI App 35, ¶7, 241 Wis. 2d 282, 625 N.W.2d 338.

Discussion

¶11 ESI's essential arguments are: (1) that the disability rating LIRC assigned to Potts is inappropriate as a matter of law and (2) that Potts' physician, Zondag, was incredible as a matter of law and that the record therefore supports ESI's opinion that Potts only sustained a 1% permanent partial disability to his shoulder. Because ESI's arguments are based on misinterpretations of the administrative code and our standard of review, they are rejected.

The Administrative Code Provisions

¶12 WISCONSIN ADMIN. CODE § DWD 80.32 provides the minimum percentage of loss of use for certain injuries under the worker's compensation scheme. The percentages are used to calculate the dollar value of the compensation award. Section DWD 80.32(7) provides the minimum percentages for shoulder injuries. The percentages are based on the “[l]imitation of active

elevation in flexion and abduction” with otherwise normal movement. WIS. ADMIN. CODE § DWD 80.32(7). If flexion and abduction are limited to 135°, the minimum percentage of disability is 5%. *Id.* If flexion and abduction are limited to 90°, the minimum disability is 20%. *Id.* If flexion and abduction are limited to 45°, the minimum disability is 30%. *Id.*

¶13 Potts’ total disability is 20% in his left shoulder. This represents the 10% that had been assessed for his 1998 injury and the 10% that Zondag assessed for the June 1999 injury in this case. Zondag’s last flexion and abduction measurements for Potts were 125° flexion and 102° abduction. ESI points out that 20% is the minimum award for limitations to 90° and argues that because Potts has greater than 90° movement, he cannot receive a 20% rating as a matter of law.

¶14 ESI’s proffered interpretation ignores the plain language of WIS. ADMIN. CODE § DWD 80.32(1), the first part of which states: “The disabilities set forth in this section are the minimums for the described conditions. However, findings of additional disabling elements shall result in an estimate higher than the minimum.” LIRC apparently considered this because in its memorandum opinion, it noted:

[T]he permanent disability figures for loss of range motion set out in Wis. Admin. Code § DWD 80.32(1) and (7) *are minimums*. In appropriate cases, medical experts may also consider factors such as pain, loss of strength, and loss of endurance, or other anatomical or functional abnormality which reduces a worker’s actual or presumed ability to engage in gainful employment. ... In sum, the commission agrees with the ALJ that the record in this case does not support the minimum award for permanent disability given by Dr. Weiss, and better supports the rating given Dr. Zondag. (Emphasis added.)

The ALJ specifically noted that Potts experiences grinding, numbness, and a “toothache-like pain” in his shoulder, pain at the surgical scar site as well as the

shoulder-arm joint, and limitations on his work. These are all “disabling elements” that allow the ALJ and LIRC to award a higher disability rating than if they considered the flexion studies alone.

¶15 Nothing indicates that the minimum for one level also represents the maximum for another. As LIRC recognized, the code specifically allows upward adjustments for additional factors. This is because “[i]t is virtually impossible to develop guidelines that will cover, in whole or in part, every conceivable condition.” WIS. DEP’T OF WORKFORCE DEV., *How to Evaluate Disability Under Wisconsin’s Worker’s Compensation Law* (4/2000), available at http://www.dwd.state.wi.us/wc/about_us/publications/WKC-7761.htm. We are not convinced that LIRC’s interpretation of WIS. ADMIN. CODE § DWD 80.32(1) is unreasonable, nor has ESI advanced a “more reasonable interpretation” for us to consider.

Credibility of Witnesses and Evidence

¶16 ESI argues that the information provided by Zondag and relied upon by the ALJ is incredible as a matter of law, and points us to four claimed errors. First, ESI claims that Zondag failed to distinguish Potts’ disability before and after June 3, 1999, as required by WIS. ADMIN. CODE § DWD 80.32(1). The second half of this section states: “The minimum also assumes that the member ... was previously without disability. Appropriate reduction shall be made for any preexisting disability.” We note first that nothing in the code requires a treating physician to make any sort of explicit finding or comparison between injuries or specific statement of any “reduction.” In any event, Zondag wrote in his notes, which the ALJ ultimately credited, that “the patient has an additional 10% permanency on top of what he previously had. Based upon range of motion and

persistent residual, this patient ... would be equivalent to a 20% permanency which 10% has previously been assigned.” This adequately considers Potts’ preexisting condition.

¶17 ESI next argues that Zondag failed to compare the ranges of motion so as to properly apply WIS. ADMIN. CODE § DWD 80.32(7). ESI argues that the measurements Zondag recorded in 1998 are nearly identical to the measurements he recorded in 2000.⁵ Potts’ 1998 flexion and abduction measurements were 136° and 122° respectively. In 2000, flexion was 125° and abduction was 102°. A full range of motion for the shoulder is 180°. *See* WIS. DEP’T OF WORKFORCE DEV., *supra*. The 1998 and 2000 measurements are not “nearly identical.” The change in flexion represents an additional loss of 6% in Potts’ range of motion, while the drop in abduction is 11%. Again, ESI points us to nothing mandating an explicit comparison. Section § 80.32(1) requires reduction for preexisting disability but, as noted above, this was considered.

¶18 ESI also contends that the records fail to document why Zondag chose the additional 10% as a rating. This is irrelevant. The ALJ ultimately made a determination based on the whole record, not simply Zondag’s rating, and LIRC agreed with the ALJ’s decision. The ALJ’s disability assessment is a discretionary decision based on witness credibility determinations. *See Transamerica Ins. Co.*

⁵ Although the injury precipitating this case occurred in 1999, Zondag’s rating was based on measurements he took when evaluating Potts in 2000 during the course of Potts’ rehabilitation.

v. *DIHLR*, 54 Wis. 2d 272, 282-83, 195 N.W.2d 656 (1972). LIRC is entitled to agree with and rely on the ALJ's credibility determinations.

¶19 The ALJ sufficiently explained why, based on evidence she credited, the award is adjusted to something higher than what might be expected based strictly on the flexion studies and WIS. ADMIN. CODE § DWD 80.32(7). She noted several additional disabling elements. Nevertheless, this court may look for additional reasons to sustain discretionary decisions. See *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. The ALJ accepted Potts' testimony and, beyond the ALJ's explicit findings, we note that Potts' maximum lifting capacity has diminished and he is now confined to sedentary work where he had been in construction or other physically intensive positions nearly all his adult life. Additionally, Potts testified that Weiss spent only one-fourth as much time with him as Zondag, while the ALJ noted Zondag made his opinions based on his familiarity with Potts and his history.

¶20 WISCONSIN ADMIN. CODE § DWD 80.32(7) says that the disability ratings are based on flexion and abduction with other measurements "otherwise normal." We note that Zondag and Weiss also measured extension, internal rotation, and external rotation. All of Zondag's measurements for these and most of Weiss' show Potts below the normal range of motion. In short, Potts did not merely suffer a loss in his range of motion as listed in the administrative code, but other adverse affects as well, all of which LIRC considered to support the ALJ's disability rating.

¶21 Finally, ESI argues that Weiss' conclusions were supported by Ihle's assessments and are more credible. Weiss measured 170° of flexion and 155° abduction when he examined Potts. We note that these measurements would

indicate Potts had recovered and exceeded his pre-1998 range of motion. Indeed, these measurements are significantly higher than virtually every measurement we gleaned from the record. Further, we do not understand why ESI cites Ihle's reports for support. ESI notes that in January 2001, approximately a week after Weiss examined Potts, Ihle measured 90° abduction. If anything, this supports Potts' current 20% disability rating, not Weiss' measurements. In any event, this argument is without merit because it ignores our standard of review for factual determinations. *See* ¶7, *infra*. Zondag's opinions are supported by the record, and we will not overturn LIRC's acceptance of them.

¶22 ESI also points to Ihle's March 2000 note in which he indicated that Potts had reached a "full range of motion." ESI apparently means to suggest Ihle thought Potts had returned to the normal, maximum range of motion. This suffers from the same fatal flaw as ESI's last argument—it ignores our standard of review. *See id.* Ihle previously indicated that Potts had reached a healing plateau—that is, no further recovery or improvement was expected. Thus, Ihle could have meant that Potts had reached as full a range as possible for him based on his injuries. This seems consistent with the concept of reaching a plateau. The same note also indicates weak left flexion, which seems inconsistent with a conclusion that Potts recovered the normal range of motion. Even if we could make our own factual determinations, we are not convinced that Ihle's records support Weiss.

Summary

¶23 The disability ratings found in WIS. ADMIN. CODE § DWD 80.32(7) are minimum awards to which injured workers are entitled. Nothing in the administrative code indicates that the minimum for one level is the maximum for

another level. Although Potts did not have the required limitation on degrees of mobility to reach a 20% disability rating solely under the terms of § DWD 80.32(7), § DWD 80.32(1) permits additional disabling elements to be considered and used to adjust disability ratings higher. The record supports findings that Potts suffered some loss in the degree of motion in his left shoulder, even though he had been previously assessed at a 10% permanent partial disability.

¶24 The June 1999 injury not only limited Potts' motion further, but has left him with persistent residual pain and physical limitations. The ALJ considered this, along with credible medical testimony, in assessing an additional 10% for the 1999 injury. LIRC accepted that under WIS. ADMIN. CODE § DWD 80.32(1) these factors allowed an upward adjustment that resulted in an award higher than the flexion studies alone mandated. ESI has not shown us a more reasonable interpretation of the administrative code. Additionally, while ESI challenges certain factual findings, the findings are adequately supported by the record and will not be overturned by this court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

