COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP583 **Cir. Ct. No. 2004CV2540**

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

STEVEN A. RUNICE,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND CITY OF RICHLAND CENTER AND WAUSAU UNDERWRITERS INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 PER CURIAM. Steven Runice appeals an order affirming a decision of the Labor and Industry Review Commission (LIRC). The circuit court

upheld a decision that a back injury Runice suffered was not work related and therefore could not support his worker's compensation claim. The issues are whether LIRC correctly applied the law to the facts of the case, whether credible evidence supported its decision and whether this court should declare a rule permitting LIRC to give more weight to the opinions of treating physicians than to the opinions of examining but non-treating physicians. We affirm.

¶2 Runice suffered a back injury in 1989 and underwent surgery for it in 1990. In April 2000, Runice joined the City of Richland Center Police Department as a patrol officer. In the first twelve months of duty, he was involved in three physical altercations with resisting suspects, the last of which occurred on March 11, 2001. Runice did not seek medical treatment nor miss work after any of the incidents, although he felt back stiffness.

¶3 In late May 2001, Runice felt a sharp lower back pain while standing in his backyard. He received emergency care treatment and ultimately underwent a second back surgery in October 2001. He was never physically able to return to police work. He filed a worker's compensation claim asserting that the three incidents while on duty aggravated his pre-existing back condition.

¶4 His treating physicians supported his claim. However, a physician retained by Richland Center's insurer, Dr. Mark Aschliman, reviewed Runice's medical records and concluded that no connection existed between Runice's police work and his May 2001 injury. Aschliman concluded that if any of the three

incidents had contributed to the injury, symptoms would have manifested themselves much sooner after the incidents in question.[1]

¶5 The Administrative Law Judge presiding over Runice's hearing accepted Aschliman's report as more persuasive and adopted its conclusion. LIRC affirmed on administrative review and Runice commenced this judicial review proceeding.

¶6 We directly review the administrative agency decision. ***Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n of Wisconsin***, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). We may set aside a LIRC decision only when (1) it acted without or in excess of its powers; (2) its order or award was procured by fraud; or (3) its findings of fact do not support the order or award. *See* WIS.

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[1] Aschliman's report included the following question and answer:

> If not directly, is it probable that the work exposure caused the patient's present medical condition by precipitation, aggravation or acceleration of a pre-existing problem beyond the normal progression?
>
> Response: No. Had Mr. Runice's work activities aggravated pre-existing lumbosacral degenerative disc disease, one would have expected the clinical complaints of pain in a more reasonable, temporal relationship. Specifically, if Mr. Runice had sustained an aggravation of his underlying degenerative process, which clearly pre-existed the alleged events in question, he would have likely sought medical care more acutely, and had the manifestation of clinical complaints of pain at the time of the events in question. This is simply not the case. Mr. Runice manifested symptoms of low back pain without clear precipitating event, or perhaps while nailing some boards at home. In either case, there is no indication the industrial activities of Mr. Runice had any contribution to his condition. There is simply no support for it. Had there been a contribution, Mr. Runice would have been involved in a work activity and developed low back pain acutely. This is simply not the case and is not documented.

STAT. § 102.23(1)(e). WISCONSIN STAT. § 102.23(6) provides that "[i]f 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." Under this provision we must set aside LIRC's order or award if it depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. ***Id.*** Under the credible and substantial test, the evidence is sufficient even if the findings based on it are against the great weight and clear preponderance of the evidence, so long as the evidence is sufficient to exclude speculation or conjecture. ***General Cas. Co. v. LIRC***, 165 Wis. 2d 174, 178-79, 477 N.W.2d 322 (Ct. App. 1991).

¶7 If the worker's compensation claimant has a pre-existing degenerative condition, as Runice did, LIRC must first determine if there was a definite "breakage" attributable to usual or normal activity on the job; if there is no definite "breakage," LIRC must determine if the work activity precipitated, aggravated or accelerated the degenerative condition beyond normal progression. ***Lewellyn v. Department of Indus., Labor & Human Relations***, 38 Wis. 2d 43, 58-59, 151 N.W.2d 678 (1968). Here, Runice contends LIRC neglected to address whether the work-related incidents aggravated and accelerated Runice's back condition and only determined there was no "breakage" related to those incidents. We disagree. It is true that LIRC did not expressly decide whether the three work-related incidents aggravated or accelerated Runice's back condition. However, LIRC adopted the ALJ's finding of "insufficient evidence to relate the applicant's back condition to the three prior work incidents." Implicit in a finding of no relation is a finding of no precipitation, aggravation or acceleration.

¶8 Credible and substantial evidence supports LIRC's determination. Aschliman found no connection between the work incidents and the subsequent back injury. LIRC chose to rely on Aschliman's report and reject the opinions of Runice's treating physicians. Essentially, LIRC's credibility determination was the decisive issue in this case and we do not review LIRC's decision on the credibility of medical evidence. ***E.F. Brewer Co. v. Department of Indus., Labor & Human Relations***, 82 Wis. 2d 634, 636-37, 264 N.W.2d 222 (1978).

¶9 We decline to impose a rule on LIRC to require or to permit giving added weight to the opinion of a treating physician. This proposed "treating physician" rule has been considered and rejected by this court. *See* ***Conradt v. Mt. Carmel Sch.***, 197 Wis. 2d 60, 63, 539 N.W.2d 713 (Ct. App. 1995). We are bound by that precedent, even if we were inclined to adopt the rule Runice proposes. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

By the Court.—Order affirmed.

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