COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP864 **Cir. Ct. No. 2006CV1915**

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

COUNTY CONCRETE CORPORATION N/K/A COUNTY MATERIALS CORPORATION, CENTRAL PROCESSING CORP. AND ZURICH AMERICAN INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND SUSAN HOFFMAN F/K/A SUSAN GUMIENY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, JR., Judge. *Affirmed*.

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. County Concrete Corporation, Central Processing Corporation and Zurich American Insurance Company (County Concrete) appeal

from a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) that Susan Hoffman's work activities on one day constituted an appreciable period of work place exposure and was a material contributory causative factor in the progression of her pre-existing neck condition. We affirm because LIRC's decision is supported by credible and substantial evidence, and LIRC properly applied Wisconsin law to the facts it found.

¶2 It is undisputed that prior to starting employment with County Concrete, Hoffman had a history of neck problems dating back to 1997. Hoffman was variously diagnosed with degenerative changes at C5-6 and cervical radiculopathy. Surgery was raised as a possibility in 1998. She last saw a physician for her neck problems in December 2002.

¶3 Hoffman began employment with County Concrete in April 2003 as a showroom manager. Her regular duties included assisting customers in selecting stone and landscaping products. County Concrete concedes that on Friday, March 5, 2004, Hoffman was required to perform work outside of her normal duties by participating in the set up of the showroom. Hoffman spent the day unloading and hanging rock and stone samples that weighed between four and twenty pounds. She experienced pain in her neck, shoulder and arm on Friday, but finished setting up the showroom on Saturday even though the pain continued. She saw a physician the following Tuesday. In May 2004, Hoffman underwent a C5-6 anterior discectomy with fusion. Hoffman returned to work in November 2004, but her symptoms recurred. Hoffman underwent a second surgery in February 2005, a C6-7 anterior discectomy with fusion. She was released to work in June 2005.

¶4 Relying upon the opinions of Hoffman's treating physicians, Lynn Bartl and Anthony Norelli, whom LIRC deemed credible, LIRC concluded that Hoffman's showroom set up work constituted an appreciable period of work place exposure and was a material contributory causative factor in the progression of her pre-existing neck condition. LIRC concluded that Hoffman suffered a permanent partial disability on a functional basis of twenty percent and made various awards to Hoffman. The circuit court upheld LIRC's decision.

¶5 On appeal, County Concrete argues that LIRC's decision was not supported by substantial and credible evidence. On review, we examine LIRC's decision, not that of the circuit court. ***Knight v. LIRC***, 220 Wis. 2d 137, 147, 582 N.W.2d 448 (Ct. App. 1998). We are further guided as follows:

> The weight and credibility of the evidence are for LIRC to evaluate. We may not substitute our judgment for LIRC's on issues of fact. We uphold LIRC's findings of fact on appeal if they are supported by credible and substantial evidence in the record.

Bunker v. Labor & Indus. Rev. Comm'n., 2002 WI App 216, ¶30, 257 Wis. 2d 255, 650 N.W.2d 864 (citations omitted).

¶6 The following evidence was before LIRC. In a June 8, 2004 WKC-16B practitioner's report on accident or industrial disease, Dr. Bartl, Hoffman's treating neurosurgeon, opined that "it is probable that the [showroom set up] event[1] caused the disability by precipitation, aggravation and acceleration of a pre-existing progressively deteriorating or degenerative condition beyond normal

[1] LIRC found that in this report, Dr. Bartl referred back to an April 22, 2004 letter to Dr. Norelli thanking him for the referral and reciting that Hoffman's symptoms began on showroom set up day.

progression." In a June 11, 2004 WKC-16B report, Dr. Norelli, Hoffman's physician, opined that "it is probable that the [showroom set up] event directly caused the disability;" he deemed not applicable the part of the report cited by Dr. Bartl regarding precipitation, aggravation and acceleration of a pre-existing condition. Dr. Bartl's September 30, 2004 WKC-16B report reiterated the opinion expressed in the June 8 report. Dr. Bartl's January 2005 report opined that the showroom set up work directly caused the disability but did not reiterate the precipitation and aggravation opinion expressed in her earlier reports. LIRC's opinion accurately summarized these reports.

¶7 County Concrete and its insurer retained Dr. Marc Aschliman to examine Hoffman. Dr. Aschliman opined in several reports that Hoffman's "job duties were not consistent with activities that would either cause directly, or aggravate beyond normal progression, [Hoffman's] current condition." Although Hoffman may have experienced discomfort in the workplace, Dr. Aschliman opined that the workplace activities did not cause or affect the development of symptoms relating to her underlying and pre-existing neck condition.

¶8 On review of the administrative law judge's decision that Hoffman sustained a compensable disability due to her showroom set up activities, LIRC agreed that the opinions of Drs. Bartl and Norelli were more credible than the opinion of Dr. Aschliman regarding the causal link between Hoffman's work and her disability. LIRC acknowledged that Hoffman's work exposure was brief, one day, and that she previously had symptoms of a neck disorder. However, Hoffman had not been treated for that disorder for over a year before setting up the showroom and her condition became significantly worse after the showroom set up; she ultimately required surgery. LIRC noted that the showroom set up work required significant, repetitive exertion; the work was not "normal exertive

activity." LIRC concluded that Hoffman's showroom set up work on March 5 "was an appreciable period of work place exposure that was a material contributory causative factor in the progression of her condition."

¶9 ***Lewellyn v. ILHR Dep't.***, 38 Wis. 2d 43, 155 N.W.2d 678 (1968), sets out circumstances ("scenario three") under which an employee may recover in a worker's compensation case:

> 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 59. Under WIS. STAT. § 102.03(1)(e) (2005-06)[2] an employer is liable in a worker's compensation claim "[w]here accident or disease causing injury arises out of the employee's employment."

¶10 Causation is a question of fact. ***Lewellyn,*** 38 Wis. 2d at 52. LIRC "is the sole judge of the weight and credibility of the witnesses" offering medical testimony. ***Wisconsin Ins. Security Fund v. LIRC***, 2005 WI App 242, ¶18, 288 Wis. 2d 206, 707 N.W.2d 293 (citation omitted). "Where there are inconsistencies or conflicts in medical testimony, the Department, not the court, reconciles the inconsistencies and conflicts." ***Id.*** We do not reweigh inconsistent medical evidence. ***Id.***, ¶24.

¶11 Drs. Bartl and Norelli both attributed Hoffman's disability to her showroom set up work, even if they did not agree with each other or, in Dr. Bartl's

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

case, with a prior opinion as to whether the work directly caused the disability or the work precipitated, aggravated and accelerated a pre-existing condition. LIRC resolved these inconsistencies as follows:

> It is clear from the substance of their statements in the form reports and attached notes that they regarded the [showroom set up] work activity on March 5, 2004, rather than a single accidental event on that day, to be the cause of [Hoffman's] disability. This is a sufficient basis for a finding of causation by occupational disease, or the related rule from ***Lewellyn*** which holds compensable injuries from work activity that precipitates, aggravates and accelerates a pre-existing degenerative condition beyond normal progression. (Emphasis in original.)

¶12 We conclude that the record contains substantial and credible evidence to support LIRC's findings and conclusions that Hoffman's showroom set up work "was an appreciable period of work place exposure that was a material contributory causative factor in the progression of her condition."

¶13 County Concrete argues that a single day of work exposure cannot constitute either an appreciable period of exposure or a material contributory causative factor in the progression of a pre-existing neck condition. In rejecting this argument,[3] LIRC observed that "the Worker's Compensation Act is intended

[3] County Concrete argues about whether Hoffman had an occupational disease. The distinction between occupational disease and accident under the third scenario of ***Lewellyn v. ILHR Dep't.***, 38 Wis. 2d 43, 59, 155 N.W.2d 678 (1968), is of less importance. In ***Shelby Mut. Ins. Co. v. DILHR***, 109 Wis. 2d 655, 661, 327 N.W.2d 178 (Ct. App. 1982) (citations omitted), the court discussed the difference between occupational disease and accident:

(continued)

to cover all injuries growing out of and incidental to employment." LIRC explained:

> The law does not require some minimum period of employment exposure or work activity as a matter of law before the exposure may become compensable. Rather, the question is whether the work exposure was a material contributory causative factor in the onset or progression of the disability under the "occupational disease" formulation, or the work activity precipitated, accelerated or aggravated beyond normal progression a pre-existing degenerative condition in the "***Lewellyn*** 3" formulation. For the reasons explained above, the commission finds the opinions of Drs. Norelli and Bartl more persuasive than Dr. Aschliman's opinion on this point.

LIRC had before it two opinions linking Hoffman's showroom set up work activity to her disability. The law does not require more in this case.

¶14 County Concrete argues that Hoffman's case falls under the second scenario discussed in ***Lewellyn***, a scenario under which recovery is denied***:***

> 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.

> Our supreme court has always recognized the "natural and logical distinction" between occupational disease and industrial accident in worker's compensation legislation. An occupational disease is "acquired as the result and an incident of working in an industry over an extended period of time." An accidental injury is "an injury that results from a definite mishap;" "a fortuitous event, unexpected and unforeseen by the injured person." As Professor Larson notes, however, "this contrast between accident and occupational disease is gradually losing its importance, and awards are frequently made without specifying which category the injury falls in."

Lewellyn, 38 Wis. 2d at 59. This is not a scenario two case. The showroom set up work that Hoffman performed on March 5 was outside the type of work she normally performed at County Concrete. In fact, LIRC found that the showroom set up activity was not "normal exertive activity," the "weights of the samples [Hoffman] worked with were not insignificant, and the job she did on [showroom set up day] required repetitive bending, reaching, and lifting." The facts of this case preclude application of the second ***Lewellyn*** scenario.

¶15 Finally, County Concrete challenges LIRC's interlocutory order regarding further disability and loss of earning capacity on the grounds that Hoffman did not present evidence of loss of earning capacity. County Concrete does not cite any legal authority in support of this claim. We will not consider this inadequately briefed issue. ***Vesely v. Security First Nat'l Bank***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

By the Court.—Order affirmed.

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