COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP923 **Cir. Ct. No. 2006CV8209**

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

ALBERT TROSTEL & SONS CO. AND SENTRY INSURANCE, A MUTUAL COMPANY,

PLAINTIFFS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND ARNULFO CALDERON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Albert Trostel & Sons Co., and its worker's compensation carrier, Sentry Insurance, A Mutual Company, appeal a circuit-court order affirming an order of the Labor and Industry Review Commission: (1) awarding

Trostel's employee, Arnulfo Calderon, temporary total-disability benefits; and (2) ordering Trostel and Sentry Insurance to pay for Calderon's surgeries.[1] Trostel and Sentry Insurance claim that the Commission's order: (1) violates due process; and (2) is not supported by credible and substantial evidence. We affirm.

I.

¶2 It is undisputed that Calderon hurt his lower back on June 7, 2000, while working for Trostel. All parties agree that Calderon herniated a disc at the L5-S1 level. In September of 2000, Khris Chan, M.D., performed an L5-S1 microdiscectomy on Calderon. Sentry Insurance, on behalf of Trostel, paid Calderon temporary total- or partial-disability benefits through August 18, 2001.

¶3 In May of 2002, Calderon sought from the Worker's Compensation Division of the Department of Industry, Labor and Human Relations additional temporary total-disability benefits, medical expenses, and a determination that he had a permanent disability.[2] Trostel and Sentry Insurance admitted liability for a seven-percent permanent partial-disability, but claimed that: (1) further treatment was unnecessary; and (2) Calderon was not entitled to additional disability benefits.

¶4 An administrative law judge held hearings in March and August of 2003. During the August of 2003 hearing, Calderon testified that he was, as

[1] The circuit-court order purports to affirm the Commission's "decision." The dispositive Commission document is, however, an "order."

[2] The Department of Industry, Labor and Human Relations was renamed the Department of Workforce Development. *See* ***Heritage Mut. Ins. Co. v. Larsen***, 2001 WI 30, ¶75 n.38, 242 Wis. 2d 47, 87 n.38, 624 N.W.2d 129, 144 n.38.

phrased by the Commission, in "unremitting pain" and that he wanted additional surgery. The administrative law judge adjourned the hearing so that Calderon could get additional treatment.

¶5 On September 26, 2003, Calderon began to see Fred H. Geisler, M.D., Ph.D. Dr. Geisler performed additional tests and recommended laminoforaminotomies at L4-5 and L5-S1. Calderon had the surgery on December 2, 2003. When Calderon did not get better, Dr. Geisler requested additional testing. Based on the results of the additional tests, Dr. Geisler diagnosed Calderon with mechanical instability at L5-S1 and recommended a dynamic lumbar stabilization implant, otherwise referred to as artificial disc replacement.

¶6 The administrative law judge held another hearing in October of 2005. As material, the issues were, whether: (1) the December 2, 2003, surgery was reasonable and necessary; (2) the proposed disc-replacement surgery was reasonable and necessary; and (3) Calderon was entitled to additional temporary total-disability benefits. Calderon testified and the parties submitted several exhibits, including: (1) reports dated October 9, 2004, and June 15, 2005, from Dr. Geisler; (2) a report dated June 8, 2005, from Morris Soriano, M.D.; and (3) a report dated July 27, 2005, from Richard K. Karr, M.D.

¶7 In his report of October 9, 2004, Dr. Geisler opined that before Calderon had the December of 2003 surgery, Calderon had "a combination of both compressive, meaning the lumbar stenosis, and potential mechanical instability." According to Dr. Geisler, the December of 2003 surgery was designed to "provide decompression," but did not "address any mechanical instability." Dr. Geisler opined that even after the December of 2003 surgery Calderon still suffered from

"mechanical instability at L5-S1" and, based on various tests, including a diskogram performed on May 14, 2004, recommended that Calderon have a "dynamic lumbar stabilization," or disc-replacement surgery.

¶8 In Dr. Geisler's June 15, 2005, report, he reiterated his diagnosis of "mechanical instability at L5-S1," opining that it was "directly caused" by Calderon's accident at Trostel in June of 2000. When asked if Calderon would be able to return to work and to estimate the percentage of Calderon's permanent disability, Dr. Geisler answered: "Undetermined, pending surgery."

¶9 Dr. Soriano's report opined that Calderon had reached "an end of healing" six to nine months after the September of 2000 surgery. According to Dr. Soriano, the December of 2003 surgery was not "necessitated by any work injury or period of work exposure," and, in his opinion, Calderon "would be the worst possible candidate" for disc-replacement surgery. Dr. Karr opined that Calderon reached an "end of healing" on June 21, 2001, and that the December of 2003 surgery and the disc-replacement surgery were not "mandated" by the June of 2000 injury.

¶10 The administrative law judge found that the December of 2003 surgery was "reasonable and necessary to cure and relieve [Calderon] from the effects of the accidental injury of June 7, 2000." In making this determination, the administrative law judge considered but rejected Dr. Soriano's and Dr. Karr's opinions, finding "very significant" the opinions that Calderon would need additional surgery despite surgery he had in September of 2000.

¶11 The administrative law judge also determined that the disc-replacement surgery was necessary to "cure and relieve [Calderon] from the effects" of his accident in June of 2000 while working for Trostel. As authorized

by WIS. STAT. § 102.18(1)(b), the administrative law judge ordered that Trostel and Sentry Insurance "are liable for the reasonable medical expenses incurred as a result of the prospective dynamic lumbar stabilization implant surgery at L5-S1."[3] The administrative law judge again considered but rejected Dr. Soriano's and Dr. Karr's opinions, and adopted Dr. Geisler's opinion:

> As credibly noted by Dr. Geisler, the applicant's work injury caused two problems - - compression (i.e., stenosis) at L4-5 and L5-S1 and mechanical instability at L5-S1. The surgery of December 2, 2003 provided decompression but did not correct the instability problem. Because the applicant did not experience sufficient pain relief from the decompression surgery, the instability needs to be addressed. The procedure recommended by Dr. Geisler to address the instability at L5-S1 is the "dynamic lumbar stabilization implant." Although this procedure is relatively new, it has been approved by the Food and Drug Administration.

(Underlining in original.)

¶12 Finally, the administrative law judge awarded temporary total-disability benefits to Calderon from, as material, September 26, 2003, the day Calderon began treatment with Dr. Geisler, through June 15, 2005, finding that "[a]s of Dr. Geisler's most recent report of June 15, 2005, [Calderon] remained

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[3] WISCONSIN STAT. § 102.18(1)(b) was amended by 2001 Wis. Act 37, § 21, effective January 5, 2002, as follows:

> Pending the final determination of any controversy before it, the department may in its discretion after any hearing make interlocutory findings, orders, and awards, which may be enforced in the same manner as final awards. The department may include in any interlocutory or final award or order an order directing the employer or insurer to pay for any future treatment that may be necessary to cure and relieve the employee from the effects of the injury.

(New material underlined.)

temporarily disabled pending the dynamic lumbar stabilization surgery." The administrative law judge also reserved jurisdiction "for such further findings and awards as may be warranted."

¶13 Both sides appealed to the Commission. The Commission affirmed, and, in addition to a brief explanatory memorandum opinion, adopted the findings of fact and legal conclusions of the administrative law judge.

II.

¶14 On appeal, we review the opinion of the Commission and not that of the circuit court. ***General Cas. Co. of Wisconsin v. Labor & Indus. Review Comm'n***, 165 Wis. 2d 174, 177 n.2, 477 N.W.2d 322, 323 n.2 (Ct. App. 1991). The Commission's findings of fact are invulnerable if they are "supported by credible and substantial evidence." ***Id.***, 165 Wis. 2d at 178, 477 N.W.2d at 324. Although the scope of our review on legal matters is broader, legal analyses by agencies that have developed expertise in an area are entitled to deference:

> In reviewing a determination of an administrative agency, we give deference along a gradient that varies with the nature of the agency's expertise and experience. *See* ***UFE Inc. v. Labor & Indus. Review Comm'n***, 201 Wis. 2d 274, 284–287, 548 N.W.2d 57, 61–63 (1996) (discussing the three levels of deference: "great weight deference, due weight deference and *de novo* review").

Dettwiler v. Wisconsin Dep't of Revenue, 2007 WI App 125, ¶4, 301 Wis. 2d 512, 516, 731 N.W.2d 663, 665. We analyze *de novo* any constitutional issues that may be lurking in the Record. *See* ***Hakes v. Labor & Indus. Review Comm'n***, 187 Wis. 2d 582, 586–587, 523 N.W.2d 155, 157 (Ct. App. 1994).

A.

¶15 As we have seen, WIS. STAT. § 102.18(1)(b) provides, as material:

> Pending the final determination of any controversy before it, the department may in its discretion after any hearing make interlocutory findings, orders, and awards, which may be enforced in the same manner as final awards. *The department may include in any interlocutory or final award or order an order directing the employer or insurer to pay for any future treatment that may be necessary to cure and relieve the employee from the effects of the injury.*

(Emphasis added.) Section 102.18(1)(b) gives the Commission authority to order Trostel and Sentry Insurance to pay for Calderon's prospective surgery. The statute is remedial and, accordingly, must be liberally construed to accomplish its purpose—to let the agency issue orders in an attempt to ensure that an injured worker will, to the extent possible, be made whole without forcing the parties to go through the extra expense entailed in a post-order assessment of whether further medical treatment is necessary. *See* ***Emmpak Foods, Inc. v. Labor & Indus. Review Comm'n***, 2007 WI App 164, ¶13, ___ Wis. 2d ___, ___, 737 N.W.2d 60, 65 (The Worker's Compensation Act is "remedial [and] must be liberally construed to afford compensation."); ***Lisney v. Labor & Indus. Review Comm'n***, 171 Wis. 2d 499, 503, 514–516, 493 N.W.2d 14, 15, 20 (1992) (employer required "to pay medical expenses even after a final order has been issued" when prior version of § 102.18(1)(b) was in effect). Thus, the end result is the same under either version of the statute—Trostel and Sentry Insurance must pay for Calderon's treatment for his work-related injury as that treatment becomes necessary.

¶16 Trostel and Sentry Insurance claim, however, that the Commission's order violates their due-process rights. First, they contend that it is not specific as

to when and under what circumstances Calderon will have the disc-replacement surgery at their expense. They assert that Calderon's medical condition could change, and argue that the "open-ended" nature of the order "potentially deprives [them] of a hearing on the relevant facts and issues at the time Calderon might chose [*sic*] to undergo the surgery." We disagree.

¶17 As we have seen, the administrative law judge retained jurisdiction "for such further findings and awards as may be warranted." Accordingly, if Calderon's medical condition changes, Trostel and Sentry Insurance may at that time seek a determination as to whether disc-replacement surgery is still reasonable and necessary. *See* ***Wright v. Labor & Indus. Review Comm'n***, 210 Wis. 2d 289, 296, 565 N.W.2d 221, 224 (Ct. App. 1997) (due process at administrative proceeding includes "right to be heard by counsel upon the probative force of the evidence presented").

¶18 Trostel and Sentry Insurance also claim that the retroactive application of WIS. STAT. § 102.18(1)(b) violates due process because the "open-ended nature" of the Commission's order "potentially affects the[ir] rights [] to rely upon a statue of limitations defense in the future." We do not give advisory opinions on what might or might not happen in the future when the parties, as here, can assert their contentions when and if the matter they fear becomes a reality. *See* ***State v. Armstead***, 220 Wis. 2d 626, 631, 583 N.W.2d 444, 447 (Ct. App. 1998) (claims based on future or hypothetical facts are not ripe for judicial review); *see also* ***U.S. Bank Nat'l Ass'n v. City of Milwaukee***, 2003 WI App 220, ¶17, 267 Wis. 2d 718, 737, 672 N.W.2d 492, 500 ("'Grotesque or fanciful situations, such as those supposed, will have to be dealt with when they arise.'") (quoting ***Gaines v. City of New York***, 215 N.Y. 533, 541, 109 N.E. 594, 596 (1915) (Cardozo, J.)).

¶19 Finally, in a largely undeveloped contention, Trostel and Sentry Insurance claim that WIS. STAT. § 102.18(1)(b) violates due process for the reasons they asserted in their argument on specificity. Statutes are, however, presumed to be constitutional, and a party contending that a statute is unconstitutional must show that beyond a reasonable doubt. ***Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶¶18–19, 237 Wis. 2d 99, 110–111, 613 N.W.2d 849, 857. As we have seen, the administrative law judge has retained jurisdiction and, therefore, Trostel and Sentry Insurance may request a hearing as to whether the disc-replacement surgery is needed when Calderon has it. They have not shown, beyond mere contention, that the statute violates their rights to due process.

B.

¶20 Trostel and Sentry Insurance also claim that the Commission's determination that the December 2, 2003, surgery and the prospective disc-replacement surgery are reasonable and necessary is not supported "by the record as a whole." *See* ***Princess House, Inc. v. Department of Indus., Labor & Human Relations***, 111 Wis. 2d 46, 54–55, 330 N.W.2d 169, 174 (1983) (court can look at entire record to determine whether "evidence sought to be relied upon is so discredited as to be discarded as a matter of law"). While acknowledging that Dr. Geisler recommended both surgeries, they argue that his opinion was "completely discredited," mainly by Dr. Soriano's and Dr. Karr's opinions that: (1) Calderon had reached an end of healing sometime in 2001; and (2) further

surgery, including disc-replacement surgery was not necessary to treat the June 7, 2000, injury.[4] We disagree.

¶21 As noted above, we must affirm if the record contains any credible and substantial evidence to support the Commission's findings of fact. ***General Cas. Co.***, 165 Wis. 2d at 178, 477 N.W.2d at 324. Substantial evidence is relevant, credible, and probative evidence on which reasonable persons could rely to reach a conclusion. ***Princess House***, 111 Wis. 2d at 54, 330 N.W.2d at 173. The Commission, not this court, determines the credibility of witnesses and weighs conflicting testimony. *See* ***id.*** When there are conflicts in the testimony of medical witnesses, the Commission's acceptance of the testimony of one qualified medical witness over another is conclusive. *See* ***E.F. Brewer Co. v. Department of Indus., Labor & Human Relations***, 82 Wis. 2d 634, 637, 264 N.W.2d 222, 224 (1978).

¶22 The Record supports the Commission's decision. As we have seen, Dr. Geisler opined that both surgeries were necessary to treat Calderon's June 7, 2000, work-related back injury at the L5-S1 level. Moreover, several doctors recommended some additional form of surgery, including:

- Michael C. Collopy, M.D., the physician whom the Commission notes was "retained" by Sentry Insurance, opined that, as of March of 2001,

[4] In their main brief on appeal, Trostel and Sentry Insurance claim that Dr. Chan "opined Mr. Calderon reached an end of healing in 2001 and did not require further surgery." The Record citations Trostel and Sentry Insurance provide do not support these assertions. Further, there are approximately thirty-four exhibits in the administrative Record covering more than two hundred pages. We do not scour the record to review arguments unaccompanied by adequate citations to the Record. *See* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990).

Calderon had not reached a "healing plateau" and recommended, among other things, a "micro diskectomy at 4-5";

- Yogendra Bharat, M.D., recommended in March of 2001 that Calderon "seek a neurosurgeon for a consultation for possible interbody fusion"; and

- Arvind Ahuja, M.D., opined in August of 2001 that Calderon "did not improve with an L5-S1 microdiskectomy" and recommended a lumbar fusion.

The Commission could reasonably conclude from this evidence that the December 2, 2003, surgery and the disc-replacement surgery were reasonable and necessary. While Drs. Soriano and Karr may have opined otherwise, the Commission's decision to reject their opinions is conclusive. *See* ***id.***

¶23 Finally, Trostel and Sentry Insurance contend that the Commission's decision to award Calderon temporary total-disability benefits from September 26, 2003, through June 15, 2005, is not supported by credible and substantial evidence. Specifically, they argue that Calderon is not entitled to disability benefits after the May 14, 2004, diskogram because there is no evidence that Calderon had additional treatment or was convalescing after that date. We disagree.

¶24 An employer must pay temporary total-disability benefits during the injured employee's healing period. ***GTC Auto Parts v. Labor & Indus. Review Comm'n***, 184 Wis. 2d 450, 460, 516 N.W.2d 393, 398 (1994).

> [T]he healing period is that period during which "the employee is submitting to treatment, is convalescing, still suffering from his injury, and unable to work because of

> the accident. The interval may continue until the employee is restored so far as the permanent character of his injuries will permit."

ITW Deltar v. Labor & Indus. Review Comm'n, 226 Wis. 2d 11, 21–22, 593 N.W.2d 908, 913 (Ct. App. 1999) (quoted source omitted).

¶25 Here, although there is no evidence that Calderon had any specific medical procedures after May 14, 2004, Dr. Geisler's June of 2005 report implicitly recognized that Calderon was still in a healing period. As we have seen, Dr. Geisler noted that Calderon was still suffering from his work-related injury and would need surgery to correct it. Dr. Geisler also wrote that Calderon would need the surgery before he could determine if Calderon could return to work or if Calderon was disabled. *See* ***id.***, 226 Wis. 2d at 22, 593 N.W.2d at 913 (employee still in healing period when, although she did not see her doctor, she "was still submitting to treatment for her injury, still suffering from it and still in need of surgery to correct it before she would reach her healing plateau"). There was sufficient evidence to support the Commission's order awarding Calderon temporary total-disability benefits through June 15, 2005.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.