

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 16, 2010

David R. Schanker
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. 2009AP2272

Cir. Ct. No. 2008CV4201

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

TIMBERLINE CEDAR WERKS, INC. AND PEKIN INSURANCE,

PLAINTIFFS-APPELLANTS,

v.

LABOR & INDUSTRY REVIEW COMMISSION AND RONALD COSTABILE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timberline Cedar Werks, Inc. and Pekin Insurance, its worker's compensation insurer, appeal from a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) that Ronald Costabile was entitled to worker's compensation benefits for temporary disability

from January 1, 2007, through March 3, 2008. We conclude that LIRC's decision was supported by substantial and credible evidence, and we affirm the circuit court.

¶2 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 will affirm LIRC's findings of fact if they are supported by credible and substantial evidence in the record. *Bunker v. LIRC*, 2002 WI App 216, ¶30, 257 Wis. 2d 255, 650 N.W.2d 864. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

¶3 We do not evaluate conflicting evidence to determine which should be accepted; we will affirm if there is credible evidence to support the finding regardless of whether there is evidence to support the opposite conclusion. *Valadzic v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 592-94, 286 N.W.2d 540 (1979). The weight and credibility of the evidence are for LIRC to evaluate. *Bunker*, 257 Wis. 2d 255, ¶30. We must consider conclusive any finding by the commission based upon a reasonable inference from the credible evidence. *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 570, 579 N.W.2d 668 (1998). Conflicts in the testimony of medical witnesses are to be resolved by LIRC, and LIRC's determination that the testimony of one qualified medical witness was more credible than another is conclusive. *E. F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978).

¶4 LIRC affirmed the findings of the administrative law judge. The administrative law judge found that Costabile worked for Timberline as a residential painter. In June 2004, Costabile began experiencing right shoulder and

neck pain, including tingling in his right arm and difficulty lifting the right arm above his shoulder. Costabile's primary care physician referred him to an orthopedist, Dr. Seipel, who diagnosed a rotator cuff tear, counseled him to avoid overhead lifting, and referred him to Dr. Noonan for evaluation of any cervical spine issues. Dr. Noonan diagnosed right cervical facet syndrome, right shoulder pathology and a herniated disc at C4-5. Dr. Noonan recommended surgery. Costabile postponed the surgery and relocated out-of-state. The medical reports show that since 2004, Drs. Seipel and Noonan have attributed Costabile's injury to his work.

¶5 Costabile returned to Wisconsin and in June 2006, he returned to Dr. Seipel complaining of constant neck pain and numbness in his right arm. Dr. Seipel reiterated his diagnoses of rotator cuff and cervical spine problems and referred Costabile to Dr. Didinsky for further evaluation of his cervical spine. Costabile remained cautioned against overhead lifting.

¶6 Dr. Didinsky opined that Costabile's cervical spine problems resulted from his employment, and he recommended surgery in the C4-5 region. Dr. Didinsky opined in September and December 2006 that Costabile's prognosis was "unlikely to change without surgical intervention" and would be "good with surgical intervention."

¶7 Timberline submitted a report from Dr. Weiss who opined that Costabile's shoulder and neck problems were pre-existing, degenerative conditions that were temporarily aggravated by overhead painting work. In Dr. Weiss' opinion, the temporary aggravation was resolved as of January 2005.

¶8 During 2007 and 2008, Costabile worked intermittently for a variety of employers. Some of the jobs permitted him to work within his restrictions;

others did not. The administrative law judge found that Costabile had to work to pay his living expenses.

¶9 The administrative law judge found that Costabile's employment was repetitive and strenuous. The administrative law judge deemed credible Dr. Didinsky's findings and interpretation of the diagnostic studies on the question of a cervical spine injury. In addition, the administrative law judge found Dr. Seipel's findings credible on the question of a shoulder injury. Costabile remained under overhead lifting restrictions and had not reached an end to the healing period for his work injury. Therefore, the administrative law judge awarded Costabile benefits for temporary total disability and temporary partial disability. Timberline sought LIRC review.

¶10 Timberline argued to LIRC that Costabile was not temporarily disabled from January 1, 2007, through the date hearing date, March 3, 2008. In its decision affirming the administrative law judge, LIRC noted that Drs. Seipel and Noonan imposed significant physical restrictions, neither physician had lifted those restrictions, and Costabile's symptoms persisted. LIRC deemed credible Dr. Didinsky's opinion in September and December 2006 that Costabile's prognosis was "unlikely to change without surgical intervention" and would be "good with surgical intervention." LIRC inferred that Costabile received sporadic medical treatment because he lacked health insurance and because Timberline refused to pay for his treatment.

¶11 Timberline argued to LIRC that Dr. Didinsky's December 29, 2006 WKC-16-B report established a healing plateau. In that report, Dr. Didinsky assessed five percent permanent partial disability. LIRC inferred that Dr. Didinsky prematurely predicted a minimum percentage of permanency after

surgery and that this inference was consistent with Dr. Didinsky's clinic notes and other opinions. LIRC determined that it was not reasonable to infer that Dr. Didinsky believed that Costabile had reached full healing without the surgery Dr. Didinsky had recommended.

¶12 LIRC also rejected Timberline's reliance upon Dr. Didinsky's statement in his WKC-16-B that he did not take Costabile off work ("not placed on disability through Dr. Didinsky" and "patient not taken off work by Dr. Didinsky"). Dr. Didinsky was aware that Costabile had seen other physicians who had imposed work restrictions. Dr. Didinsky's notes and opinions made clear that he believed Costabile had a work-related injury that required ongoing treatment, including surgery.

¶13 Lastly, LIRC rejected Timberline's arguments that Costabile's work for other employers and his occasional performance of work that exceeded his physical restrictions meant that he was not temporarily disabled and capable of unrestricted work. LIRC inferred that Costabile's work pattern revealed a strong work ethic and a need for income, not that the medical restrictions were unnecessary or suspended. Timberline conceded that it could not provide work that would accommodate Costabile's restrictions.

¶14 On judicial review, the circuit court affirmed LIRC, citing credible evidence for LIRC's decision in Costabile's favor.

¶15 On appeal, Timberline reiterates many of the arguments it made to LIRC. Timberline argues that medical opinions from 2005-06 are not credible evidence of temporary disability in 2007-08. The 2007-08 period cannot be considered in a vacuum. The diagnoses in 2007-08 were a continuation of diagnoses made and restrictions imposed in 2004-05. There was credible evidence in the

record to support LIRC's treatment of the 2007-08 period as part of Costabile's temporary disability period.

¶16 Timberline argues to this court that Dr. Didinsky's statements that he did not take Costabile off work mean more than LIRC inferred they meant. LIRC's inferences are reasonable in light of all the evidence, and we do not reweigh the evidence. As LIRC noted and the record reveals, the restrictions put in place by Drs. Seipel and Noonan remained in effect at the time of Dr. Didinsky's evaluations and surgery recommendation. Costabile was involved in a continuing care situation, and his situation had not improved in 2007-08. Timberline offers no authority for its contention that opinions rendered in 2005 had to be reiterated when the employee's circumstances had not improved and subsequent medical opinions confirmed that the employee had suffered a work-related injury and still required surgery.

¶17 Timberline argues that Dr. Didinsky assessed a permanent partial disability and therefore Costabile had reached a healing plateau. LIRC's inference about the meaning of Dr. Didinsky's permanent partial disability assessment is reasonable in light of all the evidence, which we will not reweigh. Dr. Didinsky did not opine that the healing period had ended. Rather, he anticipated surgery for Costabile.

¶18 Timberline argues that because Costabile did not obtain medical treatment in the 2007-08 period, he cannot make a temporary disability claim for that period. Timberline disputes LIRC's inference that Costabile did not seek treatment because he lacked insurance. Timberline points to Costabile's concession that he had access to health insurance through his wife as of March 2007, but he chose to await the outcome of his worker's compensation case rather than seek treatment

under his wife's insurance.¹ LIRC's inference was reasonable, and we do not reweigh the evidence.

¶19 LIRC's findings are supported by credible evidence. Starting in 2004, Drs. Seipel and Noonan attributed Costabile's injury to his work for Timberline. They imposed work restrictions, which were not lifted during the period covered by this controversy. Dr. Didinsky acknowledged those work restrictions and recommended surgery. LIRC found that Costabile delayed treatment because he lacked insurance or other resources. We affirm the circuit court's order affirming LIRC's worker's compensation award.

By the Court.—Order affirmed.

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

¹ By 2007, Costabile had obtained medical opinions that he suffered a work-related injury. We decline to speculate on the likelihood that his wife's insurer would have covered any treatment related to this pre-existing, allegedly work-related injury.

