COURT OF APPEALS
DECISION
DATED AND FILED

November 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP236 **Cir. Ct. No. 2015CV484**

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

GEORGE H. PAYNE,

PLAINTIFF-APPELLANT,

V.

SENTRY INSURANCE, A MUTUAL COMPANY, GENERAC POWER SYSTEMS, INC. AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Walworth County: PHILLIP A. KOSS, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. A Department of Workforce Development (DWD) administrative law judge (ALJ) found that George Payne's chronic back pain was

a compensable occupational disease and awarded him worker's compensation benefits. The Labor and Industry Review Commission (LIRC) reversed. Payne appeals the circuit court's order affirming LIRC's decision. We affirm the order.

¶2 Payne worked as a welder/fabricator at Generac Power Systems, Inc., from 1999 to 2011. His job involved carrying and welding heavy, often awkward, parts and required repetitive lifting, bending, and twisting. In 2003, Payne began seeing chiropractor Todd Mortensen with complaints of back pain. Dr. Mortensen diagnosed "mechanical low back pain, possibly complicated by congenital or acquired structural abnormalities."

¶3 Payne's discomfort waxed and waned over the next several years. He wore a back-support belt at work, saw Mortensen with some regularity, saw a few other medical professionals, underwent a course of physical therapy, and went to the Y for strengthening exercises. At some visits, he told the health care provider that he injured his back at work or that he felt his back "pull out" with heavy lifting or twisting at work; at other times he tied his pain to poor footwear, stress, slipping on the ice, falling down stairs, or busy weekends.

¶4 Payne voluntarily left Generac in November 2011. He did not give back pain as a reason for quitting. His back pain lessened after he quit but continued, and in May 2012, he saw Dr. Tony Schwartz, who ordered an MRI. The interpreting radiologist's impression of the MRI was that Payne had "severe degenerative changes of the facet joint at L4-L5" and "[m]ultilevel degenerative disk disease … with congenital shortening of the pedicles," which predisposes a person to spinal stenosis.

¶5 Payne filed a hearing application with the DWD's Worker's Compensation Division, seeking temporary disability benefits. He alleged a

history of repeated lower-back injuries at work. Mortensen and Schwartz each filed on Payne's behalf a "Practitioner's Report on Accident or Industrial Disease in lieu of Testimony." Both attributed Payne's chronic back pain to the nature of his tasks at Generac.

¶6 The central issue for the hearing was whether Payne sustained an injury arising out of his employment with Generac or while performing services growing out of and incidental to that employment, *see* WIS. STAT. § 102.03(1)(a), (c)1., and (e) (2013-14).[1] Dr. Alvin Krug conducted an independent medical examination (IME). Based on the history Payne provided and some medical records, Krug initially concluded that, while there was "no scientific basis indicating his workplace exposure was the probable cause in either the onset or progression of [Payne's] low[-]back condition," his complaints of back pain on January 5, 2007, November 18, 2008, and June 26, 2010, were work-related aggravations of his pre-existing degenerative condition. Krug noted that he based his opinion on the assumption "that there is not documentation of ongoing low[-]back problems prior to his January 5, 2007 work exposure."

¶7 Counsel for Generac and its insurer, Sentry Insurance, then supplied Krug with the complete certified chiropractic records of Mortensen's treatment of Payne. Upon reviewing them, Krug filed an addendum to the IME report. He retracted his original opinion that the three specific injury dates identified work-related injuries. He explained that he now believed Payne's chronic low-back pain predated any work injury at Generac, was associated with Payne's disk

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

degeneration, facet changes, and congenital condition, and thus was a personal, not work-related, matter.

¶8 After two evidentiary hearings, the ALJ concluded that Payne's claims were compensable. She found that he had an occupational disease resulting from his years of employment at Generac, that his duties were a material contributing cause of his low-back problems, that Payne's testimony was credible, and that Schwartz's and Mortensen's opinions that Payne had an occupational disease were more persuasive than Krug's revised opinion.

¶9 Generac appealed to LIRC. LIRC reversed the ALJ's award of compensation. It credited Krug's second opinion that Payne experienced only a manifestation of symptoms from his pre-existing degenerative condition, such that it had "legitimate doubt" that Payne sustained an injury arising out of his employment with Generac and while performing services growing out of and incidental to that employment. LIRC dismissed Payne's application.

¶10 Payne petitioned the circuit court for review. The circuit court found LIRC's decision was supported by credible and substantial evidence and affirmed. This appeal followed.

¶11 In an appeal from an administrative agency decision, we review the agency's decision, not the circuit court's. ***American Mfrs. Mut. Ins. Co. v. Hernandez***, 2002 WI App 76, ¶11, 252 Wis. 2d 155, 642 N.W.2d 584. In worker's compensation cases, the claimant must prove all facts essential to the recovery of compensation beyond a legitimate doubt. ***Leist v. LIRC***, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994). LIRC must deny benefits if a legitimate doubt exists as to the facts necessary to establish a claim. ***Id.***

¶12 Whether Payne sustained an injury while performing services growing out of and incidental to his employment is an issue of fact. *See* ***Bumpas v. DILHR***, 95 Wis. 2d 334, 342, 290 N.W.2d 504 (1980). "LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence." ***Bretl v. LIRC***, 204 Wis. 2d 93, 100, 553 N.W.2d 550 (Ct. App. 1996). "Credible evidence is that which excludes speculation and conjecture." ***Id.*** We do not weigh the evidence or pass upon the credibility of the witnesses. ***American Mfrs.***, 252 Wis. 2d 155, ¶11.

¶13 WISCONSIN STAT. § 102.18(3) directs that, on review of an ALJ's decision, LIRC's action "shall be based on a review of the evidence submitted." Payne argues that LIRC acted in excess of its powers, *see* WIS. STAT. § 102.23(1)(e)1., because it did not review *all* of the evidence submitted to the ALJ, specifically, photographs of the back-support belt he wore at work. He contends the remedy is reversal.[2]

¶14 When we review the agency's interpretation of a statute, there are three possible levels of deference: great weight, due weight, or de novo. ***American Mfrs.***, 252 Wis. 2d 155, ¶11. We accord "great weight" deference here because of LIRC's duty to administer the worker's compensation statutes, its long-standing interpretation of them, its expertise, and the benefit of consistent decisions. ***McRae v. Porta Painting, Inc.***, 2009 WI App 89, ¶7, 320 Wis. 2d 178, 769 N.W.2d 74. We thus will sustain the decision unless it directly contravenes

[2] The actual belt was received as an exhibit at the hearing. The ALJ then allowed the belt to be withdrawn and photographs of it submitted. Payne's counsel filed an affidavit averring that he mailed the photos to the ALJ at the DWD. The certified record LIRC prepared did not contain them. We cannot be certain of their fate upon arriving at the DWD.

the statute, is clearly contrary to legislative intent, or lacks a rational basis. *See* ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 662, 539 N.W.2d 98 (1995).

¶15 The purpose of WIS. STAT. § 102.18(3) is to prevent LIRC from considering on review any evidence *not considered by the ALJ* unless the parties are permitted to offer rebuttal evidence. *See* ***Northwestern Insulation v. LIRC***, 147 Wis. 2d 72, 79, 432 N.W.2d 620 (Ct. App. 1988). Payne cites no authority for the proposition that LIRC's failure to consider the photos, assuming they were submitted to the ALJ, commands reversal.

¶16 Second, the key issue in this case is causation—whether Payne sustained his back injury while performing service growing out of and incidental to his employment, or arose out of his employment. *See* WIS. STAT. § 102.03(1)(c)1., (e). The photos do not establish causation. They offer nothing more than showing the belt's condition. Payne provided no evidence, medical or otherwise, to support his theory that the wear and tear on the belt resulted from repetitive bending and twisting, of its age and condition when he acquired it, or whether any other employees ever borrowed it. The ALJ's decision noted that Payne "used a leather support belt" when he lifted parts at work—a fact of which LIRC was aware—but beyond that did not discuss its appearance or correlate its condition to Payne's back injury. We agree with LIRC that this case does not turn on the presence or absence of the support-belt photos but on the expert evidence regarding Payne's medical condition. LIRC did not exceed its authority by not reviewing the photographs.

¶17 Payne next asserts that LIRC's findings and decision are void because it incorrectly relied on ***Lewellyn v. DILHR***, 38 Wis. 2d 43, 155 N.W.2d 678 (1968), to explain its legitimate doubt of a compensable occupational disease.

In ***Lewellyn***, the supreme court looked at cases dealing with employees with preexisting degenerative conditions and developed three rules it felt "represent an accurate appraisal of the factual situations which should determine whether or not the particular condition is recoverable." ***Id.*** at 58. The second rule provides:

> 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 pre[-]existing 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.

Id. at 59 (footnote omitted; citations omitted). Citing ***Lewellyn***, LIRC credited Krug's opinion that Payne experienced the manifestation of symptoms from his pre-existing degenerative condition.

¶18 Payne argues, however, that ***Lewellyn*** does not provide the proper standard because the supreme court expressly stated that it was "not here concerned with an occupational disease." *See* ***id.*** at 59 n.4. We disagree. ***Lewellyn*** applies in worker's compensation cases involving pre-existing degenerative conditions. *See* ***id.*** at 58-59. We are satisfied that LIRC's "legitimate doubt" was properly founded on ***Lewellyn***'s second rule.

¶19 Payne next contends LIRC's decision to deny benefits is not supported by credible and substantial evidence. We must affirm LIRC's findings if there is *any* credible evidence in the record to support them. *See* WIS. STAT. § 102.23(6); *see also* ***R. T. Madden, Inc. v. DILHR***, 43 Wis. 2d 528, 547, 169 N.W.2d 73 (1969). The credibility of witnesses and the persuasiveness of the testimony are for LIRC to determine. ***Goranson v. DILHR***, 94 Wis. 2d 537, 556, 289 N.W.2d 270 (1980).

¶20 LIRC's decision was based on an evaluation of conflicting medical evidence. Contrary to the ALJ's findings, it found Krug, Generac's expert, more credible than Schwartz or Mortensen. LIRC noted that the latter two doctors, particularly Schwartz, "based their opinions on the assumption that [Payne] has frequently injured his back at work" but, "[a]s Dr. Krug noted, the medical record suggests otherwise." It then recited examples from the medical records where Payne attributed his back pain to "falling on ice"; being "more busy than usual"; "falling down"; "falling on stairs at home"; doing "a lot of running around over the weekend"; and several visits at which Payne said something to the effect that his discomfort was not work-related or was not a worker's compensation claim.

¶21 Payne highlights other facts in the record and findings of the ALJ that bolster his position. "It is not required that the evidence be subject to no other reasonable, equally plausible interpretations." ***Hamilton v. DILHR***, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). LIRC's findings need not reflect a preponderance of the evidence if its conclusions are reasonable. ***Kitten v. DWD***, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649. Indeed, if they are supported by credible and substantial evidence, its findings must stand even if contrary to the great weight and clear preponderance of the evidence. ***Heritage Mut. Ins. Co. v. Larsen***, 2001 WI 30, ¶24, 242 Wis. 2d 47, 624 N.W.2d 129.

¶22 Payne also argues that the employer takes the employee "as is," such that a susceptibility to injury and disability through nonindustrial causes does not relieve the employer from liability for a disability triggered by the employment. ***M. & M. Realty Co. v. Industrial Comm.***, 267 Wis. 52, 63, 64 N.W.2d (1954). Credible and substantial evidence supports LIRC's finding, based on Krug's expert opinion, that Payne's disability was not triggered by his work at Generac. LIRC "is the sole judge of the weight and credibility of the witnesses" offering

medical testimony, and it is for LIRC to reconcile any conflicts or inconsistencies. ***Wisconsin Ins. Sec. Fund v. LIRC***, 2005 WI App 242, ¶18, 288 Wis. 2d 206, 707 N.W.2d 293 (citation omitted). The evidence in support of LIRC's conclusion was neither insufficient nor incredible as a matter of law. *See* ***Link Indus., Inc. v. LIRC***, 141 Wis. 2d 551, 558, 415 N.W.2d 574 (Ct. App. 1987).

¶23 Finally, Payne complains that the circuit court acted outside its authority by making a finding of fact. We agree that a reviewing court is not to make its own findings of fact. *See* ***R. T. Madden, Inc.***, 43 Wis. 2d at 536. We review the agency's decision, however, not the circuit court's. That court's assessment of the source of the wear and tear on Payne's work belt did not factor into our analysis.

By the Court.—Order affirmed.

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