COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP198 **Cir. Ct. No. 2012CV280**

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

LIBERTY MUTUAL FIRE INSURANCE COMPANY AND APPLETON AREA SCHOOL DISTRICT,

PLAINTIFFS-APPELLANTS,

V.

THOMAS VOIGHT AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Thomas Voight sustained a work-related elbow injury and agreed to a limited compromise settling that portion of his claim with his employer, Appleton Area School District, and its insurer, Liberty Mutual Fire

Insurance Company.[1] Later, both Voight's doctor and an independent medical examiner concluded Voight had sustained a substantial permanent partial disability at the wrist, and Voight sought additional disability benefits. The District unsuccessfully argued to the Labor and Industry Review Commission that Voight's wrist claim was foreclosed by the earlier settlement and initial medical determinations about the location of the injury at the elbow. The District appeals, raising the same arguments.

¶2 We reject the District's arguments. The limited compromise specifically provided that it was to have no effect on Voight's ability to seek future benefits, and provided the District with a credit for past payments in that circumstance. We therefore agree with the Commission that Voight's wrist claim was not foreclosed by that agreement. We also defer to the Commission's conclusion that the location of the disability, not the location of the injury, is determinative as to an applicant's entitlement to permanent partial disability benefits.

BACKGROUND

¶3 The following facts were found by the Commission and are undisputed. Voight sustained an occupational injury to his right elbow on January 10, 2005. After Dr. David Eggert performed surgery in April 2005, Voight experienced severe pain and numbness in the ulnar nerve distribution, including hand and forearm pain and pain and numbness in two fingers on Voight's right hand. A second surgery relieved some symptoms, but Voight

[1] We subsequently refer to Appleton Area School District and Liberty Mutual Fire Insurance Company collectively as, "the District."

continued to experience hand issues. In October 2006, Dr. Eggert assessed twenty percent permanent partial disability at the right elbow for chronic pain, weakness, and loss of sensation.

¶4 At the District's request, Dr. Stephen Barron examined Voight in September 2005. Doctor Barron opined that it was too soon to assess permanency of Voight's symptoms. In December 2006, Dr. Barron assessed three percent permanent partial disability at the right elbow for pain, diminished grip strength, and sensory changes in Voight's hand and fingers.

¶5 A hearing was scheduled to resolve the dispute between Drs. Eggert and Barron, but the parties agreed to a limited compromise. The District agreed to pay Voight $21,000, and in exchange would be given a twenty percent credit toward "any future claims for permanent partial disability." The limited compromise was a "full settlement" of the District's liability for "indemnity, medical expenses and out-of-pocket expenses through May 24, 2007, the date on which the parties agreed to the settlement terms …." It further provided that the limited compromise was to have "no effect on the applicant's ability to seek further benefits under [WIS. STAT.] Chapter 102 …."[2]

¶6 Just before agreeing to the limited compromise, Voight began treating with Dr. Steven Taylor. Doctor Taylor performed a third elbow surgery on July 24, 2007. This surgery relieved some pain, but Voight continued to report pain in his right hand and fingers.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 Doctor Barron examined Voight again in January 2008. Doctor Barron agreed the surgery performed by Dr. Taylor was related to the occupational elbow injury, but opined that it was too early to assess permanency.[3]

¶8 In mid-2008, Dr. Taylor observed diminished right hand strength, but noted Voight had full range of motion at the elbow. Voight continued to experience right hand pain of varying intensity throughout the remainder of 2008 and 2009. On November 4, 2009, Dr. Taylor assessed forty-five percent permanent partial disability at the right wrist, attributable to motor and sensory limitations.

¶9 Doctor Barron again examined Voight in April 2010. His examination described full range of motion of the right elbow and right hand, with excellent grip strength but diminished sensation in two of the fingers. Doctor Barron also reported that Voight complained of pain in his hand and wrist. It was Dr. Barron's opinion that there was no wrist injury, and he assessed the same three percent permanent partial disability at the right elbow that he had assessed in 2006.

¶10 On February 5, 2010, Voight filed a hearing application for permanent partial disability benefits based on a forty-five percent disability rating at the right wrist. The District denied Voight's claim on the grounds that: (1) Voight's claim was foreclosed by the 2007 limited compromise agreement; and (2) Voight's disability must be rated at the elbow joint, the site of

[3] The Commission apparently found this assertion inconsistent with Dr. Barron's earlier assessment of three percent permanent partial disability.

the occupational injury. The administrative law judge rejected the latter argument but adopted the former and dismissed Voight's claim.

¶11 Voight sought review and the Commission ordered the taking of additional medical evidence. That evidence included an independent medical examination by Dr. Jerome Ebert on April 21, 2011. Doctor Ebert opined that the work incident resulted in injury at the right elbow, but he concluded that residual symptoms included pain, sensory loss, and very subtle motor loss in the right hand. Doctor Ebert attributed these residual symptoms to unintentional injury to the ulnar nerve sustained during work-related elbow surgery. He concluded there was no longer any disability at the elbow, but a forty-five percent permanent partial disability at the right wrist. Doctor Ebert's assessment was consistent with Dr. Taylor's November 4, 2009 assessment.

¶12 In response to Dr. Ebert's opinion, Dr. Barron submitted a supplemental opinion on June 6, 2011. Doctor Barron confirmed his assessment of April 2010 and opined that there should be no disability rating at the wrist because the injury was to Voight's elbow. He refused to make any assessment other than his prior rating of three percent permanent partial disability at the elbow.

¶13 The Commission accepted the opinions of Drs. Taylor and Ebert and found that Voight sustained a forty-five percent permanent partial disability at the right wrist, attributable to the effects of the occupation-related right elbow injury. It specifically rejected Dr. Barron's opinion as resting on a faulty legal basis; "it is the location of the disability or impairment, not the location of the injury, that determines whether and how the scheduled disability ratings apply," wrote the Commission.

¶14 The Commission also determined that the limited compromise agreement did not represent a final settlement of Voight's claim. The Commission focused on the agreement's language, finding that it was designed to have no effect on Voight's ability to seek further benefits. The Commission concluded Voight was "entitled to bring this 'future claim' for an assessment not in existence at the time of the limited compromise."

¶15 Ultimately, the Commission concluded Voight was entitled to an additional $21,780. It reached this total by calculating the number of weeks of compensation due based on a forty-five percent permanent partial disability, and multiplying that by the applicable pay rate. The Commission then applied the offset required by the limited compromise agreement. The Commission reserved jurisdiction, as there was medical testimony that future treatment might be necessary.

¶16 The District appealed to the circuit court. On certiorari review, the court concluded that the Commission's decision was entitled to great weight deference. The court concluded the Commission properly applied the law in allowing separate ratings for different disabilities arising from the same injury, and the limited compromise did not bar Voight from claiming additional permanent partial disability benefits for his wrist disability.

DISCUSSION

¶17 When reviewing a worker's compensation claim, we review the Commission's decision, not the circuit court's.[4] ***County of Dane v. LIRC***, 2009

[4] We also do not review the administrative law judge's decision, which was superseded by that of the Commission. *See* WIS. STAT. § 102.18(3). The District's brief places inordinate weight on a decision that is no longer controlling.

WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571. We must affirm the award unless the Commission "acted without or in excess of its powers, the award was procured by fraud, or the Commission's findings of fact do not support the award." ***County of Barron v. LIRC***, 2010 WI App 149, ¶10, 330 Wis. 2d 203, 792 N.W.2d 584. We will overturn factual findings only if they are not supported by substantial evidence. WIS. STAT. § 102.23(6). We do not substitute our judgment for that of the Commission as to the weight and credibility of the evidence. ***Id.***

¶18 On appeal, the District renews its argument that the 2007 settlement foreclosed Voight's wrist claim. The District observes that the symptomatic foundations of Voight's two claims are identical, and are characterized by right hand pain and weakness as well as diminished grip strength and sensation. The District believes Voight should be bound by his initial choice to bring his claim as an elbow injury.

¶19 Oddly, the District almost wholly ignores the language of the settlement agreement, which acknowledges the potential, even likelihood, of future claims. The agreement required the District to pay Voight $21,000. In return, the District received "a credit of 20 percent permanent partial disability to the right elbow toward *any future claims for permanent partial disability*." (Emphasis added.) The settlement had a limited temporal scope, covering only what liability the District may have incurred "for indemnity, medical expenses and out-of-pocket expenses *through May 24, 2007* …." (Emphasis added.)

¶20 But there is more. If the foregoing provisions were not sufficiently clear, the document specifically provides that the agreement is to have "no effect on the applicant's ability to seek further benefits under Chapter 102 of the Wisconsin Statutes." Further, the District reserved "all rights and defenses to

future claims, including the right to deny any additional claims on the issue of medical and legal causation."

¶21 In sum, the District's argument is wholly unsupported by the language of the settlement.[5] The agreement's language supports the Commission's finding that there was uncertainty at the time of settlement regarding Voight's diagnosis and the extent of his disability. The Commission perceived the agreement as "a limited compromise of the substantially conflicting *right elbow assessments*, which were the only medical assessments of permanent partial disability on record at that time."

¶22 Next, the District argues Voight's only claim should be for his elbow, the actual injury site. According to the District, "downstream," or distal, disabilities like those to Voight's wrist are subsumed by the disability rating at the elbow.

¶23 The District acknowledges the Commission's determination of a compensable disability may be entitled to great deference under certain circumstances. Great weight deference is appropriate when: (1) an agency is charged with administration of the particular statute at issue; (2) its interpretation is one of long standing; (3) it employed its expertise or specialized knowledge in arriving at its interpretation; and (4) its interpretation will provide uniformity and consistency in the application of the statute. ***Brown v. LIRC***, 2003 WI 142, ¶16, 267 Wis. 2d 31, 671 N.W.2d 279.

[5] The District raises a number of additional arguments. It claims the Commission's decision destroys the incentive to settle, permits claimants to introduce uncertainty to the negotiation process, and constitutes a collateral attack on the settlement. We need not address these policy arguments as the settlement does not bar further claims.

¶24 There is no persuasive argument that these requirements have not been met.[6] As authority for its position, the Commission cited two prior administrative decisions, one from 1998 and one from 2007. *See* ***Polsin v. Oscar J Boldt Constr.***, Claim No. 1996049458 (LIRC Nov. 11, 1998); ***Jerome v. Jackson***, Claim No. 2004-011204 (LIRC Feb. 22, 2007). So far as this court can tell, the Commission has employed the same rule in these types of cases for nearly fifteen years.

¶25 In ***Polsin***, the earlier of the two, the Commission accepted the treating physician's separate ratings for partial permanent disability at the right wrist and permanent motion limitations in the fingers of the right hand. "[S]uch disabilities are properly rated separately rather than lumping them in with an estimated permanent partial disability at the wrist," the Commission concluded. ***Id.*** at 3. In an extensive analysis of the issue in a footnote, the Commission credited a physician's testimony that the finger dysfunction was caused by surgery to repair the wrist injury, and wrote that "it is technically correct for the physician to rate separate disabilities separately, even when a compensable disability is distal to the original disability …." ***Id.*** at 4 n.1. The Commission then distinguished a case in which it had accepted combined wrist and finger ratings, observing that it was bound to accept uncontroverted medical evidence, even if technically incorrect:

> When the commission has credible medical evidence to support the separate assessment of separate, work-related

[6] We need not address all of these factors, as it is well-established that the Commission is charged with administering WIS. STAT. ch. 102 and possesses specialized knowledge and expertise in the areas of employment injuries and compensation. *See* ***Hagen v. LIRC***, 210 Wis. 2d 12, 19-20, 563 N.W.2d 454 (1997). In addition, the Commission's interpretation provides uniformity in its application of the worker's compensation system to distal disabilities.

> disabilities, it should always uphold that evidence. But where the physicians' opinions do not make a separate assessment, the commission must uphold the most credible of those opinions, even though they may be technically incorrect in their means of assessment.

Id. Here, there was credible medical evidence to support the separate assessment of disabilities to Voight's wrist and elbow.

¶26 In ***Jerome***, the applicant's doctor assessed permanent partial disability of 9.9 percent at the wrist. The physician hired by the insurer gave much more detailed ratings, which included separate assessments for the right elbow, wrist, middle finger, index finger, and thumb. The Commission found this latter assessment proper because the former "did not account for all of the applicant's disability with his assessment of 9.9 percent permanent partial disability at the right wrist." ***Id.*** at 2. The Commission went on to conclude that even if the applicant's disabilities were attributable to damage at the most severe injury site, separate disability ratings for each disability "would be the most accurate method of making those assessments." ***Id.***

¶27 The District observes that neither ***Polsin*** nor ***Jerome*** are "decisions from the Wisconsin appellate court[]. Thus, neither case is precedent which binds this court." While true, this statement completely misses the point. The relevant question is whether the Commission has developed the requisite expertise and adopted a long-standing interpretation on a point of law. If so, it does not matter whether this court would adopt the same rule independently; the Commission's decision is entitled to great weight deference.

¶28 In addition to ***Polsin*** and ***Jerome***, the Commission cited ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 236 N.W.2d 255 (1975), when rejecting Dr. Barron's opinion that Voight's wrist disability was subsumed by the

elbow rating. The District finds this problematic because, it states, "counsel's reading of the *entire* ***Vande Zande*** decision does not disclose any statement by the Wisconsin Supreme Court on the issue of rating disability at the location separate from the [injury site]." Voight and the Commission defend the ***Vande Zande*** citation not with a specific analysis of the case, but the notion that the Commission's holding represents "an amalgamation of information rather than a recitation of one holding from one particular case."

¶29 Voight and the Commission need not have resorted to this rather weak defense of the ***Vande Zande*** citation, for the case actually is somewhat helpful. In ***Vande Zande***, 70 Wis. 2d at 1089-90, the examiner found that the applicant had suffered a host of injuries, including total deafness in the left ear, a skull fracture, loss of sense of taste and smell, facial paralysis, and periods of intermittent headaches and dizziness. The examiner awarded 255 weeks of compensation: a scheduled fifty-five weeks for total loss of hearing in one ear, and another 200 weeks for twenty percent of permanent total disability. ***Id.*** at 1090-92. On appeal, the applicant argued "that the ear injury led to other aspects of disability and, therefore, the entire range of disabilities should be considered as a whole, rather than separating the loss of hearing from the other disabilities." ***Id.*** at 1091. The court rejected this argument, determining that the examiner properly separated the disabilities into two categories: loss of hearing and other effects. ***Id.*** at 1096. For our purposes, it is important to note that the examiner properly accounted for the "additional physical effects of deafness" in the twenty percent permanent partial disability award, rather than finding that they were subsumed by the scheduled benefit for deafness. ***Id.*** at 1093.

¶30 Finally, the District suggests that worker's compensation claims are not severable. They point to language in ***Christnovich v. Industrial Commission***,

257 Wis. 235, 237, 43 N.W.2d 21 (1950), which stated, "When the commission makes findings and a final award, it is not passing upon merely the employee's right to compensation for certain claimed or then known injuries. It is passing upon all compensation payable for all injuries caused by that accident." This statement first appeared in ***State ex rel. Watter v. Industrial Commission***, 233 Wis. 48, 53, 287 N.W. 692 (1939), in which an employee brought a claim for latent injuries that manifested after a final award had been made. In ***Christnovich***, 257 Wis. at 236, the applicant brought a claim for pain in the hip and back, but the commission found only a hip disability and did not make specific findings regarding the claimed back injury. The ***Christnovich*** court upheld the award, observing that the back claim was fully presented to the commission; the commission denied the back claim by inference, and a specific finding was not necessary. ***Id.*** at 237.

¶31 Neither ***Watter*** nor ***Christnovich*** is factually analogous to the case at hand. Here, there was no final award in place at the time Voight sought additional benefits for his wrist disability. There was only a limited compromise that left open the possibility of future claims. Under these circumstances, we conclude that the Commission properly allowed Voight's claim for disability at the wrist.

By the Court.—Order affirmed.

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