COURT OF APPEALS
DECISION
DATED AND FILED

June 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1382 **Cir. Ct. No. 2013CV1273**

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

KENNETH D. COE,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, MCC INC. AND ACUITY INSURANCE COMPANY,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Kenneth Coe appeals an order affirming a Labor and Industry Review Commission decision denying his claim for a penalty award

pursuant to WIS. STAT. § 102.18(1)(bp) (2013-14).[1] Coe argues his employer, MCC, Inc., and its insurer, Acuity Insurance Company (collectively "Acuity"), had no reasonable basis to terminate his benefits, and the Commission therefore erred by determining Acuity had not acted in bad faith. We reject Coe's arguments and affirm the order.

BACKGROUND

¶2 It is undisputed that Coe had a preexisting knee injury from the early 1990s for which he had sought treatment, including an MRI in 2006. On November 8, 2007, Coe injured his same knee while at work and received surgery eighteen days later. Coe's surgeon, Dr. Robert Hausserman, reported that the work injury precipitated, aggravated and accelerated "beyond normal progression a progressively deteriorating condition." Acuity did not dispute that Coe suffered a temporary total disability, and it paid him total disability benefits from the date of the injury until March 27, 2008. Acuity suspended payments, however, after receiving a report from Dr. Michael Orth, opining that the workplace injury did not aggravate Coe's preexisting injuries beyond their normal progression. Relying on his opinion that MRIs taken before and after the workplace injury were essentially the same, Dr. Orth concluded that Coe merely suffered a sprained knee that temporarily aggravated preexisting injuries, but the injury would have resolved in two or three months with treatments short of surgery.

¶3 After payments were suspended, Coe applied for worker's compensation benefits, claiming his period of temporary total disability extended

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

from the date of injury until his return to work in May 2008. Coe also sought payment for permanent partial disability and medical expenses. Acuity contested Coe's claims and an administrative law judge (ALJ) ruled in Coe's favor, concluding that he suffered a permanent aggravation of his preexisting injury and awarding him temporary total disability benefits, permanent partial disability benefits and medical treatment expenses. The Commission sustained the ALJ's decision, crediting both Coe's testimony that he suffered new and different pain after the workplace injury and his surgeon's opinion that the work injury aggravated, accelerated and precipitated Coe's preexisting injury beyond its normal progression.

¶4 Coe subsequently filed a claim for a penalty award pursuant to WIS. STAT. § 102.18(1)(bp), alleging Acuity acted in bad faith when it terminated his temporary total disability benefits. Based on a stipulated record, the ALJ ruled that Acuity knew or should have known there was no reasonable basis to deny benefits and awarded the maximum penalty of $30,000. The Commission reversed the ALJ's decision, concluding Acuity had not acted in bad faith. On certiorari review, the circuit court affirmed the Commission's decision, and this appeal follows.

DISCUSSION

¶5 We review the Commission's findings of fact and conclusions of law, not those of the circuit court. *See* ***United Parcel Serv., Inc. v. Lust***, 208 Wis. 2d 306, 321, 560 N.W.2d 301 (Ct. App. 1997). The Commission's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995); *see also* WIS. STAT. § 102.23(6). Our role on appeal

is to search the record for evidence supporting the Commission's factual determinations, not to search for evidence against them. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶6 We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. ***Begel v. LIRC***, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. However, we may nonetheless defer to the agency's legal determinations. An agency's legal determinations may be accorded great weight deference, due weight deference, or de novo review, depending on the circumstances. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

¶7 The Commission's determination of whether "an insurer's conduct constitutes bad faith is drawn from the underlying findings of fact" and, as a result, is "a legal conclusion." ***Brown v. LIRC***, 2003 WI 142, ¶11, 267 Wis. 2d 31, 671 N.W.2d 279. The Commission's legal conclusions in this case are entitled to great weight deference, as the Commission "has developed extensive experience interpreting penalty provisions contained in the Worker's Compensation Act" and "has developed specialized experience, expertise, and knowledge concerning bad faith." ***Id.***, ¶18. As our supreme court recognized:

> When an agency's conclusions of law are entitled to great weight deference, a court will refrain from substituting its view of the law for that of the agency charged with administration of the law and will sustain the agency's conclusions of law if they are reasonable. Thus a court should sustain an agency's conclusion of law even if an alternative view of the law is just as reasonable or even more reasonable. An agency's conclusion of law is unreasonable and may be reversed by a reviewing court if it directly contravenes the words of the statute or the federal or state constitution, if it is clearly contrary to the legislative intent, history, or purpose of the statute, or if it is without rational basis.

Id., ¶19.

¶8 WISCONSIN STAT. § 102.18(1)(bp) provides, in relevant part, that the Department of Workforce Development (DWD) may include a penalty in an award to an employee if the department determines that an employer's or insurance carrier's suspension or termination of payments resulted from bad faith. Once payments under § DWD 80.70(2) have commenced, an insurance company that unreasonably suspends or terminates the payments without credible evidence demonstrating that the claim for the payments is fairly debatable shall be deemed to have acted in bad faith. *See* WIS. ADMIN. CODE § DWD 80.70(2) (2015).

¶9 There is a two-part test a claimant must satisfy to demonstrate bad faith. ***Brown***, 267 Wis. 2d 31, ¶23. First, a claimant must show the insurer had no reasonable basis for denying benefits. In other words, the claimant must show "the insurer did not possess information that would lead a reasonable insurer to conclude that an employee's claim is fairly debatable and that therefore payment need not be made on the claim." ***Id.***, ¶24. The "fairly debatable" test is an objective test that "asks whether a reasonable insurer under similar circumstances would have denied, suspended, or delayed payment on the claim." ***Id.***

¶10 Second, the claimant must show that the insurer knew or recklessly disregarded the fact that there was no reasonable basis for denying benefits. ***Id.***, ¶26. Implicit in the two-part test is "our conclusion that the knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to facts or to proofs, submitted by the insured." ***Id.*** (quoting ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 693, 271 N.W.2d 368 (1978)).

¶11 Coe contends Acuity had no reasonable basis to terminate his benefits. Citing WIS. STAT. § 102.42(1m) and ***Spencer v. DILHR***, 55 Wis. 2d 525, 200 N.W.2d 611 (1972), Coe argues it is well settled that an employer is liable for the consequence of treatment an injured worker undergoes in good faith for a work-related injury, even if it is found that the treatment was unnecessary. Given this rule, Coe contends that Dr. Orth's opinion that surgery was unnecessary could not render Coe's entitlement to benefits fairly debatable. As the Commission notes, however, the ***Spencer*** rationale applies "only to cases involving treatment for an undisputed compensable industrial injury." ***City of Wauwatosa v. LIRC***, 110 Wis. 2d 298, 301, 328 N.W.2d 882 (Ct. App. 1982). Here, Acuity argued that, as in ***City of Wauwatosa***, there was a dispute over the cause and, therefore, the compensability of the surgical procedure utilized.

¶12 Based on Dr. Orth's opinion, Acuity argued the surgery was not done to treat the work injury but, rather, a preexisting condition. Citing ***Lewellyn v. DILHR***, 38 Wis. 2d 43, 155 N.W.2d 678 (1968), Coe asserts that an aggravation of a preexisting condition is invariably a compensable work injury. More specifically, however, the ***Lewellyn*** court held: "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 (citation omitted).

¶13 Here, Drs. Orth and Hausserman disagreed on a crucial point—namely, whether the work injury aggravated Coe's preexisting injury *beyond normal progression*. While Dr. Orth's opinion was ultimately rejected by the Commission, the dispute created by his opinion rendered Coe's claim "fairly debatable," especially in light of ***City of Wauwatosa*** and absent any authority

adopting Coe's reading of the interplay between ***Lewellyn*** and ***Spencer***. As the Commission recognized, "[a]n insurer should have the right to litigate a claim when it feels there is a question of law or fact which needs to be decided before it in good faith is required to pay the claimant." ***Brown***, 267 Wis. 2d 31, ¶29 n.34 (citation omitted). Because Acuity reasonably relied on Dr. Orth's opinion to conclude Coe's claim was fairly debatable under existing law, and given our deference to the Commission's legal conclusions at issue, the Commission reasonably determined that Acuity did not act in bad faith when it suspended Coe's payments.

By the Court.—Order affirmed.

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