

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 6, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-3080**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**JOHN SMITH,**

**PLAINTIFF-APPELLANT,**

**v.**

**LABOR AND INDUSTRY REVIEW COMMISSION,  
PAUL'S CONCRETE AND HERITAGE MUTUAL  
INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Portage County:  
FREDERIC FLEISHAUER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. John Smith appeals a circuit court order affirming the decision of the Labor and Industry Review Commission (LIRC) to deny him worker's compensation benefits. Smith challenges LIRC's determination that his injury was not work-related. He also claims that his right to file a complaint

within thirty days was infringed when LIRC considered the promptness of his complaint for purposes of credibility. For the reasons discussed below, we reject both arguments and affirm.

## **BACKGROUND**

Smith worked for Paul's Concrete Construction. On February 8, 1996, Smith was part of a crew that poured a concrete foundation for some heavy machinery. Smith stood on one-inch diameter reinforcement rods while he directed concrete from a rubber hose onto the floor. The force of the concrete coming through the hose caused him to fall a number of times throughout the day. Smith sought medical treatment for his back several days later, and eventually underwent lumbar fusion surgery to repair a herniated L5-S1 disc.

Smith filed a worker's compensation claim alleging that his back injury had occurred while he was pouring the cement on February 8. His claim was supported by two doctor's reports which indicated that his injury was work-related. However, Paul's Concrete and its insurer, the Heritage Mutual Insurance Company, disputed the nature and extent of Smith's injury and whether it had occurred during the scope of his employment. They further claimed that Heritage had overpaid Smith \$6,737.50 for temporary disability and \$2,369.85 for treatment expenses.

The matter was tried to an administrative law judge on December 3, 1997. Smith testified that he experienced pain each of the times the hose knocked him over and was very sore and worn out after work on February 8, 1996. He said the next day he had a lot of pain and numbness across his lower back, left buttocks and left leg. He had someone schedule a doctor's appointment for him, but did not mention the appointment to anyone at work that day, although he said he told

Dawn Zeinert, the office manager, and John Swenson, the dispatcher, that he was very sore. The following Monday, February 12, 1996, Smith said he again went to work in pain. Following a safety meeting at which the employees were informed they weren't giving the company enough notice of doctor's appointments, Smith said he went to the office and told Swenson and Zeinert that he had an appointment scheduled for Thursday because he had a lot of pain in his back and he wanted to get it checked out.

Smith testified that he had not had any problems with his back until after February 8. He could not explain why the notes of the nurse who took his medical history on February 15 indicated that he had been experiencing symptoms for the past two weeks. He also denied any recollection of a CT scan on his lower back in 1990, or an accompanying doctor's report which indicated a bulging L5-S1 disc, and he confirmed that he had not mentioned this prior history to any of the doctors who examined him in connection to the alleged work injury. Smith also admitted that he had first made a claim for his back treatment on his personal health insurance, but that his insurance would not cover his surgery because it was not done by an approved provider.

Zeifert testified that she first learned that Smith was claiming a work injury from their insurance carrier. She said that Smith had not spoken to her on February 9 or 12, as he testified, but said a note taken by Swenson indicated that Smith had told him on February 13 that he was going to see a doctor. The note indicated Smith had told Swenson he didn't know whether he had injured his back at home or work, but that he would be putting the bill on his private insurance. Zeifert also testified that company records showed that Smith had not worked for the construction company the week before the alleged date of his injury due to

extremely cold weather, and that, contrary to his testimony, he had worked on the Saturday and Sunday following the alleged date of injury.

The ALJ found that Smith had begun experiencing symptoms the week before pouring concrete on February 8; that he told the first doctor he saw that he had not experienced an acute injury or sudden onset of pain; and that he had told office workers that he did not know what was causing his lower back pain. The ALJ also found that Smith later changed his story to claim that the injury had occurred while he was pouring cement at work. The ALJ discounted the two doctors' reports which had concluded that Smith suffered a work injury because he concluded each had been based upon an incorrect history of Smith's symptoms. On appeal, LIRC adopted the ALJ's findings of fact and also concluded that Smith had failed to establish that his injury was work-related.

### STANDARD OF REVIEW

We review the administrative agency's decision rather than that of the circuit court. *See Stafford Trucking, Inc. v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). LIRC's factual findings must be upheld on review if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. *See Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983); § 227.57(6), STATS. A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. *See Advance Die Casting Co. v. LIRC*, 154 Wis.2d 239, 249, 453 N.W.2d 487, 491 (1989); § 227.57(6), STATS. Rather, it must examine the record for credible and substantial evidence which supports the agency's determination.

A court is not bound by an agency's conclusions of law in the same manner as by its factual findings. See *West Bend Educ. Ass'n v. WERC*, 121 Wis.2d 1, 11, 357 N.W.2d 534, 539 (1984). However, it may nonetheless defer to its determination. An agency's interpretation or application of a statute 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, 61 (1996). We will defer to any reasonable interpretation by LIRC, even if it is not the determination we would have made, because "LIRC is charged with reviewing worker's compensation determinations under Chapter 102, STATS., and it has expertise and specialized knowledge in the subject matter of that chapter." *Langhus v. LIRC*, 206 Wis.2d 494, 502-03, 557 N.W.2d 450, 454-55 (Ct. App. 1996).

## ANALYSIS

Smith claims that there was no substantial and credible evidence in the record to support LIRC's finding that he did not sustain his back injury on the job. We disagree. There was evidence that he was already suffering symptoms the week before the date on which he claimed he was injured, at a time when he was not performing work for the company. In addition, Smith undermined his assertion that he experienced the onset of pain while pouring cement by telling his employer he did not know what he had done to his back and by making his initial treatment claim under his private insurance.

Smith claims that the treatment note which indicated he had been experiencing symptoms for two weeks prior to his first doctor's appointment was not credible because LIRC erroneously attributed the note to Dr. Bauer, rather than his nurse. However, we note that LIRC also adopted the findings and conclusions

of the ALJ, who questioned Smith himself to clarify that the nurse rather than the doctor had made the treatment note while taking his medical history. Moreover, the significance of this evidence is that Smith told a health care provider that he was experiencing symptoms prior to pouring cement. It is irrelevant to the analysis whether the person Smith told was the doctor or the nurse. Therefore, LIRC's minor mistake on this point does not render the evidence upon which it relied insubstantial or incredible.

Smith also argues that the evidence upon which LIRC relied was substantially outweighed by other evidence in the record which supported his claim. He places particular emphasis upon the doctor's reports and his own testimony. However, LIRC specifically considered this evidence and found its credibility lacking.

Smith's credibility was undermined by a number of inconsistencies and conflicting evidence. He testified that he had never experienced any back problems before February 8, 1996. He could not explain, however, why he had a scan taken of his lower back in 1990, why the accompanying doctor's report indicated that he was experiencing numbness in his right leg, or why the nurse who took his medical history on February 15, 1996, would have noted that he had been experiencing symptoms for two weeks and mentioned nothing about an incident at work on February 8. Smith also testified that he had told office workers about his back pain on Friday and Monday, and that he had not worked on the Saturday and Sunday because he was in so much pain, although the office manager testified that Smith had never spoken to her about back pain and that he had in fact worked on both Saturday and Sunday.

Smith's contention that § 102.12, STATS., would become illusory if he lost credibility simply because he took advantage of the thirty days to report a work-related injury which is permitted under the statute misses the point of both the testimony and the statute. Smith's credibility was not undermined simply because he waited to report a work injury, but because he told his employer that he had an injury but specifically declined to attribute the injury to work. Furthermore, the thirty-day limitation period set forth in § 102.12 provides subject matter jurisdiction for claims which are timely filed. Taking the promptness of a claim into consideration for purposes of credibility in no way undermines the administrative agency's subject matter jurisdiction. In short, Smith's argument on this point is without merit.

In light of LIRC's determination that Smith's testimony lacked credibility, LIRC was not required to give weight to anything he said. Nor was LIRC required to give weight to the doctor's reports which were based in large part upon Smith's own account of his injury and the erroneous assumption that he had been lifting something at work. Based upon Smith's initial failure to attribute his back pain to a work injury and medical records indicating that he had been experiencing symptoms prior to the alleged date of injury, LIRC could reasonably conclude that Smith had failed to establish that his injury was work related.

*By the Court.*—Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

