COURT OF APPEALS
DECISION
DATED AND FILED

May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2914 **Cir. Ct. No. 2004CV111**

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

JAY WICKE,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, MERRILL AREA PUBLIC SCHOOLS AND WAUSAU UNDERWRITERS INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jay Wicke appeals a judgment affirming a decision of the Labor and Industry Review Commission that Wicke failed to prove beyond legitimate doubt that he suffered an injury at work on March 22, 2002. He argues

that the Commission's decision was based solely on uncorroborated hearsay contained in his emergency room medical report, and that the statements in the report attributed to Wicke were actually made by his wife and are unclear and internally inconsistent. Because we conclude substantial credible evidence supports the Commission's decision, we affirm the judgment.

¶2 Wicke, his wife and two of Wicke's fellow workers testified that Wicke injured himself while moving heavy tables at work. Both Wicke and his wife stated, however, that Wicke experienced neck and shoulder pain before that date. Mrs. Wicke noted that his neck and shoulder pain made it difficult for him to do some recreational activities like steering his snowmobile. Their testimony is consistent with the emergency room medical report by Dr. Eric Dichsen: "He awakened with this [pain] 5 days ago… He denies any trauma…." A handwritten emergency/outpatient record from March 24, 2002 notes that Wicke did a lot of pushing and pulling at his job, but was unable to recall any specific injury. Dichsen's March 24 report states the pain began seven days earlier. Wicke denied any trauma or precipitating event, but simply awakened with pain and he has had these same symptoms intermittently for the past two years. A physical therapy note dated March 25, 2002 indicated that Wicke had neck and right arm pain over one year ago that would usually go away with medication. That note indicated the pain occurs every two or three months and caused Wicke to have difficulty steering his snowmobile.

¶3 Whether Wicke sustained an accidental injury that arose while performing services incidental to his employment is a question of fact, and we must affirm the Commission's finding if it is supported by credible and substantial

evidence. *See* WIS. STAT. § 102.23(6).[1] Wicke had the burden of proving beyond legitimate doubt all of the facts essential to recovery of compensation. *See* ***Leist v. LIRC***, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994). It is the Commission's function to reconcile inconsistencies and conflicts in the evidence. *See* ***Valadzic v. Briggs & Stratton Corp.***, 92 Wis. 2d 583, 598, 286 N.W.2d 540 (1979). The Commission is the sole judge of the witnesses' credibility and the weight of their testimony. *See* ***Semons Dept. Store v. DILHR***, 50 Wis. 2d 518, 528-29, 184 N.W.2d 871 (1971). The Commission may not rely entirely on uncorroborated hearsay. ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶56, 278 Wis. 2d 111, 692 N.W.2d 572. We review the Commission's, not the circuit court's decision. ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342. 204 N.W.2d 457 (1973).

¶4 Wicke's argument that the Commission's finding is based solely on uncorroborated hearsay fails for two reasons. Dichsen's report is not hearsay and it is corroborated. Wicke's prior inconsistent statements to Dichsen are not hearsay under WIS. STAT. § 908.01(4)(a) and (b). Wicke argues that the statements were not made by him, but by his wife because he was in too much pain to respond to the doctor. That argument is inconsistent with the medical report which describes Wicke as "alert and orientated and answers questions appropriately." The statements were also corroborated by the nurses' notes, the physical therapist's notes, and the testimony of both Wicke and his wife.

¶5 Because Wicke's testimony was impeached by inconsistent statements he made when he initially sought medical treatment, the Commission is

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

free to disregard his and others' testimony that contradicted the medical reports. An employee's failure to give a doctor the same account of the alleged work-related injury warrants the Commission to entertain a legitimate doubt about the injury. ***Bumpas v. DILHR***, 95 Wis. 2d 334, 345-46, 290 N.W.2d 504 (1980).

¶6 Wicke argues that statements he made within seventy-two hours of the injury are not admissible under WIS. STAT. § 904.12(1). The rules of evidence do not apply to administrative proceedings. ***Gehin***, 2005 WI 16 at ¶31. The Commission, in its discretion, can consider medical records contemporaneous with the injury. *See* WIS. STAT. § 102.17(1)(d);[2] and WIS. ADMIN. CODE § DWD 80.22.

¶7 Wicke argues that the statements are internally inconsistent and unclear because they indicate he had suffered the symptoms in the past, but they had been less intense and of shorter duration. Past episodes were alleviated by medication after a few days. That does not necessarily mean Wicke suffered an injury at work to account for the increase in the pain's intensity or duration. Because the record referred to longstanding problems that interfered with activities such as snowmobiling, the Commission was free to reject his assertion that the onset of the present symptoms is associated with his work activities. Wicke's own statements to the initial treating physicians did not attribute his symptoms to any trauma or work activity.

[2] WISCONSIN STAT. § 102.17(1)(d) provides that medical records constitute "*prima facie* evidence" of the truth of the matters addressed in them. Wicke argues that the evidence "disappears upon introduction of evidence to the contrary." The presumption, not the evidence, "disappears." *See* ***Scholz v. Industrial Comm'n***, 267 Wis. 31, 41b, 65 N.W.2d 1 (1954). The evidence continues to exist and it is the commission's function to determine its weight and reconcile any inconsistencies.

By the Court.—Judgment affirmed.

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