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**DISTRICT IV**

June 20, 2017

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You are hereby notified that the Court has entered the following opinion and order:

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2016AP813

Continental Western Ins. Co. v. Lee W. Schon, et al.  
(L.C. #2015CV1838)

Before Lundsten, Sherman and Blanchard, JJ.

Continental Western Insurance Company appeals a circuit court order that affirmed a worker's compensation decision in favor of Lee Schon made by the Wisconsin Labor and Industry Review Commission (LIRC or the commission). After reviewing the record, we

conclude at conference that this case is appropriate for summary disposition. See WIS. STAT. RULE 809.21 (2015-16).<sup>1</sup> We affirm for the reasons discussed below.

Schon had a history of recurrent hernias that had required surgery in 1995, 2002, 2004, 2008, and 2010. Schon filed the worker's compensation claim at issue on this appeal following one of his surgeries in 2008, and amended it following the 2010 surgery, alleging an injury date of May 16, 2008, against his employer Belonger Corporation and its then insurer, Auto Owners Ins. Co. On February 15, 2012, Auto Owners filed an impleading alleging an earlier injury date of February 24, 2006, at which time Belonger was insured by Continental Western. The ALJ determined that the date of disability was in 2008, but LIRC reversed that finding, and determined that the date of disability was in 2006.

Continental Western raises three issues on appeal. It contends that LIRC: (1) "applied the incorrect standard of proof" in making its determination as to the date of Schon's work injury; (2) committed "an error of law" in determining that an injury occurred on a date on which Schon reported no injury to his employer and after which Schon experienced a period of recovery lasting two years; and (3) erroneously determined that Schon had been injured on a date when he obtained no contemporaneous diagnosis or treatment, and when a claim was first brought six years after the fact by the impleading of another insurer, not by Schon himself. We agree with the respondents that all three of Continental Western's issues essentially boil down to whether there was sufficient evidence to support LIRC's determination of the date of injury under this court's standard of review.

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<sup>1</sup> All reference to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

We review worker's compensation cases under the highly deferential standard set forth in WIS. STAT. § 102.23. The determination of the cause and extent of a claimant's disability present questions of fact. *Transamerica Ins. Co. v. DILHR*, 54 Wis. 2d 272, 276, 195 N.W.2d 656 (1972). LIRC's findings of fact are conclusive in the absence of fraud or action outside of its authority. WIS. STAT. § 102.23(1)(a) (2009-10). We may not substitute our judgment for that of LIRC as to the weight or credibility of the evidence. WIS. STAT. § 102.23(6). Rather, we must examine the record for any credible and substantial evidence that supports the agency's determination. *Id.*; *Currie v. DILHR*, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App.1997). Substantial evidence is that which is "relevant, probative, and credible, and which is in a quantum that will permit a reasonable factfinder to base a conclusion upon it," even if against the great weight and preponderance of the evidence. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983).

LIRC first made a determination that Schon's 2008 and 2010 hernias and surgeries were attributable to an "occupational disease" arising out of Schon's employment at Belonger beginning in 2006, because Schon's prior hernia issues had been substantially resolved by the 2004 surgery. That causation determination was directly supported by the expert opinion of Dr. Michael Borkowski, who performed independent medical examinations of Schon in both 2003 and 2010.

In an "occupational disease" case where a continuum of impairment slowly ripens into a barrier of further ability to work, there is a "conclusive presumption" that the date of disability under the statute is when the employee "first suffers a wage loss due to' that condition." *Virginia Sur. Co., Inc. v. LIRC*, 2002 WI App 277, ¶15, 258 Wis. 2d 665, 654 N.W.2d 306 (quoted source omitted).

LIRC determined that Schon first suffered a wage loss due to the occupational disease caused by his employment at Belonger on February 24, 2006, when he left work two hours early because he was experiencing abdominal pain and what he described as “flu-like” symptoms such as dry heaving. That night, Schon also noticed a painful bulge in the lower left quadrant of his abdomen, and a CT scan performed on March 6, 2006, confirmed a hernia in that location—which was also the exact same location where Schon experienced pain in May 2008, leading to additional surgeries and this claim.

Western Insurance argues that Schon’s symptoms in February 2006 should be attributed to the flu, rather than a hernia. However, that argument ignores this court’s standard of review. In short, Schon’s testimony about the bulge he noticed and the CT scan confirming a hernia in that location constitute substantial and credible evidence supporting LIRC’s determination of the date of disability.

IT IS ORDERED that the circuit court order affirming the worker’s compensation award for Lee Schon is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*