COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2855 **Cir. Ct. No. 2009CV147**

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

CHERYL L. HATHAWAY,

PLAINTIFF-RESPONDENT,

V.

ZURICH AMERICAN INSURANCE COMPANY AND WALGREEN COMPANY,

DEFENDANTS-APPELLANTS,

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT.

APPEAL from an order of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Reversed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Walgreen Company and its insurer, Zurich American Insurance Company (Walgreen), appeal an order reversing the Labor

and Industry Review Commission's denial of Cheryl Hathaway's worker's compensation claim. Zurich argues the Commission's decision should be affirmed because it was supported by substantial, credible evidence, and because Hathaway received a full and fair trial on her claim. We agree. We therefore reverse the circuit court's order.

BACKGROUND

¶2 In August 2004, Hathaway was injured in an automobile accident while working for Walgreen. Walgreen conceded the accident was work-related and paid temporary total disability benefits and some medical expenses. Walgreen, however, disputed the nature and extent of low back and psychological injuries Hathaway claimed she sustained from the accident. In June 2005, Hathaway requested a hearing with the Department of Workforce Development to resolve, as relevant here, whether she was entitled to loss of earning capacity benefits as a result of these injuries.[1]

¶3 Walgreen submitted reports from Dr. Gorden Clark, an orthopedic specialist, and Dr. Calvin Langmade, a psychologist. Clark's report concluded that the accident permanently aggravated Hathaway's preexisting low back condition, but that this injury resulted in, at most, a one percent permanent partial disability. Langmade concluded that the accident temporarily aggravated a preexisting psychological condition but caused no permanent psychological injuries. Both Clark and Langmade opined that Hathaway's injuries would neither affect her earning capacity nor necessitate permanent work restrictions.

[1] The hearing also addressed the reasonableness and necessity of certain medical expenses. Neither of the parties dispute the administrative law judge's findings on those issues.

¶4 Hathaway countered with reports from Dr. Jane Stark, an occupational physician. Stark's reports concluded that Hathaway sustained a three percent permanent partial disability from her low back injuries and a one percent permanent partial disability from her psychological injuries. Stark's reports also opined that Hathaway's injuries would subject her to permanent work restrictions, but the reports were inconsistent about what these restrictions would be. In one report, Stark indicated Hathaway would be restricted to working twenty hours per week for the remainder of her life. In a report the next month, she estimated Hathaway could work thirty hours per week.

¶5 Following a hearing on May 19, 2008, the administrative law judge (ALJ) left the record open for ninety days to allow Hathaway to obtain clarification from Stark on this matter. Hathaway's attorney unsuccessfully attempted to contact Stark. After ninety days, the ALJ closed the record without Stark's clarification. The ALJ then issued a written decision rejecting Stark's opinions as "lacking in credibility," and instead finding "the opinions of Dr. Clark to be the most credible .... His findings are the most consistent with the clinical evaluations and diagnostic studies. I adopt his findings as part of my order." The ALJ therefore concluded that Hathaway was not entitled to loss of earning capacity benefits for the low back and psychological injuries she sustained in the accident.

¶6 Hathaway filed a motion for reconsideration of the order, which the Commission considered as a petition for review, alleging that the record lacked key testimony from Stark. The Commission permitted Hathaway to file "the additional evidence you wish to add to the record," and advised her that it would determine, as part of its review of the ALJ's decision, whether the evidence should be included. Hathaway submitted an affidavit from Stark, which stated that her

previous report "mistakenly noted [Hathaway] was limited to 20 hours per week," but that she believed "Hathaway may work up to 30 hours per week ...."

¶7 In a written opinion, the Commission concluded that Stark's affidavit "does not include any new evidence in this case." It therefore denied Hathaway's request to remand for Stark's testimony. The Commission then reviewed the evidence presented at the hearing and affirmed the ALJ's findings and order.

¶8 Hathaway sought judicial review of the Commission's order. The circuit court concluded that the ALJ denied Hathaway a full and fair hearing when it closed the record ninety days after her hearing. It reversed the Commission's order and remanded to permit Hathaway to present Stark's testimony. Walgreen appeals from that judgment.

DISCUSSION

¶9 This appeal presents two issues: (1) whether the Commission's decision was supported by credible evidence; and (2) whether Hathaway was denied a full and fair hearing. We review the Commission's, rather than the circuit court's, decision. ***ITW Deltar v. LIRC***, 226 Wis. 2d 11, 16, 593 N.W.2d 908 (Ct. App. 1999). Our review of the Commission's decision is deferential. We will uphold the Commission's factual findings as long as there is credible evidence to support them. ***General Cas. Co. v. LIRC***, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991). Whether a party is afforded due process, however, is a question of law we review independently. ***Xerox Corp. v. DOR***, 2009 WI App 113, ¶12, 321 Wis. 2d 181, 772 N.W.2d 677.

1. Whether the Commission's decision was supported by credible evidence

¶10 Walgreen argues that we should defer to the Commission's determination that Hathaway was not entitled to loss of earning capacity benefits for her low back and psychological injuries because that decision was supported by credible evidence. We agree.

¶11 As discussed above, we review the Commission's determination under the deferential "any credible evidence" standard. *See* WIS. STAT. §§ 102.23(1)(a), (6)[2] ("The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive.").

> In applying the credible evidence test, this court does not weigh conflicting credible evidence to determine what evidence shall be believed. If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to an opposite conclusion, we must affirm. There must be, however, such credible evidence that the findings will rest on facts and not on conjecture or speculation.

Wisconsin Ins. Sec. Fund v. LIRC, 2005 WI App 242, ¶18, 288 Wis. 2d 206, 707 N.W.2d 293 (quoting ***Valadzic v. Briggs & Stratton Corp.***, 92 Wis. 2d 583, 286 N.W.2d 540 (1979)).

¶12 We conclude the record contains substantial credible evidence to support the Commission's finding that Hathaway sustained no loss of earning capacity from her low back and psychological injuries. Among other things, the Commission pointed to Clark's medical opinion that Hathaway "sustained a one percent partial permanent disability" and would not require permanent work

[2] References to the Wisconsin Statutes are to the 2007-08 version.

restrictions as a result of these injuries. It also relied on Langmade's professional opinion that Hathaway "is able to work without ongoing need for ongoing psychiatric treatment." While Hathaway presented evidence to the contrary, we must defer to the Commission's determination Clark and Langmade were more credible. "In evaluating medical testimony, [the Commission] is the sole judge of the weight and credibility of the witnesses." *See* ***United Parcel Serv. v. Lust***, 208 Wis. 2d 306, 324, 560 N.W.2d 301 (Ct. App. 1997).

¶13 While Hathaway correctly states the "any credible evidence" standard in her brief, her argument ignores it. Hathaway nowhere refutes Walgreen's arguments that Clark's and Langmade's reports were credible evidence, nor does she even address the effect of these reports. She therefore concedes the argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

2. Whether Hathaway was denied a full and fair hearing

¶14 Rather than challenge the evidence that was presented, Hathaway instead argues that the record did not include evidence critical to her claims, which she contends violated her due process right to a full and fair hearing. We disagree.

¶15 WISCONSIN STAT. § 102.18(1)(a) requires that all parties asserting worker's compensation claims "be afforded opportunity for full, fair, public hearing after reasonable notice." Our supreme court has interpreted this to mean:

> (1) The right to seasonably know the charges or claims proffered; (2) the right to meet such charges or claims by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto.

Theodore Fleisner, Inc. v. DILHR, 65 Wis. 2d 317, 326, 222 N.W.2d 600 (1974) (citation omitted).

¶16 We conclude that Hathaway received a full and fair hearing because she had numerous opportunities "to meet [the charges or claims proffered] with competent evidence." She submitted several reports from Stark addressing the nature and extent of the injuries she sustained from the accident. Even after the ALJ raised doubts about Stark's conclusions, the ALJ gave Hathaway ninety more days to clarify Stark's opinion. "[B]ecause we've had some new information from Dr. Stark brought to everyone's attention in the very, very recent past, what we're going to do is leave the record 90 days so we can obtain some clarification from Dr. Stark ...." Hathaway failed to obtain clarification. She was given yet another opportunity to show whether Stark's testimony should be included when the Commission permitted her to petition to add evidence to the record.

¶17 We cannot conclude, in light of the numerous opportunities Hathaway had to present Stark's opinions, that she was deprived of the right to present evidence. In any event, Hathaway fails to show any vital evidence was omitted from the record. She argues that "Dr. Stark's medical opinions related to Ms. Hathaway's loss of earning capacity are critical to the case," but concedes that the only testimony missing was Stark's clarification about the number of hours Hathaway would be able to work. Both the ALJ and the Commission, however, rejected Stark's assessment that Hathaway's injury necessitated any work restrictions. Therefore, the Commission reasonably concluded that the testimony Hathaway contends she should have been permitted to present added nothing to the evidence already in the record. Hathaway therefore was not denied a full and fair hearing.

By the Court.—Order reversed.

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