COURT OF APPEALS
DECISION
DATED AND FILED

January 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1278 **Cir. Ct. No. 2011CV843**

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

MENARD, INC. AND ZURICH AMERICAN INSURANCE COMPANY,

PETITIONERS-APPELLANTS,

V.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND RODNEY A. MCCULLOUGH,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County: MICHAEL A. SCHUMACHER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Menard, Inc. and Zurich American Insurance Company (collectively, Menard) appeal a circuit court order affirming a State of Wisconsin Labor and Industry Review Commission (LIRC) decision. Menard

argues LIRC's decision, which granted Rodney McCullough additional vocational retraining benefits, was not supported by credible and substantial evidence. We reject Menard's argument, and affirm.

BACKGROUND

¶2 McCullough was injured in 2003 while working as a planogrammer[1] for Menard, Inc. The injury resulted in a permanent partial disability to McCullough's right knee. Menard later terminated McCullough's employment. McCullough applied for vocational rehabilitation training with the Wisconsin Division of Vocational Rehabilitation (DVR) in June of 2005. After nearly a year on the waiting list, McCullough and his DVR counselor formulated an Individualized Plan for Employment (IPE). McCullough's amended IPE, dated December 2006, called for him to obtain a bachelor's degree in business administration. The IPE called for McCullough to attend school from January 2007 to May 2011.

¶3 Following a February 2007 worker's compensation hearing, an Administrative Law Judge (ALJ) awarded McCullough eighty weeks of retraining benefits, which was the minimum award to which all recipients are entitled by law.[2] *See* WIS. STAT. §§ 102.43(5), 102.61(1).[3] Further, the ALJ's decision explained:

[1] McCullough's job entailed designing retail displays on a computer and traveling to stores to assist in implementing the designs.

[2] We note that a typical college semester is approximately fifteen to seventeen weeks long. Assuming a sixteen-week semester, the minimum eighty weeks of retraining benefits would cover five semesters.

> Mr. McCullough's IPE calls for more than 80 weeks of retraining. At this time, I decline to decide whether Mr. McCullough is entitled to retraining benefits beyond 80 weeks. I reserve jurisdiction on this question because the record does not contain vocational opinions assessing whether four years of retraining is necessary to restore Mr. McMullough's earning capacity. Perhaps a two year associate's degree in business is enough, and a bachelor's degree is merely an earning-capacity enhancement.

At the time of the hearing, McCullough had commenced his first semester of schooling at a Wisconsin technical college. He was enrolled in only six credits, per the DVR plan, to allow him to transition back to academia.[4]

¶4 McCullough and his DVR counselor subsequently amended McCullough's IPE to change his course of study to an alcohol and other drug abuse (AODA) counselor. The credits earned prior to the conversion transferred to McCullough's new program. McCullough eventually sought additional weeks of retraining benefits, leading to additional worker's compensation hearings.

¶5 A January 2011 ALJ decision found that McCullough had earned credits as follows: spring 2007 – six credits; fall 2007 – ten credits; spring 2008 – twelve credits; fall 2008 – fourteen credits; spring 2009 – eighteen credits; fall

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] Additionally, McCullough was enrolled in several credits of independent study courses in his first semester. He did not receive credit for those courses during that semester, and it appears from the record that they may have been remedial courses required by his low admissions test scores, in order to gain entry into the business program. At the time of the hearing, McCullough had not yet been admitted to the program.

2009 – sixteen credits; spring 2010 – fifteen credits.[5] Thus, McCullough had attended seven semesters and earned ninety-one credits.

¶6 Additionally, the ALJ determined that McCullough's annual earning capacity at Menard was approximately $45,000. McCullough's projected annual earnings with a business management associate's degree would be $30,000; with an AODA associate's degree would be $27,000; and with an AODA bachelor's degree would be up to $43,000. The ALJ determined it was appropriate to award McCullough an additional eighty weeks of retraining benefits.[6] Menard appealed this decision to LIRC.

¶7 LIRC indicated it agreed with the ALJ decision and "adopted the findings and order … as its own," with one exception. LIRC modified the additional retraining benefits downward, from eighty weeks to forty. Thus, McCullough was awarded a total of 120 weeks of benefits. This was approximately equal to the seven semesters of college McCullough had already completed.[7]

¶8 LIRC explained that its decision to reduce McCullough's retraining benefits was due to "the uncertainty of [his] future plans to transfer and begin coursework at UWGB." LIRC observed that McCullough had not quite completed

[5] From spring 2009 through spring 2010, thirty-one of McCullough's forty-nine credits were earned at the College of the Menominee Nation. The ALJ decision did not account for six such credits that were earned in spring 2010, but they were set forth in a subsequent decision.

[6] The January 2011 ALJ decision set forth the dates of the fall 2009 and spring 2010 semesters, both of which consisted of approximately seventeen weeks.

[7] Assuming 17-week semesters, 120 weeks would constitute 7.1 semesters. Additionally, McCullough testified he stopped receiving his initial retraining benefits in May 2009. That would have coincided with the end of his fifth semester of schooling.

his associate degree at the technical college, it was unclear how many credits would transfer to UWGB, and McCullough had not yet applied to UWGB. Thus, LIRC "presently" limited the additional award to forty weeks and "reserv[ed] jurisdiction to permit an ALJ to determine whether extension of additional benefits [was] warranted" later. Menard appealed the LIRC decision to the circuit court, which affirmed. Menard now appeals.

DISCUSSION

¶9 Menard challenges the award of additional retraining benefits to McCullough. We review LIRC's decision, not that of the circuit court. ***Brauneis v. LIRC***, 2000 WI 69, ¶14, 236 Wis. 2d 27, 612 N.W.2d 635. LIRC's findings of fact are upheld if they are supported by substantial and credible evidence. ***Id.*** Thus, we "affirm the findings of the Commission if there is any credible evidence in the record to support those findings." ***L & H Wrecking Co. v. LIRC***, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983). This standard requires "only that the evidence is sufficient to exclude speculation or conjecture." ***Id.*** Indeed, the "Commission's findings must be upheld even if against the great weight and clear preponderance of the evidence." ***Id.*** LIRC's legal conclusions, on the other hand, are accorded varying weights of deference depending on the circumstances.[8] *See* ***Brauneis***, 236 Wis. 2d 27, ¶15.

¶10 Menard argues only that LIRC's decision was not supported by substantial and credible evidence. Menard divides its argument into four subarguments, which we reject in turn.

[8] Because Menard argues only that LIRC's decision was not supported by substantial and credible evidence, we need not determine the appropriate level of agency deference.

¶11 First, Menard argues McCullough "failed to demonstrate any entitlement to retraining benefits beyond the initial 80 weeks granted by statute." In support of this argument, Menard contends LIRC should have "placed more emphasis on" McCullough's frequent revisions to his course of study, the leisurely pace by which he proceeded with what was initially intended to be a two-year program, and his failure to mitigate retraining expenses.[9] Menard further contends that LIRC failed to adequately explain how McCullough demonstrated entitlement to additional benefits.

¶12 Menard's argument ignores the standard of review and presents the facts as it wishes LIRC had found them. Indeed, Menard fails to cite any evidence in the record that McCullough initially planned to obtain a two-year degree. As the ALJ found in the first decision, which was not appealed, McCullough's IPE called for McCullough to attend school for nine semesters, from January 2007 through May 2011. Menard also ignores the testimony—undisputed in the evidentiary record—that McCullough's *single* revision of his course of study from business administration to AODA counseling did not add any time or cost to his studies because any coursework taken prior to the switch was creditable to his new degree program.

¶13 Menard also ignores LIRC's findings that McCullough was getting good grades and had been diligent in taking his courses. There was more than sufficient evidence to support these findings. McCullough's lowest semester GPA was a 3.0 and his highest was a 4.0. After his introductory half-time semester,

[9] Menard cites no requirements that McCullough had to satisfy. Presumably, Menard is relying on WIS. STAT. § 102.61(1r)(b), which provides: "The employee must continue in rehabilitation training with such reasonable regularity as health and situation will permit."

McCullough averaged 14.2 credits per semester over the next six semesters. Thus, Menard's position, that McCullough pursued "a decidedly less-than-full-time class schedule," is unsupported by the record.

¶14 Menard's second argument is that LIRC "completely ignored evidence" of McCullough's felony history and attendant obstacles to employment. Menard asserts "LIRC's five-page decision does not make even a single mention of the Respondent's felony …." Menard's argument is misplaced. As noted above, LIRC's decision adopted the ALJ's findings and order as its own. The ALJ's decision did address the matter. Additionally, Menard's argument ignores McCullough's evidence indicating that he would be able to be licensed and employed, and Menard failed to introduce any evidence to the contrary. Moreover, Menard presented no evidence that McCullough's difficulty finding a counseling job due to his criminal record would be any greater than in the business management field. Thus, it is Menard's purported facts that constitute speculation or conjecture. *See* ***L & H Wrecking***, 114 Wis. 2d at 508.

¶15 In Menard's third argument, it argues McCullough's current retraining program would impermissibly enhance, rather than restore, his prior earning capacity. "The primary purpose of vocational rehabilitation benefits is to restore an injured worker as nearly as possible to the worker's preinjury earning capacity and potential." WIS. ADMIN. CODE § DWD 80.49(1).[10] A retraining program of eighty weeks or less is presumed to be reasonable. WIS. ADMIN. CODE § DWD 80.49(10)(b). However:

[10] All references to WIS. ADMIN. CODE § DWD ch. 80 are to the February 2012 version.

> A retraining program more than 80 weeks may be reasonable, but there is no presumption that training over 80 weeks is required. Extension of vocational rehabilitation benefits beyond 80 weeks may not be authorized if the primary purpose of further training is to improve upon preinjury earning capacity rather than restoring it.

WIS. ADMIN. CODE § DWD 80.49(10)(c).

¶16 Menard first asserts "LIRC's decision lacks any analysis of [McCullough's] earning capacity." That assertion is false; we do not address it further. Menard also emphasizes that a vocational report found that a master's degree "is not viewed to be necessary in order for [McCullough] to restore his earning capacity and potential to a level that is comparable to his pre-injury status." We fail to see how that evidence is relevant here. McCullough's IPE called for a bachelor's, not a master's, degree. Moreover, LIRC's decision temporarily limited McCullough to approximately seven semesters of benefits, which was insufficient to obtain even a bachelor's degree.[11]

¶17 In any event, there was substantial and credible evidence, cited in both the ALJ's and LIRC's decision, to support a finding that a bachelor's degree in social work or AODA counseling would not enhance McCullough's preinjury earning capacity. Indeed, Menard points to no evidence to the contrary.

¶18 Finally, Menard argues "fundamental fairness" requires that we set aside LIRC's decision. It sets forth two bases for this argument. Menard first argues the decision was "woefully inadequate" because it mistakenly indicated Menard had not argued that the retraining was intended to enhance, rather than

[11] "The necessity for additional training as authorized by the department for any employee shall be subject to periodic review and reevaluation." WIS. STAT. § 102.43(5)(b).

restore, McCullough's earning capacity. We reject this argument for two reasons. First, LIRC addressed the issue despite its belief that Menard had not made the argument. Second, any misperception by LIRC was wholly reasonable. While Menard's brief to LIRC did assert the retraining would result in enhancement, it nonetheless also asserted that the retraining would be insufficient even to restore McCullough's earning potential.[12] Thus, Menard's position was inconsistent and illogical.

¶19 Menard further argues LIRC's decision was inadequate because it failed to address the issue of McCullough's employability in light of his felony record. We have already rejected that premise.

By the Court.—Order affirmed.

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

[12] LIRC's decision observed, "Indeed, [Menard] questions whether retraining as a social worker/AODA counselor will even restore the applicant's earning capacity."