

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP671

Cir. Ct. No. 2011CV16069

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**ST. PAUL VETERINARY CLINIC
AND SOCIETY INSURANCE COMPANY,**

PLAINTIFFS-APPELLANTS,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION
AND YVONNE F. CHOJNACKI,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. St. Paul Veterinary Clinic and Society Insurance Company (collectively, “the Clinic”) appeal from an order of the circuit court that affirmed the Labor and Industry Review Commission’s decision affirming an

administrative law judge's conclusion that certain medical expenses of former employee Yvonne Chojnacki arose out of an injury she suffered on the job in November 2004. The Clinic asserts that the only credible evidence in this case came from its expert, who determined that Chojnacki's ongoing medical problems did not arise out of her workplace injury, and the Commission therefore erred in upholding the ALJ's decision. In light of our standard of review, we reject the Clinic's argument and affirm the order.

BACKGROUND

¶2 The underlying facts in this matter are largely undisputed, and we take the following background information primarily from the ALJ's decision. Chojnacki was previously employed by the Clinic as a veterinary assistant. Part of her duties involved preparing animals for surgery. On November 1, 2004, she was lifting a sedated, forty-pound pit bull from the floor to a table for surgery when she felt a snapping sensation in her lower back and experienced a sharp pain. Afterwards, Chojnacki was unable to continue working and a family member took her home. It is undisputed that this back injury was a compensable work injury, and that she has not been employed since April 2007. A "limited compromise" agreement had been entered by the parties, leaving open only the question of causation and liability for Chojnacki's ongoing medical expenses to be resolved by the ALJ.

¶3 After her injury, Chojnacki was treated by her family physician and was off work for about three weeks. She continued to have low back problems and on November 24, 2004, consulted Dr. Lawrence Frazin, a neurosurgeon. Frazin noted that Chojnacki was complaining of persistent back pain that would go into her left buttock and left thigh. He determined she had preexisting lumbar

spondylosis, which was aggravated by the work injury. He instructed her to continue with physical therapy and referred her to a pain specialist.

¶4 The pain specialist provided Chojnacki with steroid injections and other treatment. Chojnacki noted an improvement in her low back symptoms and was able to return to work full time on January 31, 2005, subject to restrictions on lifting or bending.

¶5 By June or July 2005, Chojnacki's back pain and discomfort returned, with pain into her legs and some incontinence, and she returned to Frazin in July 2005. Frazin recommended surgery, and performed a laminectomy from the L4 to S1 vertebrae on August 16, 2005. Because of continuing symptoms, Frazin operated again on April 18, 2006. After the second procedure, Chojnacki's condition worsened, with increased low back pain, pain into the right leg, increased incontinence, numbness in the left leg, and left foot drop. Frazin concluded that Chojnacki's work injury had aggravated and accelerated her preexisting condition beyond a normal progression, resulting in the surgeries, disability, and the need for continuing medical treatment.

¶6 In June 2007, Chojnacki consulted Dr. Stephen Delahunt, a spinal surgeon. Delahunt diagnosed psuedoarthrosis at L4, a left foot drop due to a nerve root injury at L5, and a soft tissue mass at L5-S1 displacing the dural sac. He recommended more surgery, which he performed in August 2007. This improved Chojnacki's low back pain, but she continued to suffer significant symptoms, including weakness in her left lower extremity and left foot drop. Delahunt determined that the work injury was responsible for her low back condition, surgeries, disability, and a need for continuing treatment.

¶7 Dr. Michael Orth, an orthopedic specialist, examined Chojnacki at Society Insurance’s request. He saw her on four occasions. Orth opined that Chojnacki had a preexisting degenerative disc disease of her spine, temporarily aggravated by the workplace injury. Orth also concluded that Chojnacki had reached the end of healing as of a February 15, 2005 examination.

¶8 The Clinic, noting that Chojnacki had reported back pain as far back as 1988, relied on Orth’s determination to assert that it was not responsible for Chojnacki’s ongoing medical expenses. Chojnacki explained that her prior injuries did not result in ongoing pain or work restrictions. Further, she noted that the relief provided by the pain specialist—relief which Chojnacki would have been experiencing at the time Orth deemed her “recovered”—did not last, and her pain returned.

¶9 The ALJ reviewed the record as a whole and concluded that Frazin and Delahunt were more credible than Orth. Thus, the ALJ concluded that Chojnacki’s “continuing low back condition and all of her surgeries and related disability and need for continuing medical treatment are all related to, caused by and arising out of the compensable November 1, 2004 injury.”

¶10 The Clinic appealed the ALJ’s decision, seeking review by the Commission. The Commission affirmed the ALJ, writing in part and as relevant to this appeal:

Based on the reports of Dr. Delahunt and Dr. [Gerald] Splittgerber, [the radiologist who had reviewed Chojnacki’s MRIs,] it is reasonable to conclude that a disc protrusion, or disc extrusion, was shown in the November 2004 MRI, which became more evident in the July 2005 MRI. Thus, it is reasonable to infer that the employee injured her L5-S1 disc with the November 2004 work injury, and that the disc pathology from the injury simply progressed over time between the November 2004 and July 2005 MRIs. On this

record, then, the ALJ reasonably credited the medical opinions of Drs. Frazin and Delahunt and found the employee's continuing low back condition and the need for continuing medical treatment arose out of the November 1, 2004 injury.

The Clinic sought judicial review of the Commission's decision, and the circuit court affirmed. The Clinic appeals.

DISCUSSION

¶11 On appeal from the Commission's order, we review the Commission's decision, not the circuit court's. *See LaBeree v. LIRC*, 2010 WI App 148, ¶14, 330 Wis.2d 101, 793 N.W.2d 77. The scope of our review is constrained by statute. We may set aside the Commission's decision only if: (1) the Commission acted without or in excess of its powers; (2) the order was procured by fraud; or (3) the Commission's findings of fact do not support the order. WIS. STAT. § 102.23(1)(e) (2011-12).¹

¶12 This appeal deals primarily with the third prong and is, essentially, a sufficiency-of-the-evidence case. There is no dispute that Chojnacki had a preexisting condition or that she had at least temporary relief from her pain. The fundamental dispute is whether the November 2004 injury was responsible for the problems that surfaced or resurfaced around July 2005. The Clinic's expert concluded that all effects of the injury had resolved around February 2005 and that any subsequent symptoms were related to her underlying degenerative disc disease. Chojnacki's doctors and the Commission determined otherwise.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶13 The Clinic contends that based on Chojnacki’s “subjective complaints and objective medical evidence, there is no support for the conclusion that her current back problems are the result of her November 2004 injury.” While the November 2004 MRI showed a bulging disc at the L5-S1 vertebrae and the July 2005 MRI showed a “full blown posterior disc extrusion at the L5-S1 level,” the Clinic contends that it “simply defies logic to contend that this herniated disc, for which [Chojnacki] had new and different symptoms, could relate back to the original low back sprain.” Further, the Clinic contends, “[t]here is no support in the medical records” for the statements the Commission attributed to Drs. Delahunt and Splittgerber; instead, the Commission “is offering a medical opinion, something which it is unqualified to give,” and improperly using its “cultivated intuition” to make findings rather than relying on “medical support.”

¶14 The Clinic, however, fails to appreciate the standard of review. We may not substitute our judgment for the Commission’s as to weight or credibility of the evidence on any finding of fact. *See* WIS. STAT. § 102.23(6). The Commission “is the ‘sole judge of the weight and credibility’ of medical witnesses.” *Conradt v. Mt. Carmel School*, 197 Wis. 2d 60, 68, 539 N.W.2d 713 (Ct. App. 1995) (citation omitted). “[I]f there are contradictory medical reports, it is for [the Commission] to decide if one expert’s testimony is more persuasive than another’s.” *Id.* at 69.

¶15 We must accept the Commission’s findings of fact if they are supported by substantial credible evidence. *See Kierstead v. LIRC*, 2012 WI App 57, ¶11, 341 Wis. 2d 343, 817 N.W.2d 878. “This requires only that reasonable minds could arrive at the same conclusion as the Commission; it does not require a preponderance of the evidence.” *Id.* We must construe the evidence in the light most favorable to the Commission’s findings, *see id.*, and those findings of fact

are, absent fraud, conclusive, *see* WIS. STAT. § 102.23(1)(a). “A finding is insufficiently supported if the evidence sought to be relied on is so discredited that it must be discarded as a matter of law.” *Wisconsin Cheese Serv., Inc. v. DILHR*, 115 Wis. 2d 573, 576, 340 N.W.2d 908 (Ct. App. 1983).

¶16 The Clinic would have us adopt its expert’s conclusions, but that would run contrary to the standard of review. While the Clinic believes there is no evidence to support a connection between Chojnacki’s November 2004 injury and her July 2005 symptoms, particularly because the July symptoms were different from the November symptoms, the record suggests otherwise.

¶17 Frazin believed the symptoms were a return of Chojnacki’s post-injury problems. Indeed, while Chojnacki suffered additional symptoms, like right leg numbness, she also had her original symptoms recur, including the low back pain and left leg numbness. Delahunt’s description of the pathology of Chojnacki’s condition was that the November 2004 incident caused lumbar spine pain which did not improve, dictating the surgeries. Further, his notes on the MRIs recorded a “very small central disc protrusion” at L5-S1 on the November image and a “mild to moderate disc protrusion” at L5-S1 on the July image.

¶18 Splittgerber, a radiologist, viewed Chojnacki’s two MRIs and prepared a report after the July imaging. According to that report, at the L5-S1 region, “there is a small posterior disc extrusion with migration inferiorly over the posterior superior corner of S1.... The small extrusion is more evident on the current study than on the previous study from November 2004.”

¶19 The Clinic believes that it “defies logic” and represents the Commission’s improper use of “cultivated intuition” to note these changes to the MRI. *See Leist v. LIRC*, 183 Wis. 2d 450, 462, 515 N.W.2d 268 (1994). The

clinic further contends the Commission erroneously inferred that Chojnacki “injured her L5-S1 disc with the November 2004 work injury” and that the injury has simply progressed.

¶20 However, this was not a case of the Commission making an unsubstantiated leap of logic. Delahunt and Splittgerber both clearly observed changes in Chojnacki’s MRI between November 2004 and July 2005. Orth, apparently, did not review those images. Delahunt concluded that the work injury made the bulging disc worse. While the Clinic attempted to attribute the injury to a preexisting condition, Chojnacki had indicated that she was not having issues prior to her November 2004 injury. Indeed, her last reported incident of back issues was in 1998, when she spent a week off of work before returning without restrictions.

¶21 Moreover, even to the extent that the bulging disc was part of a preexisting condition, Frazin opined that the injury had aggravated and accelerated its deterioration, a conclusion that appears supported by the MRI evidence of the worsening disc condition. Further, it is not inherently incredible that the work injury worsened, even though Chojnacki was pain free for an intervening period: she had received treatments to block the pain, and the pain returned as the treatment wore off.

¶22 Ultimately, this is not a case of the Commission improperly utilizing “cultivated intuition” to draw a conclusion but, rather, a matter of competing medical opinions. See *Conradt*, 197 Wis. 2d at 68. It was the Commission’s responsibility to determine which medical opinions to accept. See *Ellis v. DOA*, 2011 WI App 67, ¶31 n.7, 333 Wis. 2d 228, 800 N.W.2d 6. Though the Clinic

disagrees with the Commission's result, there is no basis on which we should disturb the Commission's decision.

By the Court.—Order affirmed.

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

