COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1613

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

HORTON MANUFACTURING COMPANY, INC., AND SENTRY INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

v.

LABOR AND INDUSTRY REVIEW COMMISSION AND JANICE A. GROEHLER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Horton Manufacturing Company, Inc., and Sentry Insurance Company (Horton) appeal a judgment affirming a decision of the Labor and Industry Review Commission that Janice Groehler's cervical spine injury

arose out of her employment at Horton and that she was entitled to benefits for loss of earning capacity under § 102.44(6), STATS. Horton argues that: (1) LIRC exceeded its authority and made findings that are not supported by the evidence and (2) Groehler is not entitled to loss of earning capacity benefits. We affirm the judgment.

Groehler, born in 1945, farmed with her husband full-time from 1966 to 1984 and part-time to 1988. Her duties were housekeeping, cooking, washing, and helping to milk forty cows. Sometime before starting at Horton, Groehler's treating doctor noted that she had neck pain; she also saw a chiropractor about once a year.

Groehler began working for Horton in 1985 as an assembler, assembling brakes and clutches for motor vehicles. She worked with a variety of tools and hand presses, which caused jolting, and her duties required lifting up to eighty-five pounds. In 1991, Horton lessened the lifting requirements, installed adjustable benches and provided better tools with less torque kickback. By this time, however, Groehler was about to go on light duty because of her work injury.

Groehler noticed increased neck problems between 1988 and 1991. Repetitive ramming with her handpress, using pliers, lifting and holding down springs as part of the assembly process bothered her. Groehler testified that she has limited mobility in her neck, and severe pain in her neck and in her arms if she has to lift too much. Although she was given light duty, at times her job required that she exceed her restrictions. Horton denied this assertion.

In 1992, Horton moved its plant from Shell Lake to Webster, a distance of thirty-three miles. Groehler was offered assembly work in Webster, which she declined, taking what was considered a voluntary separation. She

received unemployment benefits. She believed the assembly job at the new plant would have been the same as her prior job, which required consistent lifting and frequent pushing and pulling in excess of restrictions. LIRC found: "The applicant testified that she quit when the plant moved because she could not do the work." Groehler testified that her two doctors told her not to do assembly work. LIRC found, however, that Groehler did not mention neck pain on a March 1992 performance review as a reason for not moving with the employer, but testified that at least part of her concern was the additional commute.

She testified that driving caused her problems because "I can't drive any more than maybe ten, 15 minutes and my arm goes numb." She testified that the location of her physical therapy was changed so that she would not have to drive as far. However, no doctor had given her any driving restrictions.

LIRC held that Groehler was first provided work at her old wage until the Shell Lake plant closed, and later refused an offer of work at the same rate at the Webster plant. Under § 102.44(6), STATS., if an injured worker is offered work within her restrictions paying within 85% of her pre-injury wage, but refuses it without reasonable cause, she is limited to the functional permanent partial disability award without regard to loss of earning capacity. Also, under § 102.44(6)(b), if the employer terminates the relationship at the time of the injury, or the employee resigns because of his or her physical or mental limitations, or a more than 15% wage loss occurs, the department may reopen any award and make a redetermination, taking into account loss of earning capacity.

LIRC found "a termination in wage loss under sec. 102.44(6)(b), Stats., when the employer moved the plant." It concluded that Groehler's refusal of reemployment in Webster because of the additional commuting distance

constituted reasonable cause under § 102.44(6)(g). Groehler was thus not barred from receiving an award of loss of earning capacity under § 102.44(6).

Horton argues that LIRC erred by relying on an unsupported medical opinion and thereby exceeded its authority by making findings not supported by the evidence. Specifically, one of Groehler's treating physicians, Eliot Lewit, M.D., opined, and LIRC found, that Groehler's employment substantially aggravated and accelerated her pre-existing condition. Horton asserts that Lewit's opinion is "inherently unreasonable" because it is unsupported by a factual basis. We are unpersuaded.

When Horton argues that the evidence is "inherently unreasonable," it essentially argues that the evidence is incredible as a matter of law. It is only when the evidence relied upon by the commission is incredible as a matter of law that a reviewing court may reverse its findings. ***State ex rel. Harris v. Annuity & Pension Bd***., 87 Wis.2d 646, 659, 275 N.W.2d 668, 675 (1979). Evidence is not incredible as a matter of law unless it "conflicts with nature or the fully established facts, or unless the testimony supporting and essential to the verdict is inherently and patently incredible." ***State v. Sharp***, 180 Wis.2d 640, 659, 511 N.W.2d 316, 324 (Ct. App. 1993). LIRC's findings are binding on us as long as they are supported by substantial and credible evidence. ***Cornwell Personnel Assoc. v. LIRC***, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993). When experts differ, LIRC's findings as to causation are final unless they are inherently incredible. ***Crucible Steel Casting Co. v. Industrial Comm'n***, 220 Wis. 665, 669, 265 N.W. 665, 666 (1936).

The determination of the cause and extent of the applicant's disability presents a question of fact. ***Vande Zande v. DILHR***, 70 Wis.2d 1086,

1095, 236 N.W.2d 255, 259-60 (1975). To establish worker's compensation liability based on aggravation of pre-existing conditions, there must be a finding that the work activity did precipitate, aggravate and accelerate the pre-existing condition. ***Joseph Schlitz Brewing Co. v. DILHR***, 67 Wis.2d 185, 191, 226 N.W.2d 492, 495 (1975). Finding that the work was in the nature of an aggravation of a pre-existing condition is not sufficient to establish liability. ***Id***. It is the appellant's burden to establish grounds to overturn the agency's decision. ***Shoreline Park Preserv. v. DOA***, 195 Wis.2d 750, 761, 537 N.W.2d 388, 391 (Ct. App. 1995).

LIRC relied on the following facts. Groehler saw Lewit for evaluation of neck and right arm pain in 1989. In his report, Lewit recounted Groehler's ten-year history of cervical pain, worsening over the last few years. He also reported muscle spasm and that her spine X-rays showed some degenerative changes at C5-6.

In 1991, Lewit saw Groehler again and reported she was having increased difficulty doing work duties. For example, Groehler had difficulty working with a squeeze ring that required 100 repetitions a day, causing her pain. Lewit's 1992 notes indicate that Groehler's standing and leaning forward at work aggravated her neck discomfort. An MRI revealed a right paracentral disc herniation at C5-6, small protrusions at C3-4 and C6-7 without impingement and bulging at C4-5. He diagnosed suspected myofascial pain syndrome, exacerbated by work duties and complicated by the underlying disc disease. He prohibited repetitive pushing and pulling. He further recommended physical therapy and light-medium work duties.

In April 1992, Groehler started treating with John Cragg, M.D., whose practice was much closer to her residence. Groehler denied any specific injury to her neck or hands prior to the insidious onset of symptoms in the last eighteen to twenty-four months. Cragg noted that she claimed to have no neck or hand pain when she worked as a farmer. He diagnosed chronic cervical disc syndrome with referred discogenic pain. He reported in July 1992 that Groehler was forced to take a layoff due to right lateral neck pain, headaches, shoulder and arm pain. In November 1992, she complained of right lateral neck pain. She had voluntarily been off work since June. Cragg's restrictions would have been no repetitive neck bending, no lifting greater than chest level more than five or six times per hour, no repetitive firm gripping and no lifting greater than ten pounds. In February 1993, Cragg noted right lateral neck pain when Groehler twisted her neck side to side and suspected that the disc herniation at C5-6 was causing the problem.

After she sought treatment in 1991, Groehler was given assembly work within the thirty-pound, medium-light duty lifting limit, but it still involved pushing and pulling. She testified that while duties got easier, they nonetheless sometimes exceeded her restrictions. Horton disputed this assertion.

LIRC relied on Lewit's report, which concluded that Groehler's employment aggravated a pre-existing condition beyond the normal progression and that seven years of constant forceful repetitive motion at work exacerbated her discomfort. LIRC noted that Cragg diagnosed chronic cervical disc syndrome with discogenic referred pain and carpal tunnel syndrome. While Groehler remembered no acute work injury, Cragg concluded that the symptoms were the result of cumulative reaching and gripping while working for Horton. He believed that she reached a healing plateau with a permanent partial disability at

10% compared to disability to the body as a whole for her neck.[1] He imposed work restrictions of light-medium work, allowing only occasional lifting up to ten pounds. Cragg also prohibited firm grasping with the right hand as well as frequent flexion or rotation of the neck. He limited reaching above the neck to five or six times per hour. He restricted her to occasional bending/stooping, crawling, crouching, kneeling, balancing and pushing. He indicated that the restrictions were not permanent, and some might be lifted in six to twelve months.

LIRC also considered the report of Robert Fielden, M.D., Horton's independent medical examiner, who did not believe that the cervical disc disease, which he believed to be healed, was caused by Groehler's employment conditions. He did, however, set work restrictions based upon the carpal tunnel condition. He found no permanent disability due to her cervical condition and accordingly imposed no restrictions in connection therewith.

LIRC relied on Lewit's opinion finding that it was the most credible. It concluded that Groehler met her burden of eliminating any legitimate doubt whether the accident or disease causing her neck injury arose while performing services growing out of and incidental to her employment at Horton.[2] It also determined that her work activity caused permanent disability by aggravation, acceleration and precipitation beyond normal progression of her underlying degenerative cervical condition. LIRC concluded that given the C5-6 disc

[1] Cragg found 5% compared to the loss of the right hand for the carpal tunnel syndrome; Horton does not challenge this finding on appeal.

[2] Here, the administrative law judge ruled in favor of Horton based primarily on Fielden's report, but LIRC reversed based upon Lewit's report. The agency, not the hearing examiner, is the primary fact-finder. ***Burton v. DIHLR***, 43 Wis.2d 218, 222, 168 N.W.2d 196, 197 (1969). Therefore, we review the findings of the commission. *See* ***Anheuser Busch, Inc. v. Industrial Comm'n,*** 29 Wis.2d 685, 692, 139 N.W.2d 652, 655 (1966).

herniation and her symptoms, a 5% permanent partial disability attributable to the neck injury compared to the body as a whole was reasonable. This rating was 5% less than the 10% rating given by Cragg. We conclude that Lewit's opinion, together with the evidence of record, amply support LIRC's determination.

Nonetheless, Horton argues that Lewit's opinion is contrary to Fielden's and at odds with Cragg's. We are not convinced that Cragg's opinions are inconsistent with Lewit's. In any event, when there are inconsistencies or conflicts in medical testimony, the commission, not the reviewing court, reconciles the inconsistencies and conflicts. ***Valadzic v. Briggs & Stratton Corp.,*** 92 Wis.2d 583, 598, 286 N.W.2d 540, 547 (1979). Contrary medical evidence provides an insufficient basis for a reversal. *See* ***Employers Mut. Liab. Ins. Co. v. DIHLR***, 62 Wis.2d 327, 331-32, 214 N.W.2d 587, 589 (1974).

Next, Horton argues that LIRC erred in the legal application of loss of earning capacity benefits. This issue requires us to consider whether Groehler's refusal of the job offer at the Webster plant was "without reasonable cause" within the meaning of § 102.44(6)(g), STATS. Horton contends that because this is an issue of law and of first impression, we should apply a de novo standard of review. *See* ***Kelley Co. v. Marquardt,*** 172 Wis.2d 234, 244-45, 493 N.W.2d 68, 73 (1992). An agency's legal conclusions and interpretations of statutes, while not binding on this court, are subject to varying degrees of deference on appeal. ***Shoreline Park Preserv.,*** 195 Wis 2d. at 761, 537 N.W.2d at 392.

> The supreme court has recently clarified both when to defer to an agency's legal conclusion, and how much deference the courts should give. ***UFE, Inc. v. LIRC***, 201 Wis.2d 274, 284, 548 N.W.2d 57, 61 (1996) (citations omitted). An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or *de novo* review. ***Id***. at 284, 548 N.W.2d at 61.

> We will accord great weight deference only when all four of the following requirements are met: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency in the application of the statute. ***Id***. … Under the great weight standard, "a court will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court feels that an alternative interpretation is more reasonable." ***UFE,*** 201 Wis.2d at 287, 548 N.W.2d at 62.

Currie v. DILHR, 210 Wis.2d 381**,** 388-89, 565 N.W.2d 253, 257 (Ct. App. 1997). If the question before the agency is very nearly one of first impression, or when the agency has some experience in an area, the court grants the agency decision "due weight." ***Soo Line R. Co. v. Commissioner of Transp***., 170 Wis.2d 543, 549, 489 N.W.2d 672, 674-75 (Ct. App. 1992). Where it is one of first impression for the agency, and it lacks special experience considering the question presented, its decision is not entitled to deference and we consider it de novo. ***Id.*** at 549, 489 N.W.2d at 675.

We conclude the application of the loss of earning capacity benefits statute to Groehler's circumstances presents a mixed question of fact and law: the circumstances surrounding her refusal of the offer of employment are factual determinations; whether her refusal was reasonable within the meaning of § 102.44(6), STATS., is one of law. The factual determinations will not be upset unless they are unsupported by substantial evidence in the record. ***Michels Pipeline Constr. Co. v. LIRC,*** 197 Wis.2d 927, 931, 541 N.W.2d 241, 243 (Ct. App. 1995). With respect to the legal portion of the analysis, LIRC has developed significant expertise in administering the statute in question, although not on the precise question involved in this case. Because its expertise with respect to the

particular legal question involved here does not necessarily place it in a better position to make judgments regarding the interpretation of the statute than a court, we will accord LIRC's legal conclusions due weight deference. *See* ***Soo Line R. Co***., 170 Wis.2d at 549, 489 N.W.2d at 674-75.

Horton argues: "As the first case to hold that commuting distance alone constitutes reasonable cause to decline re-employment, LIRC's decision steps out of the line of cases that interpret reasonable cause in terms of the employee's ability to perform work." We disagree with Horton's characterization of the issue. We are obligated to search the record for substantial evidence that supports LIRC's decision. *See* ***Vande Zande***, 70 Wis.2d at 1097, 236 N.W.2d at 260. Here, the record discloses that the thirty-three-mile commuting distance was a significant factor largely due to Groehler's condition. She testified that after ten or fifteen minutes of driving, her arms go numb. LIRC also found "The applicant testified that she quit when the plant moved because she could not do the work." As a result, the record belies the argument that commuting distance alone was the basis of LIRC's determination.

Horton also argues Groehler refused a "slightly longer commute … because she was uncomfortable with the prospect of moving to a new location with some new people, not any physical restrictions on her work abilities." We decline Horton's invitation to reach this factual determination. *See* ***Briggs & Stratton Corp. v. DILHR***, 43 Wis.2d 398, 409, 168 N.W.2d 817, 822 (1969) (It is not in the appellate court's prerogatives to exercise fact-finding function.). Here, the parties stipulated that the Webster plant was thirty-three miles from the Shell Lake facility, not a "slightly longer" distance. Also, the testimony Horton relies

upon for its assertion that Groehler's work refusal was not based upon any physical restrictions was characterized as speculative by the administrative law judge.[3]

Horton has failed to meet its burden to establish grounds to overturn LIRC's decision.[4] We conclude that LIRC's determination that it was reasonable for Groehler, given her injury, to refuse to accept the specific offer of employment at a distant location, was in turn a reasonable interpretation of the law and the evidence. The legislative language used in § 102.44, STATS., should be liberally

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[3] In support of this assertion, Horton refers us to the testimony of Daniel Conroy, Horton's human resources manager, who testified:

> A. … I believe she was uncomfortable with that change, the uncertainty.
>
> Q. The change in what?
>
> A. New people, new location, different –
>
> Q. Were all employees offered the right to transfer their jobs from Shell Lake to the plant in Webster?
>
> ….
>
> THE COURT: Let's go back and clean up where you started. We didn't get a responsive answer and that was to whether she gave a reason for changing her mind on the transfer to Webster. That question that I believe you asked, we didn't get a responsive answer to it. ***He speculated on something but we want to know what she told you.***
>
> Q. Did she say anything specifically about her reasons for not accepting the transfer to Webster.
>
> A. ***I don't recall very much detail about that beyond the fact that she wanted to change her mind and just wasn't comfortable making that transfer*** and we were accommodating to that. (Emphasis added.)

[4] Horton also argues that LIRC's decision contradicts WIS. ADM. CODE § DWD 80.34(1) (formerly § IND 80.34), which requires any analyses of loss of earning capacity to consider the employee's willingness to make reasonable change in a residence to secure employment. Horton, however, fails to demonstrate that this argument was made before LIRC or the circuit court. We decline to consider arguments made for the first time on appeal. ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980).

construed to effect the beneficent purpose intended. *See* ***Great Northern Corp. v. LIRC***, 189 Wis.2d 313, 317, 525 N.W.2d 361, 363 (Ct. App. 1994). The record amply supports the determination that loss of earning capacity benefits are appropriate for Groehler.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.