COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1675

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

JEFFREY HUTCHINSON,

PLAINTIFF-APPELLANT,

V.

CUSTOM DRYWALL, INC., WAUSAU UNDERWRITERS INSURANCE AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Deininger, JJ.

PER CURIAM. Jeffrey Hutchinson appeals from an order affirming the Labor and Industry Review Commission's (LIRC) decision dismissing his workers' compensation claim. The issue is whether LIRC erroneously exercised its discretion by admitting the medical report of the

employer's independent medical examiner into evidence. We conclude that LIRC did not erroneously exercise its discretion, and that its order is supported by credible evidence. We therefore affirm.

BACKGROUND

The appellant, Jeffrey Hutchinson, worked for twenty-three years installing drywall. In May 1991, he injured his back while working. Since October 1991, Hutchinson's back condition has been assessed by a number of physicians. His doctors concluded that the injuries were caused by work exposure. Upon the request of his employer's insurance company, Hutchinson saw Dr. James Gmeiner. Dr. Gmeiner found that Hutchinson suffered a soft tissue strain in May 1991, and that this strain should have healed by June 1991. Dr. Gmeiner also opined that Hutchinson's complaints were consistent with degenerative disc disease. Dr. Gmeiner concluded that Hutchinson's work did not cause his degenerative condition and did not accelerate the disease's progression.

Hutchinson filed for worker's compensation benefits. The Administrative Law Judge (ALJ) dismissed the claim, concluding that Dr. Gmeiner's report and opinions best explained Hutchinson's condition. In his appeal to LIRC, Hutchinson argued that Dr. Gmeiner's report was inadmissible because Dr. Gmeiner was not available for cross-examination. LIRC affirmed the ALJ's order after concluding that the report was properly admitted. The trial court affirmed LIRC.

STANDARD OF REVIEW

Section 102.23(1), STATS., states:

> (a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section ….
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> ….
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> (e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds: (1) [t]hat the commission acted without or in excess of its powers; (2) [t]hat the order or award was procured by fraud; (3) [t]hat the findings of fact by the commission do not support the order or award.

The department's order will be upheld if there is any credible evidence in the record sufficient to support its findings. *See* ***Goranson v. DILHR***, 94 Wis.2d 537, 553, 289 N.W.2d 270, 278 (1980).

DISCUSSION

Hutchinson first relies upon § 102.17(1)(d), STATS., to support his position that LIRC erred in admitting Dr. Gmeiner's report.

> Certified reports of physicians, podiatrists, surgeons, dentists, psychologists and chiropractors, wherever licensed and practicing, who have examined or treated the claimant, and of experts, if the practitioner or expert consents to subject himself or herself to cross-examination also constitute prima facie evidence as to the matter contained in them.

Section 102.17(1)(d). Hutchinson argues that for Dr. Gmeiner's report to be admitted into evidence, Dr. Gmeiner must be available for cross-examination at

the hearing. We disagree. These reports may be entered into evidence in lieu of having the physician testify at the administrative hearing.[1]

Furthermore, if he wanted Dr. Gmeiner available for cross-examination at the administrative hearing, Hutchinson was required to subpoena him, and the subpoena must be served pursuant to § 102.17(2s), STATS.[2] While Hutchinson did subpoena Dr. Gmeiner, he did so in an improper manner. According to §§ 885.03[3] and 885.06(1)[4], STATS., the subpoena must be personally served and it must include payment of witness fees. "When a statute prescribes how service is to be made, the statute determines the matter and must be strictly followed." ***Tomah-Mauston Broad. Co., Inc. v. Eklund***, 143 Wis.2d 648, 657, 422 N.W.2d 169, 173 (Ct. App. 1988). Hutchinson failed to follow statutory requirements necessary to compel Dr. Gmeiner to attend the administrative hearing. Hence, Dr. Gmeiner was not required to attend the hearing.

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[1] In ***Bumpas v. DILHR***, 95 Wis.2d 334, 336 n.1, 290 N.W.2d 504, 505 n.1 (1980), the court noted that the WC-16B report may be filed with the department in lieu of the physician testifying at the administrative hearing.

[2] Section 102.17(2s), STATS., reads: "A party's attorney of record may issue a subpoena to compel the attendance of a witness or the production of evidence. A subpoena issued by an attorney must be in substantially the same form as provided in § 805.07(4) and must be served in the manner provided in § 805.07(5)."

[3] Section 885.03, STATS., reads: "Any subpoena may be served by any person by exhibiting and reading it to the witness, or by giving the witness a copy thereof, or by leaving such copy at witness's abode."

[4] Section 885.06(1), STATS., states, "[N]o person is required to attend as a witness in any civil action, matter or proceeding unless witness fees are paid or tendered, in cash or by check, share draft or other draft, to the person for one day's attendance and for travel."

Hutchinson next argues that the Commission erred in admitting the report because he was not provided a copy of a statement[5] allegedly used by Dr. Gmeiner to write the report. We again disagree. WIS. ADMIN. CODE § DWD 80.24 states that if an employee gives a signed statement, which in any way concerns his or her claim, a copy of the statement must be given to the employee. The failure on the part of the employer or insurance carrier to comply with this requirement precludes the use of the statement in any manner in connection with the claim. *See* § DWD 80.24.

However, the ALJ concluded that the "statement" taken by Dr. Gmeiner was a medical history, and that the employer was not required to provide Hutchinson with a copy. LIRC agreed. Both interpreted WIS. ADMIN. CODE § DWD 80.24 as applying to statements made to the employer or their insurance carrier, not to an independent medical examiner. An administrative agency's interpretation of its own regulations is entitled to controlling weight unless inconsistent with the regulation or clearly erroneous. ***City of Elroy v. LIRC***, 152 Wis.2d 320, 324, 448 N.W.2d 438, 440 (Ct. App. 1989). We conclude LIRC's interpretation of § DWD 80.24 is reasonable because the language of the rule regulates the investigative conduct of the employer or insurance carrier, and not that of independent medical examiners.

Since LIRC's order was based on Dr. Gmeiner's report, and since we have determined that Dr. Gmeiner's report was properly admitted, LIRC's order was based on credible evidence. Accordingly, we affirm.

[5] As part of the examination, Dr. Gmeiner asked Hutchinson to fill out a questionnaire. Hutchinson had trouble reading the form; therefore, Dr. Gmeiner asked him the questions and filled out the form himself. Hutchinson also allegedly signed the questionnaire.

By the Court.—Order affirmed.

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