

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3107

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**COUNTRY KITCHEN RESTAURANT AND VIRGINIA SURETY
COMPANY,**

PLAINTIFFS-APPELLANTS,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION, MELODY L.
DOVERSPIKE AND COMMERCIAL UNION INSURANCE
COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dunn County:
DONNA J. MUZA, Judge. *Affirmed.*

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

PER CURIAM. Country Kitchen Restaurant and its insurer appeal a judgment affirming a decision of the Labor and Industry Review Commission awarding benefits to Melody Doverspike for an occupational disease. Country

Kitchen argues that Doverspike did not present credible and substantial evidence to support the finding of an occupational disease instead of an accidental injury and that LIRC incorrectly determined the date of the disability. Because there is credible and substantial evidence to support LIRC's findings, we affirm the judgment.

Whether Doverspike's disability was the result of an occupational disease or an accidental injury is a question of fact. *See Shelby Mut. Ins. Co. v. DILHR*, 109 Wis.2d 655, 660, 327 N.W.2d 178, 180 (Ct. App. 1982). LIRC's findings are conclusive if supported by credible and substantial evidence. *See Bumpas v. DILHR*, 95 Wis.2d 334, 342, 290 N.W.2d 504, 508 (1980).

Credible and substantial evidence supports LIRC's finding that Doverspike suffers from an occupational disease and not merely from accidental injuries. An occupational disease is a process, usually extending over a considerable span of time, acquired as a result of work in the employment. *See Andrzejczak v. Industrial Comm'n*, 248 Wis. 12, 14-15, 20 N.W.2d 551, 552 (1945). An accidental injury, on the other hand, results from an unforeseen or unexpected definite mishap. *Id.* The reports and notes of Doverspike's treating physicians, Drs. Bodeau and Manz, support LIRC's finding that despite her previous back trouble and accidental injuries, her present condition reflects the accumulation of work exposure over time. This evidence, along with Doverspike's description of her symptoms and the medical records relating to them, support LIRC's finding that Doverspike suffered an occupational disease.

Sufficient evidence also supports LIRC's finding that the date of disability was July 1994. That finding also resolves a question of fact and requires this court to give deference to LIRC's finding. *General Cas. Co. v. LIRC*, 165

Wis.2d 174, 180-81, 477 N.W.2d 322, 324-25 (Ct. App. 1991). In an occupational disease case, the date of disability is the date of injury or the first day of lost work time attributable to the occupational disease. *Id.* The first wage loss is not the date of injury when there is a recovery from that injury and subsequent exposure that results in a “new onset” induced by a subsequent exposure. *See Zurich General Accid. Liab. Ins. Co. v. Industrial Comm.*, 203 Wis. 135, 146-47, 233 N.W. 772, 776 (1930).

The medical evidence establishes that Doverspike experienced a wage loss from the “new onset” of an occupational disease in July 1994. Wage losses she suffered before that date do not conclusively establish an earlier date of disability because the earlier wage loss was not the result of the occupational disease. LIRC reasonably found, on the basis of the medical records, that Doverspike suffered a series of traumatic work injuries, some requiring time off, that eventually progressed to an occupational back disease. Dr. Manz listed July 7, 1994 as the date the disability from work began. Doverspike experienced wage loss at that time. The medical records show that Doverspike recovered from her earlier wage loss injuries until the activities at work ripened into an occupational disease. Because there is credible and substantial evidence to support LIRC’s findings, those findings are conclusive. *See* § 102.23(1) and (6), STATS.

By the Court.—Judgment affirmed.

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

