COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP999 **Cir. Ct. No. 2013CV116**

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

AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND KIRK HASLOW,

PLAINTIFFS-RESPONDENTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND STATE OF WISCONSIN WORK INJURY SUPPLEMENTAL BENEFIT FUND,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Reversed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. The Labor and Industry Review Commission and the State of Wisconsin Work Injury Supplemental Benefit Fund appeal a circuit court order reversing a LIRC decision pertaining to the workers' compensation death benefits of Juan Camacho. LIRC determined that Camacho's death benefits

were to be calculated under the presumptive statutory amount in WIS. STAT. § 102.11(1)(g) (2013-14),[1] and that American Family Mutual Insurance Company and its insured, Kirk Haslow (collectively American Family), had not rebutted the statutory presumption and established that Camacho, who was seventeen at the time of his death, would have earned a lesser amount than the statutory amount at age twenty-seven. LIRC and WISBF argue that LIRC's decision was based upon substantial and credible evidence, and that LIRC had properly concluded that the evidence presented by American Family was not sufficient to meet its burden of proof. In response, American Family argues that the report of the vocational expert that it presented was sufficient to rebut the presumption, and that LIRC's finding that Camacho had completed some secondary education was not based upon substantial and credible evidence. As we explain below, we agree with LIRC and WISBF and, therefore, reverse the order of the circuit court.

BACKGROUND

¶2 Camacho was employed as a farm worker by Haslow on Haslow's farm. At the time of Camacho's death, he had worked for Haslow for approximately two weeks and had not yet presented Haslow with any documents showing that he was entitled to work in the United States legally. Haslow testified that Camacho filled out an application for work and that the application indicated that Camacho had at least some secondary education, which Haslow understood to mean that Camacho had completed at least the eighth grade and had some high school education.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶3 American Family claimed to have made an extensive investigation, but was unable to find any surviving family members who might be entitled to Camacho's death benefits. The Wisconsin Department of Justice applied for Camacho's benefits on behalf of WISBF. American Family responded to the application, conceding that a death benefit was due, but contesting the application of the statutory presumptive amount for a worker under twenty-seven years of age.

¶4 A hearing was held before an administrative law judge on that sole issue. The ALJ issued an interlocutory order that American Family had not met the burden of rebutting the presumption in WIS. STAT. § 102.11(1)(g), and ordering payment of the statutory amount. American Family petitioned for review by LIRC. Upon review, LIRC agreed with the ALJ and adopted the ALJ's findings and conclusions as its own. American Family appealed LIRC's decision to the circuit court, which reversed. LIRC and WISBF appeal.

DISCUSSION

Standard of Review

¶5 On appeal, we review the decision of LIRC and not the decision of the circuit court. *See* ***Wisconsin Dept. Revenue v. Menasha Corp.***, 2008 WI 88, ¶46, 311 Wis. 2d 579, 754 N.W.2d 95. We will uphold LIRC's findings of fact on appeal if they are supported by credible and substantial evidence. ***Applied Plastics, Inc. v. LIRC***, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984); WIS. STAT. § 102.23(6). In doing so, we will not substitute our judgment for LIRC's in considering the weight or credibility of the evidence on any finding of fact. ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (1989); § 102.23(6).

¶6 Statutory interpretation, on the other hand, is a question of law, which we review de novo. ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 659, 539 N.W.2d 98 (1995). While a court is not bound by an agency's interpretation of a statute, a court should defer to an agency's interpretation of a statute in certain situations. ***Id.*** Wisconsin courts apply three distinct levels of deference to agency decisions. ***Id.*** at 659-60. The highest level of deference is called great weight deference. ***Id.*** at 660. LIRC asserts that great weight deference is appropriate in its appellant's brief. American Family, in its response brief, does not challenge this assertion. It is therefore admitted by American Family that great weight deference is appropriate in this case. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n. 1, 256 Wis. 2d 848, 650 N.W.2d 75 (argument asserted by the appellant and not disputed by the respondent may be taken as admitted).

¶7 In applying great weight deference we will uphold the agency's decision as long as it is "merely [] reasonable." ***Harnischfeger Corp.***, 196 Wis. 2d at 661.

LIRC's decision

¶8 The only issue before us is the propriety of LIRC's determination of the amount of death benefits to be paid upon the death of seventeen-year-old Camacho. WISCONSIN STAT. § 102.11(1)(g) provides:

> If an employee is under 27 years of age, the employee's average weekly earnings on which to compute the benefits accruing for permanent disability or death shall be determined on the basis of the earnings that the employee, if not disabled, probably would earn after attaining the age of 27 years. Unless otherwise established, the projected earnings determined under this paragraph shall be taken as equivalent to the amount upon which maximum weekly indemnity is payable.

¶9 LIRC and WISBF contend that the appropriate amount of Camacho's death benefit is the "maximum weekly indemnity payable" under WIS. STAT. § 102.11(1)(g). American Family, on the other hand, argues that it has "otherwise established" a lesser amount. *See* ***id.*** This raises a mixed question of law and fact. First we must determine what "otherwise established" means and what is required to meet that standard. *See* ***id.*** The evidence presented must then be examined to determine if that requirement is met. As to both questions, application of the standard of review leads us to uphold LIRC's decision.

¶10 In reaching its decision, LIRC appears to have assumed that "otherwise established" creates a rebuttable presumption that the statutory maximum applies. The parties do not disagree. They do, however, disagree as to *how* the presumption is to be rebutted.

¶11 American Family argues that the method of rebutting the presumption should involve a two-step process:

> In order to have determined whether the presumption had been rebutted, LIRC should have first asked whether the record contained any evidence that Camacho would have been earning less than maximum wages upon reaching the age of 27 years. If LIRC had determined that the record contained at least some evidence that Camacho would have been earning less than maximum wages, *then and only then* would LIRC have been permitted to reach the issue of whether it was satisfied by that evidence that Camacho would have been earning a certain wage less than the maximum rate.

American Family's argument is difficult to understand. Moreover, it is conclusory and totally unsupported by citation to any legal authority. None of the cases cited by American Family, nor by LIRC and WISBF for that matter, follows such a methodology or contains any statement even remotely capable of being interpreted as support for this argument. Consequently, we will not address it further. *See*

Kruczek v. DWD, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (arguments unsupported by reference to legal authority are not addressed by this court).

¶12 LIRC and WISBF argue that the term "'[e]stablish' has long been recognized by the Supreme Court of Wisconsin as including a 'greater weight or preponderance of the evidence' test." In support of their argument, LIRC and WISBF cite to ***McKeon v. Chicago, Milwaukee & St. Paul Ry. Co.***, 94 Wis. 477, 487, 69 N.W. 175 (1896) (quoted source omitted), which states: "The word 'establish' ordinarily means 'to settle firmly; to fix unalterably.' And hence the facts could not be so 'established' except by the greater weight or preponderance of the evidence."

¶13 Although the ALJ never explicitly asserts such an interpretation, the ALJ's decision implicitly reflects that interpretation. Thus, based on the meaning of "establish" set forth in ***McKeon***, the statute requires that the maximum amount be paid unless a lesser amount is proven by the preponderance of the evidence. That interpretation is reasonable, especially when contrasted with the unsupported conclusory argument of American Family, and, thus, satisfies the great weight deference standard of review. We therefore uphold LIRC's interpretation of the statute as creating a rebuttable presumption that can only be rebutted by a preponderance of the evidence. We now examine American Family's factual arguments as to the evidence presented in light of this standard.

¶14 American Family called one witness at the hearing before the ALJ. WISBF called none. American Family's witness, Haslow, testified that he knew Camacho for less than two weeks and knew little about him. Haslow testified that he speaks only a little Spanish and Camacho did not speak English and, therefore,

he never had a personal conversation with Camacho. Haslow testified that Camacho filled out an employment application on which he indicated that he had "[s]econdary" education, which Haslow understood to mean that Camacho had some high school education. Haslow testified that most of the workers on his farm went to other dairy farms when they left his employ, but admitted that he did not really keep track of workers when they left his farm and that farm work was not a career path.

¶15 The ALJ found Haslow's testimony self-serving and not credible, and American Family does not challenge the ALJ's findings in this regard. Rather, American Family contends that the vocational report of its expert, John J. Woest, was sufficient to rebut the presumption under WIS. STAT. § 102.11(1)(g).

¶16 Woest did not testify at the hearing before the ALJ, but American Family submitted his written report. Woest states in the report that a farm worker in Wisconsin could be expected to earn approximately $443.00 per week. He goes on to state that, because Camacho was not legally employed in the country, it would be more appropriate to consider what he would make back in Mexico, where he was presumed to be from. Woest stated that Camacho's wage in Mexico could be expected to be around $233 per month. Woest's report does not discuss Camacho's education, experience or other qualifications. It appears from Woest's report that what knowledge Woest had about Camacho he obtained from Haslow. However, Haslow testified that he did not remember ever meeting with Woest and, at most, may have had a brief telephone conversation with him. Accordingly, the ALJ found that Woest's report was based upon "assumptions that are invalid." Specifically, the ALJ pointed out that Woest and American Family do "not know much about Camacho's talents, abilities and goals in life." *See* ***Evans Bros. Co.,***

Inc. v. LIRC, 113 Wis. 2d 221, 227-28, 335 N.W.2d 886 (Ct. App. 1983) ("[T]he Commission need not assume that the injured worker would have remained in the same job or at the same company until the age of twenty-seven. In addition to the actual earnings at the time of injury, the Commission may consider the qualifications of the employee and his or her educational level and experience." (citation omitted)). The ALJ's rejection of Woest's report as not valid is either a credibility determination or a determination of the weight to be given. In either case, we will not second guess the ALJ on such matters. *See* ***Advance Die Casting***, 154 Wis. 2d at 249 (we will not substitute our judgment for LIRC's in considering the weight or credibility of the evidence on any finding of fact).

¶17 American Family had the burden of proof to establish by a preponderance of evidence that some wage other than the statutory presumptive wage was what Camacho would have earned at age twenty-seven. The ALJ found that the only evidence which American Family offered to rebut the presumption was without credibility or weight. As the ALJ noted: "Had Camacho lived to age [twenty-seven], there [are] no facts in evidence to rebut the presumption…."

¶18 American Family failed to present credible evidence that rebuts the presumption by a preponderance of the evidence, indeed by any evidence at all. It is, thus, unnecessary to address American Family's remaining argument: that LIRC's finding that Camacho had completed some measure of secondary education was without credible and substantial evidence. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

CONCLUSION

¶19 For all of the reasons stated, we reverse the decision of the circuit court.

By the Court.—Order reversed.

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