COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1086 **Cir. Ct. No. 2014CV3011**

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

ANTONIO ZALDIVAR,

PLAINTIFF-APPELLANT,

V.

DEPARTMENT OF WORKFORCE DEVELOPMENT LABOR AND INDUSTRY REVIEW COMMISSION, HALLMARK DRYWALL, INC., GYPSUM FLOORS, INC. AND SOCIETY INSURANCE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Reversed and cause remanded with directions*.

Before Kloppenburg, P.J., Higginbotham, and Blanchard, JJ.

¶1 PER CURIAM. Antonio Zaldivar appeals a circuit court order that affirmed a worker's compensation decision made by the Labor and Industry

Review Commission (LIRC). For the reasons discussed below, we reverse and remand with directions.

BACKGROUND

¶2 The following facts are undisputed. Zaldivar was born in Mexico in 1980, where he attended but did not complete high school before moving to the United States in 1998. Notwithstanding his failure to seek legal resident status, Zaldivar was able to obtain a series of jobs in this country—as an agricultural laborer, a dishwasher, a roofer, a cleaning person, an assembler at a semi-trailer manufacturer, and finally, a drywaller. There was nothing in the record to suggest that Zaldivar was planning to return to Mexico or was facing any sort of deportation proceedings. To the contrary, he had hired an immigration attorney and was in the process of attempting to legalize his status.

¶3 Zaldivar had been employed by the respondent employer as a union drywaller for a number of years when he suffered the back injury at issue in this case. He earned about $26 an hour at that job, resulting in a conceded pre-injury average weekly earning capacity of just over $1,000.

¶4 The back injury caused a six percent permanent partial disability to Zaldivar's whole body, and restricted the amount Zaldivar could lift to a maximum of thirty-five pounds on occasion, or twenty pounds repetitively. Due to the lifting restrictions, LIRC found that Zaldivar would be unable to perform drywall or roofing jobs, or many of the other types of moderate-to-heavy physical work that he had performed in the past. In addition, Zaldivar's ability to perform sedentary office work would be limited by his lack of fluency in English. Zaldivar would not be eligible for government vocational retraining programs due to his

immigration status. Thus, Zaldivar most likely would be limited to seeking jobs in light-to-moderate physical labor fields, such as assembly or packaging.

STANDARD OF REVIEW

¶5 Judicial review of administrative proceedings pursuant to Chapter 227 is akin to common law certiorari review. *See* ***Williams v. Housing Auth. of Milwaukee***, 2010 WI App 14, ¶10, 323 Wis. 2d 179, 779 N.W.2d 185. We review the decision of the administrative agency rather than that of the circuit court, applying the same standards of review set forth in WIS. STAT. § 227.57 (2013-14).[1] *See* ***Currie v. DILHR***, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). We may not substitute our judgment for that of the administrative agency as to the weight or credibility of the evidence on a finding of fact. Section 227.57(6); ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). Rather, we must examine the record for "substantial evidence" that supports the agency's determination. Section 227.57(6); ***Currie***, 210 Wis. 2d at 387. The substantial evidence test requires that "'reasonable minds could arrive at the same conclusion as the agency'" based on the record before the agency. ***Kitten v. DWD***, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649 (quoted source omitted).

DISCUSSION

¶6 The dispute between the parties revolves around the factual determination of Zaldivar's future earning capacity, as needed to calculate the

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

amount of his permanent partial disability benefit. *See generally* ***Beecher v. LIRC***, 2004 WI 88, ¶¶29-30, 273 Wis. 2d 136, 682 N.W.2d 29. In calculating permanent partial disability benefits, the amount of permanent loss is calculated as a percentage of 1,000 weeks, so that "the aggregate number of weeks of indemnity shall bear such relation to 1,000 weeks as the nature of the injury bears to one causing permanent total disability." *See* WIS. STAT. § 102.44(3). In practical terms, this means LIRC must compare a claimant's potential future earning capacity to his or her pre-injury earning capacity to make a determination of the claimant's loss of earning capacity (LOEC) in percentage terms. The administrative code provides further guidance for LIRC:

> Any department determinations as to loss of earning capacity for [unscheduled injuries] shall take into account the effect of the injured employee's permanent physical and mental limitations resulting from the injury upon present and potential earnings in view of the following factors:
>
> (a) Age;
>
> (b) Education;
>
> (c) Training;
>
> (d) Previous work experience;
>
> (e) Previous earnings;
>
> (f) Present occupation and earnings;
>
> (g) Likelihood of future suitable occupational change;
>
> (h) Efforts to obtain suitable employment;
>
> (i) Willingness to make reasonable change in a residence to secure suitable employment;
>
> (j) Success of and willingness to participate in reasonable physical and vocational rehabilitation program; and
>
> (k) Other pertinent evidence.

WIS. ADMIN. CODE § DWD 80.34(1) (through May 2016).

¶7 Zaldivar's vocational expert concluded that, with the 35/20 pound lifting restriction described above, Zaldivar's future earning capacity in the local job market for entry-level janitorial, assembly, or packaging jobs would be in the range of $500 to $525 per week, which he calculated would represent a 45% to 50% LOEC.

¶8 The employer's vocational expert offered three different bases for calculating Zaldivar's future earning capacity. First, she reasoned that—because it would be illegal for any U.S. employer to hire Zaldivar while he remained undocumented—Zaldivar could be viewed as having "no earning capacity whatsoever in the United States." Second—taking into account that Zaldivar had hired an immigration attorney—the employer's vocational expert concluded that if Zaldivar was able to obtain legal resident status, his 35/20 pound lifting restriction would permit him to perform entry level machine operation, hand packaging, or stock work that would pay in the range of $520 per week, which she calculated represented a 50% to 55% reduction in Zaldivar's earning capacity. Finally—although she did not hold herself out as an expert on Mexico's job market—the employer's vocational expert suggested that Zaldivar could earn about 80 pesos (something less than $5.00 USD) a day as a cashier, sales clerk, or shoe assembler in Mexico.

¶9 LIRC determined that Zaldivar had suffered a 20% loss of earning capacity. That would correlate to average weekly earnings of about $800, or an hourly wage of about $20. LIRC further stated that it would hold the case open to allow Zaldivar to seek reconsideration if he were to obtain legal resident status.

However, we see no substantial or material evidence in the record that would support that determination.

¶10 As stated above, the highest predictions of future earnings made by the vocational experts were consistent, at $525 per week and $520 per week, with a corresponding overlap in their loss assessments at 50%. Although LIRC was not obligated to accept either of the expert's opinions, its discussion appears to have incorporated, rather than to have rejected, the experts' assessment of what Zaldivar would be able to earn in the local job market given his lifting restrictions and assuming that he could obtain employment. LIRC appears to have been relying on public policy concerns when it asserted that Zaldivar's LOEC (which the commission implicitly seems to have accepted would have been in the 50% range if Zaldivar were a permanent legal resident) must be "substantially reduced due to his current inability to legally obtain employment in the United States," and that such a reduction would be "consistent with the purpose of the" federal Immigration Reform and Control Act of 1986. However, as the joint amicus brief of the Workers' Rights Center and Voces de la Frontera points out, LIRC has not been given the authority to make such policy determinations; here, it is charged solely with calculating the difference between the claimant's pre-injury and post-injury earning capacities.

¶11 That is not to say that LIRC was necessarily precluded from taking Zaldivar's immigration status into account when assessing his future earning capacity. For instance, it was appropriate for the commission to note evidence that Zaldivar would be ineligible for vocational rehabilitative training based on his status. If an adequate record were produced, it could also be proper to consider whether Zaldivar's immigration status would hinder his ability to find work, or to

find jobs that pay as well as those available to immigrants with permanent legal resident status.

¶12 However, if the premise that Zaldivar is now unable to obtain *any* employment in the United States based on his immigration status were followed to its logical conclusion, then the job market evidence in the record that appears to have been accepted by LIRC would lead to findings that Zaldivar would have a LOEC of either (1) 100%, based upon his complete inability to access the local job market, or (2) the difference between $1,000 per week and 80 pesos a day, based on the Mexican job market. We see no evidence in the record that would support a determination that Zaldivar could earn $800 per week as an undocumented worker, but only $525 per week if he obtained legal status—which appears to be the implication of holding the case open for reconsideration in the event that Zaldivar's immigration status changes.

¶13 In sum, so far as we can see, the only rational way to view the impact of Zaldivar's lack of legal resident status upon his future earnings would be as a potential obstacle that would increase, rather than decrease, his LOEC. And, in any case, we conclude that LIRC's determination that Zaldivar had suffered only a 20% LOEC is unsupported by substantial evidence in the record. Accordingly, we reverse the order of the circuit court and remand with directions that the circuit court vacate LIRC's decision and remand the case to LIRC to reconsider the amount of Zaldivar's award. In light of our determination that LIRC's decision was not supported by substantial evidence in the record, we need not address other claims advanced by Zaldivar and the amici.

¶14 Upon remand, LIRC should make an explicit determination of Zaldivar's future earning capacity from which to calculate his LOEC. In doing so,

LIRC should clarify whether it is accepting the evidence that Zaldivar could earn about $525 in the local job market based upon his lifting restrictions and the other factors set forth in WIS. ADMIN. CODE § DWD 80.34 (through May 2016). If not, LIRC should specify the evidentiary basis in the record for its determination of Zaldivar's future earning capacity, whether in Wisconsin or in Mexico.

By the Court.—Order reversed and cause remanded with directions.

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