COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0569

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

ANITA NOVAK,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

SECURITY INSURANCE GROUP C/O EBI ORION GROUP, AND MINERAL POINT CARE CENTER,

DEFENDANTS.

APPEAL from an order of the circuit court for Iowa County: GEORGE S. CURRY, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, Deininger and Hue, JJ.[1]

¶1 PER CURIAM. The Labor and Industry Review Commission (LIRC) appeals a circuit court order that set aside its decision to reduce the amount of worker's compensation benefits awarded to Anita Novak. The circuit court concluded that LIRC's decision was improperly based on a medical report which was outdated and which neither party had asked to be followed. Because we conclude that the medical report upon which LIRC relied meets the threshold of substantial and credible evidence, we reverse the circuit court's order and remand with directions to reinstate LIRC's decision.

BACKGROUND

¶2 It is undisputed that Novak suffered a back injury on May 1, 1995, while lifting a patient in the course of her duties as a certified nursing assistant. The parties disagree, however, on the nature and extent of Novak's injury and the amount of medical expenses which can be attributed to it.

¶3 Novak was initially treated by Dr. Gordon Grieshaber on May 3, 1995. He diagnosed a lumbar strain with secondary myofascial back pain, and he prescribed medication and physical therapy. In June, Grieshaber released Novak to return to work for no more than four hours per day with lifting restrictions, and Novak assumed receptionist duties for her employer for several months. Grieshaber added fibromyalgia to Novak's diagnosis in September, as her back pain continued.

[1] Circuit Judge William F. Hue is sitting by special assignment pursuant to the Judicial Exchange Program.

¶4 In November, Dr. James G. Gmeiner examined Novak on behalf of her employer's insurer and diagnosed a soft tissue strain/sprain to the lumbar spine, accompanied by "illness behavior" and "hidden factors" which appeared to have hindered Novak's recovery. Gmeiner concluded that Novak had reached a healing plateau from the work injury by October 25, 1995, and he completed a WC-16B practitioner's report form stating that there was no permanent disability and Novak could return to work without restriction.

¶5 In December, the employer offered Novak the opportunity to return to work as a certified nursing assistant, but she declined on the basis that she could not physically tolerate the work. She began seeing a chiropractor, Dr. James Wenger, who diagnosed lumbar segmental dysfunction, low back pain, cervical segmental dysfunction, and neck pain, and recommended that she not work more than half days.

¶6 By May 1996, Wenger concluded that Novak had plateaued in her chiropractic care and referred her to Dr. Ray Purdy. Purdy diagnosed lumbrosacral pain of soft tissue origin and referred Novak to Dr. James Leonard at the UW Rehabilitation Medicine Clinic. Leonard diagnosed mechanical low back pain related to the original back strain. He believed that Novak had not yet reached an end to her healing, and could benefit from additional physical therapy. Leonard filled out a WC-16B in which he concluded that Novak had reached her healing plateau as of July 19, 1996, with three percent permanent partial disability, and said she could return to full-time work thereafter with a twenty-pound lifting restriction.

¶7 In October 1996, Novak got a job answering telephone calls for Lands' End, where she worked twenty to thirty hours per week. She took a second

part-time job in March 1997, at a convenience store where she worked some eight-hour shifts. In August 1997, the employer offered Novak a full-time position as a hospitality aide, which involved the occasional lifting of thirty pounds. Novak rejected the offer based on Wenger's four-hour-a-day limitation and lifting restrictions.

¶8 Wenger completed WC-16B forms dated March 13, 1997 and January 20, 1998. Wenger noted that Novak had been born with an extra vertebra, which made her injury more difficult to treat and placed her at higher risk for further injury. Wenger concluded that Novak was fifteen percent permanently disabled, and continued to recommend that she be restricted to half-days with lifting and movement restrictions. Grieshaber completed a WC-16B dated March 23, 1998, in which he concurred with Leonard's assessment of three percent permanent disability, but also accepted Wenger's proposed lifting restrictions and limitation to four-hour work days.

¶9 Novak's vocational expert, Veronica Butler, assessed Novak as suffering a fifty-nine to sixty-seven percent loss of earning capacity based on Wenger's restrictions, and as suffering no loss given Gmeiner's opinion. The employer's vocational expert, John Meltzer, assessed an earning capacity loss of fifty-five to sixty-five percent based on Wenger's restrictions, five to fifteen percent based on Leonard's opinion that Novak could work full-time with restricted lifting, and no loss based on Gmeiner's opinion.

¶10 The administrative law judge (ALJ) adopted Wenger's opinion that Novak was fifteen percent permanently disabled and should be restricted to four-hour working days, which the ALJ found would reduce her earning capacity by fifty percent. The ALJ ordered the insurer to pay $4,063.70 in unpaid medical

bills and to reimburse Anita for an additional $3,384.57 for medical bills which she had already paid. The ALJ reserved jurisdiction over the matter to deal with further treatment arising from the injury.

¶11 The employer appealed to LIRC, which adopted Leonard's report as the most credible medical evidence. LIRC reduced Novak's earning capacity loss from fifty percent to ten percent, reduced the medical payments and reimbursements to $2,520.80 from the $7,448.27 awarded by the ALJ, and closed the matter from future claims for additional treatment.

¶12 Novak appealed to the circuit court. She submitted a letter from Leonard in which he noted that he had no basis for disagreeing with the treatment recommended by those physicians who had examined Novak after he had completed his report. The circuit court set aside LIRC's decision on the grounds that Leonard's report was insufficient to support it. LIRC appeals the circuit court's order.

ANALYSIS

¶13 We first note that our review on certiorari is limited to the record created before the commission. *See* ***State ex rel. Whiting v. Kolb***, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). Therefore, we will not consider the letter Leonard prepared after LIRC's decision.[2] We will consider only whether:

[2] Novak argues that LIRC should have set aside its decision and reopened the matter to accept Leonard's letter as newly discovered evidence under WIS. STAT. § 102.18(4)(c) (1997-98). It appears, however, that Novak first made this motion after the circuit court had already decided the present certiorari action. Even if the motion to reopen were properly before this court, evidence is not "newly discovered" if it could have been obtained earlier with due diligence. Novak has not given any reason why she could not have obtained a clarifying letter from Leonard prior to her initial hearing.

(1) the commission stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) the evidence was such that the commission might reasonably make the order or determination in question. *See* ***id***.

¶14 WISCONSIN STAT. § 102.23(6) (1997-98)[3] permits a court to set aside an agency decision which "depends upon any material and controverted finding of fact that is not supported by credible and substantial evidence." Substantial evidence is that which is "relevant, probative, and credible, and which is in a quantum that will permit a reasonable factfinder to base a conclusion upon it." *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). We will search the record to locate evidence which supports the commission's decision, even when a factual finding is contrary to the great weight and clear preponderance of the evidence. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶15 Novak first challenges the evidence supporting the commission's decision on the grounds that Leonard's report was not properly before the commission. She points out that the report was not offered as a separate exhibit and asserts that she did not have an opportunity to cross-examine the doctor. *See* WIS. STAT. § 102.17(1)(d) and WIS. ADMIN. CODE § DWD 80.22(2). We see nothing in the cited statute or administrative rule which requires a practitioner's report to be offered separately in order to be admissible. Moreover, because Novak herself offered Leonard's report into evidence as part of her certified medical history file, without objection, the commission was never called upon to

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

decide whether or not Leonard was available. Novak has therefore waived any argument that the report was inadmissible. Because the doctor's report was certified as a medical record and properly offered and received into evidence, the commission could properly consider it.

¶16 Novak next claims that Leonard's report did not rise to the level of substantial and credible evidence. She argues that the report was remote in time, of an interim nature, and discredited by other fully established facts. The fact that the report was nearly two years old does not make it incredible as a matter of law, however. *See* ***Bourassa v. Gateway Erectors, Inc.***, 54 Wis. 2d 176, 184, 194 N.W.2d 602 (1972) (reviewing a five-year-old report). Novak's injury itself had occurred nearly three years prior to the hearing. We see nothing "interim" about Leonard's conclusion that Novak had reached a healing plateau over a year after the incident. Leonard specifically commented that Novak was likely to continue to experience some back pain, but believed that any future medical treatment would not be assessable to the work injury. The fact that some other doctors later offered contradictory opinions does not make the contrary opinions "established facts."

¶17 It is the exclusive function of the commission to weigh the medical evidence and reconcile inconsistencies. *See* ***Manitowoc County v. DILHR***, 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979). In any event, Leonard's opinion that Novak was only three percent disabled and could resume working full time was also supported by Grieshaber's opinion that Novak was only three percent disabled, Gmeiner's opinion that Novak could resume working full time, and the fact that Novak had, in fact, resumed working a number of eight-hour shifts. We are satisfied that Leonard's report constituted substantial and credible evidence

supporting the commission's determination. We reverse the order of the circuit court and direct it to enter an order affirming LIRC's decision.

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.