

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 20, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2007AP2082

Cir. Ct. No. 2006CV12128

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**JOURNAL SENTINEL, INC. AND ZURICH AMERICAN INSURANCE
COMPANY,**

PLAINTIFFS-APPELLANTS,

v.

**MICHAEL J. WAGNER AND WISCONSIN STATE LABOR AND INDUSTRY
REVIEW COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Affirmed.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 WEDEMEYER, J. The Journal Sentinel, Inc. and Zurich American Insurance Company appeal from an order of the circuit court affirming an order of

the Labor and Industry Review Commission (LIRC), which ruled that there was credible and substantial evidence to affirm the Administrative Law Judge's (ALJ) finding that Michael J. Wagner's knees and hip injuries were work-related and therefore compensable under Wisconsin's worker's compensation laws. The Journal Sentinel asserts that because the physicians' opinions were based on an inaccurate fact as to the number of steps Wagner had to use each shift he worked, there is no credible evidence to support the findings that Wagner's injuries were work-related, that we must find the treating physicians' opinions in that regard to be incredible and that LIRC therefore exceeded its power in affirming the ALJ's determination. Because LIRC did not exceed its power and because there is sufficient credible evidence in the record to uphold the findings of the ALJ, we affirm the order of the circuit court.

BACKGROUND

¶2 This is a worker's compensation case in which the worker, Wagner, based on the opinions of his treating physicians, sought worker's compensation benefits as a result of injuries to his knees and hips. Wagner began working at the Journal Sentinel in 1966, working mostly night shift as a journeyman pressman. He spent the majority of his career working in the "old pressroom" on State Street in Milwaukee. This pressroom had only three levels and although there were some stairs to climb, it was equipped with several man lifts, which greatly reduced the number of stairs a pressman had to climb in any particular shift. At most, Wagner climbed fifty to one hundred stairs in a shift. Wagner testified that he had minor episodes of discomfort in his knees during the time he worked at the State Street location, but he was never on any medication, nor did the discomfort prevent him from working.

¶3 In 2002-03, the Journal Sentinel built a new pressroom on Burnham Street, which contained three new computer operated presses that are five stories high. The new pressroom has eight flights of stairs and ninety-two steps from the bottom to the top level. It also had a metal spiral staircase, which had nineteen steps. The Journal Sentinel did not install any man lifts at the new facility. Workers were required to be trained to do all the jobs at the new pressroom. The job description of the pressroom press operator states that an employee must “be able to climb ladders and staircases repeatedly so as to work at high levels.”

¶4 In March 2003, Wagner was moved to the new pressroom on Burnham Street. Wagner testified that the metal spiral staircase was “brutally hard” to navigate. These nineteen steps went down to the “pit” where two work areas were located—the “roll prep” and “reel room” areas. Wagner’s “guesstimate” was that “on an average” he would go up 2000 and 3000 steps a shift. Wagner worked with a crew of five and everyone was required to run the stairs. Thus, if he worked in the “reel room” position, he would have to run up and down the stairs to disburse skins, metal printing plates, and web leads. Wagner testified that he was second in seniority, so he could chose the one position that offered less stair climbing than the others—the roll prep area position. He testified, however, that he was only allowed to choose this one position about 25% of the time.

¶5 In December 2003, Wagner began to experience great discomfort in his knees and then months later in his hips. He testified that the pain was “very, very much more painful” than the minor discomfort he had felt occasionally at the State Street location. The pain was “excruciating, especially when climbing stairs.” The pain was worst at the end of his shift. The pain continued to increase and in March 2004, Wagner sought medical treatment. He went to his primary

doctor, Dr. G.D. Stula. Tests were conducted and Dr. Stula opined that Wagner's injuries were work-related. He was referred to Dr. Donald Middleton, an orthopaedic surgeon. Dr. Middleton found avascular necrosis of both hips, including the hip, which had not been injured in a motor vehicle accident Wagner had in 1962. The doctor stated that the necrosis was not typical. Dr. Middleton also believed the injuries to be work-related and recommended bilateral knee surgery. Wagner underwent surgery on his left knee on December 9, 2004, after recovering from which, Wagner was released to return to work with restrictions of no kneeling, stair climbing, or squatting and a limit of a four-hour work day.

¶6 The Journal Sentinel did not accommodate the work restrictions and Wagner never returned to work. The Journal Sentinel policy was to terminate any employee who does not return to work within one year from the start of the worker's short-term disability. Accordingly, Wagner was terminated. He filed a claim seeking worker's compensation.

¶7 Prior to the hearing, Wagner was examined by Dr. Sean Keane, on behalf of the Journal Sentinel. Dr. Keane opined that no matter how many stairs Wagner climbed, his hip and knee injuries were not in any way work-related to repetitive stair climbing. Dr. Keane believed the condition was due to normal aging and the consumption of alcohol.

¶8 A hearing was conducted on the claim on March 10, 2005. The ALJ Leonard Martin reached the following findings of fact and conclusions of law:

Applicant indicates that although the job was physically strenuous, requiring lots of lifting, standing, reaching, stooping, bending and ladder use, he remained generally symptom free in his knees and hips until around December of 2003, when he began to experience pain in his hips and knees.

The development of knee and hip pain in 12/03 occurred several months after his work location moved from a facility with 3 levels to a facility 5 stories high containing 8 levels. Applicant moved to the new facility in March of 2003. The prior building reportedly had stairs, but he did not have to use them much because the facility had “man lifts.” The new facility did not have lifts, and he was not allowed to use the elevator. During and after 12/03, applicant’s knee and hip symptoms gradually worsened, and on or around 3/22/04 applicant called his supervisor and told him that he would not be in to work, but was instead going to seek medical treatment....

In a 2/16/05 report Dr. G.D. Stula opines that applicant’s hip and knee pain was directly caused by his work activity climbing stairs, and that the work exposure was either the sole cause or at least a material contributory causative factor in the onset or progression of applicant’s condition. In another report of that same date, Dr. Donald Middleton also opines that applicant’s work exposure was either the sole cause or at least a material contributory causative factor in the onset or progression of applicant’s condition.

¶9 ALJ Martin found Dr. Keane’s assessment to be less credible than that of Dr. Middleton, and ruled that the injury was work-related. The Journal Sentinel appealed to LIRC. LIRC reviewed the evidence and proceeded to adopt the ALJ’s findings and order as its own. LIRC noted:

The evidence did not indicate the applicant had any ongoing knee or hips problems, prior to the move to the new facility in March 2003. The applicant credibly testified that once the employer moved to the new facility in March 2003, he no longer had access to man lifts to alleviate the need to climb multiple stairs. The evidence indicates the applicant would have to climb seven or eight flights of stairs at the new facility on a frequent basis amounting to a total of 93 steps from the bottom to the top of the presses. The applicant testified that it was hard to go up and down the spiral staircase, which was one flight of steps below the pressroom. The applicant estimated he would climb 2000 to 3000 stairs in any given shift, and there were no elevators or man lifts available to alleviate the repetitive stair climbing in the pressroom. The applicant worked for the employer as a pressman for 38 years prior to the onset of his hip and knee problems. The

applicant credibly testified that his job was physically demanding and required lifting, standing, reaching, stooping and ladder use, but particularly stair climbing towards the end of his career.

The applicant's testimony of the amount of repetitive and frequent stair climbing required in his work was consistent and credible. The commission did not credit Dr. Keane's statement that the applicant's stair climbing would actually benefit the applicant's knees and hips. The evidence indicates the applicant had a prior injury in 1962, and a need for surgery with an insertion of a pin in his right hip and leg. The applicant had a preexisting degenerative condition, however he also testified that his work was strenuous and involved a lot of standing on his feet throughout the workday, and required some lifting up to over 100 pounds at times. In addition, the applicant's work at the new facility required extensive stair climbing. The applicant credibly testified to the onset and worsening of his knee and hip pain, as a result of the frequent climbing at work. The applicant often would have difficulty walking to his car after a strenuous work shift with stair climbing.

¶10 LIRC found substantial and credible evidence to uphold the ALJ's findings that Wagner suffered a work-related injury to his knees and hips. The Journal Sentinel then appealed LIRC's decision to the circuit court. The circuit court affirmed the decision of LIRC. The Journal Sentinel now appeals from that order to this court.

ANALYSIS

¶11 We review the decisions of the administrative agency, not those of the trial court. *WPSC v. Public Serv. Comm'n*, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). An agency's findings of fact are conclusive on appeal if they are supported by credible and substantial evidence. WIS. STAT. § 102.23(6) (2005-06)¹. Credible evidence is that evidence which excludes

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

speculation or conjecture. *Bumpas v. DILHR*, 95 Wis. 2d 334, 343-44, 290 N.W.2d 504 (1980). Evidence is substantial if a reasonable person relying on the evidence might make the same decision. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). Because we conclude that the agency's findings of fact in this case are supported by credible and substantial evidence in the record, we are bound by them.

¶12 The Journal Sentinel emphasizes the point that Wagner was not required to ascend between 2000 and 3000 steps *every* shift. It is on this basis they argue that the evidence does not support the findings and that the expert witnesses' opinions that the injury was work-related should be set aside. We are not convinced.

¶13 There is credible evidence to support LIRC's findings that Wagner's injuries were work-related:

(1) Wagner credibly testified that before working at the Journal Sentinel, he had no symptoms of knee or hip problems except for injuries from a 1962 motor vehicle accident, from which he fully recovered before being hired by the Journal Sentinel;

(2) Before moving to the new pressroom, Wagner had only minor episodes of knee pain during his many years of service to the Journal Sentinel;

(3) Wagner never needed treatment on his left knee or hip after the initial treatment following the 1962 motor vehicle accident and was fully recovered before beginning work for the Journal Sentinel;

(4) Wagner testified that every position except the “roll prep” area required repetitive stair climbing of 2000 to 3000 steps per shift, and that he was only able to choose the “roll prep” position 25% of the time;

(5) The workers were all required to learn every position and assist in those positions if they finished their job early;

(6) Even when Wagner worked the “roll prep” position, he still had to ascend and descend the circular staircase several times a shift;

(7) Wagner began experiencing pain in both knees simultaneously in December 2003;

(8) The pain worsened over time and traveled to both hips simultaneously, and was worst at the end of the shift, making it painful to walk to his car; and

(9) Both of Wagner’s treating physicians credibly opined that the work-related repetitive stair climbing was a material contributory causative factor in the onset or progression of his knee and hip conditions. *See Universal Foundry Co. v. DILHR*, 82 Wis. 2d 479, 487 n.5, 263 N.W.2d 172 (1978).

¶14 The Journal Sentinel points to evidence that contradicts or confuses some of the testimony above. Our job, however, is not to ferret out evidence contrary to LIRC’s determination, but to see if the record contains any substantial and credible evidence to support LIRC’s determination.

¶15 Further, although we are reviewing LIRC’s decision and not that of the trial court, we borrow liberally from the trial court’s analysis and adopt parts of it as our own. The trial court noted that “it was the Commission’s responsibility to resolve the issues of fact based on the record before it.” Both sides in this case

had the opportunity at the hearing to clarify any confusion about the number of stairs actually climbed by Wagner and to call the treating physicians to testify to explain the statements in the various reports. The trial court held that “the question upon judicial review is not whether the commission *could have found* a legitimate doubt, but whether the evidence was such that the Commission *was required to find* a legitimate doubt.”

¶16 We agree with the trial court’s statement that although containing some contradictory statements regarding the number of steps, the record “does not come close to demonstrating the kind of clear misinformation that would allow [the court] to find that the medical opinions were *so discredited that they must be disregarded as a matter of law.*” Further, there is no evidence that Wagner was attempting to exaggerate or mislead his physicians when reporting his stair usage, nor is there any suggestion that a more “accurate” estimate would have altered the treating physicians’ opinions as to the cause of Wagner’s injuries. As the trial court observed, the treating doctors:

were obviously working with a very general and imprecise estimate. In a report dated July 7, 2004, Dr. Stula noted that Wagner “has a job that entails *going up quite a few stairs.*” In a report dated November 29, 2004, he noted that Wagner “walks up and down stairs on concrete *quite a bit.*”

The trial court reasoned that:

What was important was that Wagner claimed to have considerable knee and hip pain shortly after his work changed to involve lots of stair climbing. The general sense of the doctors reports—as well as common sense—indicate that it was not material whether he climbed 2000 stairs every day or only three out of four days, or whether the actual daily average might have been something less than 2000.

¶17 We agree with this analysis. The record contains sufficient substantial credible evidence to support the findings that Wagner's knee and hip injuries were work-related due to the fact that the repetitive stair climbing required on the job was a material contributory causative factor in the injury. Accordingly, we affirm the findings of LIRC.

¶18 We also reject the Journal Sentinel's argument that LIRC exceeded its powers by looking outside the totality of the record in reaching its decision, namely LIRC's reference to Wagner's overall work history and work activities. The record included evidence of Wagner's overall work history, by means of Wagner's own testimony and the medical reports from his physicians. Accordingly, it was permissible for LIRC to refer to the work history and make reasonable inferences therefrom.

¶19 Finally, the Journal Sentinel asserts that the record does not contain evidence to support injury to Wagner's hips. The Journal Sentinel contends that the right hip problem came from the 1962 auto accident and there was no evidence of any injury in the left hip. Such argument is without merit. Although much of the testimony focused on the knees, there is clearly sufficient credible evidence relating to both the left and right hip being injured due to repetitive stair climbing. This evidence is found both in Wagner's testimony and his medical records. When the medical records are taken as a whole and viewed in light of Wagner's complaints of pain in both hips, the clear inference is that the doctors concluded that there was an injury to both knees and both hips and that these injuries were work-related.

Based on the foregoing, we affirm the decision of LIRC.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

