

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2009

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP103

Cir. Ct. No. 2007CV293

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

AURORA MEDICAL CENTER AND SENTRY INSURANCE, A MUTUAL COMPANY,

PLAINTIFFS-APPELLANTS,

v.

**THE STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION AND
CURTIS G. THOMS,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Manitowoc County:
JEROME L. FOX, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Aurora Medical Center and Sentry Insurance, a Mutual Company (collectively Aurora), appeal from the order of the circuit court affirming the order of the Labor and Industry Review Commission (LIRC)

awarding compensation to Curtis G. Thoms for a work-related injury. Aurora argues that there was no credible evidence to support LIRC's finding that this was a work-related injury and not a preexisting condition, and that LIRC improperly placed the burden of proof on it. Because we conclude that there was sufficient evidence to sustain LIRC's findings and conclusions, and that LIRC did not place the burden of proof on the employer, we affirm.

¶2 Thoms claimed to have been injured on December 28, 2004, while he was working as a CT scan technician at Aurora Medical Center. He claimed that he injured his back when he and two co-workers moved a heavy patient from a gurney onto a CT scan table. Shortly after being injured, Thoms was examined by Dr. Max Ots. Dr. Ots concluded that while Thoms had preexisting degenerative changes, the work incident had aggravated the condition. Ots performed surgery on Thoms in February 2005. Thoms was also examined by a physician on behalf of the employer in September 2005.

¶3 In 2006, the Department of Workforce Development held a hearing on Thoms' claim for worker's compensation. The ALJ found that Thoms sustained a compensable permanent partial disability as a result of an injury on December 28, 2004. The ALJ further found that while Thoms had a preexisting condition, doctors opined that the work-related incident was sufficient to aggravate the condition. The ALJ ordered Aurora to pay Thoms worker compensation benefits. Aurora appealed to LIRC, and LIRC also found that while Thoms had a preexisting condition, the work-related incident was sufficient to aggravate, accelerate, and precipitate that condition beyond normal progression. It therefore affirmed the ALJ's decision. Aurora then appealed to the circuit court, and it also affirmed LIRC's decision. Aurora now appeals to this court.

¶4 Our review is of LIRC’s decision, not the decision of the circuit court. See *Wisconsin Dept. of 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 so long as 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) (2007-08).¹ 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 (Ct. App. 1989); § 102.23(6).

¶5 Aurora argues that LIRC’s findings of fact are not supported by credible evidence. Specifically, Aurora argues that there was no evidence in the record that Thoms told the treating doctor that he had a preexisting condition, nor any evidence that the injury actually occurred on December 28, 2004. Aurora asserts that Thoms lied at the hearing about the fact that, before the injury, he had made and canceled two appointments with a neurologist, which were made because he had neck pain, right arm weakness, and tingling. Aurora also argues that Thoms incorrectly stated both the date on which he was injured and the date on which he made an appointment to see Dr. Ots. Aurora suggests, therefore, that the court should conclude that all of Thoms’ testimony was false.

¶6 As LIRC noted in its decision, the key issue in this case is one of credibility. LIRC concluded that, even assuming Thoms “was suffering from symptoms of right extremity numbness and tingling prior to the work incident, this

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

fact does not defeat [his] claim.” LIRC found that both of the doctors who examined Thoms concluded that the work incident was sufficient to aggravate his condition. The evidence supports LIRC’s finding, and we will not disturb it.

¶7 Aurora also argues that there was no evidence that Thoms actually suffered this injury on the date he said he did. LIRC, however, found that Thoms had testified that he had been injured on this date, and the doctor’s report verified that he had been treated for the injury shortly thereafter. LIRC further noted that the ALJ was the arbiter of credibility, and there was nothing in the record to warrant overturning the determination that the incident occurred.

¶8 We conclude that LIRC’s findings of fact are supported by credible and substantial evidence, and we will not substitute our judgment for LIRC’s. The ALJ found Thoms to be a credible witness, and we agree with LIRC that nothing in the record warrants overturning the ALJ’s credibility determination.

¶9 Aurora further argues that the ALJ unfairly shifted the burden of proof to the employer. In support of this argument, Aurora points to the statement of the ALJ that he assumed Aurora had interviewed two of Thoms’ co-workers who were working with him on the day of the incident, but that the employer had not called those witnesses to testify that the incident did not occur. Aurora argues that this shifted the burden of proof on the fact that the incident occurred to it. We disagree.

¶10 In making that statement, the ALJ was noting that there were witnesses who potentially could have refuted Thoms’ testimony. The implication being that if the witnesses could have refuted Thoms’ testimony, then Aurora would have called them. The ALJ did not shift the burden to Aurora. Rather, the

ALJ concluded that Thoms had met his burden of proof, and that Aurora had not offered potentially relevant testimony to refute his evidence.

¶11 In sum, we conclude that there was sufficient evidence in the record to support the credibility determination made by the ALJ. We also conclude that the ALJ did not shift the burden of proof, but rather found that Thoms had met his burden of proof. For the reasons stated, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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

