COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1181 **Cir. Ct. No. 2008CV3399**

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

DEBORA A. CHARTIER,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

JC PENNEY CORPORATION, INC. AND ILLINOIS NATIONAL INSURANCE CO.,

DEFENDANTS-CO-APPELLANTS.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Snyder, JJ.

¶1 ANDERSON, J. The Labor and Industry Review Commission (LIRC), JC Penney Corporation, Inc. and Illinois National Insurance Company appeal from an order of the circuit court reversing LIRC's decision that Debora A. Chartier sustained a sixty-five percent loss of earning capacity as a result of a work-related injury. Because LIRC's decision is not supported by credible and substantial evidence, we affirm.

¶2 *Standard of Review*: In deciding an appeal from a circuit court's order affirming or reversing an administrative agency's decision, we review the decision of the agency, not that of the circuit court. ***Mineral Point Unified Sch. Dist. v. WERC***, 2002 WI App 48, ¶12, 251 Wis. 2d 325, 641 N.W.2d 701. LIRC's findings are conclusive if supported by credible and substantial evidence in the record. *See* WIS. STAT. § 102.23(6) (2007-08);[1] ***General Cas. Co. of Wis. v. LIRC***, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991). Our review of an agency's factual finding is highly deferential:

> If the agency's action depends on any fact found by the agency in a contested case proceeding, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. *The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.*

WIS. STAT. § 227.57(6) (emphasis added). Further, "[t]he court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award *depends on any material and controverted finding of fact that is not supported by credible and substantial evidence*." *See*

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

§ 102.23(6) (emphasis added). "Substantial evidence" is that quantum of relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and we will only set aside an agency's decision where, "upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences." ***Wal-Mart Stores, Inc. v. LIRC***, 2000 WI App 272, ¶10, 240 Wis. 2d 209, 621 N.W.2d 633 (citation omitted). When medical reports conflict, LIRC is the sole judge of the weight and credibility of the medical witnesses. *See* ***Conradt v. Mt. Carmel Sch.***, 197 Wis. 2d 60, 68, 539 N.W.2d 713 (Ct. App. 1995).

¶3 *Facts*: Chartier was born December 28, 1953. In 1974, she began working as an in-home decorator consultant for JC Penney Corporation, where she remained for the next thirty years until she sustained a low-back, work-related injury on March 24, 2004.

¶4 Chartier was examined by Dr. Joseph Cusick, a neurosurgeon at the Medical College of Wisconsin, on June 11, 2004. Dr. Cusick recommended a nonsurgical approach, "explain[ing] to [Chartier]" that he "did not appreciate any surgical lesions that would be amenable to intervention and that would result in a decent expectation for relief of her present symptoms."

¶5 Thereafter, on September 13, 2004, Chartier filed an application for worker's compensation. On June 1, 2005, Dr. N.M. Reddy, a rehabilitation and disability specialist, examined Chartier and wrote his evaluation that same day. Dr. Reddy assessed Chartier as having a "permanent disability"; he filled out a detailed "Medical Opinion—Residual Functional Capacity" (RFC) form in this regard. Among others, this RFC form contains the following question:

> Please circle the hours and/or minutes that your patient can *continuously* sit and stand *at one time*? Circle the maximum duration. (Emphasis added.)

For both sitting and standing, Dr. Reddy circled "30" minutes. The form also asks the physician to

> [p]lease indicate how long your patient can sit and stand/walk *total in an eight hour work day* (with normal breaks).

For both sitting and standing/walking tolerance, Dr. Reddy checked the lowest time category, i.e., "less than two hours" total in an eight hour work day (with normal breaks). On the last page of the form, after giving his evaluation, including Chartier's restrictions, Dr. Reddy handwrote: "[Chartier] is unable to perform competitive work with the above restrictions."

¶6 Based on his June 1, 2005 examination of Chartier, Dr. Reddy dictated his "Independent Medical Evaluation" on June 7, 2005.[2] In Dr. Reddy's June 7 dictation, he stated:

> It is my opinion that [Chartier] should avoid any significantly repetitive bending, stooping and twisting movements of the trunk. She should be restricted to activities of lifting no more than 20lbs or carrying no more than 15lbs at a time. *Sitting and standing tolerance are limited* and she should have significant flexibility to sit and stand as tolerated with *no more than ½ hour of sitting or standing in one position*. Prolonged driving should also be avoided. Such tasks should be limited to about ½ hour at a time. (Emphasis added.)

Dr. Reddy then stated, "Given these restrictions, it is my opinion that [Chartier] is not able to return to competitive work as an interior decorator." Then, referring

[2] The heading of the hard copy of Dr. Reddy's dictation provides the "DATE OF EVALUATION" as "06/01/2005," and the "DATE OF DICTATION" as "06/07/2005."

back to his June 1 documentation of his evaluation, he stated, "I did complete the medical opinion-residual functional capacity form in this regard."

¶7 On August 1, 2005, and on January 3, 2006, Chartier's worker's compensation hearing was held before a department of workforce development worker's compensation division administrative law judge (ALJ). On February 23, 2006, the ALJ issued a decision in Chartier's favor. Temporary disability and functional permanent partial disability were awarded. JC Penney petitioned LIRC to review that decision.

¶8 On December 8, 2006, LIRC issued an interlocutory order in which it affirmed the ultimate findings of the ALJ but substituted its decision for the ALJ's February 23, 2006 decision. LIRC's decision "agreed with the [ALJ] that Dr. Reddy's [Chartier's medical expert's] physical restrictions were more accurate than those given by Dr. [Richard] Lemon," the medical expert for the defense. "[H]owever," the decision continued, "[Chartier's] back condition is nonsurgical, and she indicated in her testimony that her condition had improved. Accordingly, Dr. Reddy's assessment of 15 percent permanent partial disability will be reduced to 10 percent."

¶9 Subsequently, on October 15, 2007, a hearing was conducted before an ALJ for a determination of Chartier's loss of earning capacity claim.

¶10 At this hearing, both Chartier and JC Penney submitted evidence as to the impact the work restrictions have on Chartier's ability to work. Chartier submitted the vocational expert report of Ronald Raketti. In his report, Raketti concluded that "there are no substantial or reasonable types of employment available to [Chartier] within the sedentary or light categories of work and therefore, [Chartier] is 100% vocationally disabled."

¶11 JC Penney submitted the vocational expert report of Michael Campbell. In his report, Campbell noted:

> Dr. Reddy provides an FCE form dated 6/01/05 and a narrative report of 6/07/05. There are some differences between the two documents with respect to Ms. Chartier's physical tolerances.
>
> On the 6/01/05 form, Dr. Reddy indicates Ms. Chartier … "is unable to perform competitive work.…"
>
> In his narrative report [Dr. Reddy] … also makes a comment on [Chartier's] ability to work, but it is put in these terms: "[Ms. Chartier] is not able to return to competitive work as an *interior decorator*" (emphasis added).

Campbell made two contradictory conclusions, explaining each conclusion was made based on his focus on first one and then the other report:

> 1. If we focus solely on the 6/01/05 form filled out by Dr. Reddy, Ms. Chartier would not have any residual earning capacity.
>
> 2. If we turn to the comments Dr. Reddy makes in his 6/07/05 narrative report, Ms. Chartier would have reliable employment options … [with a] loss of 55% to 65% [earning capacity].

¶12 On January 8, 2008, the ALJ issued a decision. The ALJ did not find that Chartier was incapable of working, instead finding that she sustained a sixty-five percent loss of earning capacity. The ALJ discounted the work restrictions reported by Dr. Reddy on the functional capacity form, giving the following rationale:

> Given that [Chartier] has not had surgery and that the June 7, 2005 report is a follow-up opinion, the undersigned finds that the June 7, 2005 report better reflects the applicant's restrictions. In particular, that opinion does not prohibit any type of work; rather, it only prohibits further work as an interior decorator.

¶13 On January 28, 2008, Chartier petitioned LIRC for review of the ALJ's findings and order.[3] On August 28, 2008, LIRC issued its decision affirming the ALJ's decision. Finding that Dr. Reddy gave a "second set of restrictions" in his narrative report, LIRC upheld the ALJ's finding of a sixty-five percent loss of earning capacity. Explaining its decision, LIRC stated:

> The commission concludes the ALJ properly rated permanent partial disability at 65 percent compared to total loss of earning capacity. In its December 2006 decision on causation, the commission adopted the set of restrictions in [Dr. Reddy's] June 7 typewritten report upon which Mr. Campbell [JC Penney's vocational expert] based his estimate of loss of earning capacity at 65 percent. While the applicant has disc herniations at three levels as a result of a compensable injury, she has not undergone surgery. In the commission's prior decision, it awarded permanent partial disability on a functional basis at 10 percent, rather than the 15 percent that Dr. Reddy awarded, based in part on symptomatic improvement. On this basis, Mr. Campbell reasonably opined that Dr. Reddy's second set of restrictions also allow for light or sedentary duty work.

Citing ***Beecher v. LIRC***, 2004 WI 88, ¶54, 273 Wis. 2d 136, 682 N.W.2d 29,[4] LIRC went on to explain:

---

[3] WISCONSIN STAT. § 102.18(3) provides in pertinent part:

> A party in interest may petition the commission for review of an examiner's decision awarding or denying compensation …. The commission shall either affirm, reverse, set aside or modify the findings or order in whole or in part, or direct the taking of additional evidence. This action shall be based on a review of the evidence submitted.

[4] LIRC quoted the following from ***Beecher v. LIRC***, 2004 WI 88, ¶54, 273 Wis. 2d 136, 682 N.W.2d 29:

(continued)

> Given Dr. Reddy's second set of restrictions, the commission concludes that the applicant has not "brought forward the basic facts sufficient to satisfy the [commission] that a *prima facie* odd-lot case has been made," and that by offering Mr. Campbell's report, "[t]he employer introduce[d] expert evidence in contradiction of the basic facts of the employee's prima facie case in order to prevent the presumption [of permanent total disability] from arising."

¶14 On September 25, 2008, Chartier filed a summons and complaint in the circuit court, seeking judicial review of LIRC's decision.[5] The circuit court

---

> ***Balczewski*** [***v. DILHR***, 76 Wis. 2d 487, 251 N.W.2d 794 (1977),] holds that certain basic facts—the claimant's injury, age, education, capacity, and training—may in combination demonstrate an inability to secure continuing, gainful employment such that these basic facts constitute prima facie evidence of another (presumed) fact, namely that the claimant is permanently and totally incapable of earning a living. Ordinarily this is accomplished through expert testimony. The employer may introduce expert evidence in contradiction of the basic facts of the employee's prima facie case in order to prevent the presumption from arising. Under ***Balczewski***, however, if the claimant brings forward the basic facts sufficient to satisfy the DWD that a prima facie odd-lot case has been made, the presumption is triggered and an obligation is imposed upon the party against whom the presumption runs—here, the employer.

Notably, LIRC left out the part of the paragraph from ***Beecher*** in which our supreme court explains that the employer's obligation is the burden of proving "that it is more probable that the claimant is *not* permanently and totally incapable of earning a living.... [And] this burden requires the employer to show that there is an actual job that the claimant can do." ***Beecher***, 273 Wis. 2d 136, ¶54.

[5] WISCONSIN STAT. § 102.23(1)(a) states in pertinent part:

(continued)

reversed and remanded LIRC's order, finding that LIRC acted in excess of its powers and that LIRC's findings are not supported by substantial and credible facts on the record. LIRC, JC Penney Corporation, Inc. and Illinois National Insurance Company appeal.

¶15 LIRC's findings are not supported by credible and substantial evidence in the record. *See* WIS. STAT. § 102.23(6); *see also* ***General Cas. Co.***, 165 Wis. 2d at 178. Upon an examination of the entire record, the evidence, including the inferences therefrom, is such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences. *See* ***Wal-Mart Stores, Inc.***, 240 Wis. 2d 209, ¶10. In short, the evidence LIRC relied upon is not evidence "upon which reasonable persons could rely to reach" the conclusion LIRC reached. *See* § 102.23(6); ***Sills v. Walworth County Land Mgmt. Comm.***, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878.

¶16 First, LIRC's finding that Dr. Reddy gave a "second set of restrictions" is not sound. It is, in fact, tantamount to a finding that the *same*

> The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02. Within 30 days after the date of an order or award made by the commission either originally or after the filing of a petition for review with the department under s. 102.18 any party aggrieved thereby may by serving a complaint as provided in par. (b) and filing the summons and complaint with the clerk of the circuit court commence, in circuit court, an action against the commission for the review of the order or award, in which action the adverse party shall also be made a defendant.

doctor who saw Chartier on but *one* occasion gave her *two* separate sets of *permanent* work restrictions. This defies reason. Yet it is clear that LIRC based its decision in large part on this incredible rationale. By way of explanation, LIRC's decision states it "adopted the set of restrictions in [Dr. Reddy's] June 7 typewritten report upon which Mr. Campbell [JC Penney's vocational expert] based his estimate of loss of earning capacity at 65 percent."

¶17 Campbell focused "solely" on first one and then the other of Dr. Reddy's reports and came up with two contradicting conclusions. LIRC then adopted Campbell's conclusion based on but one of Dr. Reddy's reports and determined, without reason, that it superseded or invalidated Dr. Reddy's original report. To conclude Dr. Reddy, without basis, changed his mind as to Chartier's disability in the six intervening days between his day-of-exam report and his dictation report is absurd. Dr. Reddy's only examination of Chartier was on June 1. Dr. Reddy, in his June 7 dictation, refers back to his June 1 report. This indicates that Dr. Reddy intended these reports be read as one evaluation.

¶18 Moreover, even if Dr. Reddy had not himself flagged that these reports were meant to be read as one, it is without reason to conclude otherwise. The evidence shows that the June 7 document is Dr. Reddy's narrative (i.e., his dictation of the June 1 examination), and the June 1 document is the form that Dr. Reddy filled out on the day of Chartier's exam. The June 7 report does not reflect a change in Dr. Reddy's evaluation; it is simply an elucidation of his earlier report. In his June 1 day-of-exam report, Dr. Reddy indicates that Chartier's ability to continuously sit and stand at one time is thirty minutes. In this report he also indicates that Chartier's ability to sit, stand and walk "*total in an eight hour work day* (with normal breaks)" is "less than two hours." Then, in his June 7 dictation report, Dr. Reddy restates his earlier assessment of Chartier's ability, explaining

that her "sitting and standing tolerance are limited and [that] she should have significant flexibility to sit and stand as tolerated with no more than ½ hour of sitting or standing in one position." Dr. Reddy's June 7 report is not inconsistent with his June 1 report. To read Dr. Reddy's two reports as inconsistent lacks reason.

¶19 We reject Campbell's unfounded vacuum approach to assessing Dr. Reddy's two reports. There is no evidence in the record to support Campbell's decision to assess Dr. Reddy's day-of-exam report independently from Dr. Reddy's dictation of the same exam. The uncontroverted evidence, discussed above, shows that these reports are meant to be one assessment. Campbell's irrational vacuum approach to assessing Dr. Reddy's reports, along with Campbell's resulting contradictory conclusions, do not qualify as substantial and credible evidence upon which LIRC could rest its findings. As a result, there is no substantial and credible evidence to support LIRC's finding that Dr. Reddy's reports are separate reports stating different evaluations and conclusions.

¶20 Second, LIRC's decision is unreasonable because, like its reliance on Campbell's assessment that Dr. Reddy's reports are separate reports stating different evaluations and conclusions, its reliance on the fact that Chartier did not have surgery for its decision that she sustained only a sixty-five percent loss of earning capacity is not founded in substantial and credible evidence. LIRC seems to reason that surgery was a prerequisite to a finding of permanent total disability: "While the applicant has disc herniations at three levels as the result of a compensable injury, she has not undergone surgery." Yet, this reasoning flies in the face of the evidence. The surgeon who examined Chartier *specifically* did *not* recommend surgery, explaining he did not believe surgery "would result in a decent expectation for relief of her present symptoms." Chartier took her

surgeon's advice and did not undergo surgery. We fail to see how taking the advice of one's surgeon disqualifies Chartier from a finding that she has permanent total disability.

¶21 Neither Campbell's alteration of Dr. Reddy's medical evaluation nor LIRC's insinuation that surgery is a prerequisite to a finding of permanent total disability is substantial and credible evidence "upon which reasonable persons could rely to reach" the conclusion LIRC reached. *See* WIS. STAT. § 102.23(6); ***Sills***, 254 Wis. 2d 538, ¶11.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.