COURT OF APPEALS
DECISION
DATED AND RELEASED

July 10, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3066

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

FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT and SIMPLICITY MANUFACTURING COMPANY, INC.,

Plaintiffs-Respondents,

v.

RONALD J. BRUENDL,

Defendant-Appellant,

LABOR AND INDUSTRY REVIEW COMMISSION and ASSOCIATED INDEMNITY CORPORATION,

Defendants-Co-Appellants,

TRANSPORTATION INSURANCE COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Modified and, as modified, affirmed.*

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

PER CURIAM. Ronald J. Bruendl, Associated Indemnity Corporation and the Labor and Industry Review Commission appeal from a judgment reversing LIRC's determination that Bruendl suffered a compensable work injury in 1991 while employed at Simplicity Manufacturing Company, Inc. The critical issue is whether Bruendl's employment duties between September 18, 1991, and November 6, 1991, aggravated or accelerated back problems which originated with a 1984 work injury so that a new injury occurred. We affirm the circuit court's determination that LIRC failed to determine whether Bruendl had recovered from the 1984 injury. However, because LIRC and not the circuit court must make that determination, we modify the circuit court's remand and direct LIRC to make the necessary finding.

In 1984 during employment with Simplicity, Bruendl suffered an injury to his back. In the subsequent years, Bruendl experienced intermittent periods of temporary partial and temporary total disability. A 10% permanent partial disability was attributed to the 1984 injury. Associated Indemnity Corporation was the insurance provider at the time of the 1984 injury.

Upon return to work on September 18, 1991, after elbow surgery, Bruendl performed duties which involved bending, twisting and turning. He began to experience chronic low back pain and leg radiation causing pain. He went off work on November 6, 1991, because of the pain and did not return to work. Fire & Casualty Insurance of Connecticut was the insurance carrier in 1991.

LIRC determined, based on the report of Bruendl's treating physician, that the repetitive work performed by Bruendl between September and November 1991 accelerated the "natural process of his degenerating back condition beyond that attributable to the 1984 injury." LIRC found that Bruendl sustained a compensable work injury as of November 6, 1991, and that Fire & Casualty was the responsible party for Bruendl's disability. The trial court reversed that determination upon concluding that Bruendl's condition was a continuation of the 1984 injury.

When an appeal is taken from a circuit court's order reviewing an agency decision, we review the decision of the agency, not the circuit court. *See*

Richland Sch. Dist. v. DILHR, 166 Wis.2d 262, 273, 479 N.W.2d 579, 584 (Ct. App. 1991), *aff'd*, 174 Wis.2d 878, 498 N.W.2d 826 (1993). Although we do not defer to the opinion of the circuit court, that court's reasoning may assist us. ***Id.***

Here, the circuit court's opinion zeros in on the application of ***Zurich Gen. Accident & Liab. Ins. Co. v. Industrial Comm'n***, 203 Wis. 135, 233 N.W. 772 (1930). We agree with the circuit court that this is a ***Zurich***-type case.

In ***Zurich***, the court held:

> the "time of accident" within the meaning of the statute in occupational disease cases, should be the time when disability first occurs; that the employer in whose employment the injured workman is and the insurance carrier at that time are liable for the total consequences due thereto. So that if the end result, whatever it may be, is inevitably due to exposure already complete, that employer and that carrier become liable accordingly. If the disability is partial and there is a recovery and a subsequent disability with subsequent exposure, then it will be necessary for the commission to determine whether the subsequent disability arose from a recurrence or is due to a new onset induced by a subsequent exposure.

Id. at 146-47, 233 N.W. at 776.

As the circuit court concluded, under ***Zurich***, LIRC was required to determine whether Bruendl's injury was a new injury or a continuation of the old injury. *See* ***id.*** at 143, 233 N.W. at 775 (whether the impairment was a recurrence or a new attack brought on by subsequent exposure is a matter for the commission). To do this, LIRC must determine whether Bruendl recovered from his 1984 injury. LIRC failed to consider whether Bruendl had recovered from the 1984 injury.

The circuit court went on to hold that there was ample evidence that Bruendl never recovered from the 1984 injury. It is not for the circuit court, or this court, to make the factual determination of whether Bruendl recovered. LIRC is the fact finder and we must affirm LIRC's findings of fact if they are supported by any credible and substantial evidence in the record. ***West Bend Co. v. LIRC,*** 149 Wis.2d 110, 117-18, 438 N.W.2d 823, 827 (1989).

Bruendl argues that it is not necessary that he fully recover from the 1984 injury to have a compensable subsequent injury date. LIRC argues that "recovery" is used in the sense of a healing period or healing plateau. The question of whether Bruendl recovered to the extent necessary to conclude that a new injury occurred requires a determination of an issue of law—whether a healing plateau is the equivalent of recovery. It is a question to which LIRC's expertise and specialized knowledge should be applied. That determination will be accorded great weight. *See* ***West Bend Educ. Ass'n v. WERC,*** 121 Wis.2d 1, 12, 357 N.W.2d 534, 539-40 (1984). We will not address the issue without the benefit of LIRC's determination.

We affirm the circuit court's reversal of LIRC's determination because it did not make the finding required by ***Zurich*** of whether there was a recovery and whether the "subsequent disability arose from a recurrence or is due to a new onset induced by a subsequent exposure." ***Zurich***, 203 Wis. at 147, 233 N.W. at 776. We modify the circuit court's remand to direct LIRC to make the appropriate finding on the record.

By the Court.—Judgment modified and, as modified, affirmed.

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