

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-1779

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

SHIRLEY SHERRER,

**PLAINTIFF-PETITIONER-
APPELLANT,**

V.

**LABOR AND INDUSTRY REVIEW COMMISSION,
MILWAUKEE PUBLIC SCHOOL SYSTEM
AND CITY OF MILWAUKEE,**

**DEFENDANTS-RESPONDENTS-
RESPONDENTS.**

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

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

PER CURIAM. Shirley Sherrer appeals from a circuit court order affirming the Labor and Industry Review Commission's decision granting her

compensation for medical expenses and mileage related to treatment for a work-related eye injury but denying her any additional temporary disability, permanent disability or medical expenses for her temporomandibular joint dysfunction syndrome (TMJ), which LIRC determined was unrelated to her eye injury. Sherrer contends that LIRC erred in adopting the administrative law judge's (ALJ) conclusion that she did not complain of neck or face pain, symptoms of her TMJ dysfunction, until December 16, 1994. She claims that her medical records indicate that she reported neck and facial pain immediately following her work incident. Thus, she argues that no credible evidence supports LIRC's determination that her TMJ dysfunction is not causally related to her work incident.

On November 3, 1998, following our initial review of Sherrer's claims, we remanded this case to LIRC for clarification of factual findings made by the ALJ and LIRC, but disputed by Sherrer. On December 11, 1998, LIRC submitted an addendum clarifying the bases for its findings. Based on the record and this clarification, we affirm.

BACKGROUND

It is undisputed that on September 28, 1994, Sherrer, a Milwaukee public school teacher, suffered an eye injury after a student dropped a fluorescent light bulb in the hallway adjacent to her classroom. Following the accident, Sherrer went to Sinai Samaritan Hospital, where she was diagnosed with and treated for a possible laceration or abrasion to her left eye. As a result of her injury, Sherrer missed several weeks of work and incurred substantial medical bills.

It is also undisputed that Sherrer was subsequently diagnosed and treated for TMJ. The disputed issue Sherrer raises concerns the cause of her TMJ. Sherrer maintains that she began experiencing neck and face pain, symptoms of TMJ, approximately three days after the work-related eye injury and, therefore, she contends that her TMJ was caused by her work-related incident.

On December 19, 1995, the ALJ conducted a hearing on Sherrer's worker's compensation claim. By the time of the hearing, Sherrer had already received temporary total disability benefits for the period from September 29, 1994 to October 5, 1994. Sherrer alleged, however, that she was entitled to additional temporary total disability benefits for the period from October 8, 1994 to August 28, 1995. She also claimed that she was entitled to permanent partial disability benefits based on 2% of the body, and that she was entitled to all her medical expenses.

Following the hearing, the ALJ summarized Sherrer's medical history:

The applicant [(Sherrer)] is a 44[-]year[-]old female. She began working for the [Milwaukee Public Schools and the City of Milwaukee], as a school teacher, in November 1986. She was in her [class]room performing her duties on September 28, 1994 when a student dropped a fluorescent light bulb in the hallway outside her classroom. The applicant reported that she had a sensation in her left eye. She was seen at Mt. Sinai Hospital emergency room. No foreign body was found in the eye. A diagnosis of possible laceration was given. The applicant then sought treatment from Dr. Michael Rissell, an eye doctor. Dr. Rissell also diagnosed the applicant's condition as a slight laceration. He indicated that the applicant could return to work on October 6, 1994. Because the applicant was dissatisfied with Dr. Rissell's opinion[,], she sought treatment from Dr. Norman Cohen, also an eye doctor. Dr. Cohen also found no foreign body in the applicant's eye. It appears that the applicant next sought treatment for this injury from her

family physician, Dr. William Walker, on October 31, 1994. She reported to Dr. Walker that she had a sensation in her left eye like there was a grain of sand or other foreign body in her eye. In December 1994[,] the applicant began reporting head, face, neck and shoulder pain[,] which she related to the September 28, 1994 incident. Dr. Walker diagnosed the applicant's condition as a neck sprain and possible TMJ dysfunction. He referred the applicant to Dr. Steven Schnoll, a dentist and TMJ specialist, in February 1995. Dr. Schnoll treated the applicant for a TMJ dysfunction. The applicant also saw Dr. Michael Janowak, an ear, nose and throat doctor, in May 1995 for ear pain and popping in her throat....

The applicant's main treating orthodontist was Dr. Steven Schnoll, D.D.S. Dr. Schnoll indicated that the applicant suffered from a TMJ disorder. Permanent disability assigned by Dr. Schnoll was two percent (2%) of the body as a whole. Dr. Schnoll's two percent ... assessment is based on the applicant's pain, disc movement problems in the TM joints and the applicant's other symptoms. Those symptoms include the feeling of fullness in the ears and sinuses, upper back aches, neckaches [sic], clicking and popping sounds from the jaw joints, dull pain from the left jaw, pain in the left facial muscle, difficulty swallowing, throat problems, inability to fully open the mouth and left eye pain. The applicant's family physician and primary treating doctor was William Walker. It appears that Dr. Walker first began treating the applicant on October 31, 1994. Dr. Walker opined that the September 28, 1994 incident resulted in a foreign body in the applicant's left eye and a cervical strain. . . . The applicant was also seen by doctors at St. Joseph's Hospital. They described the applicant's symptoms as being left eye and temple pain. The applicant was also seen by Dr. John Ridley. When Dr. Ridley examined the applicant in November 1994[,] he indicated that the applicant's complaint was that she felt like she had something in her eye. One of the applicant's independent medical examiners was Dr. Thomas Blo[o]m, an ophthalmologist. Dr. Blo[o]m indicated that the applicant sustained an abrasion to her left eye, there was no evidence of ocular foreign body and the applicant had reached a healing plateau by October 5, 1994. An independent dental examination was done by Dr. Clemens Stoeckl, D.D.S. Dr. Stoeckl opined that the applicant's TMJ dysfunction was not related to the work incident of September 28, 1994. The respondent's independent medical examiner was Dr. Dennis Brown, M.D. Dr. Brown opined that the applicant did not sustain a cervical injury in the work incident of September 28, 1994.

He indicates that the work incident has not resulted in any permanent disability. The applicant was also seen by Dr. Steven Park, M.D., on a referral from Dr. Walker. Dr. Park indicated he could find no objective evidence of any neurological problem....

After reviewing the evidence submitted to the ALJ, LIRC concurred in the ALJ's findings and order and adopted the ALJ's decision as its own.

ANALYSIS

Judicial review of worker's compensation decisions is limited in scope. *See* § 102.23, STATS.¹ On appeal, this court reviews LIRC's findings of fact and conclusions of law, not those of the circuit court. *See UPS v. Lust*, 208 Wis.2d 306, 321, 560 N.W.2d 301, 306 (Ct. App. 1997). LIRC's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. *See Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis.2d 927, 931, 541 N.W.2d 241, 243 (Ct. App. 1995); *see also* § 102.23(6), STATS. Credible evidence is that which excludes speculation and conjecture. *See Bumpas v. DILHR*, 95 Wis.2d 334, 343, 290 N.W.2d 504, 508 (1980). Substantial evidence is not a preponderance of evidence, but relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979). Our role on appeal is to search the record for evidence supporting LIRC's factual determinations, not to search for

¹ Section 102.23(1)(e), provides, in pertinent part:

Judicial Review. (1)

(e) ...the court may confirm or set aside such award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

evidence against them. See *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975). We will uphold LIRC's factual determinations even if we believe that the weight of the evidence supports a contrary finding. See *Hagen v. LIRC*, 210 Wis.2d 12, 22, 563 N.W.2d 454, 458 (1997). Further, conflicts in the testimony of medical witnesses are to be resolved by LIRC, not by a reviewing court. See *E.F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 637, 264 N.W.2d 222, 224 (1978).

On appeal, Sherrer argues that "LIRC's findings that [she] did not complain of neck or facial pain until ten weeks following the September 28, 1994 work incident is clearly erroneous." As noted, following our initial review of this case, we remanded this case to LIRC to respond to Sherrer's accusations. In response, LIRC offered an addendum clarifying the bases for its rejection of Sherrer's contention. As LIRC summarized in its addendum:

[Sherrer] contended in her brief to [LIRC] that medical records submitted contained numerous entries of facial and/or neck pain to support her claim that she suffered TMJ as well as neck injury as a result of the incident on September 28, 1994.

[Sherrer] pointed to a notation in Dr. Rissell's notes dated October 3, 1994[,] which indicates that [Sherrer] still has FBS OS,² and light tension on the right side of her face and FB feels like a grain of sand. [Sherrer] contends that this notation supports her case that she suffered . . . TMJ and neck injuries as a result of the work injury in September 1994. However, [Sherrer] admitted in her testimony that the reference to tension and a grain of sand was in relationship to her eye and that she was seeing Dr. Rissell, an ophthalmologist, for eye pain. [Sherrer's] admission in her testimony that Dr. Rissell's notes on October 3, 1994 refer to her eye is inconsistent with her assertion in her brief that she was reporting neck and face pain on October 3, 1994[,] and undercuts her credibility.

² The notation "FBS OS" was defined in the record as "foreign body in left eye."

[Sherrer] also admitted upon cross-examination that she saw Dr. Rissell on October 18, October 24 and October 27 and that he did not treat [Sherrer] for any neck or face pain.

. . . Further, [Sherrer] treated with Dr. Walker on October, 31, 1994, and there is no mention in Dr. Walker's notes of any neck or face pain at that time Further, Dr. Walker's notes in November 1994 do not reflect that he treated her for any neck or face pain.

Dr. Walker indicated in his letter dated March 27, 1995, that he first saw the applicant on October 31, 1994, and he recommended that she be seen at the Eye Institute and that she returned on November 11, 1994, and complained of irritation around the eye[,] especially over the optic nerve area. . . . Dr. Walker does not mention that [Sherrer] complained of any neck or facial pain at that time. Dr. Walker indicates that on December 16, 1994, [Sherrer] came in with complaints of stiffness and soreness in her neck and shoulder and pain over her palpebral fissure, and he examined her and found that she was symptomatic of cervical strain.

. . . .

[Sherrer] contended in her testimony that she told Dr. Walker about her neck pain and TMJ symptoms on October 31, 1994, when she was seen for a sore throat. However, Dr. Walker's notes reflect only that [Sherrer] was seen for a follow-up for a sore throat with no mention of any neck problems or TMJ problems. Also, [Sherrer] was seen on October 7, 1994, and Dr. Walker's notes reflect that [she] reported feeling good [sic]. In addition, [Sherrer] contends that the medical literature states that TMJ complaints following a traumatic event are not necessarily immediate, but rather gradual. However[,] it seems inconsistent that [Sherrer] would report such TMJ problems within a few days of the incident if in fact such complaints are delayed and come on [in a] gradual manner and not suddenly as she contended in her testimony. [LIRC] does not credit [Sherrer's] testimony that she reported neck pain and TMJ problems to her treating physicians prior to December 16, 1994, given the equivocal nature of the medical records and the fact that she did not mention any such problems to Dr. Walker when he first began treating her on October 31, 1994, or thereafter until December 16, 1994.

(Footnote added.) Based on the record and LIRC's addendum, we conclude that substantial and credible evidence supports LIRC's factual findings.

Substantial and credible evidence supports LIRC's finding that Sherrer did not report her neck and TMJ symptoms until December 16, 1994, and that all of her previous complaints related solely to her eye injury. In her testimony before the ALJ, Sherrer claimed that she told Dr. Rissell about her neck pain and TMJ symptoms on October 3, 1994. Dr. Rissell's notes from that day, however, do not support her contention. Further, according to her medical records, Sherrer did not report any neck or TMJ symptoms to Dr. Walker until December 16, 1994. Sherrer also testified that she told Dr. Walker about the neck and TMJ pain on October 31, 1994 when she was seen for a sore throat. Dr. Walker's notes and records contradict her testimony, however. As LIRC noted in its addendum, in his March 27, 1995 letter detailing Sherrer's medical history, Dr. Walker wrote that Sherrer first mentioned the work incident to him on October 31, 1994. He referred her to an eye clinic. Dr. Walker wrote that when Sherrer returned to his office on November 11 and 17, she complained solely of continued eye pain. Dr. Walker noted that Sherrer first mentioned her neck and face pain during her December 16, 1994 visit. At that time, Dr. Walker diagnosed a cervical strain and prescribed physical therapy sessions.

Substantial and credible evidence also supports LIRC's finding that the independent medical examiners' opinions as to causation were more credible than either Dr. Walker's or Dr. Schnoll's. Dr. Brown, in his May 10, 1995 letter to the City of Milwaukee, concluded that it was not medically probable that Sherrer sustained a cervical injury in the work incident of September 28, 1994. Dr. Brown based his opinion on the fact that Sherrer did not complain of symptoms until December 1994, stating that the "delayed onset of the neck pain is not compatible with cervical strain." In addition to Dr. Brown's opinion, Dr. Stoeckl, in his notes regarding his July 27, 1995 examination of Sherrer, stated

that he diagnosed Sherrer with TMJ, but determined that it was not causally related to the work incident. By contrast, both Dr. Walker and Dr. Schnoll gave their opinions based on Sherrer's version of her work incident, which LIRC, in a reasonable exercise of discretion, determined not to be credible.

As noted, the issue of credibility is determined by LIRC, not this court. See *E.F. Brewer Co.*, 82 Wis.2d at 637, 264 N.W.2d at 224. Further, when different medical opinions are elicited, only the issue of credibility remains to be determined. See *Employers Mut. Liab. Ins. Co. v. DILHR*, 62 Wis.2d 327, 332, 214 N.W.2d 587, 589 (1974). When contradictory medical opinions are presented, LIRC must decide which expert opinion is more persuasive. See *Conradt v. Mt. Carmel Sch.*, 197 Wis.2d 60, 69, 593 N.W.2d 713, 716 (Ct. App. 1995).

Here, LIRC was presented with the opinions of Drs. Walker and Schnoll, citing causation, and with the opinions of three independent examiners, citing no causation. LIRC determined that the three independent medical examiners were more credible than Sherrer, Dr. Walker and Dr. Schnoll. Clearly, this determination was within LIRC's discretion. Accordingly, we affirm.

By the Court.—Order affirmed.

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

