COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 20, 1995

No. 94-3190

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

ORVILLE H. WERNER,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION, EDGAR PACKING COMPANY, INC. and TRANSPORT INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirm.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Orville Werner appeals a judgment affirming a decision of the Labor and Industry Review Commission. The commission dismissed Werner's application for worker's compensation, finding that Werner's exposure to ammonia vapor in the work place was not proven to cause his interstitial lung disease. LIRC based its decision on the medical reports of Dr. David Jolin, finding them more persuasive than the testimony of

Werner's treating physician, Vinoo Cameron, who concluded that Werner's lung disease was caused by exposure to ammonia. Werner argues that LIRC's decision is not supported by credible and substantial evidence in the record. We reject Werner's argument and affirm the trial court order upholding LIRC's decision.

BACKGROUND

Orville Werner has interstitial lung disease. Werner worked for seventeen years for the Edgar Packing Company until he retired in 1985. For sixteen of those years, he worked in a refrigerated cooler that had a chronic ammonia leak, resulting in his exposure to an undetermined amount of anhydrous ammonia vapor during the course of his employment.[1]

Two hearings were held before a Department of Industry, Labor and Human Relations administrative law judge, who found Werner to be permanently and totally disabled and ordered Edgar Packing and its compensation insurer to pay worker's compensation benefits to Werner. Edgar Packing and the insurer petitioned for review. LIRC made its own findings of fact and reversed the order, concluding that it would be required to speculate to find that Werner's interstitial lung disease arose out of and in the course of his employment. Werner appealed to the circuit court, which affirmed LIRC. Werner argues that the record contains insufficient evidence to support Jolin's opinion that Werner did not have a chronic, productive cough or symptoms of bronchiectasis, which he stated would be the usual sequelae of chronic ammonia exposure.

DISCUSSION

This court reviews the LIRC decision. ***West Bend Co. v. LIRC***, 149 Wis.2d 110, 117, 438 N.W.2d 823, 827 (1989). Our scope of review is identical to

[1] Major leaks occurred one to two times per month, with a strong presence of ammonia 12 to 18 times per year. The amount of ammonia vapor to which Werner was exposed was never measured, and there is no evidence in the record indicating how long each individual exposure lasted.

that of the circuit court. ***Oscar Mayer Foods Corp. v. LIRC***, 145 Wis.2d 864, 868, 429 N.W.2d 89, 91 (Ct. App. 1988). Resolution of the question whether a medical condition arose out of an applicant's employment may require LIRC to choose between conflicting medical testimony. *See* ***id***. It is not the function of this court to weigh disputed medical testimony; the commission's finding on disputed medical testimony is conclusive. ***Worsch v. DILHR***, 46 Wis.2d 504, 512, 175 N.W.2d 201, 206 (1970). Moreover, LIRC's findings of fact are conclusive if there is any credible evidence to support them. ***West Bend Co.***, 149 Wis.2d at 117-18, 438 N.W.2d at 827. The test for credible evidence is whether the evidence is relevant, evidentiary in nature and not a conclusion of law, and not so completely discredited by other evidence that a court could find it incredible as a matter of law. ***Worsch***, 46 Wis.2d at 513, 175 N.W.2d at 206. The question is not whether there is credible evidence in the record to sustain a finding the commission did not make, but whether there is any credible evidence to sustain the finding that the commission did make. ***Mednicoff v. DILHR***, 54 Wis.2d 7, 18, 194 N.W.2d 670, 675-76 (1972). We conclude that substantial and credible evidence supports LIRC's finding of legitimate doubt that Werner's condition arose out of or was incidental to his employment. LIRC could reasonably conclude that Werner failed to meet his burden of proof because it could only speculate concerning the cause of his condition.

In this case, Cameron testified that in his opinion, exposure to ammonia gas burned Werner's lung tissue, causing scarring and fibrosis. He stated, "I have no other explanations. ... The kind of fibrosis he has is either from a gas that went into the lungs or some other poison that went in. It's not normal." He continued, "it is plausible in my medical judgment that that ammonia gas would have caused [Werner's lung disease] because I don't know what else would."

Jolin, an internist who examined Werner at the request of Edgar Packing, stated that there is no scientific evidence that long-term chronic exposure to ammonia fumes can cause interstitial lung disease. He stated that interstitial lung disease can be caused by inhaling gases such as chlorine or sulfur dioxide; inhalation of organic dusts, including aspergillus mold; drug reaction; infectious agents such as viruses; or for no readily discernable reason. Jolin gave the opinion that, to a reasonable degree of medical certainty, Werner's lung disease was idiopathic, *i.e.*, of unknown origin, or was due to

aspergillus mold, a recognized cause of interstitial lung disease.[2] Jolin concluded that "[i]t would be pure speculation to suggest, contrary to the scientific literature, that ammonia is the cause of his interstitial lung disease."

Werner contends that Jolin's opinions, upon which LIRC's findings are based, are not supported by credible evidence in the record. First, Werner claims that although Jolin based his opinion in part on Werner's lack of a productive cough, witnesses testified that Werner exhibited a heavy cough when working in the cooler. Second, he asserts that although Jolin found no evidence of chronic bronchiectasis, there was x-ray evidence of bronchiectasis. Third, he argues that LIRC should not base its decision on Jolin's opinion that "[t]here is no scientific evidence that long-term chronic exposure to ammonia fumes can produce interstitial lung disease" because, he suggests, there are such studies, and also because LIRC's decision results in his being punished for the absence of such studies.

Cameron testified that when he first examined Werner in 1988, Werner was short of breath and his lungs were damaged. In his written report dated November 11, 1988, Cameron noted Werner reported an "[o]ccasional history of cough." Cameron did not report a chronic cough. Neither did Jolin. In his examination of Werner, Jolin reported that "[a]uscultation of the lungs revealed mild to moderately diminished breath sounds ... and a few fine crackles were heard ...." Jolin's report recounts that Werner reported an "occasional cough which is usually non-productive, though he does report production of 'brownish-yellow' sputum on infrequent occasions." No evidence in the record suggests that Werner had the chronic, productive cough that Jolin reported is a characteristic symptom of chronic ammonia exposure.[3]

In his supplemental report, Jolin addressed the issue of Werner's cough, noting that witnesses had testified "that Mr. Werner was observed

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[2] Werner tested positive for the antibodies of aspergillus mold.

[3] Werner was hospitalized in February 1988. In a consultation record from Wausau Hospital dated February 9, 1988, the consulting physician, Dr. Rick Reding, noted that Werner exhibited a persistent, nonproductive cough and that for 32 years Werner had smoked one and one-half packs of cigarettes per day and had stopped 10 years earlier. In a follow-up record dated February 29, 1988, Reding noted, "[h]e denies any cough."

coughing on numerous occasions at work." However, Jolin said, "[coughing] is a nonspecific symptom and cannot specifically be related to ammonia exposure. Coughing is an upper respiratory symptom and does not indicate that lower respiratory injury is occurring." He suggested other possible causes: "Mr. Werner's past history of smoking, exertion due to his employment, colds, or the cold, dry air of the freezer in which he worked."

Werner also contends that an x-ray dated December 30, 1991, showed evidence of bronchiectasis. Cameron interpreted this x-ray as "suggesting an element of possible bronchiectasis." Jolin also addressed the issue of bronchiectasis in his supplemental report, stating, "Mr. Werner is alleged to have bronchiectasis on one x-ray. The x-ray taken at the time of my examination did not disclose any bronchiectasis. Further, as I commented in my initial report, the absence of a productive cough tends to indicate there is no bronchiectasis. I believe the report of bronchiectasis on a previous x-ray is incorrect."

In reaching its decision, LIRC noted that Jolin's extensive research in the applicable medical literature revealed no evidence that chronic exposure to ammonia could cause interstitial lung disease, and that reports of the perception of ammonia odor do not establish that ammonia was present in sufficient concentration to have caused respiratory injury. LIRC also noted Jolin's statement that there are many possible causes for interstitial lung disease, one of which is exposure to aspergillus mold, for which Werner tested positive.

LIRC noted further that Cameron's opinion was based on studies involving a small number of patients who had been the victims of one acute exposure to ammonia rather than prolonged exposure, as in Werner's case. Jolin stated:

> In particular, the Close Report, Exhibit 9, dealt with persons who had experienced "prolonged exposure," defined by them as being more than one-half hour. It dealt with only six patients in that category. All had chemical burns of one sort or another from the ammonia, and all had full thickness airway burns. There is no

> evidence of such burns in Mr. Werner's examination.
>
> In summary, the alleged exposure of Mr. Werner is different in nature than the acute exposure in the studies and they have no application to his case.

LIRC accepted Jolin's opinion that the clinical studies submitted into evidence by Cameron did not support the factual inference that chronic exposure to low levels of ammonia gas could cause interstitial fibrosis of the lungs. LIRC noted that there was no clinical data to support the postulation in one study that chronic exposure to anhydrous ammonia vapor in low concentrations probably would result in extensive alkali burns of the tracheobronchial tree. LIRC concluded, based on its review of the evidence and consultation with the administrative law judge, that it was left with a legitimate doubt that the applicant's work exposure to ammonia vapor was the cause of his lung disease.

Werner suggests research has been done on chronic exposure to ammonia, research that was not available to counsel or doctors at the original hearings. However, if Werner had evidence he might have presented but failed to present, he cannot now collaterally attack the decision by claiming that he had affirmative evidence in the action that he did not use. *See* ***Conway v. DNR***, 50 Wis.2d 152, 160, 183 N.W.2d 77, 81 (1971).

Werner argues that "there is nothing in the literature that suggests that it is impossible for repeated exposures to cause damage to the lungs." However, the burden was on Werner to produce sufficient evidence to remove the question in dispute from the realm of speculation. *See* ***Franckowiak v. LIRC***, 12 Wis.2d 85, 87-90, 106 N.W.2d 51, 52-53 (1960). The employer was not required to prove that Werner's lung disease was caused by factors unrelated to his work. *See* ***id***. at 88, 106 N.W.2d at 52. Werner is not being punished for the absence of scientific studies. The evidence is in conflict, which is not a sufficient basis for the reversal of LIRC's findings. ***Eastex Packaging Co. v. DILHR***, 89 Wis.2d 739, 745, 279 N.W.2d 248, 250 (1979).

We have reviewed and considered the record and each of the points Werner raised. We are of the opinion that his arguments do not

demonstrate Jolin's medical testimony to be incredible, but attack the weight given by LIRC to the evidence.

The commission consulted with the administrative law judge and set forth the reasons for its contrary findings of ultimate fact. *See* ***Goranson v. DILHR***, 94 Wis.2d 537, 546, 289 N.W.2d 270, 275 (1980) (LIRC required to make findings of ultimate facts as distinguished from evidentiary facts). LIRC is not required to make a finding that it finds the testimony of any witness incredible. ***Bowen v. Industrial Comm'n***, 239 Wis. 306, 312, 1 N.W. 77, 80 (1941). LIRC concluded that Jolin's opinion was more persuasive than Cameron's and resolved the issue of causation against Werner on the basis of crediblility of medical evidence. Jolin's medical opinion was not discredited by other evidence so that this court could find it incredible as a matter of law. Therefore, LIRC's findings are affirmed.

By the Court. – Judgment affirmed.

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