

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2012

Diane M. Fremgen
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. 2012AP973

Cir. Ct. No. 11CV5044

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**HOOPER CORP. AND TRAVELERS PROPERTY CASUALTY CO. OF
AMERICA,**

PLAINTIFFS-APPELLANTS,

V.

LABOR & INDUSTRY REVIEW COMMISSION AND RONALD D. KOERNER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 KLOPPENBURG, J. Hooper Corp. and Travelers Property Casualty Co. of America (collectively “Hooper”) appeal from a circuit court order denying their petition to set aside a worker’s compensation decision of the

Labor & Industry Review Commission. Hooper contends that the commission's finding that Ronald Koerner suffered a permanent partial disability as a result of exposure to manganese at Hooper's job sites was not supported by credible and substantial evidence. For the reasons stated below, we disagree as to the reasonable inferences that could be drawn from the evidence, and therefore affirm.

BACKGROUND

¶2 From 1993 to 2000, Ronald Koerner worked for Asplundh Tree Experts clearing trees and foliage for electrical power lines. This job did not involve welding, but did involve use of pesticides and chemicals. While employed at Asplundh, Koerner suffered work-related injuries to his knee and shoulder. He received worker's compensation, and did not return to work.

¶3 After leaving Asplundh, Koerner worked for Hooper from September 11, 2000, to September 27, 2002. During the course of his employment at Hooper, Koerner worked at seven different welding substations. At those substations, Koerner performed exothermic welding (commonly referred to as "Cadwelding"), dug and located wires, installed pipes, and operated equipment. Koerner also assisted welders performing aluminum ("wire") welding. Koerner would assist by laying wire down while the others welded or by holding an umbrella or tarp so the wind would not affect the weld. Koerner stood upwind from the smoke produced by the wire welding. Koerner worked in open air and in enclosed structures in which welding occurred. The ventilation system at one enclosed structure where wire welding occurred consisted of opening the front and back doors. Koerner did not wear a respiratory apparatus while welding or assisting with welding.

¶4 While working for Hooper, Koerner began to experience sick sensations, which he described as “just not feeling right[,] [b]alance problems, kind of nauseous, trouble with breathing once in a while.” In 2001, Koerner started experiencing insomnia, restlessness, sweating, and drooling. By March 2002, Koerner sought medical care for these and other symptoms, including body pain, joint pain, muscle spasms, choking reflex, and light sensitivity. Koerner did not experience these symptoms prior to working for Hooper. In 2002, a doctor advised Koerner to stop working. From 2003 to 2004, Koerner was treated for pain consistent with fibromyalgia and received massage therapy and chiropractic treatment. In 2005, Dr. Paul Nausieda diagnosed Koerner with manganese poisoning, or “manganism,” a neurological disorder caused by manganese damage to brain cells.

¶5 In February 2008, Koerner filed a hearing application with the Department of Workforce Development Worker’s Compensation Division, claiming “[manganese] poisoning due to prolonged exposure to welding materials” during his work for Hooper. An administrative law judge held hearings on April 14, August 11, and October 18, 2010. Koerner offered his own testimony, and that of his treating physician and expert, Dr. Nausieda. Hooper called three witnesses: two Hooper employees who confirmed the history and nature of Koerner’s work at Hooper, and Hooper’s expert, Dr. Marc Novom. In addition to the facts already set forth in this opinion, the following facts were presented throughout the course of the three hearings.

¶6 Dr. Nausieda is a board-certified neurologist specializing in movement disorders. Dr. Nausieda has treated Koerner since 2005. At their first meeting on October 13, 2005, Dr. Nausieda noted that Koerner started suffering from insomnia in 2001, pain and fatigue in 2002, and, beginning in 2005, “small

handwriting” and a tremor, balance problems with slow movements, and clumsiness affecting both sides. In October 2005 and February 2006, Dr. Nausieda hospitalized Koerner for “chelation,” a procedure in which Koerner was injected with a “chelating agent” that bound to manganese in Koerner’s system and caused the manganese to excrete in urine. Koerner’s urine samples showed his manganese levels were ten to fifteen times higher than normal levels.

¶7 Dr. Nausieda conceded that the value of chelation in diagnosing and treating manganism is debatable, as manganese levels in urine vary. Dr. Nausieda testified that in his experience, chelation frequently helps stabilize manganese poisoning. Koerner stated he “felt better” after the chelation procedures.

¶8 Dr. Nausieda explained there is no way to quantitatively measure the level of exposure to manganese necessary to develop manganese poisoning. According to Dr. Nausieda, inhalation of fumes, rather than ingestion of solids, causes manganese toxicity. This is because manganese is present in various foods and vitamins, but is ordinarily detoxified by the liver, so oral consumption rarely causes toxicity. In contrast, manganese inhaled from fumes enters the lungs and ultimately the brain, potentially inducing movement disorders. Dr. Nausieda opined manganism symptoms typically have a gradual onset. According to Dr. Nausieda, manganism is a separate syndrome from Parkinson’s Disease, although their symptoms closely parallel each other. Dr. Nausieda opined that Parkinson’s Disease is extremely uncommon among people Koerner’s age (early to mid-thirties).

¶9 Dr. Nausieda explained that a person working closest to welding would be at a greater exposure risk to manganese toxicity than those working nearby, but that persons in the immediate area also maintain a risk of exposure.

According to Dr. Nausieda, if one can smell the welding fumes, he or she is being exposed to an excess amount of manganese. Dr. Nausieda explained that individuals vary in their sensitivity to manganese – what may be insufficient exposure for one person may be too much for another.

¶10 Dr. Nausieda testified that Koerner had a neurological condition consistent with “manganese toxicity for manganese overload.” He further testified that Koerner worked in an occupational setting where welding occurred and thus manganese would have been present. Dr. Nausieda admitted that he did not know from any direct source that the welding materials at the Hooper job sites where Koerner worked contained manganese. However, he opined that wire welding generally liberates manganese and that no other identifiable source of manganese existed in Koerner’s case history. In support of his opinion that manganese was present, Dr. Nausieda cited: his own general knowledge of materials used in welding; the fact that Koerner worked in an environment in which welding was ongoing, including at times in an enclosed space; Koerner’s reported exposure to fumes; and Koerner’s elevated manganese levels.

¶11 Hooper’s expert witness, Dr. Novom, disputed that Koerner had manganese poisoning, concluding that no clinical evidence of manganese poisoning existed. Dr. Novom opined that it is possible, but not probable, that standing next to someone performing welding would implicate occupation-related manganism. Dr. Novom further opined that without Koerner directly performing the welding, “it would be extremely difficult [to] implicate occupation-related manganism.” According to Dr. Novom, the manganese in Koerner’s urine did not explain whether the high levels were caused by exposure to fumes at work or by an impaired liver not properly detoxifying manganese. Dr. Novom believed many

of Koerner's symptoms could be attributed to fibromyalgia or chronic alcohol consumption.

¶12 After conducting the three hearings, the administrative law judge dismissed Koerner's application for worker's compensation. The administrative law judge determined that: Koerner had pre-existing disorders of fibromyalgia and alcoholism; Koerner sustained minimal exposure to manganese; there was no clear showing of manganese poisoning; other possible reasons existed for Koerner's symptoms; and even if Koerner had manganese poisoning, doctors had not imposed work restrictions.

¶13 On review, the commission reversed the administrative law judge's decision. The commission determined that Koerner had a 20% disability from "manganism, or manganese poisoning, caused by an appreciable period of workplace exposure that was either the sole cause or a material contributory causative factor in the onset or progression of the condition." Specifically, the commission found that:

[Koerner], while working for the employer, was exposed to welding fumes containing manganese ... when he held a tarp or umbrella upwind from a person ... who was welding with a manganese compound outside on several days. [Koerner] also was exposed to manganese from welding fumes when he performed work that took him intermittently inside substation buildings where welding that liberated manganese was occurring.

With regard to causation, the commission noted that the record clearly showed elevated manganese levels in Koerner's system, Koerner was exposed to welding fumes containing manganese while working for Hooper, and Koerner exhibited the symptoms of manganese toxicity which affect his ability to work. The commission cited Dr. Nausieda's testimony that wire welding liberates

manganese. Thus, the commission credited Dr. Nausieda's opinion that Koerner's disability was caused by his manganese exposure during employment at Hooper.

¶14 Hooper sought review in circuit court. On April 2, 2012, the circuit court dismissed Hooper's petition for judicial review, concluding that the commission's finding that Koerner's exposure to manganese during his employment at Hooper caused a partial disability was based on credible and substantial evidence. Hooper now appeals.

DISCUSSION

¶15 This is a worker's compensation case to which WIS. STAT. ch. 102 (2009-10)¹ applies. We review the commission's decision, not that of the circuit court. *White v. LIRC*, 2000 WI App 244, ¶12, 239 Wis. 2d 505, 620 N.W.2d 442. "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive." WIS. STAT. § 102.23(1). WISCONSIN STAT. § 102.23(6) further provides:

If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The 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.

In other words, we will uphold the commission's findings of fact, even if they are against the great weight and clear preponderance of the evidence, so long as

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

credible and substantial evidence supports the findings. *General Cas. Co. v. LIRC*, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991).

¶16 Evidence is credible if it is sufficient to exclude speculation or conjecture. *Bumpas v. DILHR*, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). “[S]ubstantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Hamilton v. DILHR*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980) (citations omitted). Substantial evidence does not require the existence of only one reasonable or plausible interpretation. *Id.* In sum, “the agency’s decision may be set aside by a reviewing court only when, 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.” *Id.* at 618.

¶17 On appeal, Hooper argues that Koerner failed to prove that manganese was in fact present at any of Hooper’s job sites. Accordingly, Hooper asserts that the commission’s finding that Koerner developed manganism while working for Hooper was based on speculation, not credible and substantial evidence. For that reason, Hooper asks this court to set aside the commission’s findings in accordance with WIS. STAT. § 102.23(6).

¶18 Hooper asserts that Koerner offered no proof that the welding fumes contained manganese – no testimony from anyone having personal knowledge of the manganese content in the welding materials, no ingredient list from the welding materials used by welders that Koerner assisted, and no analysis of the fumes’ content. Hooper is correct to the extent that Koerner failed to offer *direct* evidence that manganese was present in the welding fumes at Hooper. Indeed, if Hooper were to make the assertion, we might even agree that the clear

preponderance of the evidence favors Hooper. But we are bound by a highly deferential standard of review. We must affirm factual findings when there is credible and substantial evidence supporting those findings. That is the situation here. We conclude that the evidence presented, and the reasonable inferences therefrom, provide credible and substantial evidence supporting the commission's finding that manganese was present at the Hooper job sites.

¶19 In particular, we rely on the testimony from Koerner and Dr. Nausieda, which, taken together, gives rise to the reasonable inference that manganese was present. Koerner began working for Hooper in 2000 and by 2001 began experiencing symptoms of manganese toxicity. While Koerner had a history of back and neck pain predating his employment at Hooper, the symptoms evidencing manganese toxicity, such as drooling, insomnia, and tremors, did not appear until after Koerner began working for Hooper. Importantly, the record suggests no other identifiable source of manganese that existed in Koerner's work history. Thus, the timing of the onset of symptoms supports a finding that manganese was present at the Hooper job sites.

¶20 Moreover, Dr. Nausieda opined that wire welding generally liberates manganese. We recognize that Dr. Nausieda was testifying as an expert in neurology, and not in welding or occupational hazards. We further recognize that Dr. Nausieda conceded that he did not have any direct evidence that manganese was present at the particular Hooper job sites at issue. However, Dr. Nausieda has performed research on occupational exposure to manganese and has years of experience treating patients with significant exposure to manganese. While he could not testify as an expert that manganese was present at the Hooper job sites, Dr. Nausieda could testify as to his own personal knowledge regarding welding and its connection to manganese poisoning. Notably, Hooper's own expert,

Dr. Novom, conceded that welding fumes are comprised of various substances, including manganese.

¶21 Our role is not to weigh the evidence presented or to substitute our judgment for that of the commission. *See* WIS. STAT. § 102.23(6). Rather, we consider conclusive any finding by the commission based upon reasonable inferences from the credible evidence. ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 570, 579 N.W.2d 668 (1998). Given the evidence concerning the timing of the onset of Koerner's symptoms, the test results showing significantly elevated manganese levels in Koerner's urine, the diagnosis and helpful treatment of these symptoms as manganese poisoning, the absence of manganese exposure in Koerner's past, and the general undisputed evidence that wire welding typically liberates manganese, we conclude that this evidence gives rise to the reasonable inference that Koerner was exposed to manganese at the Hooper job sites. In other words, a reasonable mind could accept this evidence as adequate to support such a finding. *See Hamilton*, 94 Wis. 2d at 617.

¶22 Hooper argues that this case is analogous to ***Hayes v. Industrial Comm.***, 202 Wis. 218, 231 N.W. 584 (1930), in which the Wisconsin Supreme Court affirmed the denial of worker's compensation because there was no causal relationship between the disease (lead poisoning) and the employee's work. In ***Hayes***, the employee's job at a rubber company required him to handle tires and place them in a vulcanizer. ***Id.*** at 222. The employee worked at the company for two years. ***Id.*** For the prior approximately eighteen years, the employee worked in the painting business. ***Id.*** An analysis of the dust in the employee's workroom disclosed no lead poison. ***Id.*** at 219. The commission found that while lead poisoning is recognized as an occupational disease connected with rubber manufacturing, the employee's work at the rubber company was effectually

removed from that danger. *Id.* at 222. Therefore, the commission concluded the employee had absorbed lead prior to his work with the rubber company, and that his employment there did not “cause, aggravate, or accelerate the disease.” *Id.* The Wisconsin Supreme Court found that the evidence supported the finding and affirmed the commission’s decision. *Id.*

¶23 The facts in *Hayes* are distinguishable from those in this case. In *Hayes*, an analysis of the dust in the employee’s workroom disclosed that no lead existed; here, there is no direct evidence precluding the reasonable inference that manganese was present at the Hooper job sites. Moreover, the employee in *Hayes* had an eighteen-year history of work with a different employer in a profession where lead poisoning sometimes developed. Here, so far as the record reveals, Koerner has no history of working with manganese until his employment at Hooper. While the *Hayes* employee was unable to demonstrate that his injury occurred while working at the rubber company, as we have explained, credible and substantial evidence supported the commission’s conclusion that Koerner’s manganese exposure occurred during his employment at Hooper. As in *Hayes*, we defer to the commission’s findings as adequately supported by credible and substantial evidence in the record.

CONCLUSION

¶24 For the reasons above, we affirm the circuit court’s order affirming the decision of the Labor & Industry Review Commission.

By the Court.—Order affirmed.

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