

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 19, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1566

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**BERNADETTE DEAL, PERSONAL
REPRESENTATIVE OF THE ESTATE OF
GARY C. GRADECKI,¹**

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW
COMMISSION AND COATINGS INC.,
A/K/A SPINWELD INC.,**

**DEFENDANTS-
RESPONDENTS,**

**TRANSCONTINENTAL INSURANCE
COMPANY,**

DEFENDANT.

¹ Bernadette Deal, appointed by the Milwaukee County Circuit Court on August 8, 2000, as Personal Representative of the Estate of Gary C. Gradecki, moves to substitute as plaintiff-appellant for her brother, Gary C. Gradecki, who died on May 21, 2000. This court grants the motion to substitute and amends the caption accordingly. See WIS. STAT. § 803.10(1) (1997-98).

APPEAL from an order of the circuit court for Milwaukee County:
VICTOR MANIAN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Gary C. Gradecki appeals from the circuit court order affirming the decision by the Labor and Industry Review Commission (LIRC), affirming the determination by an administrative law judge (ALJ), that Coatings Inc.,² his employer, had not violated any statute or any order of the Department of Workforce Development (Department), and that he therefore was not entitled to a 15% increase in worker's compensation benefits under WIS. STAT. § 102.57 (1997-98).³ Gradecki contends: (1) that Coatings violated WIS. STAT. § 101.11, the safe-place statute; (2) that even if he mistakenly pushed the wrong button on his welding machine's control panel, thus causing his own injuries, his claim for the 15% increase in benefits is not barred; and (3) that the ALJ's hearsay rulings were inconsistent. We affirm.

BACKGROUND

¶2 On November 10, 1987, during the course of his employment at Coatings, Gradecki's right hand became pinned in the Caterpillar inertia welder he

² Although Coatings Inc. has changed its name to Spinweld Inc., we will refer to the corporation as "Coatings."

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 102.57 provides, in relevant part: "If injury is caused by the failure of the employer to comply with any statute or any lawful order of the department [of workforce development], compensation ... provided in this [worker's compensation] chapter shall be increased 15% but the total increase may not exceed \$15,000."

was operating. His index, middle, and ring fingers were badly mangled, and his thumb also was injured. Although his ring finger was surgically reattached, he lost his index and middle fingers.

¶3 In addition to the payment he received for medical expenses, Gradecki received the following worker's compensation benefits: \$21,413.76 for temporary total disability; \$47,496.15 for permanent partial disability; and \$11,000 for disfigurement. Gradecki then filed a claim with the Department for a 15% increase in benefits pursuant to WIS. STAT. § 102.57, contending that Coatings violated WIS. STAT. § 102.11 by failing to equip the welder with a guard or steady rest which would have offered protection to his hands.

¶4 Following a hearing, the ALJ dismissed the claim. Gradecki then filed a petition with LIRC for review of the ALJ's findings and order. LIRC adopted the findings and order of the ALJ. Gradecki then sought circuit court review of LIRC's decision. The circuit court affirmed LIRC's decision, and Gradecki now appeals.

DISCUSSION

¶5 Gradecki first contends that Coatings violated WIS. STAT. § 101.11, the safe-place statute.⁴ He argues: (1) that the inertia welder, as sold to Coatings

⁴ WISCONSIN STAT. § 101.11 states, in relevant part:

(1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter

(continued)

by the manufacturer, came with an adjustable steady rest; (2) that Coatings “did not have any type of steady rests on its inertia welding machines at the time of his accident”; (3) that a steady rest located in the tailstock area of the machine would have protected his hands; (4) that Coatings did not have the machine properly set up for operation; and (5) that LIRC’s order was not supported by credible and substantial evidence.

¶6 We review LIRC’s decision, not that of the circuit court. *See Secor v. LIRC*, 2000 WI App 11, ¶8, 232 Wis. 2d 519, 606 N.W.2d 175. We must uphold LIRC’s findings of fact “if there is any credible and substantial evidence in the record upon which a reasonable person could rely to make the same findings.” *See id.* “The evidence need only be sufficient to exclude speculation or conjecture.” *Id. v. LIRC*, 224 Wis. 2d 159, 165, 589 N.W.2d 363 (1999). Additionally, we may not substitute our judgment for that of LIRC “as to the weight or credibility of the evidence on any finding of fact.” *See* WIS. STAT. § 102.23(6).

¶7 At the hearing before the ALJ, Richard Leachy, Coatings’ vice-president at the time of Gradecki’s injury, testified regarding inertia welders in

constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

(2)(a) No employer shall require, permit or suffer any employe to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employes and frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.

general and regarding the specific model of Caterpillar welder in which Gradecki's hand was injured. He stated that he personally operated a Caterpillar inertia welder for three years, during vacations, while he was a college student. Leachy acknowledged that an adjustable steady rest was listed on the invoice for the welder involved in Gradecki's injury, but said that he did not know if Coatings ever received it. Additionally, he testified that he did not know what was meant by the term "*adjustable* steady rest" and that Coatings had never used *any* steady rests. Leachy testified that the terms "steady rest" and "guard" cannot be used interchangeably, and that a steady rest is simply a convenience for the operator. He also stated: "My understanding of a steady rest is a support that holds the work piece from underneath. It supports the work piece to get to the center line of the tailstock jaws." Leachy testified that a Caterpillar inertia welder operator generally would be required to put his hand between the tailstock jaws while loading the headstock. He also testified that no guards came with the Caterpillar welder, that the welder was designed to be loaded from the top, and that he did not think items could be loaded into the welder's tailstock if there were some type of guard over the top of the tailstock jaws.

¶8 Gradecki testified that he had operated similar Caterpillar inertia welders, without any serious accidents, for a different employer, OMC, for ten years prior to his injury at Coatings, and that he considered himself to be an expert. He characterized Leachy's description of the operation of an inertia welder as accurate. Gradecki testified that when he worked at OMC, adjustable steady rests were on all the inertia welding machines and that an adjustable steady rest serves two purposes: "It serves to set the center, the piece in the fixture pads and to—It's like a guard that you guard, like you don't put your hands in there."

¶9 After reviewing the testimony and the exhibits, the ALJ found, in pertinent part:

It appears that the only reason the applicant's hand was injured was because he mistakenly actuated the button for the tailstock fixture clamp jaws, rather than the headstock clamp. This particular machine had to be loaded from the top. Even if there would have been a steady rest in place, it does not appear it would have prevented the applicant's injury. A steady rest is placed underneath the part and there was testimony that there could not have been a steady rest for the headstock end of the machine. I also find credible the testimony that there are no guards available which would have prevented the applicant's injury. The applicant would still have to stick his hand into the machine to load the headstock part that he was loading at the time he was injured. Unfortunately, due to error or lapse in judgment, he inadvertently clamped his hand. Industrial tools are inherently dangerous. It does not appear that there was anything the respondent could have done to make this machine less dangerous.

Based on these findings, the ALJ dismissed Gradecki's claim. LIRC reviewed the evidence submitted to the ALJ and adopted the ALJ's findings and order as its own. Because the record contains credible and substantial evidence to support those factual findings, we uphold them.⁵

¶10 Gradecki next contends that even if he mistakenly pushed the tailstock clamping button, thus causing his own injuries, his claim for the 15% increase in benefits is not barred. This issue is moot. *See State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 ("An issue is moot when its resolution will have no practical effect on the underlying controversy. In other words, a moot question is one which circumstances have

⁵ Additionally, we note that the "safety devices and warning lights" section of the operating manual for the Caterpillar inertia welder, received into evidence by the ALJ, does not mention any guards or steady rests.

rendered purely academic.”) (citation omitted). Since we have concluded that we must uphold LIRC’s factual findings, WIS. STAT. § 102.57 is inapplicable.

¶11 Next, Gradecki contends that the ALJ’s hearsay rulings were inconsistent. He argues that the ALJ erred in admitting into evidence the report of his accident prepared by Joseph Crish, Coatings’ production manager. Relying on *Boyer v. State*, 91 Wis. 2d 647, 284 N.W.2d 30 (1979), Gradecki argues that the report, containing multiple levels of hearsay, was inadmissible even under WIS. STAT. § 908.03(6), the business records exception to the hearsay rule. Arguing that the report was not even admissible under WIS. ADMIN. CODE § DWD 80.12(1)(c),⁶ Gradecki claims that it “did not have probative value where it contained various levels of hearsay” and notes that he was “denied the right of cross-examination as to allegations made in the report.”

¶12 WISCONSIN STAT. § 908.03(6) provides what is commonly known as the business records exception to the hearsay rule:

RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

Leachy testified that Crish’s report was prepared, two days after Gradecki’s accident, in the ordinary course of Coatings’ business. Thus, the accident report falls within the business records exception. Further, as Coatings correctly notes in

⁶ WISCONSIN ADMIN. CODE § DWD 80.12(1)(c) (1998) provides, in relevant part, that “[h]earsay testimony may be admitted at the discretion of the examiner provided such testimony has probative value.”

its brief to this court, even if the report was not properly admitted under § 908.03(6), its admission was proper under WIS. ADMIN. CODE § DWD 80.12(1)(c).

¶13 Finally, Gradecki contends that the ALJ's refusal to admit into evidence two reports prepared for him by an engineering professor was erroneous because the reports "had probative value" and because "if the ALJ receives hearsay reports from the respondent he should do likewise for the applicant." After counsel for Coatings and its insurer pointed out that the professor's reports did not address the issue of safety in relationship to Coatings' actions, and that the reports were prepared in conjunction with Gradecki's products liability case against Caterpillar, a proceeding that did not involve Coatings, the ALJ declined to admit the reports into evidence. As Coatings correctly notes in its appellate brief, the professor's reports clearly "have no probative value with regard to the issues in this case" and were properly excluded.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

