COURT OF APPEALS
DECISION
DATED AND FILED

July 12, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP334 **Cir. Ct. No. 2015CV885**

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

ANTHONY SAN FELIPPO,

PLAINTIFF-APPELLANT,

V.

CITY OF WAUWATOSA, DEPARTMENT OF EMPLOYEE TRUST FUNDS AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Anthony San Felippo appeals from a circuit court order affirming on certiorari review the decision of the Labor and Industry Review Commission (LIRC) to deny him disability benefits for a respiratory condition that LIRC determined did not arise from his employment as a City of Wauwatosa firefighter. We affirm.

¶2 In July 2013, San Felippo sought duty disability benefits under WIS. STAT. § 40.65 (2013-14)[1] for what he claimed was asthma induced by his employment as a firefighter. The administrative law judge granted benefits to San Felippo. However, LIRC reversed the administrative law judge and denied benefits after concluding that San Felippo's respiratory condition did not arise from his employment as a firefighter. On certiorari review, the circuit court affirmed LIRC. San Felippo appeals. Additional facts will be discussed as we address the appellate issues.

¶3 We review LIRC's decision, not the circuit court's decision. ***American Mfrs. Mut. Ins. Co. v. Hernandez***, 2002 WI App 76, ¶11, 252 Wis. 2d 155, 642 N.W.2d 584. "LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence." ***Bretl v. LIRC***, 204 Wis. 2d 93, 100, 553 N.W.2d 550 (Ct. App. 1996). "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." ***Cornwell Pers. Assocs. v. LIRC***, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). LIRC's findings of fact will be upheld on appeal if after examining the entire record, "a reasonable person,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

acting reasonably," could have made the same factual findings as LIRC. ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 250, 453 N.W.2d 487 (Ct. App. 1989). It is LIRC's responsibility to make credibility determinations and to weigh the evidence. ***Id.*** at 249. If more than one reasonable inference from the evidence is possible, we are bound by the inference LIRC drew. ***Farmers Mill of Athens, Inc. v. DILHR***, 97 Wis. 2d 576, 580, 294 N.W.2d 39 (Ct. App. 1980). When there are conflicting medical reports, "LIRC is the 'sole judge of the weight and credibility' of medical witnesses." ***Conradt v. Mt. Carmel Sch.***, 197 Wis. 2d 60, 68, 539 N.W.2d 713 (Ct. App. 1995) (citation omitted). LIRC's findings resolving conflicting medical reports are conclusive. ***Bumpas v. DILHR***, 85 Wis. 2d 805, 817, 271 N.W.2d 142 (Ct. App. 1978).

¶4 We start with LIRC's decision, which we review to determine if it is supported by credible and substantial evidence. The question was whether Wauwatosa rebutted the WIS. STAT. § 891.45(2) presumption that San Felippo's asthma arose out of his employment as a firefighter.[2]

¶5 LIRC found that San Felippo worked as a firefighter from May 2005 to November 2012. San Felippo claimed sustained disability from occupational asthma arising from a November 8, 2012 coal bunker fire at a We Energies power plant. At the fire scene, a contractor supplied a coal fire suppression chemical whose material safety data sheet advises that "vapors and/or aerosols which may be formed at elevated temperatures may be irritating to eyes and respiratory tract."

[2] It is undisputed that San Felippo qualifies for the WIS. STAT. § 891.45(2) (2013-14) presumption. As relevant to this case, the statute provides that a firefighter without a history of previous respiratory impairment or disease and who has five years of service at the time he or she claims a respiratory-related disability would be presumed to have developed the respiratory impairment or disease as a result of employment as a firefighter. ***Id.***

The fire burned on the sixth floor of the facility; San Felippo was assigned to work on the third floor which contained a scale onto which coal from the burning bunker would drop. San Felippo did not wear his employer-provided breathing apparatus because the third floor's air quality, which was being monitored, did not require use of the apparatus. San Felippo worked ten to twelve hours at the fire. For part of his shift, San Felippo applied the suppression chemical frequently.

¶6 The contractor monitored the air quality on the third floor, San Felippo's assigned work area, and the air was clean and clear. None of the contractor's workers complained of respiratory problems. The contractor's representative testified that there was very little suppression chemical fluid on the floor, which contradicted San Felippo's description of the scene.

¶7 The fire department's battalion chief testified that the department also monitored the air quality on the third floor and breathing apparatus was not needed. No other fire fighters reported respiratory issues after the fire.

¶8 A We Energies operations manager testified that there was not a lot of chemical fluid on the floor and that the chemical was used much more sparingly than San Felippo claimed due to a concern about electrical equipment in the vicinity. We Energies also monitored the air quality on the third floor and found it to be safe.

¶9 A fire department captain testified that he worked with San Felippo on the third floor and that San Felippo applied the chemical suppression with the hose valve less than half open about half of the time during a four-hour period. The captain testified that a day or two after the We Energies fire, he experienced cold-like upper respiratory symptoms with wheezing, but the symptoms resolved without medical attention.

¶10 Based on the foregoing, LIRC made the following findings about the circumstances of San Felippo's claimed workplace exposure to material that he cited as the cause of his respiratory impairment or disease. San Felippo sprayed the suppression chemical "at one-quarter to one-half flow level about half the time during the four or so hours he was on the third floor" of the We Energies facility. The air quality was monitored by a contractor and the fire department and was considered safe. The third floor was large and well-ventilated. Workers who vacuumed up suppression chemical fluid did not report respiratory symptoms. While the fire department captain experienced respiratory symptoms a day or two after the fire, he did not report the symptoms, he did not seek treatment, and the symptoms resolved.

¶11 We turn to the medical evidence of San Felippo's respiratory ailment and the conflicting medical opinions LIRC considered. San Felippo testified that he did not notice any respiratory symptoms until a day or two after he worked the November 8 fire. San Felippo first sought treatment on November 28, 2012, and complained of a cough. Dr. Winkoski's treatment notes state that San Felippo complained

> of symptoms of a URI [upper respiratory infection] … including cough, runny nose, chest congestion. Notes some wheezing at night. Onset of symptoms was 4 days ago [on or about November 24], and has been unchanged since that time. Treatment to date: none. Wife and dtr [daughter] with uri symptoms.

The note does not refer to the November 8 We Energies fire. San Felippo testified that his physician's notes were incomplete because he told his physician that he

had been wheezing for longer than four days; only his cough and cold symptoms were four days old.[3]

¶12 San Felippo saw Winkoski for a persistent cough and wheezing on three more occasions between November 28 and December 18.[4] Winkoski believed that San Felippo's cough was likely postviral with scattered wheezing. He referred San Felippo to a pulmonologist whom San Felippo saw on January 8, 2013. The history taken by the pulmonologist included the first reference to the November 8 fire and an alleged associated exposure to irritants. San Felippo presented with "minimal to mild wheezes" which the pulmonologist attributed to reactive airway dysfunction syndrome (RADS). On January 15, the pulmonologist diagnosed San Felippo with irritant induced asthma. Further evaluations in April, May, and June showed improvement with a continuation of RADS and bronchia hyper responsiveness.

¶13 In his July 2013 application for duty disability benefits, San Felippo relied upon Winkoski, who opined in his duty disability medical report that San Felippo was permanently impaired by restrictive airway disease secondary to

[3] In his reply brief, San Felippo appears to argue that Winkoski's medical notes were hearsay because they were not certified or verified. This argument is raised for the first time in the reply brief, and we will not address it. ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (we will not consider arguments raised for first time in a reply brief). The circuit court also noted San Felippo's failure to raise this challenge. Finally, the argument is not supported by citations to the record establishing that San Felippo made this evidentiary challenge in the administrative proceeding. ***State v. Outagamie Cty. Bd. of Adjustment***, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376 (to have judicial review of an issue, the issue must have been raised before the administrative agency).

[4] During a December 3, 2012 visit with Winkoski, San Felippo reported an onset of symptoms ten days earlier. During the visits in this period, San Felippo did not mention the November 8 fire and consistently timed the onset of his symptoms to a period two weeks after he fought the November 8 fire.

workplace exposure. San Felippo also relied upon the pulmonologist's January 15, 2013 RADS diagnosis. The pulmonologist's duty disability medical report opined that San Felippo has RADS from a work exposure, and San Felippo was likely permanently disabled from any employment with potential exposure to respiratory irritants. San Felippo also relied upon a December 2013 treatment note from the pulmonologist that he has persistent asthma-like symptoms associated with either RADS or irritant induced asthma due to exposure to a respiratory irritant that caused a bronchial injury. The pulmonologist opined that San Felippo's employment as a firefighter, including day-to-day exposure to dust, fumes, smoke and other respiratory irritants as well as the November 8 … incident[] "was a material contributory causative factor in the onset or progression of his respiratory impairment" which was either RADS or bronchial hyperreactivity. San Felippo also submitted a scholarly article discussing RADS.

¶14 Wauwatosa relied upon the independent medical examination and opinion of Dr. Levy. Levy opined in November 2013 that San Felippo had "non-specific bronchial hyperreactivity following a community-acquired respiratory tract infection November 23, 2012." Relying on contemporaneous medical records from November 2012 stating that San Felippo's symptoms began on or about November 23, Levy attributed San Felippo's condition to a virus that San Felippo's wife and daughter had in November 2012, approximately two weeks after the November 8 fire. Levy explained that RADS resulting from a high level exposure to an irritant (from an irritant spill or a container rupture, particularly in a poorly ventilated area) will cause symptoms that require immediate medical attention. Generally, other workers in the area would also be affected. Levy opined that there is no general medical evidence that a low level or less than intense exposure to an irritant can cause RADS. The fumes and vapors to which

San Felippo was exposed at the fire scene "would not be considered sufficiently caustic to cause RADS, but more importantly, regardless of the exposure during this deployment, it is not biologically plausible that [San Felippo] could have developed the first symptoms of RADS twenty days later." Levy opined that the source of San Felippo's health problems arose from a community-acquired respiratory tract infection experienced by him, his wife, and his daughter in that time period, and San Felippo's condition was not work-related.

¶15 At the benefits hearing before the administrative law judge, Levy further explained that one-third to one-half of adults with new onset asthma can trace that condition to a community-acquired respiratory tract infection. Levy conceded that San Felippo had asthma but disputed that it was irritant-induced because "[t]here is no evidence in the medical literature that irritants in dosages less than that that cause RADS can cause asthma. Irritants in a low dose can aggravate pre-existing asthma but they can't cause it. There is no such thing as irritant induced asthma with the exception of RADS." Levy believed that it was improbable that San Felippo developed asthma as a result of seven years of firefighter work and associated cumulative exposures to irritants in the absence of evidence that he had suffered an acute respiratory injury. Levy concluded that San Felippo's asthma resulted from a respiratory tract infection, not an employment-related irritant. San Felippo presented evidence that his asthma was work-related.

¶16 With the foregoing evidence before it, LIRC addressed the WIS. STAT. § 891.45(2) rebuttable presumption of work-related disease respiratory impairment or disease. *See* ***Sperbeck v. DILHR***, 46 Wis. 2d 282, 289, 174 N.W.2d 546 (1970) (statutory presumption is rebuttable). As relevant to this case,

the statute provides that a firefighter without a history of previous respiratory impairment or disease[5] and who has five years of service at the time he or she claims a respiratory-related disability would be presumed to have developed the respiratory impairment or disease as a result of employment as a firefighter. Sec. 891.45(2). Evidence sufficient to rebut the presumption is evidence that affirmatively establishes a cause of the respiratory defect other than the presumed occupational cause. ***Sperbeck***, 46 Wis. 2d at 289.

¶17 LIRC found that Levy offered an alternate cause for San Felippo's asthma: a community-based respiratory infection. LIRC found that Levy's opinion was sufficient to rebut the presumption that San Felippo's asthma was work-related. *See* ***Appleton v. DILHR***, 67 Wis. 2d 162, 168-69, 226 N.W.2d 497 (1975) (evidence of a non-occupational cause for a respiratory condition is proper rebuttal of the presumption). Contrary to San Felippo's argument, Levy's opinion does not attack the rationale of the statutory presumption. *See* ***Sperbeck***, 46 Wis. 2d at 289. Based on the medical record, San Felippo's history, the facts surrounding the claimed irritant exposure and the medical literature, Levy opined that San Felippo's asthma was not work-related. Levy rendered a case-specific opinion, which LIRC found credible, and he did not attack the rationale of the statutory presumption.[6]

[5] It is undisputed that San Felippo's 2005 pre-employment medical examination did not reveal that he had a respiratory impairment or disease.

[6] For these reasons, we reject San Felippo's claim in his reply brief that LIRC applied the wrong standard when it applied the presumption. We conclude that LIRC properly applied the statutory presumption.

¶18 LIRC also relied upon Levy's opinion that if San Felippo's exposure had been sufficient to cause RADS, other workers would have immediately experienced symptoms and sought treatment. Winkoski's notes state that San Felippo started experiencing symptoms on or about November 24 and did not seek treatment until November 28. LIRC found that San Felippo's recollection that his symptoms started shortly after the fire was contradicted by Winkoski's treatment notes. LIRC found the treatment notes more reliable. *Cf.* ***Revels v. Industrial Comm'n***, 36 Wis. 2d 395, 401, 153 N.W.2d 637 (1967) (LIRC can rely on contemporaneous written statements which are inconsistent with later testimony.). Had San Felippo told Winkoski that his symptoms began in proximity to the fire, LIRC reasoned that "at least some mention of the exposure would have made it into his notes." No other third floor workers, who also worked without breathing apparatus, complained of respiratory symptoms. LIRC also found that the captain's testimony about his mild respiratory symptoms did not establish the exposure necessary to cause RADS. None of this is inconsistent with Levy's medical opinion upon which LIRC relied.

¶19 Based on the foregoing, LIRC found that San Felippo's respiratory condition was caused by a community-acquired respiratory tract infection, not a work exposure. LIRC reversed the administrative law judge and denied benefits.

¶20 On certiorari review, the circuit court agreed that the WIS. STAT. § 891.45(2) presumption was properly rebutted and that LIRC's findings were supported by credible and substantial evidence. The court conceded that reasonable minds could differ with regard to the conflicting medical opinions, but LIRC was free to find Levy's medical opinion more credible than the evidence offered by San Felippo in support of his duty disability claim. San Felippo appeals.

¶21 We give LIRC's decision great weight deference. ***Jicha v. DILHR***, 169 Wis. 2d 284, 290-91, 485 N.W.2d 256 (1992).[7]

¶22 San Felippo argues that LIRC's decision is not supported by credible and substantial evidence. We disagree. LIRC considered all of the evidence, made the necessary credibility determinations and resolved conflicts in the evidence. We conclude that the evidence upon which LIRC relied was credible and substantial.

¶23 San Felippo argues that Wauwatosa did not rebut the WIS. STAT. § 891.45(2) presumption.[8] We disagree. It is clear that LIRC understood the purpose of the presumption but found the presumption rebutted by Levy's credible medical opinion as to the nonwork origin of San Felippo's respiratory impairment.

¶24 San Felippo contends that Wauwatosa did not present evidence that his respiratory impairment arose from a non-work activity. We disagree. Levy opined that based upon San Felippo's medical record and the medical literature, San Felippo's respiratory impairment did not arise from the November 8 fire. In Levy's opinion, San Felippo's respiratory impairment arose from a community-acquired respiratory infection.

¶25 San Felippo argues that LIRC should have applied WIS. STAT. § 903.01 governing presumptions. Section 903.01 does not apply to department

[7] San Felippo's argument that this level of deference is not due is premised upon his further argument that LIRC misapplied the WIS. STAT. § 891.45(2) statutory presumption. Because we hold that LIRC properly applied the presumption, we do not address this argument further.

[8] In an amicus curiae brief, the International Association of Fire Fighters also argues that LIRC did not properly apply WIS. STAT. § 891.45(2) statutory presumption.

hearings. ***Goranson v. DILHR***, 94 Wis. 2d 537, 541, 551, 289 N.W.2d 270 (1980) (§ 903.01 inapplicable in department hearings).

¶26 As we have held, we see no error in the manner in which LIRC applied the WIS. STAT. § 891.45(2) presumption: LIRC recognized the existence of the presumption and then found that Levy's opinion rebutted that presumption. LIRC's approach to the § 891.45(2) presumption is outlined in ***Sperbeck***, which remained good law even after the creation of § 903.01. *See* ***City of Superior v. DILHR***, 84 Wis. 2d 663, 668-72, 267 N.W.2d 637 (1978).

¶27 San Felippo and the amicus curiae argue that LIRC did not consider WIS. STAT. § 891.45(2)3 which creates a presumption in favor of a firefighter whose impairment arises from an infectious disease. San Felippo argues that if he acquired his respiratory condition via an infectious disease, as Levy opined, then his respiratory condition is presumed to have been caused by his employment. Both LIRC and Wauwatosa argue that San Felippo did not make this argument either before the administrative law judge or LIRC. San Felippo's reply brief does not counter this claim. We assume that San Felippo concedes that he did not make this argument in the administrative proceedings. ***Charolais Breeding Ranches v. FPC Sec.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (where a party on appeal does not address an issue raised by the opponent, we assume the party concedes the issue). We decline to address this issue raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983); ***State v. Outagamie Cty. Bd. of Adjustment***, 2001 WI 78, ¶55, 244 Wis. 2d 613,

628 N.W.2d 376 (to have judicial review of an issue, the issue must have been raised before the administrative agency).[9]

¶28 We affirm the circuit court's order upholding LIRC's decision to deny duty disability benefits to San Felippo.

By the Court.—Order affirmed.

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

[9] Not only is this argument not properly before us, but we agree with LIRC that San Felippo's duty disability claim was premised on an asthma claim resulting from a workplace exposure. San Felippo did not argue to LIRC that he acquired his respiratory condition as the result of an infectious disease, even though that was the opinion of Levy.

To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").