

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 18, 2017

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. 2016AP916

Cir. Ct. No. 2015CV691

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

LINDA S. BURT-REDDING,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION, TOWN OF GRAND CHUTE,
VIRGINIA SURETY CO. INC. AND WAUSAU BUSINESS INS. CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Outagamie County:
MARK J. MCGINNIS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, 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. Linda Burt-Redding appeals a circuit court order affirming a Wisconsin Labor and Industry Review Commission (LIRC) decision denying compensation for a non-traumatic mental injury. We affirm.

¶2 Burt-Redding worked as a patrol officer in the Grand Chute Police Department. On August 29, 2002, and while in the line of duty, she shot an individual who belonged to a street gang, was threatening motorists, and was wielding a knife.¹ Following the shooting, Burt-Redding allegedly received threats which fell into three categories: (1) threats made directly to Burt-Redding; (2) threats made directly to her son; and (3) instances where the police chief warned Burt-Redding about the shooting victim's family threatening her life. Burt-Redding alleged the "repeated threats against her life and the unresolved reminders of those threats that continued over a period of several years" caused anxiety attacks, chronic depression, and post-traumatic stress disorder. She sought compensation for permanent total disability benefits or, in the alternative, loss of earning capacity.

¶3 An administrative law judge (ALJ) found "that the events most certainly caused applicant stress, and her medical records bear this out." However, the ALJ determined the threats, alone or in combination, did not amount to "extraordinary stress" of greater dimension than the day-to-day emotional strain and tension experienced by a patrol officer who would be similarly situated as Burt-Redding. See *Bretl v. LIRC*, 204 Wis. 2d 93, 106-07, 553 N.W.2d 550 (Ct.

¹ On June 5, 2007, Burt-Redding responded to another call involving the same individual, who again allegedly had a knife. She drew her gun, pointed it at him, and ordered him to lie on the ground. After the individual complied, she then handcuffed him.

App. 1996). Burt-Redding's application for worker's compensation benefits was therefore dismissed with prejudice.

¶4 LIRC affirmed the ALJ's decision and adopted as its own the ALJ's findings. In its memorandum opinion, LIRC stated:

As the ALJ noted, the applicant's encounter with [the shooting victim] was very similar to the facts presented in *Bretl*. The record also supports the conclusion that while the precise type of threats the applicant received after the incident might not occur on a daily basis, they did not subject her to greater stress than that encountered on a day-to-day basis by similarly-situated law enforcement officers.

The circuit court subsequently affirmed LIRC's decision. Burt-Redding now appeals.

¶5 We review LIRC's decision and not the circuit court's. *See Pick 'n Save Roundy's v. LIRC*, 2010 WI App 130, ¶8, 329 Wis. 2d 674, 791 N.W.2d 216. LIRC's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. *See WIS. STAT. § 102.23(6)*.² Credible evidence is that which excludes speculation and conjecture. *See Bumpas v. DILHR*, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). Substantial evidence is not a preponderance of the evidence, but is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

¶6 Burt-Redding argues LIRC's decision was based on "opinion testimony that is not supported by objective factual evidence." She insists there

² References to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

“simply is no ‘credible and substantial evidence’ in the record to support the conclusion that the stress experienced by Burt was comparable to the stresses that are experienced by police officers in general”

¶7 Our supreme court first adopted the “extraordinary stress” test for awarding worker’s compensation benefits in non-traumatic disability claims in *School District No. 1, Village of Brown Deer v. DILHR*, 62 Wis. 2d 370, 377-78, 215 N.W.2d 373 (1974). In that case, the court held that mental injury non-traumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension that similarly-situated employees must experience. *Id.* In order for a solely psychological injury caused by one’s employment to be compensable, stress must have resulted from a situation that is out of the ordinary or sufficiently rare that, when it is experienced, it has not been foreseen or expected. *Id.*

¶8 In *Bretl*, we affirmed a LIRC determination that a police officer did not sustain a compensable mental injury allegedly caused by the officer shooting a knife-wielding suspect. *Bretl*, 204 Wis. 2d at 98, 106-07. Moreover, we held LIRC is required to determine whether the duties of the job subjected the claimant to greater stress than those similarly situated, and we also determined that we owe great deference to LIRC’s determination in that regard. *Id.* at 105-06.

¶9 In the present case, LIRC correctly applied the law, and we are satisfied that its factual findings are supported by credible and substantial evidence. LIRC and the ALJ recognized Burt-Redding’s encounter was very similar to the facts presented in *Bretl*. In both cases, the suspect was an adult wielding a knife and the officer shot, but did not kill, the suspect.

¶10 The ALJ also correctly observed that Burt-Redding's case "is different from *Bretl* in one significant respect." In *Bretl*, neither the suspect nor others threatened the officer, whereas in the present case Burt-Redding was threatened by gang members.

¶11 However, the record is replete with credible and substantial evidence supporting LIRC's determination that the threats in the present case did not amount to extraordinary or unusual stress for a patrol officer like Burt-Redding. Grand Chute Police Chief Edgar Kopp testified the threats perceived by Burt-Redding "were not unusual or atypical for a police officer." Police science instructor Robert Willis, who has testified in many cases involving police use of force, also opined the threats "were not unusual nor should be considered atypical to the law enforcement profession." Willis also stated in his report that threats against law enforcement officers are a "common experience" and "[m]ost police officers accept that the possibility of threats just 'goes with the territory.'"

¶12 In his written decision, the ALJ found:

[The shooting victim] and his brothers were associated with an Asian street gang called the Crazy Hmong Boy Gang (CMB Gang). The Grand Chute Police Department was familiar with this gang and had an officer who "dealt with gangs and kept files and information on such subjects," so the officers in the Grand Chute Police Department were fully aware of the CMB gang.

Chief Kopp testified credibly that in the law enforcement profession, police officers deal with people who are not "the nicest people in society." He further testified that because of this, "any police officer knows that they potentially are setting themselves up for some kind of revenge or retaliation" from the people they deal with. According to the respondents' expert, Robert Willis, who taught street gang awareness, "Asian gangs are very often likely to seek retribution." Applicant embraced this fact in her posthearing brief, page 4, when she stated: "The []Xiong brothers were gang members and it was common

knowledge in law enforcement circles that, ‘Asian gangs are very often likely to seek retribution.’”

¶13 The ALJ also found there was no evidence that any threat against Burt-Redding was ever acted upon. In this regard, Willis stated, “[Burt-Redding’s] department did investigate reported threats and deemed them ‘unfounded.’” Moreover, the record shows Burt-Redding continued to work as a patrol officer for another five years after the August 2002 shooting. Burt-Redding never took any steps to seek prosecution of those supposedly threatening and/or harassing her and never sought assistance from any employee assistance programs available to law enforcement officers. She also received acceptable employee reviews during her continuing tenure as an officer for the Grand Chute Police Department.

¶14 Burt-Redding insists Chief Kopp “offered no specific information and no concrete example even remotely similar to Burt’s case, to support his opinion, only the vague, subjective statements indicated, which tell us nothing about the expectation, let alone the experience of other police officers.” She also insists Willis “had not ever before been called on to testify in a case where, following a shooting incident, there had been subsequent, repeated threats made against the police officer’s life, all made by the same individual or individuals.” She also asserts Willis did not identify a single incident “at all comparable to Burt’s shooting incident and the subsequent threats against her life and the life of her son.” Burt-Redding argues the “threats [she] experienced had been of a different magnitude” and LIRC “disregarded uncontroverted evidence in the record that explained the difference.”

¶15 However, these arguments go to the weight of the evidence and not its admissibility. The credibility of witnesses and the persuasiveness of their

testimony are within LIRC's province. *See* WIS. STAT. § 102.23(6). Conflicts in the testimony of witnesses are also to be resolved by LIRC and LIRC's resolution of conflicting evidence is conclusive. *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). After weighing the record evidence, including competing witness testimony, LIRC credited Chief Kopp's testimony that the threats did not constitute extraordinary stress. LIRC also found Willis's testimony compelling.

¶16 Furthermore, Burt-Redding's arguments on appeal largely discuss evidence supporting a conclusion LIRC could have reached but did not. This approach ignores our standard of review and essentially requests we retry the case. We may not second-guess LIRC's proper exercise of its fact-finding function, even if we would come to another result viewing the case independently. Reviewing LIRC's decision in this case, we are satisfied that it contains a reasonable application of the facts to the correct legal standard for non-traumatic mental injury. Accordingly, we affirm.

By the Court.—Order affirmed.

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

