COURT OF APPEALS
DECISION
DATED AND RELEASED

April 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1680

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

JERRY L. MEANA,

Plaintiff-Respondent-Cross Appellant.

v.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant,

MINNESOTA MINING AND MANUFACTURING COMPANY AND OLD REPUBLIC INSURANCE COMPANY,

Defendants-Appellants-Cross Respondents.

APPEAL from an order of the circuit court for Dane County: JACK AULIK, Judge. *Reversed and cause remanded*.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

EICH, C.J. This is a worker's compensation case in which the employer, Minnesota Mining & Manufacturing Company (3M), and its insurer,

Old Republic Insurance Company, appeal from an order reversing the Labor and Industry Review Commission's dismissal of Jerry L. Meana's compensation claim. Meana suffered a heart attack while employed by 3M, and he claims the heart attack and his current condition were caused by that employment.

The issue is whether there is sufficient evidence in the record to support the commission's determination. We believe there is, and we therefore reverse the circuit court's order and remand with directions to enter an order affirming the commission's decision.

Except for the medical testimony, which we discuss at length below, the facts are not in serious dispute. Starting in 1969 Meana worked at a variety of positions in 3M's manufacturing plant. In 1987 he began working as a "maker operator" and in that capacity was responsible for operation of a production line that manufactured material for scouring pads. When the line broke down, as it apparently did with some regularity, Meana was responsible for starting it up again.

Typically, Meana would work a twelve-hour shift (from 6:00 p.m. to 6:00 a.m.) two or three days in a row and then take two days off. In late July and early August 1990, his work schedule was unusually heavy, requiring him to work twelve-hour shifts for six consecutive days. When he arrived home at the end of the sixth day, he began to experience chest pains and drove to the hospital, where he suffered a heart attack that evening. The following day he underwent emergency heart catheterization and angioplasty procedures and continued to have heart problems after his discharge a week later.

At the hearing before the Department of Industry, Labor and Human Relations on Meana's claim for worker's compensation benefits, he testified that his job had for some time interfered with his eating and sleeping habits, and that he considered his work to be generally stressful because of the "pressures" he would feel in trying to rectify frequent machinery breakdowns on the production line. He said that the "extra" shifts he worked immediately preceding his heart attack were particularly stressful because the machinery had broken down more often than usual during that period.

The medical evidence at the hearing consisted of written reports from Meana's treating cardiologist, Dr. Gordon Johnson, and from a cardiologist retained by 3M, Dr. Kenneth Bortin. Meana's medical records showed a family history of heart disease and a pre-existing "triple vessel coronary artery disease," which was exacerbated by Meana's history of cigarette smoking, high blood pressure and hypercholesterolemia.

Despite these "risk factors," Dr. Johnson believed that Meana's heart attack was directly related to the stress involved in his heavy work schedule in July and August. Dr. Bortin, on the other hand, concluded that Meana's existing heart disease and blood-pressure and cholesterol problems, coupled with his cigarette smoking and family history, placed him in a heart-attack-prone position, and that it was these factors, and not job stress, that led to the attack.

Dr. Bortin's report noted that the job description supplied to him did not give him a sense of the degree of stress associated with Meana's ongoing job duties, and he assumed from the absence of any such information that, after twenty-one years on the job, Meana was, in general, "relatively comfortable" in his work. According to Dr. Bortin, even considering the stress associated with Meana's unusually heavy work schedule in July and August, that stress did not, in light of the other factors, predispose him to a heart attack.

On the basis of that evidence, the department's administrative law judge (ALJ) determined that Meana had suffered an "occupational disease ... arising out of and occurring while performing services growing out of and incidental to his employment" with 3M, and concluded that Meana's heart attack had left him with an eighty-percent permanent partial disability. In so ruling, the ALJ rejected Dr. Bortin's testimony as incredible because his statement that Meana was "comfortable" in his job, in the ALJ's view, contradicted Meana's own testimony that he felt stress and pressure in his job. The ALJ went on to "adopt" Dr. Johnson's report and concluded that Meana's heart attack was "direct[ly] cause[d]" by job-related stress.

On appeal, the commission reversed the ALJ's decision, concluding, among other things, that: (1) while Meana testified about the stress connected with his job, the only stress he discussed was that related to

production line breakdowns, particularly one occurring just prior to his attack; (2) Dr. Johnson's records and report discussed only the stress accompanying Meana's increased shifts in the ten days preceding the attack; and (3) in view of the nature of his job duties and the length of time Meana had been working long shifts, it could be inferred "that the degree of stress he was subject to was not so severe as to have caused or materially contributed to his preexisting heart disease."[1]

"Of even greater importance," said the commission, "is the fact that [Meana] had documented hypercholesterolemia, [a] history of cigarette use and a family history of heart disease." It concluded:

> The reasonable inference, in accordance with Dr. Bortin's opinion, is that these well-known risk factors resulted in the atherosclerotic heart disease which caused [Meana's heart attack]. The commission is left with a legitimate doubt that the stress which [Meana] experienced at work was a material contributory factor in either his atherosclerotic heart disease or his [heart attack].

In a note at the end of its decision, the commission said:

> [We] consulted with the administrative law judge, who indicated that he found [Meana] to have been a credible witness. As noted in the above decision, [we] inferred from the evidence ... that [Meana] had not demonstrated that he was subject to stress so severe as to have been a material contributory factor in the development of his heart disease or his [heart attack. We] found Dr. Bortin's opinion credible based on the substantial predisposing risk factors for heart disease and [heart attack].

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[1] The commission also noted that, immediately preceding the string of twelve-hour shifts, Meana had had ten consecutive days off.

As indicated, the circuit court reversed, agreeing with the ALJ that Dr. Bortin's opinion was incredible as a matter of law because it "rests on assumptions as to Meana's comfort with his job and ... which were substantially contradicted by Meana's credited testimony." Then, ruling that Dr. Bortin's testimony "must be disregarded" and, further, that Dr. Johnson's testimony "may, but need not, have been credited," the court vacated the commission's order and remanded the case to give both parties "an opportunity to shore up the opinions of their medical experts." The 3M Company and its insurer appeal.[2]

In an appeal from a circuit court decision in an administrative review case, we review the decision of the agency, not the court. ***Barnes v. DNR***, 178 Wis.2d 290, 302, 506 N.W.2d 155, 160 (Ct. App. 1993), *aff'd,* 184 Wis.2d 645, 516 N.W.2d 730 (1994). And that review is guided by several well-established principles.

First, whether an employee has sustained a disabling occupational disease arising out of his or her employment is a question of fact to be determined by the commission. ***General Casualty Co. of Wisconsin v. LIRC***, 165 Wis.2d 174, 178, 477 N.W.2d 322, 324 (Ct. App. 1991). The commission's factual findings are conclusive if they are supported by credible and substantial evidence. ***Id***. "Indeed, as long as there is credible evidence to support the findings, we will uphold them even if they are against the great weight and clear preponderance of the evidence." ***Id***. (citing ***Goranson v. DILHR***, 94 Wis.2d 537, 554, 289 N.W.2d 270, 278 (1980)). Thus, "[w]here ... the credible evidence supporting the commission's decision is sufficient to exclude speculation or conjecture, we may not overturn [that decision]." ***Id***. at 179, 477 N.W.2d at 324.

The credibility of the witnesses and the persuasiveness of their testimony are for the commission, not the courts, to determine. ***L & H Wrecking Co. v. LIRC***, 114 Wis.2d 504, 509, 339 N.W.2d 344, 347 (Ct. App. 1983). In applying the credible evidence test to findings of the [agency], a reviewing court does not weigh conflicting evidence to determine which should be believed. If

[2] Because we reverse the circuit court and affirm the commission's decision, we need not consider Meana's cross-appeal in which he challenges the court's action in remanding the case to the commission for the taking of additional evidence.

there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to the opposite conclusion, a court must affirm.

Id.

Finally, the commission is not required to justify its decision; the burden is on the challenger to show that the decision should be overturned. ***Racine Education Ass'n v. Commissioner of Ins.***, 158 Wis.2d 175, 182, 462 N.W.2d 239, 242 (Ct. App. 1990). It follows that our role on appeal is to review the record for credible and substantial evidence supporting the commission's decision, rather than to search for or weigh opposing evidence. ***Kimberly-Clark Corp. v. LIRC***, 138 Wis.2d 58, 67, 405 N.W.2d 684, 688 (Ct. App. 1987).

As we have noted above, the commission determined that Meana had not carried his burden of establishing that his heart attack was caused by job-related factors because, after reviewing the record of the hearing, the commission found itself "left with a legitimate doubt" that, given all of the other "risk factors" present in the case, Meana's heart attack was the result of job stress, as he claimed. And where the evidence before the commission is such as to raise in the minds of the commissioners "a legitimate doubt ... regarding the facts necessary to establish a claim, the commission is required to reject the petition for benefits." ***Hakes v. LIRC***, 187 Wis.2d 582, 590, 523 N.W.2d 155, 158 (Ct. App. 1994) (citation omitted).

Correctly defining "legitimate doubt" as not just "any doubt that the [commission] chooses to entertain," but one arising from "`some inherent inconsistency' .. or conflict in the testimony," ***Bumpas v. DILHR***, 95 Wis.2d 334, 344, 290 N.W.2d 504, 508 (1980) (quoted source omitted), Meana argues that the commission could not have such a doubt in this case because: (1) Meana's testimony about his job stress was credible; (2) Dr. Johnson's testimony that job stress caused the heart attack was credible; and (3) Dr. Bortin's testimony that the attack was caused not by Meana's job but by several unrelated cardiac risk factors was incredible.

It is true, as Meana asserts, that he testified that he felt pressure in his job, had experienced stress at work in the days preceding his heart attack, and was physically exhausted from working a series of long shifts at that time. He also testified that he felt "pressure" on the job in general. The commission

did not discount Meana's testimony. Assuming it to be credible and weighing it together with the other evidence, however, the commission found that that stress "was not so severe as to have caused or materially contributed to his pre-existing heart disease."

As for Dr. Johnson's testimony, his first report documented Meana's history of cigarette use and pre-existing "triple vessel coronary artery disease,"[3] and concluded generally as follows:

> It is my impression, based on personal observation, that when a patient is subjected to marked stress, whether emotional or physical[,] which involves a concomitant significant increase in heart rate and blood pressure, that stress is a major probable cause of atherosclerotic plaque rupture in a coronary vessel with subsequent spasm and clot formation and occlusion of the vessel causing the patient to have a myocardial infarction. The medical literature has not documented this well because it is difficult to have treatment and control groups of patients.

Approximately one month later, Dr. Johnson stated in a letter to Meana's attorney:

> It is my opinion, to a reasonable degree of medical probability, that Mr. Meana sustained an acute ischemic event with atherosclerotic plaque rupture and subsequent occlusion with eventual myocardial infarction directly related to *his preceding heavy work schedule* and its related stress as reported to me by the patient.

(Emphasis added.)

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[3] The report also suggested that Meana may have had a previous heart attack.

Like Dr. Johnson, Dr. Bortin began his report by reciting Meana's "long-standing" history of smoking, high cholesterol, hypertension and family heart problems, concluding that "[i]t was these risk factors rather than the stressful working environment that predisposed Mr. Meana to development of coronary atherosclerosis."[4] Dr. Bortin went on to discuss Meana's job:

> The job description as supplied to me did not give me a true sense of the degree of stress associated with his type of work. I would assume that after twenty-one years at the same job, that he was relatively comfortable performing his tasks. There was[,] though[,] a change in his working schedule with six consecutive twelve hour shifts preceded and followed by a twenty-four hour rest period.... [I]t will be difficult to prove that the stress associated with the change in his work schedule was the direct cause of his acute myocardial infarction. Other than the number of consecutive ... shifts worked, no specific aberrations in the working environment that might affect his heart rate or blood pressure were documented.

As the commission correctly notes in its decision, Dr. Johnson's two reports make no reference to any ongoing job stress in Meana's employment at 3M; and his conclusion that Meana's heart attack was job-related refers only to the stress "related to his preceding heavy work schedule"--that is, his unusual six-day stretch of twelve-hour days immediately preceding the attack.

Dr. Bortin's report, reaching the opposite conclusion with respect to the role played by job stress in Meana's heart attack, was based on the same considerations: he concluded that the attack resulted from Meana's existing (atherosclerotic) coronary disease, and that it was Meana's other risk factors, not

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[4] In this regard, Dr. Bortin noted that the medical literature "has [n]ever documented a stressful working environment as an independent risk factor for atherosclerotic cardiovascular disease," but that "[i]t has been concluded by most researchers that stress is an indirect rather than direct risk factor for coronary atherosclerosis."

the "stress associated with the change in his work schedule" requiring him to work six successive twelve-hour shifts, that caused the disease and the attack.

As a result, Meana's argument--which the trial court adopted--that Dr. Bortin's opinion should be disregarded because it assumed a lack of stress over the period of Meana's employment at 3M--is unavailing. The testimony of his own physician--which he relies on as meeting his burden to prove his heart attack was caused by job-related stress--is based solely on Meana's heavy work schedule in the days immediately preceding the attack. He presented no medical evidence that, whatever stress he may have felt in his job over time, stress either caused or aggravated his pre-existing coronary heart disease. And whatever assumptions Dr. Bortin made or did not make about the existence of long-term job stress, he based his opinion on the stress Meana experienced immediately prior to his hospitalization--just as Dr. Johnson did. Dr. Bortin concluded that that stress was far outweighed by Meana's other "risk factors" in causing the condition of which he complains.

We are left with a simple conflict in the opinions of the two physicians, and it is well established that the commission, not the reviewing court, resolves conflicting medical testimony in worker's compensation proceedings. "The commission's finding on disputed medical testimony is conclusive. Where there are inconsistencies or conflicts in medical testimony, the [agency], not the court, reconciles the inconsistencies and conflicts." ***Valadzic v. Briggs & Stratton Corp.***, 92 Wis.2d 583, 598, 286 N.W.2d 540, 547 (1979).[5] On this record, the commission could properly resolve that conflict in favor of the conclusions stated in Dr. Bortin's report, and those conclusions plainly justify the commission's "legitimate doubt that the stress which [Meana] experienced at work was a material contributory factor" in causing the condition upon which his compensation claim is based.

We therefore reverse the order of the circuit court and remand with directions to enter an order affirming the commission's order dismissing Meana's claim.

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[5] Professor Larsen puts it this way: "In summing up the problem of conflicting medical testimony, one may recall Alexander Pope's famous line in which he asks: `Who shall decide when doctors disagree?' In work[ers] compensation the answer is easy: The Commission decides." 3 LARSEN, THE LAW OF WORKMEN'S COMPENSATION, sec. 80.24(c), p. 15-747-48.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.