

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 26, 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. 96-1222

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**BUTTERFIELD REFRIGERATION,
a Wisconsin Corporation,
and FEDERATED MUTUAL
INSURANCE COMPANY, a
Foreign Corporation,**

Plaintiffs-Appellants,

v.

**LABOR AND INDUSTRY REVIEW
COMMISSION and
JEROME K. BUTTERFIELD,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Butterfield Refrigeration and its insurer appeal a judgment affirming a decision of the Labor and Industry Review Commission. LIRC found that Butterfield Refrigeration's employee, Jerome Butterfield, sustained a work-related back injury that precipitated, aggravated and accelerated a preexisting degenerative condition beyond its normal progression and awarded temporary and total disability payments from Butterfield's last day of work to the date of the hearing. Butterfield Refrigeration argues that LIRC exceeded its authority when it affirmed the administrative law judge's decision based on a different theory of recovery and that the evidence does not support its findings that the back problems were the result of work-place exposure or that the disability lasted for the duration LIRC found. We reject these arguments and affirm the judgment.

The ALJ found that Butterfield sustained a "compensable (occupational disease) low back injury." LIRC found that the injury precipitated, aggravated and accelerated a preexisting degenerative condition. Citing *Joseph Schlitz Brewing Co. v. DILHR*, 67 Wis.2d 185, 192, 226 N.W.2d 492, 495 (1975), Butterfield Refrigeration argues that LIRC elected to "mount and ride an entirely different horse" when it modified the ALJ's decision. We disagree. In *Schlitz*, the employee's widow filed an application for death benefits alleging that her husband's death was caused by inhalation of noxious gases, not coronary artery heart disease as stated in the death certificate. The hearing examiner found that she had not met her burden of proof. DILHR awarded death benefits, holding that "the deceased sustained accidental injury in the nature of an aggravation of a preexisting cardiac condition by inhalation of carbon dioxide" The court held that the commission's authority to affirm, reverse, set aside or modify the hearing examiner's findings did not include the right to substitute an entirely different basis for liability than the one tried by the parties and ruled on by the examiner.

LIRC's findings in this case differ from the ALJ's findings in degree, not in kind. Both the ALJ's and LIRC's decisions reflect the physical toll on Butterfield's back caused by his job responsibilities and the injuries he sustained in several falls arising out of his employment. The issue of Butterfield's medical history regarding the back injury, the scope and nature of his degenerative condition and the cause of his back ailments were contested at the hearing. Unlike the findings in *Schlitz*, the factual bases necessary to support LIRC's findings were litigated before the ALJ. After consultation with the ALJ, LIRC is entitled to modify his findings of fact in this matter to conform

with the evidence presented at the hearing. See *Rucker v. DILHR*, 101 Wis.2d 395, 291, 304 N.W.2d 169, 173 (Ct. App. 1981).

Butterfield Refrigeration next argues that the evidence does not support LIRC's finding that Butterfield's back problems were the result of workplace exposure. LIRC's findings are supported by Dr. Richard Buechel. Because Buechel initially declined to find any causal relationship between Butterfield's back problems and his work, and because LIRC disregarded part of Buechel's opinion, Butterfield Refrigeration contends that his opinion was so discredited that it should have been ignored as a matter of law. The weight and credibility of testimony are to be decided by LIRC. *E.F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 636-37, 264 N.W.2d 222, 224 (1978). It is LIRC's function to reconcile inconsistencies in the testimony. *Carr v. Industrial Comm'n*, 25 Wis.2d 536, 538-39, 131 N.W.2d 328, 330 (1964). A reviewing court may not substitute its own judgment in evaluating the weight or credibility of the evidence. *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983). As the arbiter of the witnesses' credibility, LIRC was free to accept Buechel's opinion, or any part of it, despite his hesitation and despite contrary opinions by other doctors.

Finally, sufficient evidence supports LIRC's findings regarding the duration of Butterfield's temporary total disability. The extent or duration of a disability is a question of fact and this court must search the record to locate evidence that supports LIRC's determination, rather than weighing medical evidence opposed to it. *VandeZande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975). LIRC's findings of fact are conclusive if supported by credible and substantial evidence. Section 102.23, STATS. The medical records establish that Butterfield fell at work resulting in injuries to his back, knee, elbow and teeth. While the treatment records initially focus on the knee and elbow injuries, there is medical evidence of ongoing back treatment and testimonial evidence from Butterfield that he was disabled due to back symptoms from the time he ceased working until the date of the hearing. The ALJ and LIRC both found that Butterfield was a credible witness. LIRC's findings are therefore supported by substantial and credible evidence.

By the Court.—Judgment affirmed.

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