

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2007

David R. Schanker
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. 2007AP525-FT

Cir. Ct. No. 2006CV184

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**HELLENA MOSER, ON BEHALF OF HER DECEASED HUSBAND, ROBERT
J. MOSER, JR.,**

PLAINTIFF-APPELLANT,

v.

**USEMCO, INC., TRAVELERS INDEMNITY COMPANY OF CONNECTICUT
AND LABOR AND INDUSTRY REVIEW COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Monroe County:
MICHAEL J. MCALPINE, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 PER CURIAM. Hellena Moser, on behalf of her deceased husband Robert Moser, appeals a circuit court order affirming a decision of the Labor and

Industry Review Commission.¹ Moser argues that the Commission's decision is not supported by credible and substantial evidence and that it acted outside of or in excess of its lawful authority. We affirm.²

¶2 We will uphold the Commission's factual findings if they are supported by substantial and credible evidence. See WIS. STAT. § 102.23(6) (2005-06)³; *Kitten v. DWD*, 2001 WI App 218, ¶19, 247 Wis. 2d 661, 634 N.W.2d 583, *aff'd on other grounds*, 2002 WI 54, 252 Wis. 2d 561, 644 N.W.2d 649. "Substantial evidence is the quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion." *Kitten*, 247 Wis. 2d 661, ¶19.

¶3 Moser argues that the Commission's decision is not based on substantial and credible evidence and that it acted in excess of its authority when it concluded that Robert's exposure to welding fumes at work was not a material factor in the development or progress of the cancer that killed him.

¶4 Robert's treating physician, Dr. Robert Witte, attributed Robert's cancer to years of exposure to welding fumes. Dr. Witte based his opinion on studies that showed higher rates of lung cancer among welders exposed to welding fumes than the general public. However, Dr. David Blake, a doctor contracted to perform an independent medical examination on Robert, opined that Robert's

¹ We review the decision of the Labor and Industry Review Commission, not the decision of the circuit court. *Motola v. LIRC*, 219 Wis. 2d 588, 597, 580 N.W.2d 297 (1998).

² Pursuant to our order of March 22, 2007, this case was placed on the expedited appeals calendar.

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

exposure to welding fumes was not a material contributory causative factor in the onset or progression of Robert's lung cancer. Dr. Blake pointed out that one of the studies Dr. Witte relied on in asserting that welders have a higher incidence of lung cancer due to welding fumes showed no significantly increased rate of lung cancer among welders when asbestos exposure and smoking were taken into account. Dr. Blake explained that this suggests that the increased cancer risk to welders is associated with asbestos exposure, rather than welding fumes themselves. Dr. Blake stated that Robert's lung cancer was not the type of cancer associated with asbestos exposure. Finally, Dr. Blake opined that Robert's cigarette smoking was a direct cause of his lung cancer.

¶5 We must affirm the Commission's decision if it is supported by "evidence which a reasonable person could accept as adequate to support a conclusion." *Id.* Dr. Blake's opinion was adequate to support the decision. It was the Commission's prerogative to find Dr. Blake's opinion more credible than Dr. Witte's opinion. *Id.*, ¶20 (the commission, not the reviewing court, determines the credibility of the witnesses). We thus conclude that there was substantial and credible evidence to support the Commission's decision and that it acted within its authority in making the decision it did.

By the Court.—Order affirmed.

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

