

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2008AP369

Cir. Ct. No. 2007CV5710

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MICHAEL AVINA,

PLAINTIFF-APPELLANT,

v.

**STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,
MANAGEMENT DECISIONS AND TRAVELER'S CASUALTY AND SURETY CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Michael Avina appeals a circuit-court order affirming the Labor and Industry Review Commission's conclusion that Avina's injury was not caused by his employment with Management Decisions. Avina claims that the

Commission's decision is not supported by credible and substantial evidence. We affirm.

I.

¶2 Avina worked at Management Decisions from October 1, 1991, to December 11, 1993. In September of 2004, Avina sought a worker's compensation hearing, alleging that he was permanently and totally disabled as a result of his exposure to secondhand smoke at Management Decisions. Avina described his injury as "severe chronic central nervous system and other multi system failures."

¶3 An administrative law judge held two hearings. Avina was the only witness to testify. Avina also submitted, among other things: (1) reports from Gunnar Heuser, M.D., Pauline Harding, M.D., Wayne Konetzki, M.D., and Hutan Ghojallu, D.C.; and (2) numerous treatises, articles, and documents discussing secondhand smoke and multiple chemical sensitivity.

¶4 At the hearing, Avina testified that he conducted telephone surveys at Management Decisions in a fifteen-by-fifteen-foot room with six or seven other workers who smoked "continuous[ly]." According to Avina, the room had two portable fans, but there were no exhaust ports in the ceiling. Avina told the administrative law judge that the smoke in the men's bathroom was so heavy that "you could actually see it hanging in the air [and] feel it on your skin." Avina also testified that he was exposed to fumes from an office photocopier and formaldehyde from carbonless paper.

¶5 According to Avina, during his first year of employment he experienced many "symptoms," including a plugged or runny nose, a frequent

need to urinate, muscle and joint problems, stomach pain, “paling,” dizziness, and headaches. Avina testified that his symptoms got worse during the second year, culminating in a “traumatic day” on October 11, 1993, when he experienced an increased or erratic heart rate, a crushing sensation in his chest, and hazy vision. Avina told the administrative law judge that he sought medical treatment from a family doctor, who told Avina to seek employment elsewhere or wear a mask to avoid the smoke. After Avina saw the doctor, he began to work in a nonsmoking room, but testified that “[a]t that point the damage was done.” Avina quit his job on December 11, 1993, to work at the post office.

¶6 Dr. Heuser reviewed Avina’s medical and other “pertinent” records. In his report, Dr. Heuser found that Avina had been exposed to an “apparently very high” level of cigarette smoke at Management Decisions:

Mr. Avina was exposed from 10/1/91 – 12/11/93 in a work area which had an eight-foot ceiling, was very poorly ventilated and had thirteen smokers working in it.¹ Mr. Avina was one of the workers, but did not smoke.

Extensive calculations were undertaken by knowledgeable experts as to what exposure occurred during the above time which adds up to 687 days total of exposure.

The density of the cigarette smoke was calculated to be 1400 micrograms per cubic meter by Repace Associates.² This measurement is apparently very high.

¹ In a 1994 recorded statement, Avina said that “8 ... 11 people out of a total of 19 or so” who worked in the room smoked. (Ellipses in original.) As we have seen, at the administrative hearing, Avina testified that six or seven workers in the room smoked. The Commission in a written decision found that Avina worked with “six or seven other workers.”

² The only evidence of the 1400 microgram calculation in the Record is Avina’s testimony. According to Avina, Repace Associates, Inc., did not do onsite testing. Instead, Avina described the conditions at Management Decisions to a physicist at Repace Associates who came up with the 1400 microgram calculation.

(Footnotes added.) Dr. Heuser opined that Avina “developed ... [m]ulti-system complaints” that are “related to not only secondary cigarette smoke, but also to off-gassing of office products, especially formaldehyde from the carbonless copier paper and from the high volume copier producing thousands of survey studies.” He concluded that Avina “was exposed to second-hand smoke in significant amounts for a long enough time so as to become symptomatic and chronically ill.”

¶7 Dr. Harding examined Avina in April of 2001. She opined that Avina “developed permanent sensitization to cigarette smoke fumes due to his extreme everyday exposure at work.” Specifically, Dr. Harding noted that Avina’s “[e]xtreme second-hand tobacco smoke exposure” caused “C[entral] N[ervous] S[ystem] dysfunction (auditory abnormalities, nerve abnormalities, motor conduction dysfunction, impairment of attention and alertness, short term memory loss, marked tendency to perseverate, sleep deprivation/REM sleep deprivation), chronic nasal discharge, chronic abdominal pain, chronic chest pain, [and] shortness of breath.”

¶8 Dr. Konetzki performed tests on Avina in the mid-1990s. He described Avina’s exposure as “work[ing] for over two years with twelve heavy smokers in an office which was inadequately ventilated to handle the smoke load.”³ This caused a condition outlined in Section 5 of this report.” (Footnote added.) Dr. Konetzki did not fill out section five. He did, however, check a box on the report indicating that Avina’s “work place exposure” was “either the sole cause of the condition, or at least a material contributory causative factor.”

³ As noted, the Commission found that Avina worked with “six or seven other workers.”

¶9 Finally, Dr. Ghojallu, a chiropractor, treated Avina in 2003. Dr. Ghojallu diagnosed Avina with central and peripheral nervous system dysfunction “with associated hormonal changes resulting in deep sleep disturbances, chronic pain throughout the body, chronic fatigue syndrome, [and] chronic chest pain[.] [S]ymptoms also include numbness and pain in the upper and lower extremities and intermittent headaches. He also has difficulty keeping awake or being alert.” Dr. Ghojallu opined that Avina’s condition was a “direct result of his exposure to second hand tobacco smoke at his work place ... between 1991-1993.”⁴

¶10 Management Decisions submitted, as material, reports from Stuart Levy, M.D., and Marc Novom, M.D. Dr. Levy, a pulmonologist, reviewed Avina’s medical records. Dr. Levy also reviewed medical publications on exposure to environmental tobacco smoke. Dr. Levy opined that Avina’s pulmonary function tests were normal. In his report, Dr. Levy wrote that exposure to environmental tobacco smoke increases the risk for lung cancer, may cause asthma, and may increase the risk for coronary heart disease, stroke, and invasive pneumococcal disease. Dr. Levy noted that his research did not, however, reveal a link between environmental tobacco smoke and neuropathy or encephalopathy:

⁴ Dr. Ghojallu also reviewed Avina’s medical history, noting that Avina reported:

symptoms of chest pain and pain down the left arm (along with many other symptoms he was experiencing) at the Community Health Center. On [*sic*] October 11, 1993 is the date of his traumatic event at work. An electrocardiogram and an echocardiogram were performed there to diagnose his condition. He states that he was diagnosed with mitral valve prolapse, left anterior fascicular block, incomplete right bundle branch block, mild dilated aortic root and dilated inferior vena cava.

Dr. Ghojallu did not discuss these test results further.

“A Medline search fails to identify any peer reviewed publication linking environmental tobacco smoke and neuropathy or encephalopathy except for one publication related to neurodevelopmental deficits which are not applicable to this case.” Dr. Levy also noted that environmental tobacco smoke “is included in chemical odor intolerance,” which is distinguishable from a multiple chemical sensitivity:

Sensitization refers to the causation of a condition which was not previously present from prolonged exposure to a chemical which had some effect on functional capacity or ability to work. Intolerance to an odor is not associated with an injury and has no effect on functional capacity or ability to work.

¶11 Dr. Novom, a neurologist, also reviewed Avina’s medical records. He diagnosed Avina with “[s]omatoform disorder/hypochondriasis,” secondary “[f]ibromyalgia/chronic fatigue syndrome,” and “[o]bsessive-compulsive traits manifest by ... ruminative concerns over bodily injury from second hand smoke exposure.” Dr. Novom opined that Avina’s exposure to secondhand smoke did not cause any neurologic injury or health condition.

¶12 The administrative law judge denied Avina’s claim. Avina appealed to the Commission. The Commission affirmed, concluding in its written decision that there was insufficient evidence that Avina was injured by secondhand smoke:

The critical issue in this case is not simply whether workers may suffer injury from exposure to second hand smoke. Even the employer’s expert, Dr. Levy, acknowledges that studies relate second hand exposure to cancer, respiratory infection, heart disease, stroke, and possibly asthma. However, the record does not support finding that the applicant has suffered an injury from secondhand tobacco smoke in this case.

The applicant does not have cancer. He has not had a stroke, and it is not clear that he has actual heart disease--at least, his right bundle branch blockage has not been shown

to be evidence of underlying heart disease--much less that it is related to the smoking. The evidence on the respiratory problems is sketchy as well. The applicant does have respiratory complaints--the stuffed nose which he has to blow every 45 minutes--but the medical opinions he offers do not persuade the commission that complaint is due to his exposure to tobacco smoke.

In making this determination, the Commission rejected Avina's medical experts and credited Drs. Levy and Novom:

Dr. Heuser never examined the applicant personally, which would have enhanced his credibility in ruling out Dr. Novom's diagnosis of hypochondriasis. Further, Dr. Heuser's opinion is based on the 1400 microgram exposure level which seems to be rather speculatively-derived. Dr. Konetzki's report is incomplete. Dr. Harding and chiropractor Ghojallu really do not explain the medical or scientific basis for why they believe the applicant's host of complaints are related to second hand smoke exposure. The applicant has not persuasively rebutted Drs. Levy and Novom's statement that no relevant, reliable studies connect secondhand smoke exposure to neurological problems, or central or peripheral nervous system complaints.

The Commission concluded based "on the evidence of this case" that Avina's complaints were not "rationally related to the smoke exposure from 1991 to 1993."

II.

¶13 On appeal, we review the opinion of the Commission and not that of the circuit court. *General Cas. Co. of Wisconsin v. Labor & Indus. Review Comm'n*, 165 Wis. 2d 174, 177 n.2, 477 N.W.2d 322, 323 n.2 (Ct. App. 1991). The Commission's findings of fact are invulnerable if they are "supported by credible and substantial evidence." *Id.*, 165 Wis. 2d at 178, 477 N.W.2d at 324. Although the scope of our review on legal matters is broader, legal analyses by agencies that have developed expertise in an area are entitled to deference:

In reviewing a determination of an administrative agency, we give deference along a gradient that varies with the nature of the agency's expertise and experience. See *UFE Inc. v. Labor & Indus. Review Comm'n*, 201 Wis. 2d 274, 284–287, 548 N.W.2d 57, 61–63 (1996) (discussing the three levels of deference: “great weight deference, due weight deference and *de novo* review”).

Dettwiler v. Wisconsin Dep't of Revenue, 2007 WI App 125, ¶4, 301 Wis. 2d 512, 516, 731 N.W.2d 663, 665.

¶14 Avina claims that the Commission's determination that his injuries were not caused by secondhand smoke is not supported by credible evidence. Specifically, he contends that the Commission erroneously relied on Drs. Levy and Novom's reports. Avina argues that the Commission should have rejected their reports because: (1) neither doctor is an expert in environmental medicine; and (2) neither doctor examined Avina, performed any tests, or followed any diagnostic protocol.⁵ We disagree.

¶15 Avina's argument amounts to an attack on the weight and credibility of Drs. Levy and Novom's medical opinions.

In evaluating medical testimony, the [Commission] is the sole judge of the weight and credibility of the witnesses. The [C]ommission's finding on disputed medical testimony is conclusive. Where there are inconsistencies or conflicts in medical testimony, the [Commission], not the court, reconciles the inconsistencies and conflicts.

⁵ Avina did not object before the administrative law judge to the admissibility of Drs. Levy and Novom's reports. To the extent that Avina may suggest on appeal that Drs. Levy and Novom's reports were inadmissible because the doctors were not experts in environmental medicine, Avina should have objected before the administrative law judge so that a more-proper foundation, if necessary, could have been attempted. See WIS. STAT. RULE 901.03(1)(a) (timely, specific objection required to preserve alleged error); see also *James v. Heintz*, 165 Wis. 2d 572, 579, 478 N.W.2d 31, 34 (Ct. App. 1991) (“A witness called to give expert testimony may, like any other witness, establish a proper testimonial foundation by his or her own testimony.”).

Valadzic v. Briggs & Stratton Corp., 92 Wis. 2d 583, 598, 286 N.W.2d 540, 547 (1979). Under this standard, we review the Record to locate credible and substantial evidence that supports the Commission’s determination, rather than to weigh evidence opposed to it. *Vande Zande v. Department of Indus., Labor & Human Relations*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255, 260 (1975).

¶16 The Record supports the Commission’s decision. As we have seen, Dr. Levy: (1) opined that Avina’s pulmonary function tests were normal; and (2) could not find any medical publication linking environmental tobacco smoke to neuropathy or encephalopathy. Dr. Novom opined that Avina’s exposure to secondhand smoke did not cause any neurologic injury or health condition. The Commission could reasonably conclude from this evidence that Avina’s “severe chronic central nervous system and other multi system failures” were not caused by secondhand smoke. That Avina’s medical experts may have opined otherwise does not render Drs. Levy and Novom’s opinions inherently incredible. *See Consolidated Papers, Inc. v. Department of Indus., Labor & Human Relations*, 76 Wis. 2d 210, 219, 251 N.W.2d 69, 74 (1977) (expert’s conflicting medical opinion did not render contrary opinions inherently incredible). If Avina wished to challenge the bases for Drs. Levy and Novom’s opinions, he could have exercised his right to subpoena the doctors for cross-examination. *See* WIS. STAT. § 102.17(2s) (party’s lawyer may subpoena witness); WIS. ADMIN. CODE § DWD 80.22(2) (“Use of reports shall be permitted in any case in which claim for compensation is made, provided the reporting doctor is available for cross examination.”). In this case, the Commission gave clear and compelling reasons for rejecting Avina’s medical experts and crediting Drs. Levy and Novom. There is more than sufficient evidence to support the Commission’s decision.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

