

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2003

Cornelia G. Clark
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. 02-3150

Cir. Ct. No. 02CV1780

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**UNITED HEARTLAND, INC., A WISCONSIN CORPORATION,
D/B/A UNITED WISCONSIN AND NEW BERLIN PLASTICS, INC.,
A WISCONSIN CORPORATION,**

PLAINTIFFS-APPELLANTS,

v.

**LABOR & INDUSTRY REVIEW COMMISSION
AND LAWRENCE D. AMAIHE,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
MEL FLANAGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. New Berlin Plastics, Inc., and its worker's compensation insurance carrier, United Heartland, Inc. (d/b/a United Wisconsin) (collectively, United), appeal the circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) that reversed and set aside an order of an administrative law judge (ALJ) who found that Lawrence E. Amaihe

did not suffer from a work-related injury and, thus, was not entitled to worker's compensation benefits. United submits that, in doing so, LIRC made an unreasonable inference regarding the date of the onset of pain to support its award of benefits, that its finding in this regard was a material finding of fact unsupported by the record, and that LIRC relied on medical evidence that was not credible. We affirm.

I. BACKGROUND.

¶2 Amaihe, a part-time employee for New Berlin Plastics, Inc., made a claim for worker's compensation benefits arising out of an injury that he claimed occurred on Friday, March 24, 2000. Ironically, at the time of the accident, Amaihe had already given notice that he was quitting his job. Amaihe alleged that, early into his four-hour shift (3 a.m. to 7 a.m.), he was lifting a box from the ground to an overhead skid when he heard a "noise" in his neck or back. Amaihe testified that he continued to work because he did not experience pain until later. Amaihe did not report the injury until two days after it occurred because he did not work on the weekend.

¶3 The medical doctors who either examined Amaihe or reviewed his medical records were not in agreement as to what injury he suffered or whether the injury was job-related. The doctor at the Concentra Clinic, where Amaihe initially sought medical advice, examined Amaihe, took x-rays that showed no abnormalities, and diagnosed his condition as "left shoulder strain." He then released him to go back to work with restrictions. However, Amaihe's pain increased, causing him to go to the emergency room of a nearby hospital, where he was diagnosed with "acute left shoulder strain."

¶4 Amaihe then saw Dr. Tyne, who diagnosed Amaihe's injury as a "cervical radiculopathy, secondary to degenerative changes at C6-7[.]" Dr. Tyne opined that the work incident aggravated this underlying condition. But another expert, Dr. Dicus, from the Concentra Clinic, was skeptical of Amaihe's injury. Dr. Dicus noted that Amaihe displayed exaggerated and inconsistent responses during his physical examination. Dr. Dicus also held the belief that any neck and back pain experienced by Amaihe was not employment-related.

¶5 Next, Amaihe went to see Dr. Masci. According to the medical records, Amaihe told Dr. Masci that he originally heard the "noise" at the time of the accident coming from his cervical spine, and not, as first reported, from his neck. Dr. Masci diagnosed Amaihe as having a herniated disc at C7-T1, after a MRI scan revealed the injury. The doctor believed that the injury was work-related.

¶6 The next doctor to see Amaihe was Dr. Karr. Dr. Karr, hired by United, examined Amaihe and took his history, at which time Amaihe stated that he first heard the "noise" at the time of the accident coming from his neck and that he first experienced pain upon waking the next morning. Dr. Karr opined that on March 24, 2000, Amaihe experienced a cervical strain/sprain resulting in an aggravation of a multi-level degenerative cervical spondylosis beyond its expected progression.

¶7 Finally, at the behest of United, Dr. McDevitt reviewed Amaihe's medical file. He concluded that Amaihe did not sustain a work-related injury to his neck on March 24, 2000. Rather, Dr. McDevitt believed that any work-related injury that occurred was a temporary shoulder strain and that the disc problem revealed by the MRI was a preexisting condition.

¶8 After Amaihe filed for worker's compensation benefits, an ALJ presided over a hearing. The ALJ dismissed Amaihe's claim for benefits, apparently adopting the view of those doctors who found Amaihe only strained his shoulder on March 24, 2000, and concluded that the herniated disc found by the MRI could be explained away as a preexisting condition. LIRC reversed, finding that Amaihe did sustain a compensable work injury. In doing so, LIRC awarded Amaihe benefits for temporary disability, permanent partial disability and continuing medical expenses, and retained jurisdiction for future awards. United appealed the award to the circuit court. The circuit court affirmed the LIRC.

II. ANALYSIS.

¶9 The power of this court to set aside LIRC's findings is extremely limited. WISCONSIN STAT. § 102.23 (2001-02), is very clear. Section 102.23(1) states, in part:

(a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02

¶10 With respect to LIRC's orders or awards, it is equally difficult to overturn them. Section 102.23(6) states:

If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

¶11 United argues that the decision of LIRC should be overturned, both because the Commission wrongfully inferred that Amaihe's onset of pain occurred on Friday night rather than Saturday night, and because this inference is a material finding of fact unsupported by credible evidence. LIRC found:

[Amaihe] began experiencing pain around his neck and shoulders that evening, extending into his left ring and small finger. The applicant's testimony is confusing because he testified that the pain began Saturday evening, but the commission inferred that he meant Friday evening, because he consistently identified the morning he finished his work shift as the next day of the week.

¶12 As the trial court accurately noted, the actual date of the onset of Amaihe's pain was of no consequence to LIRC's decision:

There is no indication that the determination as to pain onset makes any difference to LIRC's ultimate determination. The commission specifically stated that it based its findings upon "credible medical evidence [which] demonstrated that [Amaihe] did sustain a disc herniation at C7-T1 as direct result of the work injury of March 24, 2000." Whether the onset of pain was on Friday or Saturday was inconsequential to the commission's ultimate determination, and therefore, LIRC's order does not depend on this factual finding.

(Citation omitted.)

¶13 We agree. Whether the onset of pain was Friday night or Saturday is inconsequential. Moreover, given the unusual hours that Amaihe worked, and the fact he was foreign-born with an imperfect command of the English language, Amaihe may have easily confused Friday night with Saturday night in his testimony. We also agree with the trial court's remarks:

Furthermore, it is the function of the commission alone to reconcile inconsistencies in witness testimony. *Carr v. Industrial Comm.*, 25 Wis. 2d 536, 539, 131 N.W.2d 328 (1964). The exercising of this fact-finding function is left exclusively to the commission and not the reviewing court.

Briggs & Stratton Corp. v. IHLR, 43 Wis. 2d 398, 409 (1969). As such, this court has no authority to set aside the commission's order on the basis of this factual determination.

¶14 Whether Amaihe's pain was first felt on Friday night or Saturday night does not matter to the eventual diagnosis that Amaihe suffered a herniated disc as a result of his lifting boxes onto a skid at his workplace. As a result, LIRC's finding that pain occurred on Friday rather than Saturday night is irrelevant and not a material finding of fact as alleged.

¶15 Finally, United contends that the "LIRC's award relied solely upon medical evidence that is not credible." United claims that United's Dr. Karr and Dr. Masci, both of whom found that Amaihe had a compensable injury, were not credible medical witnesses because the doctors relied upon an inaccurate history given to them by Amaihe.

¶16 Dr. Karr's report sets forth Amaihe's statement that he began having pain after he woke up "the next morning." United argues that this information is inconsistent with Amaihe's testimony at the hearing. As to Dr. Masci, United submits that because the doctor recorded Amaihe as reporting the "breaking noise" coming from his neck rather than from his back, as reflected in the Concentra medical records, and that Dr. Masci's diagnosis was unreliable as he failed to consider whether Amaihe's injury was preexisting. We disagree.

¶17 Again, United makes much of Amaihe's conflicting testimony as to when he first experienced pain. But, as noted, LIRC found that Amaihe was referring to Friday night as the date of the onset of pain, and we are obligated to accept its conclusion. With respect to Dr. Masci, Amaihe's report of hearing a noise in his back, rather than his neck, is of no consequence. The challenge to this

slight difference in Amaihe's report of where he first heard the noise that signaled his injury is insignificant, nor do we agree that Dr. Masci failed to consider whether Amaihe's injury was preexisting. We adopt the trial court's decision concerning the diagnoses of both Dr. Karr and Dr. Masci:

Next, United and New Berlin argue that LIRC's decision was not based upon credible evidence because in its findings the commission relied upon Dr. Karr's opinion. United and New Berlin claim Dr. Karr's opinion was incredible because Dr. Karr made his diagnosis with the belief that Amaihe's pain began the morning following the March 24, 2000 incident.

The commission determined that "Dr. Karr's evaluation was thorough, balanced, and unambiguous with respect to the work incident having played a causative role" in Amaihe's condition. The commission was aware that there was confusion as to when the onset of pain occurred, but still LIRC found Dr. Karr's evaluation to be credible.

The weight and credibility of testimony is to be solely determined by the commission. *E.F. Brewer Co. v. IHLR Dept.*, 82 Wis. 2d 634, 637 (1978). "In evaluating medical testimony, the department is the sole judge of the weight and credibility of the witness." *Manitowoc County v. IHLR Dept.*, 88 Wis. 2d 430, 437 (1979). As this court has no authority to reevaluate the credibility of Dr. Karr's testimony, LIRC's determination as to the weight and credibility to be afforded to his testimony must be sustained.

....

United and New Berlin argue that LIRC improperly relied upon the opinion of Dr. Masci. United and New Berlin assert that Masci's testimony was not credible because he failed to consider Amaihe's preexisting degenerative disc disease. Again, the weight and credibility of testimony is to be solely determined by the commission. *E.F. Brewer Co. v. IHLR Dept.*, 82 Wis. 2d 634, 637 (1978).

(Citation omitted.)

¶18 As was the trial court, we are satisfied, given our limited review of LIRC decisions, that substantial evidence in the record supports LIRC's decision.

United and New Berlin argue that there is insufficient evidence of record to support LIRC's ultimate determination. LIRC based its conclusion on the opinions of Drs. Karr, Masci, and Block. United and New Berlin opine that each of these opinions are incredible as previously argued, and therefore, LIRC's determination is not based upon substantial evidence of record.

Essentially, United and New Berlin argue that LIRC reached the wrong conclusion. This is a question of credibility and weight. As previously explained, this court cannot reevaluate and reweigh the credibility of expert medical testimony. *Manitowoc County*, 88 Wis. 2d at 437.

Accordingly, we affirm the order of the trial court.

By the Court.—Order affirmed.

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

