

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 7, 1995

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. 95-0297

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DAVID C. ZUGENBUEHLER,

Plaintiff-Respondent,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant,

**GRIMM BUILDERS, INC., AND
REGENT INSURANCE CO.,**

Defendants-Co-Appellants.

APPEAL from an order of the circuit court for Dane County: MICHAEL N. NOWAKOWSKI, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. The Labor and Industry Review Commission (LIRC), Grimm Builders, Inc. and Regent Insurance Co. appeal from an order remanding David C. Zugenbuehler's worker's compensation claim to LIRC for a determination of benefits. LIRC originally denied the claim because it concluded that a legitimate doubt existed that the injury arose out of Zugenbuehler's employment. Because we conclude that LIRC's findings are supported by substantial and credible evidence, we reverse.

In April 1992, Zugenbuehler underwent surgery for an injury to his left wrist. At the time of the surgery he claimed that the injury occurred at work on October 9, 1991, while removing nails from scaffolding. He had first seen another doctor for the same injury on October 18, 1991, and told that doctor that the injury resulted from removing nails from a tree while working with a tree stand. In his testimony before LIRC, Zugenbuehler explained that his tree stand story was a lie originally told to protect his employer from a worker's compensation claim and to help him keep his job. In its decision denying Zugenbuehler's claim, LIRC found that there was a legitimate doubt as to how his injury was sustained. On appeal, the trial court reversed, finding no substantial evidence to support LIRC's determination that the on-the-job injury did not occur.

After reviewing the evidence, LIRC will deny a worker benefits if the evidence raises a legitimate doubt as to the facts necessary to establish a claim. *Leist v. LIRC*, 183 Wis.2d 450, 457, 515 N.W.2d 268, 270 (1994). However, "there must be in the testimony some inherent inconsistency before [LIRC] is warranted in entertaining a legitimate doubt. It cannot rely solely upon its cultivated intuition." *Reich v. DILHR*, 40 Wis.2d 244, 250-51, 161 N.W.2d 878, 882 (1968) (quoted source omitted).

A trial court may set aside LIRC's decision if LIRC's findings of fact do not support the order or award. Section 102.23(1)(e)3, STATS. However, a court

shall not substitute its judgment for that of [LIRC] as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside [LIRC's] order or award and remand the case to [LIRC] if [LIRC's]

order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

Section 102.23(6).

LIRC alone has the power and authority to weigh evidence and to determine the credibility of witnesses. *Reich*, 40 Wis.2d at 251, 161 N.W.2d at 882. Accordingly, LIRC's factual findings are binding on a reviewing court if there is any credible evidence in the record to support them. *L & H Wrecking Co., Inc. v. LIRC*, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983). The reviewing court must search the record to locate credible evidence supporting LIRC's determination and not weigh evidence opposed thereto. *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975).

LIRC denied Zugenbuehler's claim because it determined that the injury was the result of a non-work-related incident. LIRC decided this over Zugenbuehler's protests that the injury had actually occurred on the job and that his original tree stand story was a lie. Because LIRC has the power to assess a witness's credibility, and because there was evidence in the record implicating Zugenbuehler's credibility, LIRC acted within its power when it chose to believe one story and disregard the other.

Zugenbuehler argues that LIRC incorrectly disbelieved his claim that the injury occurred in the course of his employment. In *Reich*, the court faced a similar situation in which a claimant was accused of fabricating a claim by faking an injury in front of an eyewitness. *Reich*, 40 Wis.2d at 261-62, 161 N.W.2d at 887-88. The court stated that if the claimant was capable of planning such a ruse, she would have followed through on it when talking to her doctors afterwards. *Id.* at 262, 161 N.W.2d at 888. Because she did not mention the incident to her doctors, the court reasoned, it must not have been fabricated. *Id.*

Similarly, in the instant case, the trial court stated that if the appellant had fabricated a worker's compensation claim by staging an accident at work on October 9, he surely would have reported it as such to the first doctor he saw on October 18. And if it was only after October 18 that he

fabricated the worker's compensation claim, he could not have produced the undisputed testimony of both the company owner and his supervisor that he had complained of wrist pain on October 9 at the job site. For these reasons, Zugenbuehler argues, the October 9 incident must have occurred, and LIRC had no evidence to reach the opposite conclusion.

However, there is evidence in the record to support a finding that Zugenbuehler's story of the October 9 injury is false. First, Zugenbuehler had no eyewitnesses to an injury on October 9. Secondly, Zugenbuehler's supervisor's testimony about an injury suffered on that day was only an assumption he had made based on Zugenbuehler's complaints of wrist pain. It was common on construction sites for workers to grumble about minor aches and pains. Zugenbuehler's complaints on October 9 could have been just such grumbling (perhaps arising out of his September 28 injury) which he later enlarged into a complaint about an injury he had just suffered on the job that day.

This is one possible inference that can be drawn from the facts in the record and which supports LIRC's denial of Zugenbuehler's claim. As stated above, if facts in the record support a legitimate doubt concerning the applicant's claim, then LIRC must deny the claim, and we must defer to LIRC's factual determination. Accordingly, we reverse the trial court's order and direct the trial court to reinstate LIRC's decision.

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

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