

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 22, 1996

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2139

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

KERRY L. FARMER,

Plaintiff-Appellant,

v.

**LABOR AND INDUSTRY
REVIEW COMMISSION,
JAY DEE CONTRACTORS, INC., and
ARGONAUT MIDWEST INSURANCE
COMPANY,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Kenosha County:
MICHAEL FISHER, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Kerry L. Farmer appeals from an order affirming a determination by the Labor and Industry Review Commission (LIRC) that Farmer is not entitled to any additional worker compensation benefits. At issue is whether Farmer's psychological impairments are related to the work injury.

We conclude that LIRC's decision is supported by credible and substantial evidence. We affirm the order.

While employed by Jay Dee Contractors, Inc., Farmer suffered a work injury on February 27, 1991, and never returned to work. He developed a chronic pain syndrome. He was also found to be suffering from maladies of depression and emotional dysfunction. Based on the opinion of Dr. Marc Novom,¹ LIRC found that on May 28, 1992, Farmer reached a healing plateau for both his physical and psychological injuries caused by the work accident. It found that Farmer's current disability stems from his nonindustrial depression. It assigned a two percent permanent partial disability and determined that there was no loss of earning capacity.

When an appeal is taken from a circuit court order on administrative review, we review the decision of the agency, not the circuit court. See *MPI Wis. Machining Div. v. DILHR*, 159 Wis.2d 358, 365-66, 464 N.W.2d 79, 81-82 (Ct. App. 1990). It is LIRC's duty to deny benefits if it finds that a legitimate doubt exists regarding the facts necessary to establish a claim. *Leist v. LIRC*, 183 Wis.2d 450, 457, 515 N.W.2d 268, 270 (1994). If there is credible evidence to support LIRC's denial, we will not upset it on appeal. *Id.*

We must affirm LIRC's findings of fact if they are supported by any credible and substantial evidence in the record, even if they are contrary to the great weight and clear preponderance of the evidence. *West Bend Co. v. LIRC*, 149 Wis.2d 110, 117-18, 438 N.W.2d 823, 827 (1989); see also § 227.57(6), STATS. We cannot substitute our judgment for that of the commission regarding the credibility of witnesses or the weight to be accorded to the evidence supporting factual findings. *West Bend Co.*, 149 Wis.2d at 118, 438 N.W.2d at 827.

Farmer first argues that the opinions rendered by Novom cannot constitute credible and substantial evidence on psychological issues because

¹ Novom concluded that Farmer's "immutable depressed state draws no relation whatsoever to the original worker's injury. His emotional state is greatly charged if not excessively focused on marital conflict."

Novom, a consulting neurologist, is not an expert in the field of mental or psychological conditions. Farmer did not object to the admission of Novom's report or his competency to render opinions as to psychological causation. Despite the apparent waiver of any potential error, we conclude that LIRC was entitled to rely on Novom's opinions.

It was not necessary that Novom be qualified as an expert in the particular medical field in which some of his opinions fell. "The law ... does not recognize any gradation of experts based on specialized training or practice. So long as a physician qualifies as an expert the weight to be accorded his [or her] testimony is for the [fact-finder]." *Riehl v. De Quaine*, 24 Wis.2d 23, 32, 127 N.W.2d 788, 793 (1964); *see also State v. Peters*, 192 Wis.2d 674, 687, 534 N.W.2d 867, 872 (Ct. App. 1995) (the admissibility of scientific evidence is not conditioned upon its reliability). Novom was qualified as a medical expert; indeed, Farmer stipulated to the admission of Novom's reports. The weight and credibility of his opinion was a matter solely for LIRC.² *Valadzic v. Briggs & Stratton Corp.*, 92 Wis.2d 583, 598, 286 N.W.2d 540, 547 (1979).

Farmer next claims that LIRC could not rely on the written report of Dr. Brad Grunert, who performed an independent psychological evaluation, when Grunert's testimony at the hearing was different. Farmer characterizes Grunert's report as concluding that Farmer's psychological impairments are not caused by the work accident. He then relies on the following question on cross-examination as impeaching that conclusion:

Q: And that the marital relationship notwithstanding, the injury was a materially contributing factor to the development of the major depressive disorder?

A: That is correct.

² Farmer's claim that Novom's reports were based on an incomplete medical history because there was no evidence that Novom reviewed records of the treating psychiatrist bears only on the weight and credibility LIRC gives to the reports.

The question asked of Grunert on cross-examination was a hypothetical question and somewhat confusing. We do not deem Grunert to be bound by the answer or that his answer impeached his prior written report. That report stated that in Grunert's opinion Farmer's psychological impairments are

multifactorial in their causation. The primary stressor that appears to have initiated these by history is his deteriorating marital relationship. I have no doubt there is some component which has contributed to his situation as a result of his chronic pain, however, this contribution really seems to be minimal in terms of the magnitude of his marital difficulties.

Grunert's testimony on cross-examination was consistent with this opinion. He was asked not to consider marital discord at all and render an opinion as to the cause of Farmer's psychological problems. The only possible response was that the work accident, the only remaining factor, was the cause. The question was an unfair attempt to make it appear as though Grunert had changed his opinion. LIRC could ignore that part of the testimony.³

Farmer next argues that LIRC, in noting that Farmer was not incapable of cooperating with treatment, misinterpreted the testimony of Dr. William Bjerregaard, a treating psychiatrist. We need not decide whether Bjerregaard was of the opinion that Farmer was not capable of cooperating with treatment.⁴ LIRC made no specific finding that Farmer was uncooperative with treatment. That issue was not the linchpin of LIRC's decision.

³ Even if we were to accept Farmer's characterization that Grunert's testimony was a departure from the statements in his report, that does not render the report incredible as a matter of law. Contradictions in minor points of testimony do not render the testimony inherently or patently incredible but merely create a question of credibility for the fact finder to resolve. *Haskins v. State*, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980).

⁴ Bjerregaard testified that Farmer's paranoid tendencies complicated treatment.

Farmer's final argument is that LIRC erred in determining that he did not have a physical disability and in denying a claim for loss of earning capacity. LIRC held:

Considering the lack of objective verification of this pain, it is inferred that the only significant disability which the applicant continues to experience stems from his non-industrial depression. Accordingly, no loss of earning capacity is found.

Farmer complains that there are no vocational reports in the record from which LIRC could make its conclusion. However, he fails to recognize that it was his burden to establish the loss of earning capacity claim. Farmer's application for a hearing listed reduced earning capacity as a claim for additional compensation. The hearing transcript does not reveal any understanding by the parties that, as Farmer asserts in his reply brief, the loss of earning capacity claim was not ripe at the time of the hearing because of unresolved psychological and healing plateau issues. There was no request before or at the hearing that the loss of earning capacity claim be the subject of a continued hearing. Farmer cannot now complain that he was denied the opportunity to make the necessary proof on his loss of earning capacity claim.

We conclude that LIRC's inference that Farmer's only significant disability stems from his nonindustrial depression is supported by sufficient evidence. Novom found that there was no readily definable biologic basis for Farmer's ongoing complaint of pain. Farmer's treating physician also indicated that a large degree of Farmer's disability was of psychiatric origin. Alternative sources of the depression were demonstrated.

Novom concluded Farmer could return to a "variety of employ," albeit not with his former employer, abiding by permanent work restrictions. Farmer never offered any evidence that the work restrictions precluded his ability to return to work at the requisite wage level. LIRC properly denied Farmer benefits for loss of earning capacity.

By the Court. – Order affirmed.

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