

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 26, 1996

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. 95-2646**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**ROBERT M. BALISTRERI,**

**Plaintiff-Appellant,**

**v.**

**CITY OF MADISON,  
DEPARTMENT OF EMPLOYEE TRUST FUNDS,  
LABOR AND INDUSTRY REVIEW COMMISSION,**

**Defendants-Respondents.**

APPEAL from an order of the circuit court for Dane County:  
ROBERT A. DE CHAMBEAU, Judge. *Affirmed.*

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

PER CURIAM. Robert Balistreri appeals from an order affirming a decision by the Labor and Industry Review Commission. That decision denied Balistreri's claim for disability benefits from his former employer, the City of Madison. The issues are whether LIRC relied on inadmissible evidence, whether substantial credible evidence supports the decision, and whether

Balistreri was denied a fair opportunity to present evidence. We conclude that the disputed evidence was properly ruled admissible, that it and other evidence constituted substantial credible evidence in support of LIRC's decision and that Balistreri was not denied due process during the evidentiary proceedings. We therefore affirm.

Balistreri served fourteen years as a Madison police officer, until he resigned in 1987. He then filed for a disability pension under § 40.65, STATS., as a protective occupation participant, alleging that he was forced to resign due to mental harm arising from extraordinary job-related stress.

During evidentiary hearings before an administrative law judge for the Department of Industry, Labor and Human Relations, Balistreri testified to numerous incidents that caused him to experience, in his view, extreme levels of stress and anxiety. These included a time in 1978 when he helplessly witnessed a friend's death in a burning car. Other incidents involved a series of embarrassing and humiliating run-ins with a supervisor, Captain Morlynn Frankey, occasions when he did not receive backup from other officers, and times where he received unjustified reprimands or criticism from superiors. He testified that these incidents caused him severe depression, nervous disorders, headaches, anxiety, insomnia, extreme tension, blackouts and nightmares, alienation, and inability to function.

The City initially retained Dr. Leigh Roberts, a psychiatrist, to evaluate Balistreri. After Dr. Roberts prepared his report, which concluded that Balistreri did not suffer from a job-related disability, Dr. Roberts lost his license to practice medicine. The City then retained another psychiatrist, Dr. Michael Kaye. The findings and diagnosis in his written report were very similar to Dr. Roberts', and he attached a copy of Dr. Roberts' report to his. Over Balistreri's objection, the administrative law judge admitted Dr. Kaye's report with Dr. Roberts' attached, and allowed him to testify.

At the last of the evidentiary hearings, Captain Frankey offered testimony disputing Balistreri's description of many of their alleged conflicts. The administrative law judge then denied Balistreri an opportunity to rebut Frankey's testimony.

In his decision, the administrative law judge concluded that Balistreri "did not suffer from a situation of greater dimensions than the day-to-day emotional strain and tension which all police officers must experience." Accordingly, benefits were denied. Balistreri appealed to LIRC, which affirmed, in substantial part based on Dr. Kaye's report and its finding that except for the burning car incident, none of the incidents described by Balistreri amounted to unusual stress. Balistreri sought reconsideration and challenged the admission of Dr. Kaye's report and testimony because it was tainted by its close resemblance to and association with Dr. Roberts' report. LIRC found, however, that:

Dr. Kaye's medical report ... is a careful and thorough psychological analysis of the applicant, and his diagnoses and conclusions are explained in detail and fully supported by his analysis and by the record submitted at the hearings. The fact that his diagnoses are very close to those of Dr. Roberts' does not render them incredible. While the commission disagreed with the administrative law judge's exercise of discretion in even allowing Dr. Roberts' report into evidence ... any error in admitting the report would be harmless because the report was not relied on in making any finding. The fact that Dr. Kaye may have reviewed Dr. Roberts' report and concurred with most or all of its conclusions does not change the fact that Dr. Kaye's own psychological opinions were competent and credible.

Balistreri also sought reconsideration on whether he was denied due process when he was not allowed to rebut Captain Frankey's testimony. The commission reiterated its finding that "cross-examination of Captain Frankey was allowed, and the applicant had previously given ample testimony regarding his version of events." On review, the trial court affirmed, resulting in this appeal.

It is settled that persons may claim disability benefits under § 40.65, STATS., for mental injury or harm resulting from employment-related stress. However, to be compensable, nontraumatic mental injury must have

resulted from a situation of greater dimensions than the day-to-day emotional strain and tension all employees in the particular profession must experience. *School Dist. No. 1 v. DILHR*, 62 Wis.2d 370, 377-78, 215 N.W.2d 373, 377 (1974).

Review of LIRC's decisions on § 40.65, STATS., disability claims proceed under the worker's compensation review procedure. Section 40.65(2)(a). Under those procedures, review is limited to whether the commission acted within its powers, the order was procured by fraud, or LIRC's findings of fact do not support the order. Section 102.23(1)(e), STATS. If LIRC's order depends on any finding of fact, we accept LIRC's judgment as to the weight and credibility of the evidence on that finding. Section 102.23(6). We may, however, set aside LIRC's order if it depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. *Id.* We disregard any error that does not prejudice the claimant. Section 102.23(2).

LIRC properly admitted and considered Dr. Kaye's report and testimony. Balistreri contends that Dr. Kaye's report and recommendations were so similar to Dr. Roberts' that one can only conclude that "Dr. Kaye's own thinking was impermissibly and irrevocably tainted." However, the commission concluded otherwise after comparing the reports, and concluded that Dr. Kaye provided a

careful and thorough psychological analysis of the applicant, and his diagnoses and conclusions are explained in detail and fully supported by his analysis and by the record ... the fact that Dr. Kaye may have reviewed Dr. Roberts' report and concurred with most or all of its conclusions does not change the fact that Dr. Kaye's own psychological opinions were competent and credible.

We accept LIRC's determination on Dr. Kaye's credibility and on the weight accorded his conclusions. Section 102.23(6), STATS.

There was credible and substantial evidence to support LIRC's decision. As noted, LIRC found Dr. Kaye's report and testimony credible, and accorded it substantial weight. Balistreri, in effect, concedes that with Dr. Kaye's evidence, LIRC's decision is sufficiently supported. The fact that Balistreri introduced evidence from other experts who supported his claim is of no consequence because LIRC chose not to accord any weight to their evidence.

Balistreri has not shown that his due process rights were violated when he had no opportunity to rebut Captain Frankey's testimony. He has not offered proof as to what testimony he would have provided in rebuttal, nor how it would have differed from his previous testimony. Nor has he shown how he would have benefited from offering additional testimony. For purposes of its decision, LIRC fully accepted his version of all the events during his employment that allegedly caused him mental injury. He has therefore shown neither error nor prejudice from the administrative law judge's decision.

*By the Court.*—Order affirmed.

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