

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 1, 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. 95-0171

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LEEANN GUERNDT,

Plaintiff-Appellant,

v.

**LABOR & INDUSTRY REVIEW
COMMISSION, JIM'S
WELDING and THE TRAVELERS
INSURANCE COMPANY,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, Sundby, and Vergeront, JJ.

PER CURIAM. Leeann Guerndt appeals from an order affirming a decision of the Labor and Industry Review Commission. The Commission denied Guerndt's application for worker's compensation benefits because it determined that she had not proven that she suffered an injury which arose out

of her employment. Because the findings of fact underlying the Commission's order are supported by substantial credible evidence, we affirm.

Guerndt worked for Jim's Welding as the office manager. She began work in February of 1990. Guerndt first saw a physician for shortness of breath on April 15, 1991. On October 14, 1991, Guerndt underwent surgery for the removal of a lesion on her lung.¹ She returned to work, on a part-time basis, on December 2, 1991. Guerndt continued working fifteen hours per week until May 15, 1992, when she resigned.

Guerndt claimed that dust and fumes in her workplace caused her respiratory problems. The Administrative Law Judge, relying on the medical opinion of Dr. Jed Downs that Guerndt suffered from "occupationally induced asthma," found that Guerndt had incurred an injury while performing services arising out of her employment. The ALJ did not discuss the other medical evidence in the record.

The Commission reversed the ALJ. In its order, the Commission discussed both Dr. Downs' opinion and the report submitted by an independent medical examiner, Dr. Donald P. Schlueter, a professor at the Medical College of Wisconsin. Dr. Schlueter opined that a respiratory condition such as Guerndt's would require direct exposure to welding fumes for a "prolonged period of time, in most cases many years." Dr. Schlueter noted that Guerndt had only "brief and intermittent" exposure to welding fumes at her job. He also noted that the "pulmonary functions studies" performed prior to the October 1991 surgery "were entirely normal" except for "minimal small airways obstruction, as seen in smokers." Dr. Schlueter concluded that Guerndt's asthma was not caused by occupational exposure at the workplace nor did the exposure materially aggravate or accelerate her asthma. In his opinion, Guerndt developed asthma from a March 1992 respiratory infection.

On appeal, our standard of review is the same as that of the circuit court. *Boynton Cab Co. v. DILHR*, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). The Commission's order must be affirmed unless, *inter alia*, the

¹ Guerndt does not claim that the surgery was related to her employment.

Commission's findings of fact do not support the order. Section 102.23(1)(e)3, STATS. If the order "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." Section 102.23(6), STATS. The court may reverse the Commission if the order "depends on any material and controverted finding of fact that is not supported by credible and substantial evidence." *Id.* A finding of fact will be upheld "if there is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion." *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983).

The cause of Guerndt's asthma presents a question of fact. *See Manitowoc County v. DILHR*, 88 Wis.2d 430, 437, 276 N.W.2d 755, 758 (1979). When evaluating medical evidence, the Commission is the sole judge of the weight and credibility to be given to the witnesses. *See id.*

Guerndt had the burden of proof to establish that she sustained a work-related injury. *Bumpas v. DILHR*, 95 Wis.2d 334, 342, 290 N.W.2d 504, 507 (1980). The Commission has a "duty" to deny a claim "if it finds [that] a legitimate doubt exists regarding the facts necessary to establish a claim." *Id.* (quoting *Erickson v. DILHR*, 49 Wis.2d 114, 118, 181 N.W.2d 495, 497 (1970)).

The Commission found Dr. Schlueter's opinion to be "the more credible" of the two medical opinions. Although Dr. Downs diagnosed occupationally induced asthma, the Commission noted that his opinion acknowledged the absence of various tests that would have shown a "definite work association." The Commission noted that Guerndt worked at Jim's Welding for a relatively short period of time, and was not directly exposed to any welding fumes. The Commission wrote that "Dr. Schlueter credibly opined that it would take years of heavy exposure to result in this kind of respiratory problem."

Guerndt challenges those portions of Dr. Schlueter's opinion in which he inaccurately describes the physical layout of the workplace and the types of welding done at Jim's. Guerndt argues that Dr. Schlueter's mistaken premises render the entire opinion not credible. We disagree. The comments of the circuit court are pertinent: "[A] close reading of the Commission's decision

shows that its causation finding was based upon Dr. Schlueter's opinion that it would takes [sic] many years' exposure to welding fumes before pulmonary problems developed.... While the Court acknowledges that there are factual flaws in Dr. Schlueter's report, those flaws do not render his diagnosis incredible." We agree that the inaccuracies are not relevant to the essence of Dr. Schlueter's opinion and, therefore, they do not defeat its validity.

Guerndt also suggests that the Commission overstepped its bounds when it did not accept Dr. Downs' medical opinion as credible, as had the ALJ. In its order, the Commission noted that it had consulted with the ALJ with regard to witness credibility, and that the ALJ "found the applicant to be very credible with regard to the dust and the fumes in the office where she worked." The Commission expressly accepted that credibility assessment, but found that Dr. Schlueter's medical opinion with regard to the necessary exposure was credible. The Commission acted properly. See *Braun v. Industrial Comm'n*, 36 Wis.2d 48, 57, 153 N.W.2d 81, 85 (1967) (the Commission is required to consult on the record with the ALJ where credibility of a witness is involved, and the Commission reverses the ALJ). However, as to the competing medical opinions, neither doctor testified in person, so that the impressions of the ALJ on the credibility of the medical witnesses was immaterial. This court cannot disturb the Commission's judgment of the weight and credibility of the medical evidence. *Manitowoc County*, 88 Wis.2d at 437, 276 N.W.2d at 758.

Credible and substantial evidence supports the Commission's finding that Guerndt did not sustain a compensable injury. The Commission properly denied Guerndt's application for worker's compensation benefits.

By the Court. – Order affirmed.

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