

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3565

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

GALE L. KRUGER,

PLAINTIFF-APPELLANT,

v.

**LABOR & INDUSTRY REVIEW COMMISSION, DAIRY
EQUIPMENT COMPANY, AND EMPLOYERS
INSURANCE OF WAUSAU,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Gale Kruger appeals a trial court order affirming the decision of the Labor and Industry Review Commission (LIRC) that dismissed his application for worker's compensation. On appeal, Kruger contends, as he did before the trial court, that his constitutional rights were

violated in various ways by the administrative law judge (ALJ) and LIRC. Kruger's contentions are without merit, and we therefore affirm.

BACKGROUND

While performing services for his employer, Dairy Equipment Company, Kruger cut his finger on November 1, 1994. All claims with respect to that injury were paid, except that there was a dispute over whether a subsequent hearing loss was caused by an infection that developed in the finger. Kruger filed his application for worker's compensation for disabling hearing loss, tinnitus (ringing in the ears) and dizziness in August 1995.¹ His treating physician, Dr. G. Mark Pyle, prepared a WC-16-B report in which he stated that "laceration to finger resulted in blood poisoning, which resulted in a loss of hearing, bilateral tinnitus and disequilibrium," and opined that it was probable that this event directly caused the disability. The report was filed with the agency on October 2, 1995, and a copy was provided to the employer.

The hearing was scheduled for April 25, 1996, by notice dated February 26, 1996. On April 10, 1996, the employer's attorney and its insurance carrier hand delivered to Kruger's attorney medical reports, including a WC-16-B report from Dr. Michael McDonald, given at the request of the employer, and a report from Dr. Pyle, dated March 26, 1996. Dr. McDonald's report opined that there was no causal connection between the hearing loss and the infection from the injured finger. Dr. Pyle's report incorporated a letter from him dated March 12, 1996, that stated in response to questions posed in an attached letter by the

¹ Kruger also filed an application for an elbow injury in October 1995. This application was heard at the same time as the August 1995 application but is not an issue on this appeal.

employer's counsel: "I do think it is possible that the November 1st [cut finger] injury caused the patient's symptom, but I do not feel that it is probable." The letter also stated: "it is correct that Mr. Kruger did not advise me of any prior problems with tinnitus, dizziness, or decreased hearing ... [and] my opinion was partially based upon the medical history of no prior tinnitus, dizziness, or hearing problems."

By letter dated April 11, 1996, Kruger's counsel requested that the hearing be postponed to permit him and his client to meet with Dr. Pyle to follow up on the doctor's "contradictory opinions" or, in the alternative, that Kruger be permitted to withdraw his application without prejudice. In the letter making this request, Kruger's counsel explained that he had scheduled a meeting with Dr. Pyle for April 29, the earliest date on which Dr. Pyle was available. The employer objected, and the ALJ decided that the hearing should go ahead as scheduled.

At the beginning of the hearing on April 25, 1996, the ALJ addressed Kruger's desire to meet with Dr. Pyle and possibly obtain a follow-up report from him. The ALJ, over the employer's objection, decided that Kruger should have this opportunity, and stated that she would "keep the record open for what I consider a reasonable amount of time for that report to be sent in or at least notify me as to the results of that visit. I think perhaps fifteen days is adequate." Kruger's counsel responded that that was reasonable. The employer objected to this because, counsel asserted, correspondence from Dr. Pyle to Kruger's counsel after the date of his first report stated that causation was only a possibility, so there had been plenty of time for Kruger to follow up on that apparent inconsistency and the employer's counsel had done just that, resulting in the March 12 letter from Dr. Pyle.

On May 9, 1996, Kruger's counsel wrote to the ALJ advising that he had met with Dr. Pyle and enclosing a third report prepared by Dr. Pyle. This report stated: "laceration to finger resulted in blood poisoning, followed by a left ear loss of hearing, bilateral tinnitus and disequilibrium," and opined that it is not probable that the event described directly caused the disability but it was probable that the event described caused the disability by precipitation, aggravation and acceleration of a pre-existing progressively deteriorating or degenerative condition beyond normal progression. The accompanying letter related Dr. Pyle's explanation for this opinion. Kruger's counsel asked for a reconvened hearing for the limited purposes of taking Dr. Pyle's testimony so that Dr. Pyle could explain his opinion in person to the ALJ.

The employer's attorney wrote to the ALJ in a letter dated May 17, 1996, "continuing [her] objection to receipt of additional information from Dr. Pyle, including the updated report and reconvening the hearing to take Dr. Pyle's testimony."

The ALJ issued a decision dated May 31, 1996, which stated that the record was closed on May 17, 1996. The ALJ found that the hearing loss did not arise out of the work-related injury to his finger. The ALJ found the medical opinion of Dr. McDonald to be the most credible. In Dr. McDonald's opinion, there was no causal connection between the hearing loss and the infection. The ALJ found that the medical records from various doctors Kruger had seen about his hearing loss showed that they did not know whether it was caused by the infection and that the "record lacked a single coherent medical opinion on the cause of the applicant's hearing loss as it related to his finger infection." The ALJ referred to Dr. Pyle's three opinions as examples of this uncertainty, describing

each as expressed in his original report, the March 26 report, and the one most recently submitted.

Kruger petitioned LIRC for review of the ALJ's decision on the ground that it was unsupported by substantial evidence, was capricious and unreasonable, and that the ALJ denied Kruger a fair hearing by giving the appearance of bias and by demonstrating actual bias and personal animosity toward Kruger. In support of this petition, Kruger filed his affidavit, which related incidents just before and during the hearing, and comments, facial expressions and body language by the ALJ, which made him feel that he did not get a fair hearing. The employer objected to the affidavit on the ground that the record was already closed.

LIRC adopted the findings and order of the ALJ as its own and affirmed them. In its memorandum decision, LIRC found that, based upon a review of the record and the transcript of the proceedings, the ALJ was not biased against Kruger and did not deny him due process of law. LIRC also found that the ALJ did not err in refusing to reconvene the hearing to permit Dr. Pyle to testify. On the merits of the decision, after an independent review of the record, LIRC found nothing that warranted overturning the ALJ's determination to credit Dr. McDonald's opinion more than Dr. Pyle's.

The trial court affirmed LIRC's decision. It concluded that the finding that there was no causal connection between the finger injury and the hearing loss was supported by substantial and credible evidence. It also concluded that the ALJ's decision not to reconvene the hearing to permit Dr. Pyle to testify was not an erroneous exercise of discretion and did not deny Kruger the right to a fair hearing. Finally, the court concluded that the hearing transcript contained no

evidence of the alleged bias, that Kruger's affidavit was not a substitute for objecting to the instances of alleged bias when they occurred and thereby making a proper record, and that Kruger had therefore waived the right to raise the issue of bias.

On appeal, Kruger does not challenge the sufficiency of the evidence to support a finding of a lack of causality,² but repeats the constitutional challenges he made in the trial court: that the ALJ and LIRC denied him due process of law by denying him the right to present Dr. Pyle's live testimony, and that LIRC denied him due process of law by affirming the decision of the ALJ, who was biased against him. We agree with the trial court that there is no merit to either of these contentions.

² Although the responsive briefs argue that there is substantial and credible evidence to support a finding of lack of causality, we do not understand Kruger to be arguing otherwise. In his first brief, he acknowledges:

[T]o the extent that Dr. Pyle's opinion stands alone, without any meaningful explanation regarding what they considered to be inconsistencies in his opinion, it cannot be gainsaid that there is arguable merit to the conclusion announced by the Administrative Law Judge and the Commission, that Kruger failed to meet his burden of proof in this case.

In his reply to the respondent's arguments on the evidence supporting LIRC's findings, Kruger states:

Of course the evidence at this point does not support Kruger's claim. There never has been any dispute that without the support of Dr. Pyle's explanation of his apparently contradictory medical opinion, Gale Kruger had little or no support for his claim for compensation for the bilateral hearing loss, tinnitus and dizziness that has devastated his life.

DISCUSSION

Kruger is correct that under statutory and constitutional law, he had the right to present evidence at the hearing, and that includes presenting witnesses. *See* § 102.17(1)(c), STATS.; *Bituminous Cas. Co. v. DIHLR*, 97 Wis.2d 730, 734, 295 N.W.2d 183, 186 (1980). No one, however, prevented Kruger from calling Dr. Pyle to testify at the April 25, 1996 hearing. Kruger's argument is that he was constitutionally entitled to a reconvened hearing after he met with Dr. Pyle in order to permit Dr. Pyle to explain the apparent inconsistencies in his opinions in person to the ALJ.

A hearing on a worker's compensation application may be adjourned in the discretion of the department. Section 102.17(1)(a), STATS.³ Because this is committed to the discretion of the department, the scope of our review is narrow. *Theodore Fleisner, Inc. v. DIHLR*, 65 Wis.2d 317, 326, 222 N.W.2d 600, 606 (1974). The required elements for a hearing that meets the constitutional due

³ WISCONSIN ADMINISTRATIVE CODE § DWD 80.09 contains this provision on postponements and continuances:

Witness attendance; extension of time and postponement. (1) Upon receipt of the notice of hearing, it is the responsibility of each party to contact any witnesses necessary for that party's case and to make arrangements to have them attend the hearing.

(2) Requests for postponements and continuances shall be considered by the department only if such requests are received within a reasonable time before the date of the hearing.

(3) The department shall grant postponements and continuances only because of extraordinary circumstances. Neither the scheduling problems nor the convenience of the parties shall be considered extraordinary circumstances.

(4) A postponement, continuance or extension of time may not be granted upon the mutual agreement of the parties without the consent of the department.

process standard—notice, right to present evidence, and right to be heard on the evidence and the law—are used to test the propriety of the department’s refusal to grant an adjournment within its discretion. *Bituminous*, 97 Wis.2d at 734, 295 N.W.2d at 186. We conclude that the ALJ did not deny Kruger a hearing comporting with due process and did not erroneously exercise its discretion in denying Kruger’s request to reconvene the hearing to permit Dr. Pyle to testify.

It is the responsibility of each party, upon notice of the hearing, to contact witnesses necessary for that party’s case and to make arrangements for them to attend the hearing. WISCONSIN ADMINISTRATIVE CODE § DWD 80.09. Kruger’s counsel was notified of the April 25, 1995 hearing date on or about February 26, 1996. Kruger acknowledges that he was aware that Dr. Pyle’s opinion was crucial to his case. Since Dr. Pyle was his treating physician, he had access to his own medical records. The records that Kruger submitted at the hearing include a letter dated October 12, 1995, from Dr. Pyle to Kruger’s counsel and Kruger’s medical records dated July 14, 1995, which use the term “possible” and “possibly” in linking Kruger’s ear problems with the infection. Kruger suggests it was somehow unfair or improper that the employer did not provide his counsel with a copy of Dr. Pyle’s second report until April 10, 1995, but it is undisputed that the employer complied with the applicable time requirements.

While the ALJ did not grant Kruger’s April 11 request for a continuance of the April 25 hearing, she did, at the beginning of that hearing, grant him fifteen days to meet with Dr. Pyle and to submit a report or advise her of the results of the visit. Kruger’s counsel said that was reasonable. He did not at that time indicate that he wanted to present Dr. Pyle as a witness, or that he might wish to do so. He first made that request on May 9 when he filed Dr. Pyle’s third

report. His letter repeated Dr. Pyle's explanation of the opinion expressed in the report.

Under these circumstances, it was neither unfair nor unreasonable for the ALJ to deny reconvening the hearing to permit Dr. Pyle to testify in person. Dr. McDonald had not testified in person, and counsel's letter did not explain what could be added by Dr. Pyle's testimony that was not conveyed to the ALJ in writing. Kruger had the opportunity to have Dr. Pyle present at the April 25, 1995 hearing, and no information presented to the ALJ demonstrated that it was necessary to a fair proceeding to reconvene the hearing at a later date for that purpose.

We turn now to Kruger's claim that the ALJ was biased. Due process requires that an adjudicator in an administrative hearing be fair and impartial. *Nu-Roc Nursing Home, Inc. v. DHSS*, 200 Wis.2d 405, 415, 546 N.W.2d 562, 566 (Ct. App. 1996). There is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings. *Id.* Due process is violated when the decision maker is biased in fact, or when the risk of bias is impermissibly high. *Id.* We understand Kruger's claim to be that the ALJ was biased in fact, since he does not argue that the circumstances in which the risk of bias has been applied are present here. *See Id.* at 416, 546 N.W.2d at 566 (risk of bias includes situations where adjudicator has pecuniary interest in outcome or has been target of personal abuse or criticism by party appearing before him or her).

We agree with the trial court and LIRC that the transcript of the hearing and the written submissions up to the date the record was closed, May 17, 1995, do not show any basis for a conclusion that the ALJ was biased against

Kruger. There are no critical statements made either to or about Kruger, his attorney, or his position. Indeed, the transcript of the hearing shows instances in which the ALJ reprimanded the employer's attorney for the repetitive nature of her questions. And the ALJ's decision to give Kruger additional time to meet with Dr. Pyle and file another report if he chose demonstrates a concern with giving Kruger a full opportunity to present his case.

Kruger relies on his affidavit as the factual basis for his claim of bias, asserting that it is part of the record and is uncontroverted. There is no support in either statutory or case law for considering his affidavit in these circumstances. The record is created in the proceeding before the ALJ. All testimony at any hearing on a worker's compensation claim must be taken down by a stenographic reporter, except that in the case of an emergency, as determined by the ALJ conducting the hearing, testimony may be recorded by a recording machine. Section 102.15(3), STATS. "Review by the commission is on the record of the case, including the synopsis or summary of the testimony or other evidence presented at the hearing, as prepared from a tape recording of the hearing or from notes taken at the hearing by the administrative law judge. The commission may also consider the hearing tapes or a transcript of the hearing testimony...." WIS. ADM. CODE § LIRC 1.04. *See also* WIS. ADM. CODE § LIRC 3.02 (preparation of transcripts for commission review in worker's compensation cases). "The commission shall either affirm, reverse, set aside or modify the findings in whole or in part, or direct the taking of additional evidence...." Section 102.18(3), STATS. If the record in the case is inadequate for the commission to arrive at a decision, the commission shall remand to the Department of Workforce Development to take additional evidence on behalf of the commission. WIS. ADM. CODE § LIRC 1.05.

There is no reason Kruger's counsel could not have made a record in the proceeding before the ALJ of any comments, body language, facial expression or incidents before or during the hearing that Kruger or his counsel felt evidenced biased. Kruger's explained that it was not until he received the ALJ's opinion without the opportunity to first present Dr. Pyle's live testimony that the full significance of the ALJ's behavior before and during the hearing could be assessed. We find no merit to this explanation. The trial court concluded that the ALJ's decision was supported by credible and substantial evidence and Kruger does not contend otherwise on appeal. We have concluded, as did the trial court, that the ALJ did not erroneously exercise her discretion and did not deny Kruger due process by denying his request to reconvene the hearing for Dr. Pyle's testimony. We do not see how the ALJ's decision made her conduct before or during the hearing objectionable, when neither Kruger nor his counsel considered it so at the time.

A claim that a decision maker demonstrates bias and personal animosity is a serious claim. Before making such a claim the proponent should take care that there is some evidence to support this claim presented in a procedurally correct manner. Kruger did not do that here. Accordingly, he has waived the right to consideration of any of his assertions of bias that are not part of the record of the proceedings before the ALJ. Based on the record, there is no evidence to support his claim.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

