

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP297

Cir. Ct. No. 2007CF301

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ACUITY INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

CREST PRECAST, INC.,

INVOLUNTARY-PLAINTIFF,

v.

**LABOR & INDUSTRY REVIEW COMMISSION, TED WHITMAN (DEC'D)
C/O STEPHANIE WHITMAN, MACKENZIE RENEE MALONE AND MICHAILA
MARIE MALONE, C/O DEBORAH MALONE,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sheboygan County:
TERENCE T. BOURKE, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Acuity Insurance Company appeals from an order confirming a decision of the Labor and Industry Review Commission (LIRC) dismissing Acuity's claim for decreased compensation under WIS. STAT. § 102.58 (2005-06).¹ Credible and substantial evidence supports LIRC's decision, and the evidence does not offer a more reasonable conclusion. We therefore must affirm.

¶2 Crest Concrete Products employed Theodore Whitman as a truck driver. On September 6, 2005, Whitman's boom truck crossed the center line, ran across the opposite traffic lanes, crashed through a guardrail, plummeted down an embankment and collided with a freight train. Whitman was pronounced dead at the scene. The La Crosse county medical examiner submitted samples of Whitman's blood and vitreous humor² to the Wisconsin State Laboratory of Hygiene for ethanol (alcohol) testing. The blood sample analysis detected no drugs and was invalid for ethanol due to contamination by diesel fuel. The vitreous humor analysis showed an ethanol result of 0.341 g/100 ml.

¶3 Acuity, Crest's worker's compensation insurer, conceded liability for death benefits but claimed entitlement to decreased compensation payments under WIS. STAT. § 102.58. At the worker's compensation hearing, the administrative law judge (ALJ) dismissed Acuity's claim because it concluded that Acuity did not carry its burden of proof. LIRC adopted the ALJ's findings and order, and the circuit court confirmed LIRC's decision. Acuity appeals.

¹ Under WIS. STAT. § 102.58, "if injury results from the intoxication of the employee by alcohol beverages, as defined in [WIS. STAT. §] 125.02 (1) ... the compensation and death benefit provided in this chapter shall be reduced 15% but the total reduction may not exceed \$15,000." All references to the Wisconsin Statutes are to the 2005-06 version.

² Vitreous humor is the clear, colorless, transparent jelly that fills the eyeball behind the lens. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2559 (1993).

¶4 Resolution of this appeal is driven wholly by our standard of review. Although the appeal is taken from a circuit court's review of a LIRC decision, we review LIRC's decision, not the circuit court's. *Virginia Sur. Co. v. LIRC*, 2002 WI App 277, ¶11, 258 Wis. 2d 665, 654 N.W.2d 306. The parties differ as to the degree of deference we must give LIRC's conclusions of law. Acuity says none at all; LIRC argues it merits great weight. Having found only a few published decisions where LIRC applied WIS. STAT. § 102.58, we deem the middle ground, due weight, to be most suitable here. See *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284-87, 548 N.W.2d 57 (1996). Under the due weight standard, we must uphold LIRC's decision if it is reasonable and comports with the statutory purpose, unless a more reasonable interpretation is available. *Id.* at 286-87.

¶5 Acuity also challenges LIRC's findings of fact. LIRC's findings are conclusive on appeal as long as they are supported by credible and substantial evidence. WIS. STAT. § 102.23(6). The evidence only need be sufficient to exclude speculation or conjecture. *Id. v. LIRC*, 224 Wis. 2d 159, 165, 589 N.W.2d 363 (1999). It is solely the role of LIRC to weigh the evidence, to determine its credibility, and to decide what should be believed. See *E. F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 636-37, 264 N.W.2d 222 (1978). Our role is to search the record to locate credible evidence that supports LIRC's findings. *Brakebush Bros., Inc. v. LIRC*, 210 Wis. 2d 623, 630, 563 N.W.2d 512 (1997).

¶6 The two-part issue is whether Whitman was intoxicated and, if so, whether the accident resulted from his intoxication, thus entitling Acuity to a fifteen-percent reduction in compensation payments. Both present questions of fact, and LIRC may draw reasonable inferences regarding both from the credible and substantial evidence. See *Heritage Mut. Ins. Co. v. Larsen*, 2001 WI 30, ¶56,

242 Wis. 2d 47, 624 N.W.2d 129. The employer bears the burden of proving both. *Haller Beverage Corp. v. DILHR*, 49 Wis. 2d 233, 235, 181 N.W.2d 418 (1970).

¶7 LIRC adopted the ALJ's findings as its own and upheld the ALJ's order. It is not entirely clear, however, that LIRC or the ALJ conclusively found intoxication.³ At the worker's compensation hearing, Acuity submitted as evidence the state lab reports and the report of occupational medicine consultant Dr. James C. Foster. By extrapolating the vitreous humor alcohol result of 0.341 using one of several variances, Dr. Foster opined to a reasonable degree of medical certainty that Whitman's BAC was at least 0.29 and that his BAC likely caused or contributed to the fatal accident. The ALJ confessed to being left with questions about the reliability and validity of the test results underpinning Whitman's "alleged intoxication," however. The ALJ noted, for instance, that while the fluid samples were collected on September 6, 2005, the state lab received them on September 19 and issued its findings on October 26. The report left unexplained the delay, the date of testing and the significance, if any, of the notation that the specimens were received "labeled but not sealed." The ALJ also questioned (1) why, when faced with "discrepancies" in the literature about extrapolating BAC from vitreous humor results, Dr. Foster consulted with the Kenosha county medical examiner instead of the one who collected the samples;

³ The ALJ referred to Whitman's "alleged intoxication" and went on to say that "[e]ven if" the vitreous humor sample results validly supported a conclusion of intoxication, that evidence alone would not support Acuity's claim for reduced payments. In addition, LIRC itself said that, "[e]ven assuming Mr. Whitman was intoxicated," there was no evidence he was driving erratically, was unconscious, otherwise disabled or "suffered any ill effects when he was intoxicated." (Emphasis added.) "[W]hen he was intoxicated" reasonably can be read as following from the earlier-stated assumption. We look to support the finding that was made, not to find support for one that was not. *Briggs & Stratton Corp. v. DILHR*, 43 Wis. 2d 398, 408, 168 N.W.2d 817 (1969).

(2) why Dr. Foster selected the extrapolation method he did; and (3) the total lack of evidence about Whitman's general health, the truck's mechanical condition, and any intervening incident that might have caused the accident. To those findings, LIRC added that there was no evidence that anyone witnessed Whitman drinking.

¶8 Whether or not the ALJ or, vicariously, LIRC found intoxication is immaterial, however, because the employer must prove both intoxication *and* causation. *See id.* Acuity contends Dr. Foster's opinion established a causal connection because it described how "Whitman's intoxication caused impairment and affected his ability to drive his vehicle." Not precisely. Dr. Foster described how intoxication affects motorists generally, not its particular effect on Whitman. LIRC may draw reasonable inferences about causation from the credible and substantial evidence. *See Heritage Mut. Ins. Co.*, 242 Wis. 2d 47, ¶56.

¶9 Moreover, LIRC did not accept the causal connection Dr. Foster drew. The ALJ found that Dr. Foster was neither a forensic expert nor an accident reconstruction expert and so could "hardly independently explain what the vitreous humor test result means." No other evidence was introduced from which a causal connection between Whitman's alleged intoxication and his fatal injury could be inferred. Besides adopting these findings as its own, LIRC added that no witnesses established unsafe or erratic driving or that Whitman was unconscious or passed out at the time of the accident due to intoxication. LIRC concluded that Dr. Foster's report cited nothing established beyond a speculative level that intoxication was a substantial factor in Whitman's death.

¶10 Acuity also argues that causation was established because Dr. Foster's medical opinion is the only one in the record. Such an argument suggests that the burden then shifts to the claimants so that, as in WIS. STAT. § 940.25

(2)(a), to show that the injury would have occurred even without the intoxication. The burden does not shift, however. The results of scientific tests are not conclusive even if they are not contested. *Consolidated Papers, Inc. v. DILHR*, 76 Wis. 2d 210, 220, 251 N.W.2d 69 (1977). The vitreous humor BAC results, even if uncontroverted, do not render Dr. Foster's testimony credible. *See id.* As the sole judge of the weight and credibility of medical evidence, *see United Parcel Service, Inc. v. Lust*, 208 Wis. 2d 306, 324, 560 N.W.2d 301 (Ct. App. 1997), LIRC was entitled to reject his opinion.

¶11 Acuity also asserts that it cannot be required to negate all possible explanations of the truck careening over the embankment to the railroad tracks below. We agree. *See Haller Beverage Corp.*, 49 Wis. 2d at 236. It must offer something, however, to establish some causal link between Whitman's alleged intoxication and his fatal injury. *See id.* Evidence of intoxication alone will not support a reduction in payments. *Massachusetts Bonding & Ins. Co. v. Industrial Comm'n*, 8 Wis. 2d 606, 608, 99 N.W.2d 809 (1959).

¶12 Acuity in essence asks us to substitute its own conclusions—or ours, should we agree with them—for those of LIRC. Such a request misapprehends our limited standard of review. By adopting and upholding the ALJ's findings, LIRC found that Dr. Foster's opinion fell short of being credible and substantial. *See Secura Ins. v. LIRC*, 2000 WI App 237, ¶23, 239 Wis. 2d 315, 620 N.W.2d 626. LIRC's factual findings are conclusive upon us, and we may not substitute our judgment as to the weight or credibility of the evidence. WIS. STAT. §§ 102.23(1)(a) and 102.23(6). Just as LIRC must deny an employee's claim for compensation for failing to meet the burden of establishing facts showing entitlement to compensation, LIRC also must deny a claim for a decrease in compensation if it has a legitimate doubt about either intoxication or a causal

relationship to the injury. *See Massachusetts Bonding & Ins. Co.*, 8 Wis. 2d at 609. LIRC's decision is supported by credible and substantial evidence, is reasonable, comports with the statutory purpose, and the record does not establish a more reasonable interpretation. Under the due weight standard, therefore, we must uphold it. *See UFE, Inc.*, 201 Wis. 2d at 286-87.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

