**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

October 27, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-3181**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT II**

---

**EMPLOYERS MUTUAL COMPANIES AND LAKE PEWAUKEE SANITARY DISTRICT,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION AND THOMAS A. RICKHEIM,**

**DEFENDANTS-RESPONDENTS.**

---

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Employers Mutual Companies and Lake Pewaukee Sanitary District (hereinafter Employers Mutual) appeal from a judgment of the circuit court affirming the administrative decision that Thomas A. Rickheim

suffered a work-related injury and partial vocational disability. The issues on appeal are whether the administrative finding of a work-related injury was supported by the evidence and whether the Administrative Law Judge (ALJ) exceeded her authority when she found vocational disability. Because we conclude that there was sufficient evidence to support the findings of the Labor and Industry Review Commission (LIRC), we affirm.

¶2 Rickheim was employed by the Lake Pewaukee Sanitary District for fourteen years. LIRC found that his job duties included digging up manhole covers and building and repairing barges. His work required him to lift covers and hatches which weighed between 75 to 400 pounds. During his employment with the Sanitary District, he suffered numerous injuries, including injuries to his legs, feet, ankles, knees, elbows and back. On the morning of October 16, 1995, he suffered a sharp pain in his lower back while at home. He went to work, but eventually the pain became so bad that his supervisor sent him home. That was his last day of work.

¶3 After a hearing, the ALJ determined that Rickheim suffered a work-related injury and a fifty-percent loss of earning capacity. This finding was upheld by LIRC, whose decision was affirmed by the circuit court. Employers Mutual appeals from the judgment of the circuit court.

¶4 We will uphold LIRC's findings of fact on appeal so long as they are supported by credible and substantial evidence. *See* ***Applied Plastics, Inc. v. LIRC***, 121 Wis.2d 271, 276, 359 N.W.2d 168, 171 (Ct. App. 1984); § 102.23(6), STATS. We will not substitute our judgment for LIRC's in considering the weight or credibility of the evidence on any finding of fact. *See* ***Advance Die Casting Co. v. LIRC***, 154 Wis.2d 239, 249, 453 N.W.2d 487, 491 (1989); § 102.23(6).

¶5 Employers Mutual argues first that the finding of a work-related injury was not supported by the evidence. We disagree. This issue is, in essence, one of credibility. LIRC's findings are based on the opinion offered by Rickheim's physician. Employers Mutual's physician offered a contrary opinion. LIRC found that Rickheim's physician felt that Rickheim's work was "a material and contributory causative factor" in the onset of his condition. Employers Mutual's physician did not believe Rickheim's work contributed to his condition. LIRC further considered that Employers Mutual's physician noted that Rickheim did heavy work but did not indicate in his report that he was aware of the specific type of heavy lifting and other activities that Rickheim performed. LIRC offered this as one reason why Rickheim's own physician's opinion was more credible. We do not see any reason to disturb these findings.

¶6 Employers Mutual also argues that the record is devoid of any evidence of a prior work-related injury to Rickheim's back. The law, however, does not require a specific event to establish an occupational disease. "If the work activity precipitates, aggravates and accelerates beyond normal progression, a progressively deteriorating or degenerative condition, it is an accident causing injury or disease and the employee should recover even if there is no definite 'breakage.'" ***Lewellyn v. DILHR***, 38 Wis.2d 43, 59, 155 N.W.2d 678, 687 (1968). There was evidence presented that Rickheim engaged in heavy lifting, bending and twisting. His physician stated that this work was a major contributing factor to Rickheim's condition. This was sufficient to support LIRC's finding that Rickheim suffered from an occupational disease.

¶7 Employers Mutual next argues that the ALJ exceeded her authority when she found that Rickheim had suffered a permanent disability on a vocational basis. Employers Mutual is particularly concerned with the ALJ's finding that:

"The Department has a long standing policy that the person making the claim has the right to make a choice of claims.... The vocational expert was not in a position to second guess that choice as a means of defeating that claim." Employers Mutual argues that this is a not a rule or a statute, "but a policy with murky origins." It is possible, however, to affirm LIRC's decision without relying on this policy.

¶8 LIRC found that Rickheim was pursuing vocational retraining on his own initiative. However, even in light of the retraining efforts, Rickheim's vocational expert testified that she assessed his future loss of earning capacity within the fifty-five percent range. Employers Mutual's expert stated on cross-examination that he had no problem with the conclusion that Rickheim had suffered a fifty to fifty-five percent loss of earning capacity. LIRC considered Rickheim's back problems and disability, as well as his prior work history of manual labor and his educational background, to find that he suffered a fifty-percent loss of earning capacity. We agree with the circuit court that evidence supports this finding.

*By the Court.*—Judgment affirmed.

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