

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 10, 2002**

Cornelia G. Clark  
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. 01-0095  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-1465**

**IN COURT OF APPEALS  
DISTRICT IV**

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**MILLERS MUTUAL INSURANCE COMPANY,**

**PLAINTIFF-RESPONDENT-CROSS-  
APPELLANT,**

**EAGLETON FEED & FARM,**

**INVOLUNTARY-PLAINTIFF-  
RESPONDENT-CROSS-APPELLANT,**

**v.**

**ROBERT BRESINA,**

**DEFENDANT-APPELLANT-CROSS-  
RESPONDENT,**

**LABOR AND INDUSTRY REVIEW COMMISSION,**

**DEFENDANT-CO-APPELLANT-CROSS-  
RESPONDENT.**

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APPEALS and CROSS-APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed in part; reversed in part.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Robert Bresina and the Labor and Industry Review Commission (LIRC) appeal from the circuit court's order affirming in part and reversing in part LIRC's decision. Millers Mutual Insurance Company cross-appeals. Bresina and LIRC complain that the circuit court improperly applied WIS. STAT. § 102.18(1)(d) (1999-2000)<sup>1</sup> when it reduced LIRC's determination of permanent disability from ten percent to five percent. In its cross-appeal, Millers Mutual contends that the circuit court erred in finding there was substantial and credible evidence to support LIRC's finding of causation and disability. We agree with Bresina and LIRC that the circuit court misapplied the statute. We reject Millers Mutual's assertion that LIRC's finding was not supported by substantial and credible evidence. Accordingly, we reverse the appeal and affirm the cross-appeal.

¶2 Bresina was injured when a truck in which he was riding rolled over into a ditch while he was working for Eagleton Feed & Farm. He applied for worker's compensation benefits. Millers Mutual Insurance Company conceded that Bresina was totally disabled for a period of about three and a half months after the injury. The hearing examiner denied Bresina's claim for an additional period of total disability and for permanent partial disability. LIRC reversed the hearing

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

examiner, concluding that Bresina was totally disabled for an additional five months beyond the initial period conceded by Millers Mutual and that Bresina was ten percent permanently disabled. Millers Mutual appealed LIRC's decision to the circuit court. The circuit court affirmed in part and reversed in part, concluding that LIRC had violated WIS. STAT. § 102.18(1)(d).

¶3 We first address the cross-appeal. Millers Mutual argues that LIRC's decision is not supported by substantial and credible evidence. "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive." WIS. STAT. § 102.23(1)(a). "If the commission's order or award 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." WIS. STAT. § 102.23(6). "The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence." *Id.* We will search the record to locate credible and substantial evidence supporting LIRC's determination, "rather than weighing the medical evidence opposed thereto." *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶4 We conclude that the commission's decision is supported by substantial and credible evidence. Drs. T.S. Thomas, Chris Hougen, and Peter Ihle all opined that Bresina suffered a disc herniation as a result of the accident, causing him pain and restricting his movement. Dr. Thomas assessed five percent permanent partial disability caused by the accident. Dr. Hougen assessed eighteen percent permanent partial disability caused by the accident. Dr. Ihle estimated that Bresina had a minimum of five percent permanent partial disability that Dr. Ihle

believed was a result of the work injury. The doctors treated Bresina for continuing symptoms after the conceded period of temporary total disability had ended and Dr. Thomas specifically recommended that Bresina not return to work until five months after the period of conceded total disability ended. The opinion of these three doctors is substantial and credible evidence sufficient to support the commission's finding of ten percent permanent partial disability and five months of additional temporary total disability.

¶5 We next address the appeal. LIRC and Bresina argue that the circuit court erred in concluding that LIRC's ten percent permanent disability award violated WIS. STAT. § 102.18(1)(d). We agree that the circuit court did not properly interpret and apply the statute to the facts of this case. WISCONSIN STAT. § 102.18(1)(d) provides:

Any award which falls within a range of 5% of the highest or lowest estimate of permanent partial disability made by a practitioner which is in evidence is presumed to be a reasonable award, provided it is not higher than the highest or lower than the lowest estimate in evidence.

The circuit court concluded that the award violated the statute because the lowest estimate of disability in the record was made by Dr. Richard Lemon, who concluded that Bresina suffered no permanent disability, and the ten percent award was not within five percent of this lowest estimate.

¶6 We first address the circuit court's conclusion that Dr. Lemon's finding of no disability is the lowest estimate of disability in the record. The circuit court concluded that LIRC was entitled to accept as true testimony from three doctors who opined that Bresina's herniated disc resulted from his work-related accident and that his level of disability was between five percent and eighteen percent. However, the circuit court's application of the disability formula

in WIS. STAT. § 102.18(1)(d) involved the assumption that LIRC was simultaneously required to take into account Dr. Lemon's opinion that there was no causation and that, consequently, Bresina had no disability resulting from the accident. This approach is logically inconsistent. LIRC rejected Dr. Lemon's evaluation because he examined Bresina before the MRI revealed Bresina's disc herniation. *See Leist v. LIRC*, 183 Wis. 2d 450, 460, 515 N.W.2d 268 (1994) (LIRC may reject a medical opinion where there is something in the record to support its rejection). Because LIRC rejected Dr. Lemon's medical opinion, the lowest estimate of permanent partial disability in the record was five percent.

¶7 Turning to whether LIRC's ten percent award was presumptively reasonable under WIS. STAT. § 102.18(1)(d), we look first to the language of the statute. *See Dubis v. General Motors Acceptance Corp.*, 2000 WI App 209, ¶7, 238 Wis. 2d 608, 618 N.W.2d 266 ("Statutory interpretation begins with the language of the statute itself."). "If the language is clear and unambiguous on its face, we merely apply that language to the facts at hand." *Id.* However, "[w]here the language of a statute is ambiguous, we ... consider legislative intent and collateral sources, including the scope, history, context, subject matter and object of the statute" to determine the statute's meaning. *Id.* (citation omitted).

¶8 We conclude that the language of the statute is ambiguous because reasonable persons could disagree on the scope of the range of presumptive reasonableness created by the statute. LIRC urges us to rely on an annotation discussing the statute in the biennial *Worker's Compensation Act* pamphlet published by the Department of Workforce Development. *See Pigeon v. DILHR*, 109 Wis. 2d 519, 524, 326 N.W.2d 752 (1982) ("[A]nnotations in the biennial Workmen's Compensation Act pamphlet are relevant in construing statutes."). The pamphlet provides: "Section 102.18(1)(d) gives the department the right to

make an order within the range of the highest and lowest estimates of permanent disability within 5 percent of any estimate in evidence.” Note 92, *Worker’s Compensation Act*, WKC-1 (2000). We find this interpretation persuasive. The ten percent award is “within the range of the highest and lowest estimates of permanent disability” and is “within 5 percent of any estimate in evidence.” Therefore, the award was presumptively reasonable under the statute.

¶9 In sum, we reverse the portion of the circuit court’s order reducing the permanent disability award to five percent. We conclude LIRC’s decision is supported by substantial and credible evidence and affirm the decision of LIRC in all respects.

*By the Court.*—Order affirmed in part; reversed in part.

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

