

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 25, 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. 01-2955
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-349

**IN COURT OF APPEALS
DISTRICT IV**

INTEGRITY MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

DÉCOR PRODUCTS, INC.,

**INVOLUNTARY-PLAINTIFF-
(IN T. CT.),**

v.

**TAMMY R. ZAHORIK AND LABOR AND INDUSTRY REVIEW
COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Integrity Mutual Insurance Company appeals a judgment affirming an award of worker's compensation benefits to Tammy Zahorik. The issue is whether there was sufficient evidence to support LIRC's award. We directly review LIRC's decision. See *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We affirm that decision and consequently the circuit court judgment as well.

¶2 Integrity is the worker's compensation insurer for Décor Products, Inc. In August 1996, Zahorik began working for Décor as a screen maker. Her duties included frequent lifting of two seventeen-pound screen frames at a time, initially with a partner, but by herself during the last few months of her employment. Handling the screens also involved bending, kneeling, twisting and turning, and standing for long periods.

¶3 Before she worked for Décor, Zahorik had suffered a back injury related to other employment, and had undergone surgery for the problem in 1995. In February 1999, she told a supervisor that she was experiencing low back pain, and asked for help in lifting the screens. She received none, and the pain eventually increased. After April 1999, she could not return to work, and claimed temporary total disability benefits. Décor and Integrity opposed the claim, contending that the 1995 back injury caused Zahorik's disability.

¶4 Upon hearing testimony and reviewing various medical reports, an administrative law judge (ALJ) held that Zahorik's 1999 disability was not related to her 1995 injury, but was a separate and distinct condition caused solely or materially by her work activity at Décor. The ALJ primarily relied on medical test results showing damage at the L5-S1 level of her spine, with no evidence of abnormality at the L4-5 level, the location of her 1995 injury surgery. The ALJ

also relied on the opinions of two treating physicians, who both reported that the 1995 and 1999 injuries were not related, and that the latter was the source of the disability. Although an independent medical examiner reached the opposite conclusion, the ALJ rejected his opinion because it was based on erroneous information, contradicted the test results, and depended on unreliable medical notes to conclude that Zahorik had exaggerated her symptoms. On administrative review, LIRC affirmed the ALJ's decision, on essentially the same grounds. On appeal, Integrity contends that LIRC erroneously disregarded proof of a "legitimate doubt" as to Zahorik's claim of benefits.

¶5 If there is "legitimate doubt" as to the existence of facts necessary and essential to the worker's compensation claim, LIRC must deny the claim because the claimant has failed to sustain his or her burden of proof. *Bumpas v. DILHR*, 95 Wis. 2d 334, 342-43, 290 N.W.2d 504 (1980). The term "legitimate doubt" does not refer to any doubt that the department chooses to entertain. *Id.* at 344. Legitimate doubt exists only where there is some inherent inconsistency or conflict in the testimony. *Id.*

¶6 We conclude that Zahorik adequately proved a work-related injury beyond a legitimate doubt. Integrity's argument essentially rests on the premise that legitimate doubt exists whenever conflicting evidence is presented. However, that premise is not the law in Wisconsin. The weight and credibility of the evidence are for LIRC to evaluate. *Currie v. DILHR*, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997). We may not substitute our judgment for LIRC's on issues of fact. *Id.* Our inquiry under the legitimate doubt standard is not whether LIRC properly resolved evidentiary conflicts, but whether the award is based on mere possibility or speculation, as opposed to fact. *White v. LIRC*, 2000 WI App 244, ¶26, 239 Wis. 2d 505, 620 N.W.2d 442. Here, LIRC based the award not on

speculation, but on test results and the opinion of two treating physicians. LIRC's decision to award Zahorik benefits is thus supported by "credible and substantial evidence," notwithstanding the presence of contrary evidence which LIRC deemed less credible. *See* WIS. STAT. § 102.23(6) (1999-2000).

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

