

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 27, 1995

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1324

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

LEONARD PLAZA,

Plaintiff-Appellant,

v.

**LABOR AND INDUSTRY
REVIEW COMMISSION,
WORKER'S COMPENSATION
DIVISION, WAUSAU DAILY
HERALD and LIBERTY
MUTUAL INSURANCE COMPANY,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND F. THUMS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Leonard Plaza appeals a judgment affirming a decision of the Labor and Industry Review Commission finding that Plaza failed to establish that a hernia was work related and finding that a back injury

resulted in a 5% permanent disability. Because credible and substantial evidence supports LIRC's decision, we affirm the judgment.

Judicial review of LIRC's findings of fact is governed by statute and is limited in scope. *R. T. Madden, Inc. v. DILHR*, 43 Wis.2d 528, 536, 169 N.W.2d 73, 76 (1969). This court must affirm LIRC's findings if there is any credible evidence in the record to support those findings. *Id.* at 547, 169 N.W.2d at 82. The credibility of witnesses and the persuasiveness of the testimony are matters for LIRC to determine. *Goranson v. DILHR*, 94 Wis.2d 537, 556, 289 N.W.2d 270, 279 (1980).

Plaza had the burden of proving all facts essential to recovery of compensation beyond a legitimate doubt. *Leist v. LIRC*, 183 Wis.2d 450, 457, 515 N.W.2d 268, 270 (1994). Therefore, Plaza was required to prove that he sustained a compensable hernia while he was at work and that his back injury resulted in more than 5% permanent disability. See *Bumpas v. DILHR*, 95 Wis.2d 334, 342-43, 290 N.W.2d 504, 507 (1980). If the evidence presented raised any legitimate doubt, LIRC was required to deny the application for compensation on the ground that Plaza did not sustain his burden of proof. See *Fitz v. Industrial Comm'n*, 10 Wis.2d 202, 205, 102 N.W.2d 93, 95 (1960).

LIRC reasonably concluded that Plaza's hernia was not work related. Plaza contends that he suffered the hernia in June 1990 while moving heavy furniture at work. He continued to work regularly from that day until October 22, 1990 when he entered the hospital for repair of his hernia. He could not recall any specific onset of pain in June and did not notice any bulge or become nauseous or suffer any other symptoms associated with traumatic hernia at that time. Plaza notes that his treating physician stated in a medical form that the hernia was work related. LIRC reasonably discounted this statement because the doctor was merely repeating what Plaza told him and Plaza did not inform the doctor of other activities that could account for the hernia. LIRC could reasonably conclude that Plaza's evidence left legitimate doubt as to the cause of his hernia.

Sufficient evidence also supports LIRC's finding that Plaza suffered a 5% permanent disability due to his back injury. Some confusion was created by LIRC's imprecise and inconsistent use of the terms "loss of earning

capacity," "functional disability" and "the vocational loss." Nonetheless, LIRC's ultimate finding that Plaza suffered a 5% permanent disability based on his back injury is supported by sufficient evidence. As the trial court noted, worker's compensation disability is not the same as functional disability. LIRC's finding of permanent partial disability must be based on a consideration of both loss of bodily function and loss of earning capacity. See *Pfister & Vogel Tanning Co. v. DILHR*, 86 Wis.2d 522, 529, 273 N.W.2d 293, 297 (1979). LIRC affirmed the administrative law judge's finding of 5% functional disability and no additional loss of earning capacity. LIRC entertained legitimate doubt regarding the loss of earning capacity based on Plaza's failure to establish more than a haphazard, halfhearted attempt to find suitable employment. See WIS. ADM. CODE § IND 80.34(1)(h). A vocational expert testified that there were several perspective employment opportunities within Plaza's restrictions. Plaza did not go to Job Service to see if he could get any jobs and never went to the Senior Job Service. He never sought work through an employment agency. He could remember the name of only one business that he contacted and he did not fill out an application for that business. Although he testified that he called prospective employers from ads in the newspaper, he could not remember the names of any perspective employers he called. On the basis of this evidence, LIRC could reasonably find that Plaza failed to meet his burden of proving loss of earning capacity beyond legitimate doubt.

By the Court.—Judgment affirmed.

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