

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 19, 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, 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. 95-2026-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RAYMOND LUDWIKOWSKI,

Plaintiff-Respondent,

v.

LABOR & INDUSTRY REVIEW COMMISSION,

Defendant-Co-Appellant,

IRECO AND CIGNA INSURANCE COMPANY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Douglas County:
JOSEPH A. McDONALD, Judge. *Reversed.*

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

PER CURIAM. The Labor & Industry Review Commission and Ireco and Cigna Insurance Company appeal a judgment overturning LIRC's decision that Raymond Ludwikowski's claim for loss of earning capacity is

premature.¹ The trial court concluded that LIRC based its decision on speculative evidence. Because we conclude that credible and substantial evidence supports LIRC's decision, we reverse the trial court's judgment and reinstate the LIRC decision.

An administrative law judge awarded Ludwikowski permanent total disability benefits based on reports and opinions that he suffered injuries resulting in a loss of earning capacity. LIRC modified the ALJ's decision, concluding that Ludwikowski's claim for loss of earning capacity was premature. LIRC relied on reports from Dr. William Fleeson and vocational expert Michael Guckenberger. LIRC found the medical evidence submitted by Dr. Fleeson to be more credible than that offered by Ludwikowski's treating physician, Dr. W. S. Pollard. LIRC also found that Ludwikowski's vocational experts did not adequately address the possibility that Ludwikowski could perform work under the restrictions suggested by Dr. Fleeson.

Ludwikowski has not met his burden of proving his claim for loss of earning capacity. The burden is on Ludwikowski to establish the essential elements of his claim, and if the evidence presented raises a legitimate doubt as to the existence of facts necessary to establish the claim, LIRC has the duty to deny the claim. *Bumpas v. DILHR*, 95 Wis.2d 334, 342-43, 290 N.W.2d 504, 507-08 (1980). There is evidence to support LIRC's conclusion that Ludwikowski failed to establish a permanent total disability beyond legitimate doubt. LIRC could reasonably believe Ludwikowski had not exhausted his employment or retraining options for someone with his limitations. It is LIRC's function to decide the significance of Ludwikowski quitting his efforts toward job placement and retraining. LIRC reasonably concluded that the claim was premature and that it was appropriate to postpone any determination of lost earning capacity until retraining is further explored.

The trial court erroneously determined that LIRC, in relying on Dr. Fleeson's report, based its decision on speculative evidence. While Dr. Fleeson's report states that he believes he can predict the outcome of a functional capacities assessment and he wonders if an MRI would show persistent disc and/or epidural fibrosis, his recommendations were not based

¹ This is an expedited appeal under RULE 809.17, STATS.

on speculation. His examination led him to question whether Ludwikowski's self-reported limitations reflected a valid representation of his true capacities. Because Ludwikowski resisted undergoing the functional capacities analysis and no MRI had been performed, Dr. Fleeson's report is most fairly characterized as a statement that he is skeptical of Ludwikowski's self-reported symptoms and limitations and that he believes that further testing is necessary before a final conclusion can be reached. Dr. Fleeson's report supports LIRC's determination that Ludwikowski had not established his claim for loss of earning capacity beyond legitimate doubt because, in the absence of these evaluations, his claim was premature.

Ludwikowski argues that LIRC was required to discuss the credibility of witnesses with the ALJ before it reversed the ALJ's decision. Even if LIRC's decision can be fairly described as a reversal, it was not required to consult with the ALJ because the demeanor and credibility of witnesses was not involved in its decision. See *City of Appleton v. DILHR*, 67 Wis.2d 162, 170, 226 N.W.2d 497, 501 (1975). LIRC did not rely on the testimony of the medical witnesses, but rather on reports submitted by them. While the vocational experts testified, LIRC's criticism of Ludwikowski's witnesses was not based on their demeanor or believability, but rather on LIRC's view that their reports were incomplete. No conference with the ALJ was necessary under these circumstances.

Ludwikowski also contends that his medical and vocational expert witnesses were more credible than his opponents'. The role of this court is limited to reviewing the record to locate credible and substantial evidence that supports LIRC's determination, rather than weighing the evidence opposed to it. *VandeZande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975). LIRC's findings of fact are conclusive if supported by credible and substantial evidence. *Bumpas*, 95 Wis.2d at 342, 290 N.W.2d at 508. We have concluded they are supported by the requisite credible and substantial evidence. Section 102.23(6), STATS., prohibits the courts from substituting their judgment as to the credibility of witnesses or the weight of the evidence.

By the Court.— Judgment reversed.

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