COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2426

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

GREGORY HUBATCH,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,
MILLER BREWING COMPANY AND
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID HANSHER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Gregory Hubatch appeals from the circuit court's judgment affirming the order of the Labor and Industry Review Commission

(LIRC), which denied his claim for vocational rehabilitation. On appeal, Hubatch argues that LIRC erroneously concluded that, contrary to his testimony, he was offered DVR assistance in 1986 and he chose not to pursue his claim within the time limits found in WIS. STAT. § 102.61(1) (1997-98),[1] and, as a consequence, he was ineligible for rehabilitation benefits in 1996. We disagree and, therefore, affirm.

I. BACKGROUND.

¶2 Hubatch began his employment with Miller in 1976 as a forklift driver. On November 11, 1981, Hubatch severely injured his back while attempting to lift a heavy ramp with a co-employee. Dr. Jacques Hussussian diagnosed Hubatch's injury as a herniated disc requiring surgery. Dr. Hussussian performed a laminotomy and discectomy on Hubatch and, after approximately six months of recovery, Hubatch returned to work in 1982. For the first six months following his return he performed light duties. Although Dr. Hussussian ultimately assigned Hubatch five percent permanent partial disability, Hubatch eventually returned to his regular duties as a forklift driver.

¶3 As a member of Brewery Worker's Union Number 9, Hubatch was involved in a worker strike that lasted from June 1983 until September 1983. Following the strike, Hubatch was laid off until 1988. During this five-year layoff, Hubatch was employed in various unskilled or semi-skilled jobs.

¶4 In 1986, while laid off from Miller, Hubatch applied for services from the Department of Vocational Rehabilitation (DVR). Although the record of

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Hubatch's contact with DVR in 1986 has been destroyed, Hubatch testified that, in an effort to help him find a job, DVR gave him various tests to ascertain his interests. Also, Dr. Hussussian's office notes dated 6/19/86 indicate that DVR asked him to evaluate Hubatch for purposes of his vocational rehabilitation. Hubatch claimed that DVR did not offer him additional schooling or offer him retraining at that time.

¶5 Hubatch returned to work at Miller in 1988, but remained subject to periodic layoffs. After returning to work, Hubatch continued to perform his normal duties as a forklift driver. However, in 1991, after Hubatch complained of continuing back problems, Dr. Hussussian increased Hubatch's permanent partial disability from five percent to ten percent. The doctor also suggested that Hubatch observe a fifty-pound lifting restriction and that he avoid repetitive bending, lifting, pushing and pulling. Despite the increase in permanent partial disability and suggested restrictions, Hubatch continued to perform his normal duties as a forklift driver.

¶6 In 1996, Miller informed Hubatch and other brewery workers that the work force was being restructured. Miller decided to downsize its brewery workforce and offered severance and/or retirement packages to the workers affected by the downsizing. Members of Hubatch's union who rejected the offer would not be guaranteed alternative employment with Miller, but would retain their seniority if the workers were called back to their previous jobs. In the event the workers were not called back, they would be given preferential status to interview for other job openings as they occurred. Hubatch chose to accept the severance package under which he received approximately $22,000 in exchange for the termination of his employment.

¶7 Following his severance, in November 1996, Hubatch again applied to DVR for benefits. Hubatch's DVR counselor, Cary Merkl, believing that Hubatch was eligible for vocational benefits, prepared an individual written rehabilitation plan for him. Hubatch was paired with Michael Ewens of Vocational Professionals to assist him in finding a job. Hubatch allegedly sought employment as a forklift driver, truck driver, shipping and/or receiving clerk, and as a bartender. However, Hubatch did not accept other employment. Hubatch asserted that his primary reason for not finding alternative employment was that he wanted a job that paid wages commensurate with his wages at Miller, and the pay at the places he contacted was too low.

¶8 Because Hubatch was unsuccessful in procuring a new job, Merkl authorized a second individual written rehabilitation plan for Hubatch under which Hubatch would obtain an Associate Degree in Marketing/Transportation. This plan was changed when Merkl and Hubatch mutually decided that Hubatch should complete a four-year degree in business administration, and a third individual written rehabilitation plan was prepared.[2]

¶9 Hubatch then filed a claim seeking vocational rehabilitation benefits for his schooling with the Department of Workforce Development. Miller opposed Hubatch's claim and the matter went to a hearing before an Administrative Law Judge, who concluded that Hubatch was entitled to retraining benefits. Miller petitioned LIRC for review of the ALJ's decision. LIRC rejected Miller's arguments that: DVR erroneously exercised its discretion; the

[2] Miller asserts that one week prior to the hearing on this matter, Merkl and Hubatch decided against the four-year degree, and instead decided that Hubatch should complete the Associate Degree in Marketing and then begin a second Associate Degree as a microcomputer specialist.

twelve-year statute of limitation had run; and, by accepting the severance package, Hubatch was precluded from seeking the reopening of the loss of earning capacity issue under WIS. STAT. § 102.44(6). LIRC reversed the award, however, adopting Miller's argument that Hubatch forfeited any rehabilitation assistance because he abandoned his initial rehabilitation application with DVR in 1986. LIRC observed that WIS. STAT. § 102.61(1) (1981-82), now renumbered as WIS. STAT. § 102.61(1r)(a), places time limits on a person seeking benefits:

> He must undertake the course of instruction within 60 days from the date when he has sufficiently recovered from his injury to permit his so doing, or as soon thereafter as the officer or agency having charge of his instruction shall provide opportunity for his rehabilitation.

LIRC concluded that Hubatch was not forthright in testifying that DVR failed to offer retraining, schooling or, at the very least, employment assistance in 1986. It reasoned that DVR had offered him assistance in 1986 and he abandoned his opportunity for vocational rehabilitation during the layoff from Miller, waiting until 1996, after accepting his severance package, to commit himself to a retraining program. Relying on those facts, LIRC concluded that Hubatch forfeited his opportunity for rehabilitation benefits. Hubatch appealed LIRC's decision to the circuit court. The circuit court affirmed LIRC's decision, holding that the record contained substantial and credible evidence supporting LIRC's finding that Hubatch abandoned his rehabilitation application with DVR in 1986.

II. ANALYSIS.

¶10 On appeal, Hubatch argues that LIRC erroneously concluded that, under WIS. STAT. § 102.61(1), he was not entitled to vocational rehabilitation in 1996 because he had abandoned his pursuit of vocational rehabilitation in 1986

and, by operation of § 102.61(1), he could not be awarded benefits ten years later. Specifically, Hubatch asserts that LIRC erred in finding his testimony incredible that in 1986 DVR simply told him there "wasn't much" it could do for him and it did not offer vocational rehabilitation at that time. Hubatch also asserts that LIRC erred when it found that because DVR did not hesitate to certify a vocational rehabilitation program for Hubatch in 1996, it was reasonable to infer that DVR had also certified vocational rehabilitation in 1986.

¶11 For purposes of this appeal, we review LIRC's decision and not the circuit court's. *See* ***Stafford Trucking, Inc. v. DILHR***, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We may only reverse LIRC's decision if: (1) LIRC "acted without or in excess of its powers"; (2) the order was procured by fraud; or (3) "the findings of fact by LIRC do not support the order or award." ***Eaton Corp. v. LIRC***, 122 Wis. 2d 704, 708, 364 N.W.2d 172 (Ct. App. 1985). "LIRC's findings of fact will be upheld on appeal if they are supported by credible and substantial evidence in the record." ***North River Ins. Co. v. Manpower Temp. Servs.***, 212 Wis. 2d 63, 69, 568 N.W.2d 15 (Ct. App. 1997); *see also* WIS. STAT. § 102.23(6). Further, we "are not bound by LIRC's conclusions of law, but reasonable legal conclusions by LIRC will be sustained even if an alternative view may be equally reasonable." ***Eaton Corp. v. LIRC***, 122 Wis. 2d 704, 708, 364 N.W.2d 172 (Ct. App. 1985).

¶12 LIRC and not the reviewing court must determine the credibility and weight of the evidence. *See* ***id.*** at 570 (quoting WIS. STAT. § 102.23(6)); *see also* ***Sterlingworth Condominium Assoc. v. DNR***, 205 Wis. 2d 710, 727, 556 N.W.2d 791 (Ct. App. 1996). We may not "second guess" the weight LIRC attributes to the evidence; rather, we may only pass on the reasonableness of LIRC's findings. *See* ***Copland v. Dept. of Taxation***, 16 Wis. 2d 543, 555, 114 N.W.2d 858 (1962);

see also WIS. STAT. § 102.23(6). Finally, the drawing of reasonable inferences from the evidence is also within the sole province of LIRC. *See* ***Goranson v. DILHR***, 94 Wis. 2d 537, 556, 289 N.W.2d 270 (1980).

¶13 Here, our review of LIRC's findings of fact and the application of those findings to the law, WIS. STAT. § 102.61(1), presents a mixed question of law and fact. *See* ***Johnson v. LIRC***, 177 Wis. 2d 736, 740, 503 N.W.2d 1 (Ct. App. 1993); *see also* ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995). In ***Michels***, this court asserted:

> "When the question on appeal is whether a statutory concept embraces a particular set of factual circumstances, the court is presented with mixed questions of fact and law. The conduct of the parties presents a question of fact and the meaning of the statute a question of law. The application of the statute to the facts is also a question of law. However, the application of a statutory concept to a set of facts frequently also calls for a value judgment; and when the administrative agency's expertise is significant to the value judgment, the agency's decision is accorded some weight."

Id. (citation omitted). We must not substitute our judgment for LIRC's application of the law to the facts if a rational basis exists in law for LIRC's interpretation, and it does not conflict with controlling precedent. *See* ***Klusendorf Chevrolet-Buick, Inc. v. LIRC***, 110 Wis. 2d 328, 331-32, 328 N.W.2d 890 (Ct. App. 1982).

¶14 In its findings of fact and conclusions of law, LIRC indicated that when Hubatch was injured in 1981, WIS. STAT. § 102.61 provided that he "undertake the course of instruction within 60 days from the date when he has sufficiently recovered from his injury to permit of his so doing." LIRC noted that Hubatch returned to work early in 1982 following his 1981 injury. Then, in June

1983, Hubatch was laid off until 1988, but according to both Hubatch and Dr. Hussussian's note, he sought assistance from DVR in 1986. Although LIRC acknowledged that Hubatch's DVR file from 1986 had been destroyed, and it acknowledged that Hubatch testified that in 1986 DVR made some attempts at helping him find a job, but that he had been informed there "wasn't much" it could do for him, LIRC discounted Hubatch's testimony.

¶15 LIRC determined that Hubatch's "equivocal testimony to the effect that DVR decided there wasn't much they could do for him [was] incredible." LIRC reasoned that because DVR did not hesitate to certify Hubatch for retraining in 1996, it was reasonable to conclude that DVR would have suggested educational retraining to Hubatch in 1986. Based on these findings, LIRC concluded that following his initial contact with DVR in 1986, Hubatch abandoned his pursuit of vocational rehabilitation. Therefore, LIRC concluded that Hubatch was not entitled to vocational rehabilitation because he failed to undertake a course of vocational rehabilitation within the time limits of WIS. STAT. § 102.61(1). Hubatch now challenges these findings, as well as the inferences and conclusions LIRC drew from the findings.

¶16 Hubatch argues that LIRC erroneously concluded that his testimony was incredible. Hubatch asserts that LIRC attempted to support its finding of incredibility by concluding that because DVR certified Hubatch for retraining in 1996, it must have done so in 1986. Hubatch contends that this is not a reasonable conclusion drawn from the evidence, but rather a "cultivated intuition." Hubatch maintains that the only evidence in the record regarding the substance of his 1986 meetings with DVR is his testimony. He asserts that Miller failed to either offer contradicting testimony or submit any evidence to support the conclusion that

Hubatch abandoned DVR in the 1980's and, therefore, LIRC's conclusion amounts to mere conjecture. We disagree.

¶17 We are satisfied that LIRC reasonably concluded that Hubatch's testimony was incredible because the record supports LIRC's conclusion that Hubatch abandoned DVR following his initial encounter in 1986. In arriving at its conclusion, LIRC inferred that instead of pursuing vocational rehabilitation during the layoff, Hubatch took his chances that he would be rehired at Miller. Hubatch's own testimony clearly supports this inference. Hubatch testified that, during the layoff, he always wanted to return to work at Miller if the opportunity would arise. He also testified that the job paid well and he hoped to retire from Miller. LIRC also found persuasive a 1991 note written by Dr. Hussussian indicating that the doctor had suggested DVR to Hubatch, but Hubatch stated that he had tried this and "wasn't satisfied." Moreover, LIRC relied on its experience with DVR in determining that Hubatch's account was not plausible. LIRC asserted that "[e]ven assuming DVR did not suggest schooling in 1986, it is not credible that this agency would have given up in helping the applicant to find new, suitable employment, had he maintained contact with the agency." From this evidence, LIRC reasonably concluded that following his injury in 1981, Hubatch pursued DVR assistance in 1986, but then abandoned his pursuit of rehabilitation shortly thereafter.

¶18 We conclude that the evidence in the record supports LIRC's decision that Hubatch failed to comply with WIS. STAT. § 102.61(1) when, in 1996, he sought benefits for a work injury that occurred in 1981 and for which he had previously sought the services of DVR. Section 102.61(1) required Hubatch to undertake vocational rehabilitation within sixty days from the date he was sufficiently recovered from his injury, or as soon thereafter as the opportunity for

vocational rehabilitation was provided. LIRC reasonably concluded that the evidence presented indicated that Hubatch had abandoned his pursuit of vocational rehabilitation following his initial contact with DVR in 1986. Therefore, we are satisfied that LIRC properly concluded that Hubatch was not entitled to vocational rehabilitation benefits.[3]

By the Court.—Judgment affirmed.

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

[3] Because we conclude that LIRC properly concluded that Hubatch abandoned his pursuit of vocational rehabilitation in 1986 and, therefore, was not entitled to benefits in 1996 because he failed to comply with the time limits in WIS. STAT. §102.61(1), we need not consider Hubatch's second argument that Miller failed to prove that he violated §102.61(1). *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if this court's decision on one point disposes of an appeal, we need not consider the other issues raised).