

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 20, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**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.

**No. 00-1834**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**WILLIAM B. DIEL,**

**PLAINTIFF-APPELLANT,**

**V.**

**STATE OF WISCONSIN-LABOR AND INDUSTRY REVIEW  
COMMISSION, SNAP-ON CORPORATION AND TIG  
INSURANCE COMPANY C/O GAB ROBINS N. AMERICA,  
INC.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Kenosha County:  
S. MICHAEL WILK, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. William B. Diel appeals from an order dismissing his complaint challenging a decision of the Labor and Industry Review

Commission (LIRC). LIRC affirmed an administrative law judge's (ALJ) denial of permanent partial disability due to work-related hand and wrist injuries and temporary total disability due to a psychological injury resulting from the work-related injury. We affirm.

¶2 The ALJ made the following findings. Diel sustained hand and wrist injuries in September 1994 while working as a material handler at Snap-On Corporation. Diel was temporarily totally and temporarily partially disabled from November 1, 1994 to September 25, 1995, and received benefits for that period.

¶3 While agreeing that Diel was temporarily totally and temporarily partially disabled from November 1994 to September 1995, the ALJ rejected Diel's claim for permanent partial disability to his hands and wrists. Diel contended that he had continuing, significant pain and problems with his hands and wrists, was no longer able to work on his car collection and "jobbed out all work on the cars." However, a surveillance videotape showed Diel working on his cars with both hands without any apparent difficulty. In light of the videotape, the ALJ found that Diel's credibility was poor. The ALJ also found that Diel's past medical treatment was conservative in nature and did not include surgery. The ALJ found that Diel did not sustain a permanent disability to his hands and wrists.

¶4 Diel also claimed temporary total disability benefits from November 1995 to December 1996 on the grounds that he had anxiety and depression due to his hand and wrist injuries. The ALJ found the opinion of Dr. Calvin Langmade, a psychologist, more credible than that of the other mental health evaluators. The ALJ found that Diel's psychological condition arose from a pre-existing psychological condition and was unrelated to the work injury. The ALJ rejected Diel's claim of a psychological injury arising out of his work injury.

¶5 Diel sought review by LIRC. In adopting the ALJ's decision, LIRC stated that the ALJ's refusal to find a permanent disability rested to a large degree on Diel's poor credibility. LIRC cited Diel's testimony that he was unable to work on his cars due to hand and wrist pain and videotape evidence which showed him using his hands for an extended period and in a variety of ways while working on his cars. LIRC observed that a physician's opinion regarding a patient's abilities is largely based on the patient's description of ongoing pain and limitations. The credibility of Diel's complaints to his physicians was placed into question by evidence that Diel was able to function in ways he denied.

¶6 LIRC found the same credibility flaw in Diel's claim of psychological injury: Diel's observed conduct suggests that he had exaggerated his psychological problems. LIRC affirmed the ALJ's assessment of Diel's psychological injury claim, including the ALJ's reliance on Dr. Langmade's opinion that Diel's psychological problems did not relate to the work injury but were pre-existing.

¶7 LIRC also rejected Diel's claim that the ALJ erroneously refused to admit into evidence reports prepared by Drs. Fogle and Jayaprakash. The reports were generated for purposes of seeking social security benefits, but they were not accompanied in the worker's compensation proceedings by the required WC-16-B forms. Because the reports were not on certified forms and Dr. Langmade did not use the reports to refresh his memory, LIRC concluded that the ALJ did not err in excluding them.<sup>1</sup>

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<sup>1</sup> Even though the reports were not admitted into evidence, Diel was allowed to question Dr. Langmade regarding the opinions contained in the other doctors' reports.

¶8 On review, the circuit court found credible and substantial evidence to support LIRC's findings that Diel did not sustain a compensable psychological injury or a permanent partial disability due to his work-related hand and wrist injuries. Diel appeals.

¶9 We review LIRC's decision, not that of the circuit court. *Brakebush Brothers, Inc. v. LIRC*, 210 Wis. 2d 623, 629, 563 N.W.2d 512 (Ct. App. 1996). LIRC's findings of fact are conclusive as long as they are supported by credible and substantial evidence. *Id.* at 629-30. The weight and credibility of evidence is determined by LIRC. *Id.* at 630. We must consider conclusive any LIRC finding which is based upon a reasonable inference from the credible evidence. *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 570, 579 N.W.2d 668 (1998). Conflicts in the testimony of medical witnesses are to be resolved by LIRC, and LIRC's acceptance of the testimony of one qualified medical witness over another is conclusive. *E. F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). We do not assess the facts de novo, as Diel would have us do.

¶10 Diel contests LIRC's determination that he did not prove a permanent partial disability to his hands and wrists. Diel contends that LIRC's reliance on the videotape evidence violates the rule of *Brakebush*. In *Brakebush*, the court held that an employer's surveillance evidence does not rebut an employee's claim of injury in the absence of medical evidence linking the activity observed during surveillance with the claim of injury. *Brakebush*, 210 Wis. 2d at 632. The employee submitted medical evidence substantiating his work-related injury; the employer presented surveillance evidence that the employee was playing pool and bow hunting which was inconsistent with the claimed injury. *Id.* The court held that evidence of the employee's recreational activities, standing alone, was not evidence that the employee could perform light duty work. *Id.* The

employer erroneously expected LIRC to assume that the employee was able to work without providing any medical evidence to that effect. *Id.* at 632-33.

¶11 Here, LIRC did not rely on the videotape surveillance evidence to find that Diel did not suffer permanent hand and wrist injuries. Rather, LIRC deemed the surveillance evidence relevant to Diel's credibility about the extent of his disability due to the work injury. Diel testified that he jobbed out all of the work on his cars due to his work injury; the videotape showed Diel working on his cars. LIRC perceived a difference between the existence of an injury and not being truthful about its effects. Here, LIRC found Diel was not truthful about the effects of his hand and wrist injuries. LIRC's use of the videotape evidence did not violate *Brakebush*.

¶12 Furthermore, LIRC deemed more credible those medical opinions which opined that Diel did not suffer from a permanent physical or psychological injury. It was within LIRC's province to make the credibility determination and to disregard the opinions of medical witnesses if they were based upon statements of the claimant which LIRC did not believe to be true. *Davis v. Indus. Comm'n*, 22 Wis. 2d 674, 679, 126 N.W.2d 611 (1964).

¶13 Diel contends that LIRC's denial of benefits for psychological injury was contaminated by its consideration of the surveillance evidence as evidence of malingering. We disagree with Diel's characterization of LIRC's findings regarding the videotape evidence. LIRC and the ALJ relied on Dr. Langmade's opinion. Dr. Langmade initially diagnosed Diel with nonwork-related depression. Dr. Langmade's diagnosis was based on his assessment of Diel's emotional difficulties dating back to at least 1992, two years before the injury. After viewing the videotape, Dr. Langmade elaborated on his initial diagnosis and declared Diel

a malingerer. However, the ALJ and LIRC relied on Dr. Langmade's initial diagnosis of nonwork-related depression, not on the opinion he rendered after viewing the videotape. There is no evidence that LIRC relied on Dr. Langmade's opinion that Diel is a malingerer. The denial of benefits for psychological injury was not premised upon the surveillance evidence.

¶14 Diel complains that he was denied due process because the ALJ hindered his cross-examination of James Denerath, the investigator who conducted the surveillance. Diel contends that Denerath referred to his notes and file while testifying. The ALJ denied Diel's request for access to Denerath's file because Denerath had not referred to his file while testifying. Relief on appeal is not available unless the error complained of affected the substantial rights of a party. *Amsoil, Inc. v. LIRC*, 173 Wis. 2d 154, 167, 496 N.W.2d 150 (Ct. App. 1992). In seeking relief from this decision, it is incumbent upon Diel to suggest what he hoped to gain by having access to the file. He has not done so.

¶15 Diel also complains that he was denied a fair hearing because the ALJ rejected the opinions of Drs. Fogle, Jayaprakash and Fugete.<sup>2</sup> The ALJ rejected the reports because they were not in the proper format. This was not error. Under WIS. STAT. § 102.17(1)(d) (1999-2000),<sup>3</sup> the ALJ has discretion to exclude medical reports unless good cause is shown for the failure to submit the reports on the required WC-16-B forms. Medical reports be certified on WC-16-B forms. WIS. ADMIN. CODE § DWD 80.22(4). Diel did not show good cause for accepting the improperly documented reports.

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<sup>2</sup> LIRC did not address the ALJ's rejection of Dr. Fugete's report.

<sup>3</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶16 Diel argues that the excluded opinions were used to cross-examine Dr. Langmade. We do not agree that using the opinions in cross-examination necessarily bootstraps improperly documented opinions into evidence.

¶17 Finally, Diel argues that LIRC erred in not accepting the opinion of his psychotherapist on the question of his psychological injury. We disagree. First, psychotherapists are not included among those medical professionals who may render an opinion in worker's compensation cases. WIS. STAT. §§ 102.13(1)(a), 102.17(1)(d). Second, the ALJ found, and LIRC agreed, that Diel had not been anymore forthright with his psychotherapist than he had been with the ALJ about the extent of his disability.

*By the Court.*—Order affirmed.

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

