

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 24, 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. 00-2236

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RODNEY R. THOMPSON,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION,
EAU CLAIRE COUNTY HIGHWAY DEPARTMENT,
EMPLOYERS INSURANCE OF WAUSAU, AND
EAU CLAIRE COUNTY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Rodney R. Thompson appeals from an order affirming a Labor and Industry Review Commission (LIRC) decision to deny him

worker's compensation benefits. The dispositive issue is whether LIRC could deny benefits without considering unrefuted medical evidence in the record supporting Thompson's claim. We conclude that it could not, and therefore reverse and remand for reconsideration of Thompson's claim giving due regard to all of the evidence.

¶2 In 1992, Thompson began receiving treatment for a shoulder injury. In his contacts with various physicians, he attributed the injury to a work-related accident that occurred in May 1990, with the condition gradually worsening over time.

¶3 In June 1996, the condition deteriorated to the point where he had surgery to alleviate the problem. He commenced this administrative review proceeding when he was denied benefits on his subsequent claim for temporary total disability and permanent partial disability.

¶4 The issues litigated before LIRC were whether Thompson suffered a work-related injury, and when it occurred.¹ The physician who operated on Thompson, Dr. DeCesare, variously attributed causation to the specific injury of May 1990, to that injury and a subsequent reinjury, and to long-term occupational stress. Also in evidence were records from Thompson's family physician documenting that, years before filing his worker's compensation claim, Thompson attributed the injury to the May 1990 accident. Additionally, the County submitted the independent medical examination performed at its request by Dr. Kittleson. In his report, Dr. Kittleson concluded, after examining a transcribed

¹ Employers Insurance of Wausau provided worker's compensation coverage to the County until January 1, 1995. Thereafter the County was self-insured. The date of the onset of Thompson's injury was therefore significant in determining which carrier was liable to him.

interview with Thompson and Thompson's complete medical records, both before and after May 1990, that Thompson most likely suffered his injury in a specific traumatic event. Doctor Kittleson's opinion was that "[t]he patient sustained a work related injury to his right shoulder on May 31, 1990. This led to the development of chronic impingement syndrome and rotator cuff tendonitis, right shoulder."

¶5 Although there is no medical evidence or testimony refuting the claim that Thompson's injury was work related, the administrative law judge denied the claim on the grounds that Dr. DeCesare's vacillating opinion as to the specific cause of the injury created legitimate doubt that it was work related. LIRC affirmed on the same grounds. Neither the administrative law judge nor LIRC addressed Thompson's testimony, substantiation of that testimony by Thompson's medical records, or Dr. Kittleson's report.

¶6 We review LIRC determinations *de novo*. ***Bunker v. LIRC***, 197 Wis. 2d 606, 611, 541 N.W.2d 168 (Ct. App. 1995). Our standard of review gives extraordinary deference to LIRC's findings of fact. WIS. STAT. § 102.23(1)(a) and (6) (1999-2000).² Essentially, "[a] reviewing court may not substitute its own judgment in evaluating the weight or credibility of the evidence.... [I]f there is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion, [LIRC's] finding must be upheld." ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). Consequently, we find no error in LIRC's determination that Dr. DeCesare's vacillating opinion as to causation should not be given any weight.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶7 However, it is equally true that LIRC cannot “reject a medical opinion unless there is something in the record to support its rejection.” *Leist v. LIRC*, 183 Wis. 2d 450, 460, 515 N.W.2d 268 (1994). An example of something of record which can support rejection is the sort of vacillation shown in Dr. DeCesare’s reports. Or, LIRC might determine that the information provided to the examining physician lacks veracity or reliability. *See Erickson v. DILHR*, 49 Wis. 2d 114, 125-26, 181 N.W.2d 495 (1970).

¶8 Here, on the other hand, Dr. Kittleson’s independent examination unequivocally attributed Thompson’s injury to the work-related accident of May 1990. LIRC’s decision contains no reason for doubting the accuracy or veracity of the medical history Dr. Kittleson relied on, nor does that decision identify any other basis to reject Dr. Kittleson’s unrefuted opinion. In fact, it is open to question whether LIRC even considered Dr. Kittleson’s opinion.

¶9 Therefore, on remand, LIRC shall reconsider its decision on Thompson’s claim, giving due regard to all of the medical evidence, including Dr. Kittleson’s report. If that additional evidence in support of Thompson’s claim is rejected, LIRC’s opinion must explain why. *See Leist*, 183 Wis. 2d at 462 (“LIRC’s decision to deny benefits must be grounded in a reasoned analysis and supported by credible evidence.”).

By the Court.—Order reversed and cause remanded with directions.

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

