COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 13, 1996

No. 95-1896

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

VERNON SHIER,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION, ADVANCED AGRICULTURAL, INC. and SHEBOYGAN FALLS MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed.*

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

CANE, P.J. Vernon Shier appeals a circuit court order that affirmed a decision of the Labor and Industry Review Commission dismissing Shier's application for worker's compensation benefits. Because we conclude the department's findings of fact are supported by credible and substantial evidence in the record, we affirm.

FACTS

It is undisputed that Shier injured his back in 1961, 1988 and 1991. At the time Shier injured his back in 1988 and 1991, he was employed by Advanced Agricultural, Inc., a retail seed business he owns. At the time of the 1988 injury, Sheboygan Falls Mutual Insurance Company was Advanced Agricultural's worker's compensation insurer. Shier recuperated from his injury for nearly a year, during which he received temporary total disability benefits from Sheboygan Falls. Sheboygan Falls also paid Shier permanent partial disability benefits totaling $8,190.

In 1989, Shier returned to work, although his doctor placed restrictions on his activities. He continued to receive the same wage he was earning on the date of his injury. In 1991, Shier injured his back again while lifting a bag of seed. At the time of the 1991 injury, the worker's compensation insurer for Advanced Agricultural was Employer's Mutual of Des Moines.

Shortly after the 1991 injury, Shier's doctor told him he could no longer work. Shier filed an application for hearing with the Department of Industry, Labor and Human Relations, seeking total temporary disability payments for the 1991 accident, as well as permanent total disability and vocational loss. Shier's application stated he had been injured in 1991 when he lifted a fifty-pound bag of seed, and that he suffered a prior injury in 1988 when he slipped on the ice while unloading a truck.

A hearing was scheduled for the case involving the 1991 injury. Shier asked the administrative law judge to rule that Sheboygan Falls must participate in the hearing. Although the ALJ's ruling on Shier's request is not in the record, it is undisputed that the ALJ denied the request. It further appears that a hearing on the 1991 injury was never held, because Shier compromised his claim against Employer's Mutual for $62,000.

After he settled with Employer's Mutual, Shier filed an application for a hearing on the 1988 injury. The ALJ held a hearing and issued a decision denying Shier's claim for further compensation for loss of earning capacity for the 1988 injury. The ALJ noted in its decision that Sheboygan Falls had already

conceded permanent partial disability of 7%, so the sole issue before it was whether Shier sustained a loss of earning capacity as a result of the March 24, 1988, injury. The ALJ's findings of fact and conclusions of law provide:

> It is undisputed that applicant was injured on March 24, 1988 while working for the respondent corporation, a retail seed business. On the date of injury, applicant was earning $500 per week. After a lengthy recovery, applicant was released to return to work by Dr. Gruesen on May 1, 1989 on a full-time basis with the following restrictions: avoid lifting more than 35 pounds and avoid repetitive bending, twisting, and stooping.
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> It is undisputed that following his recovery, applicant returned to work for the same employer at the same wage he was earning on the date of the injury. In fact, he continued to receive the same wage right up until his subsequent injury on April 16, 1991. It was not until after the accident on April 16, 1991 that applicant terminated his employment because of his physical limitations. It was not until after the accident on April 16, 1991 that applicant's treating physician disqualified applicant from the labor market after placing further additional restrictions upon him.
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> In light of the foregoing, the Administrative Law Judge finds that applicant sustained no loss of earning capacity as a result of his March 24, 1988 injury. Under the circumstances, therefore, it is not necessary to determine the extent, if any, of applicant's alleged loss of earning capacity.
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> If the injury of March 24, 1988 caused a loss of earning capacity, presumably the physical limitations resulting from that injury had already manifested themselves in the wage applicant was earning on April 16, 1991. See Neal and Danas, Worker's Compensation Handbook, page 5-18 (3d. 1991). Yet the evidence is undisputed that applicant's wage remained the same after the

> March 24, 1988 injury. In pursuing his claim for permanent total disability benefits based upon the date of injury of April 16, 1991, in case No. 91-038682, applicant presumably argued that the wage he was earning on April 16, 1991 already reflected any diminution in earning capacity caused by the March 24, 1988 injury. If that is not the case, then on what basis did applicant claim he was permanently totally disabled as a result of the April 16, 1991 injury?
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> Finally, with regard to applicant's assertion that the odd-lot doctrine applies, the Administrative Law Judge further finds that but for the 1991 injury, it is pure speculation whether applicant would have quit his job working for the respondent following the March 24, 1988 accident. So long as applicant remained employed with the respondent at more than 85 percent of his March 24, 1988 wage, he had no claim for loss of earning capacity, irrespective of whether he was unemployable under the odd-lot doctrine. See section 102.44(6)(a) and (b), Wis. Stats. Furthermore, the Administrative Law Judge finds that evidence applicant returned to work for the respondent following the March 24, 1988 accident at his same wage, is, in itself, sufficient evidence to rebut the application of the odd-lot doctrine.
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> Under all the circumstances, the record reflects a legitimate doubt that applicant suffered a loss of earning capacity as a result of the March 24, 1988 injury. Upon the foregoing Findings of Fact, applicant's claim for benefits is dismissed.

Shier appealed and LIRC affirmed the ALJ's decision, adopting its findings of fact and conclusions of law as its own. Shier appealed and the circuit court affirmed LIRC's decision. Shier now seeks relief in this court.

ISSUES

The first issue concerns the meaning of the ALJ's decision. Shier interprets the ALJ's decision as a series of conclusions of law which, Shier argues, are erroneous and should be reversed by this court. Conversely, Sheboygan Falls argues the ALJ's decision is based simply on the facts; Shier failed to prove he sustained a loss of earning capacity and, therefore, his claim was denied. LIRC agrees with Sheboygan Falls, but also argues that even if the ALJ decided the case on legal grounds, the ALJ's legal conclusions are correct. We agree with Sheboygan Falls that the ALJ's decision to deny Shier's claim was based on factual findings rather than legal conclusions. We need not reach Shier's arguments that the ALJ misapplied the law with respect to §§ 102.44(6)(a) and (b), STATS., the odd-lot doctrine and occupational disease. However, we briefly address Shier's arguments that DILHR's administrative rulings deprived him of his benefits, and that LIRC's decision should be reversed because Shier suffers from an occupational disease.

STANDARD OF REVIEW

Our scope of review is the same as the circuit court's, and we reach our decision without deference to that court's decision. ***Goldberg v. DILHR***, 168 Wis.2d 621, 626, 484 N.W.2d 568, 570 (Ct. App. 1992). The law is well settled that the determination of the cause and extent of the claimant's permanent disability present questions of fact, ***Swiss Colony, Inc. v. DILHR***, 72 Wis.2d 46, 58-59, 240 N.W.2d 128, 134 (1976), and that LIRC's findings thereon are conclusive if supported by credible and substantial evidence. *See* ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173-74 (1983). Therefore, we must affirm LIRC's factual findings if they are supported by any credible and substantial evidence in the record. ***L & H Wrecking Co. v. LIRC***, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983). We cannot substitute our judgment for that of LIRC in respect to the credibility of a witness or the weight to be accorded the evidence supporting any finding of fact. ***West Bend Co. v. LIRC***, 149 Wis.2d 110, 118, 438 N.W.2d 823, 827 (1989).

However, whether the ALJ's decision is based on findings of fact or conclusions of law requires interpretation of the ALJ's decision, which is a question of law we review de novo. A mislabeled finding will be treated by the reviewing court as what it is rather than what it is called. ***Connecticut Gen. Life Ins. Co. v. DILHR***, 86 Wis.2d 393, 404-05, 273 N.W.2d 206, 211 (1979).

INTERPRETATION OF THE ALJ'S DECISION

LIRC adopted the ALJ's findings and conclusions as its own, so we look to the ALJ's decision to determine the basis upon which Shier's claim was denied. Shier argues the ALJ did not decide the case based on questions of fact. Instead, Shier argues, the ALJ decided that because he returned to work at Advanced Agricultural at the same wage he earned when he left the job, his earning capacity was not affected. We disagree.

We conclude for two reasons that the ALJ actually decided the case based on findings of fact, rather than conclusions of law. First, the decision specifically cites evidence that Shier returned to work with limited restrictions, earned the same wage and continued working until he had a second accident. These are findings of fact. This evidence addresses Shier's previous work experience, previous earnings, present occupation and earnings and likelihood of future suitable occupational change; these are all factors an ALJ must consider under WIS. ADM. CODE § IND. 80.34 when determining loss of earning capacity. If the ALJ had decided as a matter of law Shier could not sustain a loss of earning capacity if he returned to work without a 15% reduction in earnings, there would have been no need to discuss specific evidence of Shier's ability to continue working.

Second, the concluding paragraph states: "[T]he record reflects a legitimate doubt that applicant suffered a loss of earning capacity as a result of the March 24, 1988 injury." The term "legitimate doubt" is part of the standard under which the department evaluates evidence, not the law. *See* ***Bumpas v. DILHR***, 95 Wis.2d 334, 342, 290 N.W.2d 504, 507 (1980) (the department has a duty to deny compensation only where the evidence raises a legitimate doubt as to the existence of facts essential to establish a claim). The ALJ's use of the term "legitimate doubt" suggests the case was decided on factual grounds.

For these reasons, we conclude the ALJ's decision reflected a finding of fact that Shier had failed to establish the essential elements of his claim for compensation for loss of earning capacity.[1]

[1] Because we conclude the ALJ's decision was based on findings of fact in this case, we do not reach the legal issues raised by appellant. However, we reject LIRC's contention advanced at oral argument that a worker who is injured and returns to work earning 85% or more of his or her former wage cannot, as a matter of law, receive compensation for loss of earning capacity if he is later unable to work. The language of § 102.44(6)(b), STATS., indicates workers can return to work and, if they are unable to continue working, can ask the department for compensation for loss of earning

REVIEW OF THE EVIDENCE

Next, we must examine whether the ALJ's findings, as adopted by LIRC, are supported by substantial and credible evidence in the record. *See* ***L & H Wrecking Co.***, 114 Wis.2d at 508, 339 N.W.2d at 346. Shier argues the testimony of his physician, Dr. Robert Gruesen, is of critical importance. Doctor Gruesen in his deposition testified that 50% of Shier's current condition is attributable to events that occurred before the 1988 injury. Of the remaining 50% disability, Dr. Gruesen testified 70% of Shier's present condition is due to the 1988 incident and 30% is due to the soft tissue aggravation that occurred in 1991. While we recognize that this testimony suggests Shier suffered a debilitating injury in 1988 that could have resulted in a loss of earning capacity, it is not conclusive evidence that Shier sustained any loss of earning capacity; Dr. Gruesen did not offer an opinion as to loss of earning capacity. Even if he had, there is other evidence that suggests Shier's 1988 injury did not result in a loss of earning capacity, or that any loss in earning capacity is attributable to Shier's 1991 injury rather than his 1988 injury.

For example, Dr. Marvin Wooten conducted an independent medical evaluation and concluded:

> Based on my review of medical records, it would appear that this patient has received accumulative disability rating of 66 percent over the years, 55 percent of which is referable to those injuries incurred prior to 1988, seven percent of which is referable to his reinjury and surgical treatment in 1988, and the final four percent of which is referable to his reinjury in May of 1991.

(..continued)
capacity.

In reference to the multiple injury situation presented in this case, our initial examination of the law in this area suggests there is currently no bright-line rule that an applicant cannot sustain a loss of earning capacity for an earlier injury if he or she returned to work without a reduction in earnings and then suffers a second injury. Thus, if sufficient evidence was presented, an applicant could conceivably receive compensation for loss of earning capacity for the earlier injury. Such a result would appear to be consistent with the overall purpose of the Worker's Compensation Act.

A vocational expert, John Birder, also evaluated Shier, at Shier's request. Birder's report recognized that Shier returned to work in 1989 with a 7% permanent partial disability due to the 1988 injury. Birder noted that after Shier returned to work in 1989, "He apparently was able to do fairly well until he again injured himself on April 6, 1991." Birder also concluded:

> It should be noted that [at the examination] he walked with a pronounced limp in his right leg and has been doing so since July 1991. ...
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> ....
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> At this time, Mr. Shier has been unable to continue operating his business *as he had done prior to his most recent work related injury*. ...
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> ....
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> At the time of the [1991] injury, he was earning $500.00 weekly. Since that time, he reports that he is not earning anything ... *it would appear that Mr. Shier has sustained a loss of future earning capacity of approximately 50 to 55%*. (Emphasis added.)

A second vocational expert examined Shier to determine to what extent Shier sustained a loss of earning capacity as a result of his 1991 accident. This expert, Steve Zanskas, also reviewed the reports of Dr. Gruesen and another doctor who had examined Shier: Dr. James Gmeiner. Zanskas concluded that using Dr. Gruesen's conclusions,

> it would be my opinion to a reasonable degree of vocational probability that Mr. Shier has sustained a 50% loss of future earning capacity. *Sixty per cent to 70% of this loss of future loss of future earning capacity would be attributed to Mr. Shier's prior condition* and 30% to 40% would be attributed to the 4/16/91 incident as indicated by Dr. Gruesen. (Emphasis added.)

Zanskas did not offer an opinion as to whether the loss of earning capacity attributable to "Mr. Shier's prior condition" was due in any part to the 1988 injury.

Zanskas also offered a second conclusion:

> Based on Dr. Gmeiner's opinion that Mr. Shier experienced a temporary aggravation and that no industrial permanency has occurred, it would be my opinion to a reasonable degree of vocational probability that *Mr. Shier has sustained no future loss of earning capacity.* (Emphasis added.)

Thus, Dr. Zanskas concluded that using Dr. Gmeiner's opinion, Shier as of May 1992 had suffered no loss of earning capacity due to any injury.

This synopsis of testimony reveals conflict of opinion among the doctors and vocational experts regarding the extent of Shier's permanent injury and ability to work, and the degree to which any loss of earning capacity could be attributed to the 1988 accident. The ALJ resolved this conflict in favor of Sheboygan Falls, concluding, "[T]he record reflects a legitimate doubt that applicant suffered a loss of earning capacity as a result of the March 24, 1988 injury." We cannot substitute our judgment for that of LIRC in respect to the credibility of a witness or the weight to be accorded the evidence supporting any finding of fact. ***West Bend Co.***, 149 Wis.2d at 118, 438 N.W.2d at 827. Based on our review of the record, we conclude there is credible and substantial evidence in the record to support LIRC's finding and therefore, we must affirm LIRC's decision dismissing Shier's claim for benefits. *See* ***L & H Wrecking Co.***, 114 Wis.2d at 508, 339 N.W.2d at 346.

THE DEPARTMENT'S RULINGS

Shier argues the department's rulings deprived him of his benefits. Specifically, Shier argues that because he filed his claim in 1991 listing the 1988 and 1991 injuries as the cause of his permanent disability, Sheboygan Falls should have been required to participate in the 1991 claim. Although there are no documents in the record that detail the ALJ's decision, the ALJ had apparently decided Sheboygan Falls need not participate. Even if we agreed with Shier that DILHR erred, we must nonetheless reject his claim for some type of relief. Shier did not appeal the 1991 case, and we cannot remand this case with instructions to consider the two claims together, since Shier already settled his claim against Employer's Mutual.

SHIER'S CLAIM THAT HE SUFFERS FROM AN OCCUPATIONAL DISEASE

Shier argues he suffers from an occupational back condition and that Sheboygan Falls is responsible for the damage. He explains that he asserted, presumably at the hearing, that permanent total disability benefits, at a minimum, should be apportioned between Employer's Mutual and Sheboygan Falls. However, he notes, the ALJ, LIRC and the circuit court did not directly address the issue.

On appeal, Shier's argument cannot afford him relief because we are affirming the ALJ's conclusion that the record reflects a legitimate doubt that Shier suffered a loss of earning capacity after the 1988 injury. Thus, we never reach the issue of apportionment; there is nothing to apportion because Shier did not prove a loss of earning capacity.

For the foregoing reasons, we affirm the circuit court's order affirming LIRC's decision to dismiss Shier's claim for compensation for loss of earning capacity.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.