

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 14, 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. 95-2094-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

EDWIN SWEDLUND,

Plaintiff-Respondent,

v.

**STATE OF WISCONSIN
LABOR AND INDUSTRY
REVIEW COMMISSION,**

Defendant-Co-Appellant,

**UNITED FIRE & CASUALTY
COMPANY and K & S PAVING,**

Defendants-Appellants.

APPEAL from an order of the circuit court for Rock County:
JOHN H. LUSSOW. *Affirmed and cause remanded.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. The State of Wisconsin Labor and Industry Review Commission (LIRC), K & S Paving, and United Fire & Casualty Company appeal from a circuit court order reversing LIRC's decision, which in turn set aside findings by an Administrative Law Judge (ALJ), who found that Edwin Swedlund suffered a 50% loss of earning capacity. For the reasons set forth below, we affirm.¹

BACKGROUND

On May 22, 1989, Swedlund fell four feet from a paving machine, injuring his back and hip. He was then sixty-three years old. In 1992, a hearing was held before an ALJ. Swedlund presented expert evidence that he suffered a 70-80% loss of earning capacity. The employer, K & S Paving, and its insurer, United Fire and Casualty Company (UFC), presented evidence that Swedlund's loss of earning capacity was 0-12%, and he could work as a receptionist, a telephone operator, a clerk, a dispatcher or an electronics assembler. The ALJ found Swedlund suffered a 50% loss of earnings capacity. In so finding, the ALJ specifically rejected UFC's claims that Swedlund could be a receptionist, telephone operator, a clerk, a dispatcher or an assembler.

K & S Paving and UFC appealed to LIRC, which set aside the ALJ's determination. Instead, relying upon UFC's vocational expert's report, LIRC found a 12% loss of earning capacity. Swedlund appealed to the circuit court, which reversed LIRC. LIRC, K & S Paving and UFC then appealed to this court. We affirm the circuit court, and reverse LIRC's determination.

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

STANDARD OF REVIEW

In a worker's compensation case, we review LIRC's decision, not that of the circuit court. *Stafford Trucking v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). We will set the factual findings aside only if LIRC acted without or in excess of its powers, or if the award was procured by fraud, or if LIRC's findings do not support the order or award. Section 102.23(1)(e), STATS. We examine the entire record to determine whether there is substantial and credible evidence which could support the findings. *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 174 (1983). We may set aside LIRC's order or award and remand the case to LIRC if its order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. Section 102.23(6). We conclude that LIRC's findings are not supported by credible and substantial evidence.

ANALYSIS

In setting aside the ALJ's finding, LIRC relied upon two factors: First, that Swedlund had voluntarily chosen not to seek work which he was medically approved to do, and second, he had chosen to retire. We consider each matter in turn.

Seeking work

In determining that Swedlund failed to seek work, LIRC relied upon UFC's vocational expert's report. We conclude that the UFC report is incredible as a matter of law. For this reason, it was error for LIRC to rely on the report. Stated otherwise, the report does not furnish "credible and substantial" evidence under § 102.23(6), STATS., for LIRC's determination.

All expert testimony in this appeal agrees that after his injury, Swedlund has been restricted to sedentary work. He may not lift more than a few pounds, and he may not twist or stoop or bend. He must have employment at which he can sit, but he is unable to sit for extended periods without discomfort.

Further uncontroverted evidence establishes that although Swedlund went as far as the seventh grade in school, his actual educational achievement is far lower. Swedlund is in the third percentile for spelling,² the sixth percentile for reading and the sixteenth percentile for arithmetic. His grade-level equivalents in these skills are between third and fifth grade. His only vocational skills derive from a lifetime of on-the-job training as a heavy equipment operator, truck driver and manual laborer. The uncontroverted evidence establishes that he has a severe pre-existing speech impediment.

Despite these academic, vocational and physical limitations, UFC's vocational expert opined that Swedlund was fit for work as a receptionist, telephone operator, clerk, assembler or dispatcher, even though he "could not be considered a viable candidate for vocational training."

UFC's vocational expert's report must be rejected. A man with limited vocational skills, who is functionally illiterate, functionally innumerate and cannot speak clearly, cannot realistically be expected to function as a receptionist, telephone operator, clerk, assembler or dispatcher. These jobs uniformly require basic reading, writing and arithmetic skills. Further, several of these jobs (receptionist, telephone operator and dispatcher) additionally require the ability to speak clearly.

Because the report is incredible as a matter of law, it may not be the basis for any portion of LIRC's determination. On remand, LIRC must reconsider its award based only upon the balance of the record.

² As the UFC report explains, this indicates that 97% of the men in Swedlund's peer group have a higher spelling score.

Retirement

LIRC determined that Swedlund is retired because "he intends to preserve his social security benefits in their entirety, and not reenter the competitive world of work within his restrictions."³ But there is no "competitive world of work within [Swedlund's] restrictions." He is an unskilled and illiterate, outdoor laborer, truck driver, and heavy machinery operator with a speech impediment who has been restricted by injury to sedentary work. To hold that he must willingly forego tangible social security benefits for an illusory "world of work" as a prerequisite to worker's compensation flies in the face of reality, as well as Wisconsin case law.

As our supreme court stated in *Kohler Co. v. DILHR*, 42 Wis.2d 396, 403, 167 N.W.2d 431, 434 (1967), we "can[not] agree that accepting social security old age benefits moves one into a fixed class or category." In this case, Swedlund testified that he would work if he could find something suitable. Swedlund's decision not to forego or compromise available social security benefits in the absence of a realistic opportunity at a suitable job does not bespeak a decision to "totally remove himself" from the job market.

We affirm and remand to the trial court with directions to remand to the commission. On remand, LIRC shall reconsider its determination without giving any consideration to UFC's vocational expert's report.⁴

By the Court.—Order affirmed and cause remanded.

³ This finding is a quote from UFC's expert's report in which she further states that her "impression" is based upon a comment reported as follows: "[Swedlund] informed me that he wishes to preserve his social security retirement benefits and did not want to compromise the amount of said benefits in any manner."

⁴ The trial court remanded with specific instructions to reinstate the ALJ's finding because the trial court erroneously determined that the ALJ's opinion should be deferred to. On remand from the circuit court, LIRC shall proceed as directed in this opinion. LIRC is the fact-finder.

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