STATE OF WISCONSIN **CIRCUIT COURT** **COUNTY OF DANE**
BRANCH 7

FRANCIS V. GADZIK,
Plaintiff,

v.

LIRC & CENTER FOR COMPREHENSIVE SERVICES, INC.,
Defendants.

MEMORANDUM DECISION and ORDER

Case No. 05 CV 1669

BACKGROUND

This *pro se* plaintiff has brought this action for judicial review, challenging a number of aspects of the decision denying him unemployment compensation (U. C.). As will be seen, some of his issues need not be addressed here because Mr. Gadzik does raise a factual point that is dispositive of this case.

LIRC eventually found that Mr. Gadzik met the threshold for eligibility for U. C. by having been forced to quit his job with Comprehensive Services due to "medical necessity" within the meaning of Wis. Stat. § 108.04(7)(c).[1] But, in the decision under review, the Commission went on to declare him ineligible for U.C. because it found that he was unable to work because under Wis. Admin. § DWD 128.01(2)(b) he was limited to "less than 15%of the opportunities for suitable work."

DECISION

There can be no question but that the "less than 15%" conclusion was premised on the testimony of William Brockmiller, a department labor analyst, who stated, ". . . if the claimant was restricted to just medium work, with no other restrictions, he would

[1] While not agreeing that he quit for health reasons, he will let that decision stand. Reply Brief, p. 2.

be available for 90 percent of all suitable work." [2] Again, on the next page, he repeated his belief the Mr. Gadzik had a "medium restriction" on lifting. He made the same reference on page 103 of the transcript. This characterization is even carried over into LIRC's brief. [3] The medical evidence in the record on this subject is Exhibit A, which is what Mr. Brockmiller said he relied on. This is a U.C. form completed by Calvin S. Bruce, M.D. on December 27, 2004. In section V. A. "Restrictions" the classification checked as within Mr. Gadzik's ability is "**Heavy Work.**"[4] Clearly, Mr. Brockmiller was in error when he reported a limitation to medium work, and this error has been maintained through out this case.

It is impossible to know how this error affects the expert's percentage determination because at the end Mr. Brockmiller was stating the plaintiff could perform between 5 and 13 percent of the available work.[5] Obviously, if correction of this error changes the upper figure by adding as few as two percentage points, Mr. Gadzik would not be disqualified by the 15 % rule. In any event, this determination is founded on a factual error committed by the Department's expert and carried through-out the case.

This mistake, alone, implicates Wis. Stat. § 102.23(6), and turns the Commission's percentage finding into one that is "not supported by credible and substantial evidence." Other concerns also undermine this same finding. Of great significance,

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[2] Transcript at p. 90.
[3] LIRC's brief at p. 5.
[4] Ex. 10 from the earlier hearing is the same form filled out by Dr. Bruce on 2/26/04 in which he obviously misunderstood the instructions, checking the boxes of all the lifting he believed plaintiff could perform, including "heavy work."

because it restricted Mr. Gadzik to only 19% of the available jobs, was his self-proclaimed inability to work in the morning. This is a major factor in bringing down his percentage. Yet, the factual basis is solely the claimant's own report. He also said that he has in the past taken medication for his "pre-insomnia anxiety."[6] This condition is not even mentioned in Dr. Bruce's report, and there was no exploration as to whether the medication allowed Mr. Gadzik to work morning hours. If this is a non-existent or surmountable condition, that fact could add 81% to critical number necessary for eligibility. The record seems woefully incomplete on this subject, and it is questionable whether Mr. Gadzik's own diagnosis would meet the "substantial evidence" test as analyzed in *Gehin v. Wis. Group Insurance Board*, 278 Wis. 2d 111, 692 N.W. 2d 572 (2005). It certainly is far less weighty than the hearsay medical opinions rejected by the Supreme Court in *Gehin*.

Clearly, Mr. Brockmiller was less than comfortable assigning figures to Mr. Gadzik's other psychological conditions.[7] The litany he gives at p. 92 , totally disqualifying claimant from many general areas of work, is stunning, given that the witness had no knowledge of the degree to which Mr. Gadzik's problems were disabling and was not qualified as an expert in the impact of psychological conditions. The labor market analyst-turned-psychologist completely eliminated all sorts of areas of work for plaintiff by saying things like: ". . . I **think** that would be a problem for the claimant." and "So the characteristics I have selected I **believe** would be difficult for

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[5] Transcript at p. 104 and p. 2 of LIRC's April 22, 2005 decision
[6] Id. at pp. 67-68.
[7] Id. at pp. 97-98.

claimant to perform."[8] The basis for these "beliefs" was never established, nor was any explanation given as to why these conditions would absolutely exclude plaintiff from all these occupations.

All of this becomes even more worrisome when one reviews the approaches taken by both Mr. Gadzik and Mr. Davenport, the representative of claimant's former employer. Mr. Gadzik seemed to want to convince the examiner of the multiplicity and seriousness of his various conditions. But this effort, if successful, would work against him in disqualifying him for more and more jobs. On the other hand, Mr. Davenport tried to rehabilitate Mr. Gadzik, by pointing out how well he handled his U.C. appeal and case and his ability to do something he puts his mind to.[9] If Mr. Davenport had succeeded, that tactic could have worked against the employer's interest by showing plaintiff be able to handle more than 15% of available jobs. It seems apparent that neither of these "laymen" understood the operation of § DWD 128.01(2)(b). Standing alone, that conclusion would not support remand, but taken together with the previous determinations, it provides more reason to take such an action.

And finally, since remand will be the result of this decision, it is necessary to address Mr. Gadzik's claim that his hearing was not fair and impartial because the decision-maker, investigator, and expert witness all work for DWD. "There is a presumption of honesty and integrity in those serving as adjudicators in state administrative proceedings." *Nu-Roc Nursing Home, Inc. v. DHSS,* 200 Wis.2d 405, 415,

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[8] Id. at p. 92. Emphasis added.

9 Id. pp. 100-102.

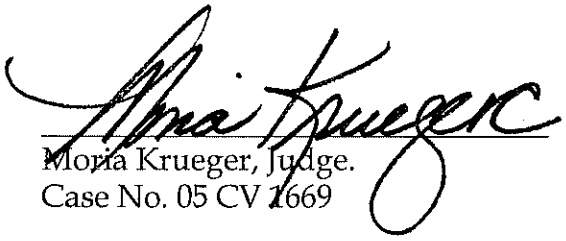
546 N.W.2d 562 (Ct.App.1996). In the absence of a showing of actual bias or prejudice, none can be inferred based solely on these participants in the proceedings all being employed by the department. There is no merit to this contention.

ORDER

For the reasons stated above, it is determined that a material and controverted finding of fact that plaintiff is limited to less than 15% of the opportunities for suitable work is not supported by credible and substantial evidence. The Commission's Order is HEREBY **SET ASIDE**, and this case is **REMANDED** for further determination consistent with this decision.

Dated this 16th day of December 2005 at Madison, Wisconsin.

BY THE COURT:



Moria Krueger, Judge.
Case No. 05 CV 1669

CC:
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Attorney William S. Sample