

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 19, 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. 95-1454

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ROBERT SENDA,

Petitioner-Appellant,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION,
UNIVERSAL WELDING & ENGINEERING and
FIRE & CASUALTY INSURANCE OF CONNECTICUT,**

Respondents-Respondents.

APPEAL from an order of the circuit court for Milwaukee County:
LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Robert Senda appeals from an order of the circuit court affirming a decision by the Labor and Industry Review Commission that denied him worker's compensation benefits. The order of the circuit court confirming the decision of the Commission is affirmed.

Senda was employed by Universal Welding and Engineering as a foreman/iron worker. On June 4, 1987, Senda injured his back when he fell approximately nine feet from framework on which he had been working. Although Senda continued to work on the day of the accident, the next day he was sent to the Occupational Health Clinic where he was examined by Dr. Reichle. He was instructed to stay off work for six weeks. At that time, it was conceded that Senda had sustained a compensable injury. Thereafter, Senda by Universal and its insurer began receiving temporary total disability benefits.

On July 29, 1987, Dr. Reichle released Senda to return to work. From June 5, 1987, through February 5, 1990, Senda periodically missed work as a result of his injury. During this time, Senda sought treatment from a number of different physicians and was seen at several different hospitals.

On May 10, 1989, Senda was seen by Dr. Novom for an independent medical examination. Dr. Novom concluded from an earlier lumbar CT scan that Senda's injury of June 4, 1987, most likely represented an aggravation of an underlying pre-existing congenital condition. Dr. Novom recommended surgical intervention. Based on this recommendation, Senda underwent a laminectomy that was performed by Dr. Ulrich. Senda was released to return to work on August 8, 1989. Both Drs. Ulrich and Novom determined that Senda had sustained a ten-percent functional permanent partial disability of the whole body and began receiving benefits.

Senda saw Dr. Novom for a re-evaluation on February 12, 1990. At that time, Dr. Novom again opined that Senda's condition was only partly related to the work injury of June 4, 1987. He also noted that Senda achieved a healing plateau, despite residual back pain and even though Dr. Ulrich's surgery was only partially successful. Dr. Novom concluded that Senda's back condition was 50% related to his underlying degenerative condition. He also assessed work restrictions that limited Senda to performing sedentary work; lifting no more than 10 to 15 pounds. Also, Senda was to avoid bending, stooping or standing for any length of time over 30 to 45 minutes.

After seeing Dr. Novom in February of 1990, Senda returned to work. While avoiding strenuous work at first, Senda became dissatisfied with his work restrictions and began to engage in more strenuous work, which

exceeded his medical restrictions. According to the record, Senda sustained other injuries to his back subsequent to the June 4, 1987, work injury. These incidents include: (1) an attempt in 1989 to lift his 30-pound daughter; (2) blows to his back by his wife following his surgery in 1989; (3) a beating by three youths outside a tavern on April 10, 1990; (4) a fall down the stairs at his home in 1990; (5) a pulled muscle in his back in 1991 after lifting 50 pounds; and (6) additional lower back pain injuries in 1992 while moving a weld mat and beam.

Senda ultimately stopped working on March 28, 1992. Dr. Delahunt continued to treat Senda. His treatment included additional back surgery on June 4, 1992. Dr. Novom reexamined Senda on September 4, 1992, and found that Senda's continued back pain was due to a combination of factors including progressive multi-level degenerative changes of the lumbar spine and continued strenuous activity.

At the hearing on November 25, 1992, and continued on April 13, 1993, Dr. Novom failed to appear to give testimony pursuant to subpoena issued on Senda's behalf. Although Senda initially requested a third hearing in order to obtain Dr. Novom's testimony, he changed his mind and subsequently waived his right to a continued hearing and thus, the opportunity to cross-examine Dr. Novom. In an order dated February 3, 1994, the Commission found that Dr. Novom's opinion was most credible. The Commission found that Senda was not entitled to additional compensation or medical treatment.

On appeal, this court reviews the administrative agency not that of the circuit court. *Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n*, 156 Wis.2d 611, 616, 457 N.W.2d 502, 504 (Ct. App. 1990). The determination of the nature and extent of permanent partial disability attributable to loss of earning capacity are questions of fact, and the Commission's findings in this regard are conclusive if supported by credible and substantial evidence. *Manitowoc County v. DILHR*, 88 Wis.2d 430, 437, 276 N.W.2d 755, 758 (1979). The drawing of several reasonable inferences from undisputed facts also constitutes fact finding. *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1094, 236 N.W.2d 255, 259 (1975). Any legal conclusion drawn by the Commission from its findings of fact, however, is a question of law subject to *de novo* review. *Nottelson v. DILHR*, 94 Wis.2d 106, 114-115, 287 N.W.2d 763, 767 (1980). Thus, in examining in the Commission's findings here, this court's role is to review the record for

credible and substantial evidence that supports the Commission's determination rather than to weigh opposing evidence. *Vande Zande*, 70 Wis.2d at 1097, 236 N.W.2d at 260.

Senda argues that the Commission erroneously determined that his continuing disability and treatment were unrelated to the June 4, 1987, work injury because the Commission exceeded its authority and made fact-findings upon insufficient evidence. We disagree. In arguing that the Commission exceeded its authority, Senda states that the Commission changed the issue from that litigated at the hearing and substituted an "alternative issue on review." The Commission stated the issue as: "Whether the applicant's accident of June 4, 1987 caused an injury which arose out of his employment with the employer and the nature and extent of the applicant's disability beyond that conceded." The hearing examiner's statement was: "Whether the applicant's injury of June 4, 1987 arose out of his employment and the nature and extent of the disability therefrom and the liability for medical expense." These statements of the issue are not materially different, however, because Universal conceded ten-percent permanent partial disability. Senda also argues that the Commission's statement of the issue is slanted in favor of Dr. Novom's opinion that no further disability existed after February, 1990, and that Dr. Novom's appearance at the hearing for cross-examination was imperative. As noted, Senda subpoenaed Dr. Novom to testify at the hearing on November 25, 1992. Dr. Novom was, however, excused from his subpoena because he was unavailable. While he could not be present at the continued hearing on April 13, 1993, that hearing could not be concluded because of a bomb threat. Thereafter, Senda did not pursue enforcement of the subpoena and eventually waived the right to a continued hearing and thus, the opportunity to cross-examine Dr. Novom. Senda's own failure to require that Dr. Novom testify does not form a basis for setting aside the Commission's decision.

Further, Senda argues that the Commission's fact finding was not supported by the evidence. We disagree. The evidence in the record and applicable law amply support the Commission's determination. We observe that the Commission accepted the opinions of Dr. Novom. The Commission made the following pertinent findings of fact:

The commission finds most credible Dr. Novom's September 1992 opinion that the applicant reached a

healing plateau in August 1989; that he had a 10 percent permanent partial disability at that time; and that any additional disability after August 1989 or treatment after February 12, 1990 was not related to the June 4, 1987 injury. While the seriousness of the injury and the applicant's testimony about continuing pain support the opinions of Drs. Minikel and Delahunt, the commission cannot overlook the applicant's subsequent work injuries in April 1991 and January 1992 which arise from separate work incidents. Moreover, the applicant's involvement in the April 1990 altercation outside the Blue Suede Shoes establishment, which resulted in a trip to the hospital emergency room, demonstrates a basis for further back injury which is unrelated to the June 4, 1987 accident. Unquestionably, the applicant returned to physically demanding duties upon his return to work after he recovered from the 1989 laminectomy. However, those very duties and Dr. Novom's opinion raised a legitimate doubt in the commission's mind as to whether the additional disability which arose after August 1989 and the treatment he received after February 12, 1990 were related to the June 4, 1987 injury.

We cannot say that its acceptance of Dr. Novom's findings was in error. See *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979).

The Commission has the duty to deny compensation if it has a legitimate doubt as to the existence of facts essential to compensation. *Beem v. Industrial Comm'n*, 244 Wis. 334, 337, 12 N.W.2d 42, 43 (1943). The Commission reached its conclusion based on the opinions of Dr. Novom, which it found credible, Senda's work duties upon returning to employment in August 1989, the work-related injuries of 1991 and 1992, and the non-work related injuries incurred by Senda after his 1989 laminectomy. The record here amply supports the Commission's conclusion that a legitimate doubt existed as to Senda's disability and the need for future treatment.

By the Court. – Order affirmed.

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