

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 26, 1997

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2307

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DAVID L. HOLLAND,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION;
MINDEMANN TRUCKING, INC.; AND WEST BEND
MUTUAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. David Holland appeals from an order affirming a decision of the Labor and Industry Review Commission (commission), which denied his application for permanent partial disability related to an alleged back

injury that he sustained during a fall at work. The commission found that there was neither a back injury that resulted from the fall, nor an aggravation of a prior existing condition. Because the commission's findings of fact are supported by substantial evidence, we affirm.

Holland was employed by Mindemann Trucking as a truck driver in March of 1993, when he slipped and fell while on a job assignment, resulting in injury to his right leg and thigh. He was initially treated for these injuries by Dr. Michaelsen, who noted that Holland's back was "really normal," and referred him for further evaluation regarding calf and thigh pain. In May of 1993, an MRI evaluation revealed a disc herniation at L5-S1 on the left side. Doctors Lippman and Wright, who subsequently evaluated Holland, noted in their reports that they could not understand how such a condition could result from the right side injuries that he complained of. In July of 1993, Holland filed a disability claim for injuries sustained to his right leg and side from the fall. His first complaint of lower back pain occurred in September of 1993. Following further evaluations in late 1993 and early 1994, which revealed disc degeneration at L5-S1, spinal stenosis at L4-5, and arthritis at L4-5 and L5-S1, Holland underwent successful surgery for these conditions.

Holland claimed that his back surgery was necessitated by his fall on the job. The administrative law judge (ALJ) ruled that there was insufficient evidence as to any direct injury to Holland's back as a result of the fall, and that he had failed to meet his burden of proving that the fall aggravated, precipitated or accelerated the degenerative back disease he was suffering from.

The commission affirmed the ALJ, noting that several inconsistencies in the medical record left it with a legitimate doubt concerning

compensation for anything beyond the initial injuries treated by Dr. Michaelson. These inconsistencies included evidence that Holland's back complaints were not mentioned until several months after the fall, and his right side complaints were not supported by medical evaluations which revealed left side herniation. Additionally, the commission relied on Dr. Lippman's opinion that Holland's back condition was not work related, but rather the result of the normal progression of his preexisting degenerative disc disease.

The trial court affirmed the commission's decision, noting that the inconsistency between the right side pain and left side degeneration, the long delay between the fall and the onset of back pain, and Dr. Lippman's opinion that the fall and the back disease were not connected, provided sufficient evidence on which LIRC could rest its determination.

On appeal, our standard of review is the same as that of the circuit court. *Boynton Cab Co. v. DILHR*, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). We affirm if the commission's findings of fact support the order. See § 102.23(1)(e)3, STATS. If the order depends on any fact found by the commission, we may not substitute our judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. Section 102.23(6). We may reverse the commission only if its order "depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. *Id.* Substantial evidence is "evidence that is relevant, probative, and credible and which is in a quantum that will permit a reasonable fact finder [sic] to base a conclusion upon it." *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983). A finding of fact will be upheld "if there is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion." *Id.*

It is the function of the commission, and not of this court, to determine the credibility of witnesses, and to weigh the evidence and decide what should be believed. *E.F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 636, 264 N.W.2d 222, 224 (1978). Conflicts in testimony of medical witnesses are to be resolved by the commission. *Id.* at 637, 264 N.W.2d at 224. The role of this court is to review the record to locate the credible evidence that supports the commission's determination, rather than weighing the opposing evidence. See *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975).

Holland contends that LIRC and the trial court erred in affirming the ALJ's decision, because Dr. Lippman's reports, upon which the ALJ relied, are not credible, substantial or sufficient to provide support for the decision. Specifically, Holland contends that the ALJ based his findings solely on the reports of Dr. Lippman, while ignoring the reports of Drs. Dannenmaier, Wright, Hastings and Michaelsen.

Dr. Lippman's reports expressed his medical opinion that Holland had a preexisting back disease, and there was no relationship between his fall and subsequent back surgery. This is relevant, probative and credible evidence upon which a reasonable fact-finder may base a conclusion. See *Princess House*, 111 Wis.2d at 54, 330 N.W.2d at 173. We may not weigh the credibility of the medical evidence and other testimony that contradicts Dr. Lippman's opinion, as Holland asks us to do. See *E.F. Brewer Co.*, 82 Wis.2d at 637, 264 N.W.2d at 224.

The commission also found inconsistencies in the record, noted above, which provided a legitimate doubt regarding the facts necessary to establish Holland's claim. Holland had the burden of proving that the injury he sustained

was work related. *Bumpas v. DILHR*, 95 Wis.2d 334, 342, 290 N.W.2d 504, 507 (1980). Again, it was for the commission to weigh the conflicting evidence presented, which it did, and we may not substitute our judgment for that of the commission. *See* § 102.23(6), STATS.

By the Court.—Order affirmed.

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

