

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1635

Cir. Ct. No. 2013CV9646

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DAVID DOLLAR,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION,
AURORA HEALTH CARE METRO, INC. AND
SENTRY CASUALTY CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DANIEL A. NOONAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Appellant David Dollar appeals an order affirming the Labor and Industry Review Commission's decision denying him worker's

compensation benefits. Dollar argues that the Commission's decision is not supported by credible and substantial evidence.¹ We affirm.

¶2 Dollar was injured at work on June 23, 2011, when a file cabinet fell on him, hitting him in the head. He received temporary disability from June 26, 2011 through February 19, 2012. Dollar then sought additional temporary total disability, additional medical expenses and prospective medical treatment in the form of fusion surgery.

¶3 At the hearing on Dollar's claim, conflicting evidence was submitted. Dollar testified that he has experienced increased pain since the work injury, which affects his ability to perform daily activities without discomfort. Dr. Thomas Perlewitz, who is Dollar's treating physician and has seen him multiple times over several years, opined that Dollar's work injury aggravated his pre-existing degenerative disc disease, necessitating fusion surgery. Dr. John Xeno, who was hired by the respondents, submitted a medical report opining that Dollar had healed from the work injury within three months of the date of injury and that his continuing pain and other symptoms were the result of the natural progression of Dollar's pre-existing degenerative disc disease.

¶4 The hearing examiner concluded that Dr. Xeno's medical assessment was more credible than Dr. Perlewitz's medical assessment and denied Dollar's claim for additional compensation. The Commission affirmed the hearing examiner's decision. The circuit court also affirmed.

¹ We review the Commission's decision, not the decision of the circuit court. *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477.

¶5 Dollar argues that the Commission’s decision is not supported by credible and substantial evidence. He contends that the Commission should not have credited the opinion of Dr. Xeno over Dr. Perlewitz because Dr. Xeno examined him more than six months after he was injured at work and saw him only one time. Dollar also argues that Dr. Xeno’s opinion that he recovered within three months of the work injury had no evidentiary basis because Dr. Xeno did not examine him until well after the three-month period during which Dr. Xeno opined that he should have completely healed.

¶6 Our standard of review largely dictates resolution of this appeal. We may “not substitute [our] judgment for that of the [C]ommission as to the weight or credibility of the evidence on any finding of fact.” WIS. STAT. § 102.23(6) (2013-14).² Moreover, “[c]onflicts in the testimony of medical witnesses are to be resolved by LIRC, and a determination made by LIRC that the testimony of one qualified medical witness rather than another is to be believed is conclusive.” *Bretl v. LIRC*, 204 Wis. 2d 93, 101, 553 N.W.2d 550 (Ct. App. 1996).

¶7 The Commission’s decision is supported by Dr. Xeno’s medical opinion. Dr. Xeno’s medical opinion was based on his examination of Dollar, albeit six months after Dollar’s injury, and Dollar’s medical records, which included two MRIs, one taken in 2009 and one taken two weeks after Dollar’s work injury. Dr. Xeno’s report states that the post-injury MRI was largely unchanged, except for slight progression of the degenerative process in Dollar’s spine that had been going on for several years. Dr. Xeno’s opinion that Dollar’s

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

pain and other symptoms were not the result of the work injury was grounded on his interpretation of the medical imaging. Where, as here, qualified medical witnesses present conflicting medical assessments, we accept the Commission's determination about which medical assessment is more credible. Therefore, we affirm the Commission's decision denying additional benefits to Dollar based on Dr. Xeno's conclusion that Dollar's increased pain and other symptoms are the result of his pre-existing degenerative disc condition, not the work injury he sustained in June 2011.

¶8 Dollar contends that there is no evidence controverting his testimony that his level of pain has increased. The Commission did not say that it did not believe Dollar's assertion that he was having increased pain. The Commission simply concluded that Dollar's increased pain was caused by his pre-existing degenerative disc disease, rather than his work injury. This argument is unavailing.

¶9 Dollar next argues that there is no legitimate doubt that he is entitled to benefits. This argument simply recasts his first argument that the Commission's decision is not supported by credible and substantial evidence. Therefore, we reject this argument

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

