

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 8, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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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.

**No. 00-0781**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**TIMOTHY WIESE,**

**PLAINTIFF-APPELLANT,**

**V.**

**LABOR & INDUSTRY REVIEW COMMISSION, ERIC F.  
NELSON PAINTING & DECORATING, INC., AND REGENT  
INSURANCE CO.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County:  
SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Johnston,<sup>1</sup> JJ.

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<sup>1</sup> Circuit Judge William D. Johnston is sitting by special assignment pursuant to the Judicial Exchange Program.

¶1 JOHNSTON, J. Timothy Wiese appeals from an order affirming the order of the Labor and Industry Review Commission (LIRC) which denied, in part, his worker's compensation claim. LIRC adopted the Administrative Law Judge's findings. Wiese contends those findings are not supported by credible and substantial evidence. We conclude that they are and we therefore affirm.

### **BACKGROUND**

¶2 Wiese was employed as a union painter by Eric Nelson Painting. On May 18, 1992, while at work, his automobile was rear-ended. Wiese sustained neck and back injuries and missed approximately eleven weeks of work. He was treated by a chiropractor, Dr. Patrick Andersen, and then by Dr. Thomas Zdeblick, an orthopedic surgeon, and Dr. James Leonard, a physical medicine and rehabilitation specialist, at the University of Wisconsin Hospital and Clinics. On January 20, 1994, Wiese underwent a two-level cervical fusion at levels C5-6 and C6-7. On May 6, 1994, nine days after returning to work, Wiese's automobile was again rear-ended while on his way to work. Wiese underwent a second fusion on February 22, 1995.

¶3 Wiese filed for worker's compensation benefits for temporary total disability and permanent partial disability for various time periods. The issues before the ALJ were: (1) whether Wiese's alleged injuries arose out of his employment, (2) the nature and extent of disability, and (3) liability for medical expense. The ALJ weighed the medical opinions of Dr. Leonard, Dr. Zdeblick, and Dr. Thomas Grossman, an expert for Nelson Painting's worker's compensation insurer, Regent Insurance. The ALJ found Dr. Grossman's opinion to be the most credible.

¶4 LIRC adopted the factual determinations and order of the ALJ and made findings of fact as follows:

a. Extent of disability from May 1992 injury.

The applicant argues, essentially, that his doctors are more credible than the respondent's medical examiner, Dr. Grossman, on the extent of disability. However, the commission does not agree.

After carefully reviewing the record, the commission concludes that the applicant recovered from the May 1992 car accident without permanent disability. While cervical problems were noted initially in the emergency room, the applicant's most immediate concern was with his back. In his first treatment note of December 1992, Dr. Leonard discusses neck symptoms only collaterally and it is not clear from Dr. Leonard's report that the applicant even had ongoing neck complaints at that time. Certainly, Dr. Zdeblick states in January 1993 that chiropractic treatment gave the applicant "good relief" of his cervical complaints.

Indeed, the first records clearly documenting neck complaints are dated in July 1993 (14 months after the injury). At that time, Dr. Leonard opined that the applicant's neck complaints were musculoskeletal. It was not until January 1994 (and the intervening increase of symptoms while bending to turn the grill valve) that the applicant saw Dr. Zdeblick (who ultimately performed the fusion surgery) about his neck. Further, the applicant had considerable degenerative pathology in his spine shown in the earliest x-rays. It also appears that the actual nerve cord abnormalities eventually shown in the 1994 MRI may have arisen well after the May 1992 car accident; at least, the 1993 cervical CT scan did not mention significant impingement. In sum, the commission adopts the ALJ's conclusion that the applicant had only a short-term "temporary aggravation" from the work injury.

¶5 Wiese petitioned the Dane County Circuit Court for review of LIRC's decision. The circuit court affirmed LIRC's decision, and Wiese appeals, contending that LIRC's findings are not supported by credible and substantial evidence.

## STANDARD OF REVIEW

¶6 The findings of fact made by LIRC acting within its power, in the absence of fraud, are conclusive. WIS. STAT. § 102.23(1)(a) (1999-2000).<sup>2</sup> The reviewing court is not to substitute its judgment for that of LIRC as to the weight or credibility of the evidence on a finding of fact. Section 102.23(6); *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). Where LIRC's decision depends upon a material and controverted finding of fact that is not supported by credible and substantial evidence, this court may set aside LIRC's order and remand the case to LIRC. Section 102.23(6); *Princess House*, 111 Wis. 2d at 51. In evaluating medical testimony, LIRC is the sole judge of the weight and credibility of those witnesses. See *Manitowoc County v. DILHR*, 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979). This court reviews the record for credible and substantial evidence to support LIRC's determination. See *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

## DISCUSSION

¶7 Wiese argues that the ALJ made factual errors which were adopted by LIRC, and thus, its findings are not supported by credible and substantial evidence. Wiese contends that those findings which are not based on credible and substantial evidence are: (1) LIRC's characterization of the testimony of Drs. Leonard and Zdeblick; (2) Wiese is "just now" claiming the two fusions were related to the 1992 motor vehicle accident; (3) Wiese had considerable degenerative spine pathology shown in the earliest x-rays; (4) the first records clearly documenting Wiese's neck complaints were made in July 1993; and (5) Dr.

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Grossman's medical opinion is more credible than the medical opinions of Wiese's treating physicians, Dr. Leonard and Dr. Zdeblick.

**1. Characterization of doctors' testimony.**

¶8 Wiese first points to what he asserts is the ALJ's finding that Drs. Leonard and Zdeblick concluded there was no causal relationship between the second accident and the first fusion, which he claims is unsupported by credible evidence. While Wiese's reference to the ALJ's finding is correct, this does not affect the validity of the ultimate finding that any claimed permanent disability was not work related. It appears to us that the ALJ was focusing on Dr. Zdeblick's deposition testimony that the second accident played some part in the failure of the first attempted fusion, but that there was no way to pinpoint that with objective data.

¶9 As LIRC argues and the trial court determined, the erroneous finding was "surplusage unnecessary to sustain the order." *Franckowiak v. Industrial Comm'n*, 12 Wis. 2d 85, 88, 106 N.W.2d 51 (1960). LIRC's order rested upon its ultimate finding that the medical opinion of Dr. Grossman was more credible than that of Dr. Leonard or Dr. Zdeblick. Again, in evaluating medical testimony, LIRC is the sole judge of the weight and credibility of those witnesses. *Manitowoc County*, 88 Wis. 2d at 437.

**2. Wiese "just now" claiming the two fusions were related to the 1992 accident.**

¶10 Wiese next argues that the ALJ mischaracterized the facts, suggesting that he is "just now" claiming the fusions were related to the 1992 automobile accident. The ALJ states: "The applicant now claims that all of his disability including the second fusion relates to the first motor vehicle accident

and not the second.” Wiese’s position is that he has always maintained his neck problems were the result of the car accidents. Wiese overreads the ALJ’s statement. Wiese did claim before the ALJ that his disability related to the first accident and not to the second, and the ALJ’s statement is supported by credible and substantial evidence.

### **3. Wiese’s degenerative spine pathology in his earliest x-rays.**

¶11 LIRC’s decision states, “[T]he applicant had considerable degenerative pathology in his spine shown in the earliest x-rays.” Wiese argues that the May 6, 1992 x-rays were the earliest taken in this matter, and the resulting reports do not mention a degenerative process.

¶12 A reviewing court is to search the record for credible and substantial evidence which supports LIRC. *See Vande Zande*, 70 Wis. 2d at 1097. The deposition of Dr. Grossman was part of the record. He opined that Wiese’s accidents of May 1992 and May 1994 had nothing to do with the need for cervical fusion, and that Wiese suffered from a degenerative spinal process prior to the May 1992 accident. Dr. Grossman based this opinion on his radiological interpretations of various films, including Dr. Zdeblick’s interpretations. One of those noted degeneration at the C-6 level with mild posterior spurring. Another radiographic study referred to buckling of the ligamentum flavum which Dr. Grossman described as a degenerative condition. Dr. Grossman disagreed with the opinion of Dr. Zdeblick and Dr. Leonard that trauma could be the cause of these findings. Dr. Grossman filed a WKC-16-B which had an attached “Record Review” consisting of some thirty-one pages. Reviewed were UW Hospital and Clinic records, including those of Dr. Zdeblick and Dr. Leonard, which concerned the effects of the two automobile accidents. According to Dr. Grossman’s record

review, Dr. Leonard's August 23, 1993 note indicated that, after bending over to twist a valve on a grill, Wiese returned to the clinic complaining of pain extending from the cervical spine to the left trapezius and the left shoulder and left-sided headaches. Dr. Grossman's record review also referenced Wiese's March 1988 jump from a second floor window and diagnosis of chronic strain, and a September 1987 auto accident after which Wiese experienced back pain.

¶13 Dr. Grossman states at page twenty-six of his report:

It is particularly interesting to note that there is minimal mention made of any cervical or upper extremity complaints in the University of Wisconsin Hospital and Clinics records until August 23, 1993 when the complainant, in an apparently trivial move, i.e., minimal energy, minimal velocity, was twisting a valve on a grill on a Saturday and reported excruciating neck and upper extremity pain.

¶14 Dr. Grossman's opinions from this record review are:

Taken as a whole, the records presented for review do not support causal association between the motor vehicle accident of May 1992 or the motor vehicle accident of May 1994 and the claimant's ongoing neck and upper extremity complaints. Instead, the radiographic, CT and magnetic resonance imaging studies indicate that there are chronic degenerative conditions in both the cervical and lumbar spines. The time course of events in both motor vehicle accidents and the August 1993 Saturday event strongly support a degenerative process in the cervical spine. Indeed, of the records presented for review, the August 23, 1993 event seems to have provided the most significant increase in symptoms. This, in my opinion, is clearly the lowest energy event regarding the claimant's cervical spine. I note that there was radiographic evidence of failure of fusion at the C6-7 level before the claimant's second motor vehicle accident in May 1994, and the May of 1994 accident was low velocity, low energy with no objective findings of significant injury.

The records presented for review support a diagnosis of degenerative conditions of the cervical spine and lumbar spine which appear to follow a relentless

degenerative course of the cervical spine and a waxing and waning course in the lumbar spine. The absence of significant objective findings following either motor vehicle accident does not, in my mind, establish causal association between the claimant's ongoing complaints and those motor vehicle accidents. Indeed, I am struck by the fact that the trivial incident on August 23, 1993, appears to have promoted the most significant subjective complaints. This would support a diagnosis of degenerative condition. In degenerative conditions of the spine, many individuals note painful events. However, current thinking is that these events are manifestations of the underlying condition. The events of and by themselves are not causative.

¶15 Credible and substantial evidence is found in the record which supports LIRC's finding that Wiese had considerable degenerative pathology in his spine shown by the earliest x-rays.

#### **4. Neck complaints first documented in July 1993.**

¶16 LIRC states, "While cervical problems were noted initially in the emergency room, the applicant's most immediate concern was with his back." LIRC further found:

In his first treatment note of December, 1992, Dr. Leonard discusses neck symptoms only collaterally and it is not clear from Dr. Leonard's report that the applicant even had ongoing neck complaints at that time. Certainly, Dr. Zdeblick states in January 1993 that chiropractic treatment gave the applicant "good relief" of his cervical complaints.

¶17 LIRC found that in records dated July 1993, Dr. Leonard opined that Wiese's neck complaints were musculoskeletal. In January 1994, Wiese first saw Dr. Zdeblick about his neck. Therefore, there is credible evidence on which reasonable people could rely to reach the conclusion LIRC did, that the first records clearly documenting Wiese's complaints about his neck were July 1993. See *Princess House*, 111 Wis. 2d at 54-55; *Manitowoc County*, 88 Wis. 2d at 437.

## 5. Dr. Grossman is the most credible expert witness.

¶18 Wiese contends that Dr. Grossman just reviewed the medical records generated by UW Hospital and Clinics, Dr. Leonard, and Dr. Zdeblick. Dr. Grossman never examined or treated him. Thus, Wiese contends Dr. Grossman's opinions are not as credible as those of Dr. Leonard and Dr. Zdeblick. Dr. Grossman's WKC-16-B report and deposition have been previously discussed. Dr. Grossman's diagnosis concerning the May 18, 1992 accident included whiplash associated disorder grade II and degenerative disk disease of the cervical spine at levels C4-5, C5-6, and C6-7 with small central herniated nucleus pulposus at the C4-5 and C5-6 and diffuse disk bulging at the C6-7 level. Dr. Grossman identified the degenerative disk disease as a condition pre-existing the May 18, 1992 and May 6, 1994 accidents. Dr. Grossman's opinion was that this pre-existing degenerative condition caused the need for the fusions, not the accidents.

¶19 Again, our search of the record shows that credible and substantial evidence supports Dr. Grossman's medical opinions and thus LIRC's findings and decision based on those opinions. See *Vande Zande*, 70 Wis. 2d at 1097. Additionally, when conflicts exist between the testimony of medical witnesses, they are to be resolved by LIRC. See *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). Since LIRC is the sole judge of credibility of witnesses in this case, we must defer to its finding that the opinion of Dr. Grossman was more credible than the opinions of Dr. Leonard and Dr. Zdeblick.

¶20 We therefore conclude that substantial and credible evidence existed in the record to support LIRC's decision denying Wiese's claim of permanent partial disability and additional temporary total disability.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

