

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2003

Cornelia G. Clark
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. 03-0258

Cir. Ct. No. 02CV001946

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**WISCONSIN WORKER'S COMPENSATION UNINSURED
EMPLOYERS FUND C/O GALLAGHER BASSETT SERVICES,
INC.,**

PLAINTIFF-APPELLANT,

KEN DONAIS CONSTRUCTION,

INVOLUNTARY-PLAINTIFF,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
CHRISTOPHER ASLAKSON,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. The Wisconsin Worker's Compensation Uninsured Employers Fund (the Fund) appeals an order affirming a Labor and Industry Review Commission (LIRC) decision on a worker's compensation claim. The claimant, Christopher Aslakson, worked for the Fund's insured, Ken Donais Construction. There was no dispute that Aslakson suffered a work-related injury. This judicial review proceeding concerns LIRC's calculation of the extent of Aslakson's resulting disability, and the amount of his disability awards. We affirm.

¶2 Aslakson's work-related accident occurred on July 9, 1998. He suffered injuries to several parts of his body, the most serious being a fractured hip. He had surgery on that hip and was hospitalized for a week. The only further treatment Aslakson received was a second operation on the hip about one year later. Aslakson's treating physician declared that Aslakson reached a healing plateau on December 27, 1999.

¶3 The Fund contested several aspects of Aslakson's claim, and an evidentiary hearing was conducted to resolve the contested issues. The presiding administrative law judge determined that Aslakson earned \$450 per week while Donais employed him; he was entitled to periods of total temporary and partial temporary disability benefits between July 9, 1998, and December 31, 1999; he sustained 15% permanent partial disability attributable to his hip injury; he suffered permanent partial disability of 5% to his body as a whole; and he suffered a 40% loss of earning capacity as a result of his disabilities. LIRC affirmed the administrative law judge's decision on administrative review, and adopted her findings and conclusions as its own.

¶4 After the circuit court affirmed LIRC's decision, the Fund appealed. The issues are whether LIRC had sufficient evidence to calculate Aslakson's wages at \$450 per week; whether LIRC awarded temporary disability benefits without sufficient evidence; whether evidence supported the finding of a 40% loss of earning capacity; and whether evidence showed that the hip injury caused a 15% permanent partial disability.

¶5 The Fund describes all of its issues as questions of law, and asserts that on review we must apply non-deferential standards of review. However, each issue actually concerns whether the evidence supported the factual findings. In reviewing the sufficiency of the evidence, "[w]e must affirm LIRC's findings of fact if they are supported by any credible and substantial evidence in the record, even if they are contrary to the great weight and clear preponderance of the evidence." *Hoell v. LIRC*, 186 Wis. 2d 603, 612, 522 N.W.2d 234 (Ct. App. 1994). In applying this test, we do not substitute our judgment for that of the agency as to the weight or credibility of the evidence. *Currie v. DILHR*, 210 Wis. 2d 380, 387, 565 N.W.2d 253 (Ct. App. 1997). It is LIRC's duty to resolve conflicts in the opinions of medical witnesses, and LIRC's decision to believe one witness over another is conclusive. *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). We do not review the circuit court's decision on appeal, but focus directly on LIRC's decision. *Bunker v. LIRC*, 2002 WI App 216, ¶13, 257 Wis. 2d 255, 650 N.W.2d 864.

¶6 Substantial evidence supports LIRC's wage determination. Aslakson submitted limited evidence on this issue. He testified that he worked about forty-five hours per week for Donais, and earned \$10 per hour. He submitted a receipt showing a \$460 payment from Donais that he testified represented a week's pay. The Fund offered no evidence on the issue, but

contends that Aslakson's limited submission was insufficient. That, however, is a matter of weight and credibility, solely for LIRC to decide. We will not reverse LIRC's determination that Aslakson satisfied his burden with the evidence he presented. See *Currie*, 210 Wis. 2d at 387.

¶7 Substantial evidence also supports LIRC's award of temporary disability benefits. Temporary disability may extend until the healing period expires, which occurs when the "employee is restored so far as the permanent character of his injuries will permit." *Knobbe v. Industrial Comm'n*, 208 Wis. 185, 190, 242 N.W. 501 (1932). Here, a treating physician set December 27, 1999, as the end date of Aslakson's healing period. The Fund contends that, notwithstanding this opinion, Aslakson cannot receive temporary benefits because he did not seek treatment during his recuperation period, except for his second surgery. However, LIRC considered Aslakson's testimony that his doctors told him that no additional treatment would accelerate his healing, and considered the absence of any evidence showing otherwise. No rule of law requires a particular minimum amount or level of treatment during a healing period. It was LIRC's prerogative to accept the evidence that Aslakson did not negligently or deliberately extend the healing period by refusing or avoiding available, beneficial treatment.

¶8 Evidence supports LIRC's determination as to the loss of earning capacity. LIRC's finding was consistent with the opinion of Aslakson's vocational expert witness. The Fund contends that this expert's opinion was flawed, and that the Fund's expert provided a much superior report. The Fund also contends that other evidence it provided showed a significantly higher earning capacity for Aslakson. The Fund's argument goes directly to the weight and

credibility of the evidence. As noted, LIRC's decision on these matters is conclusive and not subject to review. *See Currie*, 210 Wis. 2d at 387.

¶9 There is also sufficient evidence to support a 15% permanent partial disability determination. The Fund contends that LIRC "simply adopted the permanent disability assessment of [Aslakson's treating physician] as its own." Again, doing so was LIRC's prerogative as a matter of weight and credibility. Its decision on the matter is beyond review in this court.

By the Court.—Order affirmed.

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

