

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0831

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**DINGS COMPANY, A DIVISION OF VENTUREDYNE, LTD.,
A WISCONSIN CORPORATION AND
LIBERTY MUTUAL FIRE INSURANCE COMPANY,
A WISCONSIN CORPORATION,**

PLAINTIFFS-APPELLANTS,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION
AND HERBERT TUTKOWSKI,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Dings Company and Liberty Mutual Fire Insurance Company appeal from a judgment affirming the Labor and Industry Review

Commission's award of worker's compensation benefits to Tutkowski, an employee of Dings.¹ Dings argues: (1) that the award is not supported by credible and substantial evidence; and (2) that the administrative law judge erred in denying Dings's motion for a continuance, thereby denying Dings due process of law. We affirm.

BACKGROUND

Tutkowski worked for Dings for forty-one years as a metal fabricator. Throughout his employment, Tutkowski was exposed to extremely loud noise from the processes and machinery used to cut and pound sheet metal into various shapes. Tutkowski retired from Dings on May 31, 1995.

On July 19, 1995, Tutkowski saw Dr. Steven Millen for an assessment of his hearing. Based upon Tutkowski's work and medical histories, a physical examination, and an audiogram, Dr. Millen determined that Tutkowski had suffered a bilateral hearing loss that had probably resulted from chronic noise exposure at work. Dr. Millen opined that Tutkowski had a 22.4% hearing loss in his left ear, and a 38.4% hearing loss in his right ear. Thereafter, Tutkowski filed a worker's compensation claim for work-related hearing loss.

Dr. Millen referred Tutkowski to another doctor for further tests, and an acoustic tumor was found in Tutkowski's right ear. After the discovery of the tumor, Dr. Millen determined that the tumor was primarily responsible for Tutkowski's loss of hearing in his right ear. Dr. Millen further opined: "The hearing loss however in his left ear is work related and I would use the left ear as

¹ Throughout this opinion, Dings Company and Liberty Mutual Fire Insurance Company will be referred to collectively as Dings.

an appropriate marker for the degree of compensation.” The tumor was removed on February 13, 1996, leaving Tutkowski with no hearing in his right ear.

On July 17, 1996, Dr. Kenneth Peters examined Tutkowski on behalf of Dings’s worker’s compensation insurer, Liberty Mutual. Dr. Peters noted that Tutkowski had a total loss of hearing in his right ear because of the removal of the tumor, but nonetheless concluded that Tutkowski had suffered a bilateral hearing loss from chronic noise exposure. In a letter to Liberty Mutual, Dr. Peters wrote:

“[Tutkowski’s] audiogram shows a sloping high frequency sensorineural hearing loss in the left ear which is consistent with that produced by chronic noise exposure. Since chronic noise exposure produces a high-frequency hearing loss which is symmetrical, then one can use the left ear as representing the amount of hearing loss that would have occurred in the right ear had he not had the acoustic tumor. His 4-frequency average in the left ear is 45. This calculates to a 25.6% impairment. This impairment then can be considered as a bilateral impairment.”

(Paragraph breaks omitted.) Contrary to his initial assessment, however, on November 21, 1996, in response to a letter from Liberty Mutual, Dr. Peters opined that Tutkowski “has a unilateral noise induced hearing loss in the left ear that could be attributed to his work place noise.”

Tutkowski’s claim was heard by an administrative law judge on January 16, 1997. The administrative law judge determined that Tutkowski had suffered a bilateral hearing loss as a result of chronic noise exposure at Dings, and awarded Tutkowski permanent partial disability compensation. The administrative law judge concluded that Dr. Peters’s November 21, 1996 opinion that Tutkowski had a unilateral occupational hearing loss in his left ear “is not credible, given the nature of [Tutkowski’s] bilateral noise exposure.”

Dings sought review of the administrative law judge's determination before the Labor and Industry Review Commission. Dings argued that the administrative law judge's award was not supported by substantial and credible evidence, and that the administrative law judge erroneously exercised its discretion in denying a request for a continuance. The commission affirmed the administrative law judge's determination, adopting the findings and order of the administrative law judge as its own. Dings then sought review in the trial court, pursuant to § 102.23(1)(a), STATS. The trial court affirmed the commission's decision.

DISCUSSION

Dings argues that the evidence is insufficient to support a finding that Tutkowski suffered a bilateral occupational hearing loss. Dings asserts that the undisputed evidence establishes that the removal of the tumor in Tutkowski's right ear resulted in Tutkowski having no hearing in his right ear, and therefore, Tutkowski's right ear hearing loss cannot be attributed to chronic noise exposure at work.

"The scope of our review is identical to that of the trial court. We review the decision of the commission rather than the trial court." *Hill v. LIRC*, 184 Wis.2d 101, 109, 516 N.W.2d 441, 445 (Ct. App. 1994) (citation omitted). Whether Tutkowski sustained a bilateral hearing loss as a result of chronic, work-related noise exposure is a question of fact. *See Bumpas v. DILHR*, 95 Wis.2d 334, 342, 290 N.W.2d 504, 507 (1980).

If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award

and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

Section 102.23(6), STATS. "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." *Cornwell Personnel Assocs., Ltd. v. LIRC*, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993).

Although the evidence supports Dings's assertion that the removal of the tumor from Tutkowski's right ear caused Tutkowski to lose all hearing in his right ear, this does not foreclose the conclusion that, prior to the removal of the tumor, Tutkowski also suffered a partial permanent hearing loss in his right ear as a result of chronic noise exposure.² Cf. *Theodore Fleisner, Inc. v. DILHR*, 65 Wis.2d 317, 323, 222 N.W.2d 600, 604–605 (1974) (worker's compensation may be awarded when a work activity aggravates a pre-existing degenerative condition). The evidence was sufficient from which to conclude that part of the hearing impairment that existed in Tutkowski's right ear prior to the removal of the tumor was caused by work-related chronic noise exposure.

Prior to the discovery and removal of the tumor, Dr. Millen determined that Tutkowski had a 22.4% hearing loss in his left ear and a 38.4% hearing loss in his right ear, and that the hearing loss in both ears had probably resulted from chronic noise exposure at work. After the tumor was discovered,

² Dings asserts that Tutkowski cannot be compensated for work-related hearing impairment in his right ear because removal of the tumor caused a total loss of hearing in the right ear, and thus Tutkowski had no hearing in that ear to lose as a result of the chronic noise exposure. Tutkowski suffered the work-related injury prior to the removal of the tumor, however. The fact that Tutkowski lost all hearing in his right ear after his hearing was damaged by chronic noise exposure does not render the earlier work-related hearing loss non-compensable.

Dr. Millen opined that the tumor was primarily responsible for Tutkowski's loss of hearing in his right ear, but that the hearing loss in Tutkowski's left ear was an "appropriate marker for the degree of compensation." Similarly, Dr. Peters initially opined that, prior to the removal of the tumor, Tutkowski had suffered a bilateral hearing loss as a result of chronic noise exposure, and that the hearing loss in Tutkowski's left ear could be used to represent the amount of hearing loss that Tutkowski would have suffered in his right ear had he not also had the tumor. Although Dr. Peters later altered his analysis in response to a letter from Liberty Mutual and opined that Tutkowski had suffered only a unilateral hearing loss as a result of chronic noise exposure, the administrative law judge rejected the change of opinion as not credible because both of Tutkowski's ears had been exposed to the chronic noise. Indeed, Dr. Peters had initially explained that "chronic noise exposure produces a high-frequency hearing loss which is symmetrical." The evidence is sufficient to support the conclusion that Tutkowski suffered a bilateral hearing loss as a result of chronic noise exposure.

Dings also argues that the commission erred in affirming the administrative law judge's denial of its request for a continuance. Dings argues that the administrative law judge denied Dings the opportunity for a full and fair hearing by denying the request for a continuance, and that the administrative law judge thereby violated Dings's right to due process. Specifically, Dings asserts that Tutkowski materially misrepresented to the medical experts his medical history and his history of work-related noise exposure, and that Dings needed a continuance to determine how the alleged misrepresentations would have affected the experts' medical opinions regarding the cause of Tutkowski's hearing loss.

Neither Dings's request for a continuance nor the administrative law judge's resolution of the request appear in the record. Therefore, Dings appended

to its brief to the commission an affidavit asserting that it had requested a continuance and that the administrative law judge had denied the request. The affidavit provided:

The undersigned [counsel for Dings], being first duly sworn on oath, deposes and says that on January 15, 1997, I contacted Administrative Law Judge Andrew Roberts to request postponement of the scheduled January 16, 1997, hearing. The conference call included myself, [counsel for Tutkowski] and ALJ Roberts. I informed ALJ Roberts that respondents were requesting the postponement because information received indicated that the applicant provided untruthful medical histories to his treating physician and IME [independent medical examiner] doctor and that the IME doctor needed to be provided with the accurate information. After argument, ALJ Roberts denied the postponement.

During the telephone conference, respondents requested that the issue for postponement be held open or the hearing continued.

Dings also attached to its brief to the commission the following statement from Dr. Peters: “If the occupational and medical history supplied by the employee has been materially misstated, my conclusion to a reasonable degree of medical probability might change.”

“Whether to postpone or continue a hearing is committed to the sound discretion of the agency.” *Argonaut Ins. Co. v. LIRC*, 132 Wis.2d 385, 389, 392 N.W.2d 837, 838 (Ct. App. 1986). “The agency’s decision to deny a motion for continuance will not be upset absent a ‘flagrant abuse’ of that discretion.” *Id.*

The ultimate test to determine whether due process of law has been accorded a party to an administrative proceeding is the presence or absence of fair play. The three elements of fair play in an administrative proceeding are: “(1) the right to seasonably know the charges or claims preferred; (2) the right to meet such charges or claims by competent evidence; and (3) the right to be heard

by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto.” The three elements of fair play have been used to test the propriety of the Department’s refusal to grant an adjournment, which is within its discretion under sec. 102.17(1)(a), Stats.

Bituminous Cas. Co. v. DILHR, 97 Wis.2d 730, 734, 295 N.W.2d 183, 186 (Ct. App. 1980) (footnotes omitted).

As noted, neither Dings’s request for a continuance nor the administrative law judge’s resolution of the request appear in the record. Thus, we do not know which alleged misrepresentations Dings identified for the administrative law judge, when Dings learned of the alleged misrepresentations, or what the administrative law judge’s reasoning was in denying the request for a continuance. Indeed, even Dings’s submissions to the commission do not supply this information. We therefore conclude that Dings has waived his continuance and due process claims by failing to make a record adequate to enable meaningful review of those issues. *See Shoreline Park Preservation, Inc. v. Wisconsin Dep’t of Admin.*, 195 Wis.2d 750, 769 n.8, 537 N.W.2d 388, 394 n.8 (Ct. App. 1995) (“It is fundamental, of course, that our review is limited to the record, and that it is up to the appellants to ensure that the record contains facts supporting their arguments for reversal.”) (citation omitted); *cf. Rivera v. Eisenberg*, 95 Wis.2d

384, 392, 290 N.W.2d 539, 543 (Ct. App. 1980) (“This court will not speculate on appeal when we do not know what occurred in the trial court.”).³

By the Court.—Judgment affirmed.

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

³ Dings also argues that the commission erred in adopting the administrative law judge’s findings and order without specifically addressing Dings’s claim that the administrative law judge improperly denied the motion for a continuance. Although the commission did not separately address the issue in its opinion, the commission implicitly concluded that the alleged misrepresentations that Dings identified in its brief were insignificant, and thus, that they did not merit a continuance. We agree. Indeed, Dings made no specific offer of proof that any of the alleged misrepresentations would have affected the opinions of the medical experts; he merely presented a vague assertion from Dr. Peters that his opinion might change “[i]f the occupational and medical history supplied by the employee has been materially misstated.”

Moreover, much of the information that Dings asserts Tutkowski withheld from the medical experts in fact appears in the various medical reports submitted by those experts. Among other things, Dings complains that Tutkowski did not reveal to Dr. Millen and Dr. Peters that he had suffered a skull fracture in 1954, and that he had a history of ear problems that required surgical placement of a tympanostomy tube in his left ear. The fact that Tutkowski suffered a skull fracture in 1954 appears in a November 13, 1995 letter to Dr. Millen from Dr. Meyer, a doctor to whom Dr. Millen referred Tutkowski. Additionally, Dr. Millen wrote in a July 22, 1995 letter that Tutkowski had an “episode of fluid buildup in his left ear in the late 1970’s,” and Dr. Peters’s notes from his examination of Tutkowski on July 17, 1996, reflect that Tutkowski “did have a tympanostomy, tubes, on the left side.”

