

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2014AP2788

Cir. Ct. No. 2014CV253

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JACQUELINE LOVE-MUELLER,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION, TARGET CORP.
(STORES), EMPLOYER AND TARGET CORP. (STORES), INSURER,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Jacqueline Love-Mueller appeals a circuit court order confirming a LIRC decision finding that she failed to make a prima facie showing of total permanent disability under the “odd-lot” doctrine. We affirm.

¶2 Love-Mueller was born on April 18, 1963, and obtained a G.E.D. in 1980. She completed a certified nursing assistant program and a one-year program in licensed vocational nursing. She worked in Iowa and Texas from 1981 to 1994, and then moved to Wisconsin where she was required to re-certify her nursing license. As a result, she worked for several years as an assembler for a manufacturer. She ultimately obtained certification as a licensed practical nurse in Wisconsin and worked in a nursing home from 1997 to 2000. She briefly worked again in an assembly job before going to work for Target in 2001. She worked at a Target distribution center, loading inventory into semi-trailers. She sustained a conceded low back injury on March 16, 2006.

¶3 As a result of the injury, Dr. Stephen Robbins performed L5-S1 total disc replacement surgery on February 5, 2007. Doctor Robbins released her with permanent sedentary restrictions of fifteen pounds lifting, avoidance of repetitive movements, and alternating sitting and standing every thirty minutes. He assessed 13% permanent partial disability to her lumbar spine condition.

¶4 On February 7, 2008, Love-Mueller began treating with Dr. Arvind Ahuja. A two-level fusion was performed at L4-5 through L5-S1 on July 9, 2008. A December 2008 CT scan showed deterioration of the L3-4 disc space, and in the meantime her symptoms had worsened. On June 16, 2010, Dr. Ahuja performed a third lumbar surgery, which had a poor result.

¶5 Doctor Ahuja did not provide any assessment of permanency, but at the employer's request Dr. Paul Cederberg examined and evaluated her in 2009 and 2010. Doctor Cederberg's first report is dated September 10, 2009, wherein he concludes that the 2007 and 2008 surgeries were work-related. He assessed 20% permanent functional disability, and light sedentary physical restrictions

requiring minimal repetitive bending and twisting, and a maximum of twenty pounds lifting and pushing.

¶6 In his updated report dated November 4, 2010, Dr. Cederberg reiterated his opinion of work-related permanent aggravation of Love-Mueller's condition at L4 through L5, and stated that the L3-4 level was not injured in the work incident, but was degeneration accelerated by the prior fusion at L4-5 and L5-S1. Doctor Cederberg did not comment in his updated report regarding physical restrictions except to state that Love-Mueller was "able to work as an administrative professional and can do an office type of job up to eight hours a day."

¶7 At the request of Love-Mueller's lawyer, Dr. Richard Karr examined and evaluated her on July 11, 2011, and submitted a report dated July 19, 2011. Doctor Karr opined that all three lumbar surgeries were work-related. He assessed 58% permanent functional disability. He also stated that she could work full-time with physical restrictions.

¶8 Love-Mueller testified that she could not tolerate a full-time job. She testified that she was receiving Social Security Disability Income, and her employer was paying her monthly permanent partial disability based on a concession of 60% permanent partial disability. She had submitted a large number of resumes and applications online, but she had not had any responses to her applications.

¶9 Love-Mueller's vocational expert, Kevin Shutz, stated in a report that during his interview, Love-Mueller "walked with a limp and had a difficult time sitting for any extended period." Schutz discussed various vocational factors and stated that her various limitations associated with her work injuries made her

“very unlikely to well compete with others for any type of competitive work, especially an administrative type of position.” Schutz also stated that “[u]sing Dr. Karr and Dr. Robbins’ opinions as medical foundation, Ms. Love-Mueller is permanently and totally disabled for vocational purposes associated with injuries that she sustained at work, on 3/16/06.” Schutz alternatively stated that if it is accepted that Love-Mueller could work full-time in sedentary work environments, her loss of earning capacity would be in the range of 55% to 60%.

¶10 Target’s vocational expert, Edith Veith, opined that under Dr. Cederberg’s or Dr. Karr’s restrictions Love-Mueller “would be able to obtain work in various positions[,] including administrative assistant, office assistant, program assistant, project coordinator, information processing, receptionist, secretary, transcriptionist, [or] word processor.” Veith further opined that these jobs were typically flexible enough to allow a person to change positions between tasks. Veith estimated Love-Mueller’s pre-injury earning capacity at \$38,000 to \$40,000 annually, and in the administrative assistant field she could expect to earn \$36,254 annually. Veith estimated her loss of earning capacity to be in the range of 10% to 20%.

¶11 The administrative law judge (ALJ) accepted Dr. Karr’s restrictions and Schutz’s vocational opinions as constituting a prima facie case for total permanent disability under the odd-lot doctrine. The ALJ then applied the burden-shifting analysis for total permanent disability outlined in *Beecher v. LIRC*, 2004 WI 88, ¶44, 273 Wis. 2d 136, 682 N.W.2d 29. The ALJ concluded that the general categories of jobs listed by Veith were insufficient to carry the evidentiary burden of showing actual job availability.

¶12 For a number of reasons, the Commission reversed the ALJ's conclusions regarding whether Love-Mueller submitted a *prima facie* case for permanent total disability. The Commission stated that both physicians who provided medical opinions regarding her physical restrictions, Dr. Karr and Dr. Cederberg, indicated that Love-Mueller could work a full eight-hour day. While Love-Mueller indicated that she personally decided she could not work full-time, the Commission noted that her physical capacity was a medical question, and that the physicians agreed that she could work a full day.

¶13 Moreover, the Commission found that Love-Mueller's "self-directed job search is questionable." The Commission also noted that Schutz's vocational assessment of permanent total disability "relies in part upon the applicant's statements made to [Dr. Karr] describing her own view of her physical capacity for work." The Commission concluded that Schutz's report was contrary to the credible medical evidence, and stated: "Given the lack of credibility of Schutz's report, and the fact that the applicant has not been medically restricted from full-time work, no *prima facie* case for permanent total disability was presented."

¶14 The Commission also found that Veith's vocational opinion of 10% to 20% loss of earning capacity "underestimates the effect that the applicant's substantial physical limitations and medical history may have on prospective employers, especially given the applicant's age." The Commission noted that Love-Mueller "is an intelligent individual who possesses particularly marketable skills for sedentary, office-oriented work." It also noted that she had a nursing and an assembler background, as well as computer skills and an administrative assistance associate degree. Accordingly, the Commission awarded Love-Mueller 60% loss of earning capacity, based primarily on Target's concession and Schutz's alternative opinion.

¶15 Love-Mueller requested judicial review. The circuit court affirmed the Commission, holding that substantial and credible evidence supported the Commission’s findings that Love-Mueller failed to establish a prima facie case of total permanent disability. This appeal follows.

¶16 The odd-lot doctrine is triggered when an employee is so injured that he or she “can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.” *Balczewski v. DILHR*, 76 Wis. 2d 487, 493, 251 N.W.2d 794 (1977). In other words, if the accident leaves the worker in the position of an “odd lot” in the labor market, “the burden of showing that the claimant is in fact employable and that jobs exist for the injured claimant shifts to the employer.” *Id.*, at 495.

¶17 The odd-lot doctrine operates as a rule of evidence. An employee establishes a prima facie case of odd-lot disability if the employee shows that because of injury, capacity, education, training or age, the employee is unable to secure any continuing and gainful employment. *Beecher*, 273 Wis. 2d 136, ¶44. Interpreting the odd-lot doctrine is a question of law, but evaluating the evidence requires a factual inquiry. *See id.*, ¶¶20-26. Findings of fact made by the Commission acting within its powers are conclusive as long as they are supported by credible and substantial evidence. WIS. STAT. § 102.23(1)(a) and (6) (2013-14).¹ In a judicial action under WIS. STAT. § 102.23, we review the Commission’s decision rather than the circuit court’s. *Cargill Feed Div./Cargill Malt & AIG Cas. Co. v. LIRC*, 2010 WI App 115, ¶13, 329 Wis. 2d 206, 789 N.W.2d 326.

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

¶18 In the present case, the Commission properly concluded that Love-Mueller did not establish a prima facie case under the odd-lot doctrine. As to her injury and capacity to work, the Commission credited the medical opinions of Love-Mueller's own medical expert Dr. Karr, as well as Dr. Cederberg, regarding Love-Mueller's physical restrictions. Both doctors concluded that Love-Mueller could work a full eight-hour day, notwithstanding her injury. Consistent with that conclusion, Target's vocational expert opined that Love-Mueller could work in various administrative positions under Dr. Cederberg's and Dr. Karr's restrictions.

¶19 The Commission rejected Love-Mueller's personal opinion that she could not work full days. The Commission also did not give weight to Schutz's opinion regarding her capacity to work because "it is evident that Schutz's assessment of permanent total disability relies in part upon the applicant's statements made to him describing her own view of her physical capacity for work." The Commission reasoned that Schutz's opinion "is contrary to the credible medical evidence of record that the applicant can compete in the workplace."

¶20 The Commission also considered proper factors including Love-Mueller's age, education, and training. It noted that she was fifty years old at the time of the hearing, "is an intelligent individual who possesses particularly marketable skills for sedentary, office-oriented work." It found that she had a nursing and assembler background, is proficient with a computer, is a strong typist, and has an administrative assistant associate degree. It concluded that these factors would make her a strong candidate for many office support positions in various professions.

¶21 There is substantial and credible evidence in the record to support the Commission’s findings. The Commission appropriately weighed all the evidence and was entitled to select the expert opinions it considered most credible. Based on the applicable standards of review, we cannot substitute our judgment for the Commission’s as to the weight or credibility of the evidence, even if the evidence is subject to other equally plausible interpretations. WIS. STAT. § 102.23(6); *Hamilton v. DILHR*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). The weight given to the evidence from Dr. Karr and Dr. Cederberg regarding Love-Mueller’s capacity to work must stand. Because Love-Mueller failed to establish a prima facie case of odd-lot disability, the burden of persuasion never shifted to the employer.²

By the Court.—Order affirmed.

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

² In her reply brief, Love-Mueller argues that “[s]ubsequent to the Love-Mueller decision, LIRC decided to begin applying the other relevant evidence provision to the Loss of Earning Analysis in the *Zaldivar* case. *Zaldivar vs. Hallmark Drywall, Inc.*, Claim No. 2010-010154.” We generally do not consider arguments or cases cited for the first time in the reply brief, and we decline to do so here. See *Northwest Wholesale Lumber, Inc. v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).

