

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0288

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JILL LITERSKI,

PLAINTIFF-APPELLANT,

v.

**LABOR & INDUSTRY REVIEW COMMISSION, EMPIRE
SCREEN PRINTING AND CONNECTICUT INDEMNITY
COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Jill Literski appeals from a circuit court order affirming the decision of the Labor and Industry Review Commission to deny her claim for worker's compensation benefits. She claims there was no substantial

and credible evidence to support the commission's finding that a fall Literski suffered at work was not the cause of her subsequent back surgery and disability. We disagree and affirm.

BACKGROUND

¶2 Literski tripped over a skid and fell hard on her back at work on October 20, 1997. The fall was observed by several other employees at Empire Screen Printing. The next day, Literski came to work and filled out an injury report stating that she had fallen on her tailbone and hit her head, but told her supervisor she did not anticipate further problems from the injury. She cut her hand at work that day, but did not complain of back pain when she sought treatment. She did, however, mention to at least one co-worker who had observed her walking "funny," that her back still hurt.

¶3 On November 9, 1997, Literski experienced severe back pain while herding emus onto a trailer. She sought medical treatment the following day, complaining that she had strained her back while moving the emus. Literski again complained of continuing back pain when she was hospitalized for unrelated conditions in December 1997. Literski left work early on November 10 and 11, complaining of back pain, and began missing full days of work as the result of back pain in January 1998. She eventually had surgery to repair a bulging disc in April 1998.

¶4 Literski filed a worker's compensation claim for temporary total disability benefits, medical expenses, and permanent disability of unknown extent. Her treating physician, Dr. Mark Stevens, concluded that her back problems were caused by the fall on October 20. Dr. Kenneth Lay, the physician for the employer's insurance carrier concluded that Literski's bulging disc was the result

of degeneration of a preexisting condition. Neither doctor testified at the hearing. The ALJ and the commission both found Lay's opinion to be more credible, and concluded that Literski had failed to demonstrate that her fall at work was the cause of her subsequent surgery and disability. However, Literski contends that Lay's opinion was incredible as a matter of law because it was based on two factual mistakes. We will discuss Lay's opinion and the other evidence in more detail below.

STANDARD OF REVIEW

¶5 Our certiorari review is limited to the record created before the commission. *See State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). We will consider only whether: (1) the commission stayed within its jurisdiction, (2) it acted according to law, (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) the evidence was such that the commission might reasonably make the order or determination in question. *See id.* The facts found by the commission are conclusive if supported by "any reasonable view" of the evidence, and we may not substitute our view of the evidence for that of the commission. *Id.* (citations omitted). We will sustain the commission's decision if it was supported by substantial and credible evidence. *See Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 53, 330 N.W.2d 169 (1983), *superseded by WIS. STAT. § 108.02(15)(k)16 on other grounds, National Safety Associates, Inc. v. LIRC*, 199 Wis. 2d 106, 543 N.W.2d 584 (Ct. App. 1995).

ANALYSIS

¶6 The commission may deny worker's compensation if it finds "legitimate doubt" regarding the facts necessary to establish a claim, based on

inherent inconsistencies or conflicts in the testimony. *Erickson v. DILHR*, 49 Wis. 2d 114, 118-19, 181 N.W.2d 495 (1970). Here, the commission found legitimate doubt that Literski's fall on October 20 had led to her back surgery, primarily because she had not complained about her back to any of the various medical practitioners she had seen between October 20 and November 10.

¶7 The commission's determination that the October 20 fall did not cause Literski's disability was supported by the medical records which showed that Literski sought medical attention on November 10 and, at that time, attributed her back pain to straining her back while herding emus the day before. It was also supported by testimony and timecards which showed that Literski came in to work the day following the skid incident and worked nearly her full shift before leaving to get stitches in her thumb from another accident, but that she left early on each of the two days following the emu incident, complaining of back pain.

¶8 The commission's decision was also supported by Lay's report, which attributed Literski's bulging disc to a preexisting condition. Literski asserts that Lay's opinion was incredible, as a matter of law, because Lay made two factual errors in his report. First, he concluded that Literski must have recovered from the November 9 emu incident because she did not complain of back pain again until January, when in fact, medical records showed that she was still complaining of back pain in December. The commission, however, noted this factual error and decided that it was not significant enough to affect its decision.

¶9 Secondly, in response to the question, "Prior to October 20, 1997, did Ms. Literski have a preexisting condition?" Lay answered, "Yes, x-rays show degenerative change with narrowing of the lumbosacral interspace." Literski claims this conclusion was unsupported by the record because the x-rays taken

prior to 1997 were negative for back problems. However, Lay also noted that the prior x-rays were negative. Thus, it is not clear whether Lay was mixing up the dates of the x-rays, as Literski asserts, or whether he was merely saying that the later x-rays showed a degeneration which indicated a preexisting condition. The commission could have given the statement either interpretation, and we will not substitute our view of the evidence for the commission's. In sum, we are satisfied that there was substantial and credible evidence from which the commission could have reached its decision.

By the Court.—Order affirmed.

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

