COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP351 **Cir. Ct. No. 2008CV1329**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CURTISTHENE MONTGOMERY,

PETITIONER-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION AND COUNTY OF MILWAUKEE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Curtisthene Montgomery appeals from an order of the circuit court affirming the decision of the Labor and Industry Review Commission dismissing Montgomery's traumatic- and occupational-injury claims as not work-

related.[1] Montgomery argues that the Commission exceeded its authority and violated her due-process rights by considering and dismissing the occupational-injury theory of liability because she contends that she only asserted a traumatic-injury theory of liability. We affirm.

I.

¶2 In 2002, Montgomery began working at the Milwaukee County Courthouse as a security agent. On August 16, 2004, she was using a handheld metal detector called a "wand" to detect any impermissible objects concealed by visitors entering the courthouse. According to Montgomery, she was wanding a visitor on that date when she felt a painful "pop" in her neck. She says that she reported the incident to Ernesto Sanchez, who was the person in charge, but was told that she could not leave because of a staff shortage. Sanchez denied talking with Montgomery on August 16th, testifying that he was on vacation that day. The following day, Montgomery says she was assigned duties that did not require wanding. The next week she was transferred to a non-wanding position, and, after that, her jobs rotated, including occasional wanding. Montgomery continued to work, including overtime hours, until her vacation in October of 2004. At the end of the vacation, she sought medical treatment for the first time. On the day she was to return to work, Sanchez testified that Montgomery phoned him and

[1] Montgomery misidentifies the document appealed from as "the judgment entered on November 13, 2008." The circuit court's decision entered on that date, however, is marked "DECISION AND ORDER" and declares "THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL." Thus, the final document is an *order*, not a judgment. Our review is not affected by this obvious misstatement, *see* WIS. STAT. RULE 805.18(1) ("The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.") (made applicable to appellate procedures by WIS. STAT. RULE 809.84), but we caution counsel to be more careful in the future.

reported that she was having "pain in her shoulder" caused "by sleeping on her shoulder" the night before. According to Sanchez, she did not tell him that the pain stemmed from an earlier "wanding" injury. She worked for a few hours on October 18, 2004. On October 19, 2004, her doctor told her that she should not return to work because she complained of "extreme pain in the right arm and right neck and also numbness and tingling and loss of strength in the right arm." The doctor ordered physical therapy for her.

¶3 In June of 2005, Montgomery applied for worker's compensation, claiming that she: "Injured Neck/Shoulder while wanding at work in August 2004. Pain increased and she was forced to miss work starting October 19, 2004."[2] At the start of the hearing in February of 2007, the administrative law judge said:

> There were 2 injury dates here, one was August 16th, 2004 and the other October 18th, 2004. At issue is whether the injury arose out of or incidental to the work for the respondent….
>
> First [of] all, [counsel for Montgomery,] is that an accurate and complete statement of the matters conceded and issues in dispute as far as your client's concerned?

Montgomery's lawyer answered: "It is with the exception that there -- we're not making a claim at this time for the shoulder." Montgomery's medical records were introduced at the hearing. The administrative law judge summarized the medical records:

[2] The "date-of-injury" box on the hearing-application form was left blank. In March of 2006, Montgomery's lawyer sent a letter asking that the hearing application "be amended to include a date of injury of August 16, 2004."

> She … sought treatment from the emergency room at St. Mary's Hospital. At that time she mentioned her work duties, but did not say she sustained a traumatic work injury. The emergency room doctor indicated that the applicant reported pain over the last week and diagnosed the condition as a cervical strain. The applicant sought treatment from Dr. T.A. O'Connor, her regular doctor. Again the applicant did not report a traumatic August 2004 injury....
>
> ... When the applicant first saw Dr. O'Connor on October 19, 2004 she gave a one week history of symptoms and no history of a traumatic injury. In his [medical report on the workers'-compensation form] WKC-16B of November 12, 2004, Dr. O'Connor indicated that the applicant suffered a traumatic injury on "October 18, 2004," …. In his WKC-16B of June 9, 2006, Dr. O'Connor then lists injury dates of August 16, 2004 and October 18, 2004. The applicant was referred to Dr. N. M. Reddy … for an independent medical evaluation. Dr. Reddy indicated that the applicant had a pre-existing cervical condition … [and] "she was at a higher risk to develop severe symptoms if there was an acute traumatic event such as the one in August 2004." The applicant was referred to Dr. Michael Mitchell[, who] opin[ed] that the claimed August 16, 2004 injury aggravated the pre-existing cervical disc disease. The applicant's treating surgeon was Dr. Michael Major … [who initially opined] that the applicant had degenerative cervical arthritis [but] could not say whether the work aggravated and accelerated the degenerative condition beyond normal progression. Initially he also lists the injury date as October 18, 2004. Later, he lists the claimed injury date of August 16, 200[4]. Permanent disability assigned by Dr. Major is 25 percent, with half due to the pre-existing condition and half due to the August 16, 2004 work injury. The applicant was also seen by Dr. Jack Deckard … [who] could not determine if any portion of the applicant's degenerative disc disease was work related. The applicant was seen by Dr. Theodore Bonner …. Dr. Bonner opined that he could not state to a reasonable degree of medical certainty that the applicant's cervical condition was work related. The applicant was also seen by Dr. Richard Karr, the respondent's independent medical examiner. Dr. Karr opined that the applicant suffered from degenerative cervical stenosis, which was not aggravated by her work.

¶4 During the hearing, Montgomery's lawyer asked her: "With regard to the information that was given in your statement, when you were asked about a specific event, in your mind is there one specific event that caused all of your problems including your neck that radiated down your arm?" Montgomery answered: "No." Her lawyer then asked: "It's not just 1 day that caused the problem?" to which Montgomery said: "Correct. Yeah."

¶5 The administrative law judge concluded that Montgomery had not proven she sustained either a traumatic injury on August 16, 2004, or an occupational injury on October 18, 2004. The Commission affirmed the administrative law judge, and, as we have seen, the circuit court affirmed the Commission.

II.

¶6 Montgomery claims that the Commission exceeded its authority by dismissing the occupational-injury theory of liability. She argues that she never raised that theory and her "due process rights" were violated because that claim was not properly "noticed for hearing" depriving her "of a full and fair hearing on that type of injury." (Uppercasing omitted.) The Record belies her claim.

¶7 On appeal, we review the decision of the Commission, not the circuit court. ***General Cas. Co. of Wisconsin v. Labor & Indus. Review Comm'n***, 165 Wis. 2d 174, 177 n.2, 477 N.W.2d 322, 323 n.2 (Ct. App. 1991). The Commission's factual findings are invulnerable when they are "supported by credible and substantial evidence." ***Id.***, 165 Wis. 2d at 178, 477 N.W.2d at 324. There is substantial evidence in the Record to support the Commission's decision that Montgomery's injury was not compensable; in fact, the Record reveals that there is little evidence to support her claim that a traumatic injury even occurred

on August 16, 2004. There was no report of the traumatic injury except Montgomery's claim that she told the person in charge, who, as we have seen, denied that. Montgomery continued to work and did not seek any medical treatment until two months later. When she did seek treatment, she did not mention the "pop" or pain from August 16th, but instead reported having pain during the week preceding her first seeking treatment. Further, Dr. Deckard, Dr. Bonner, and Dr. Karr opined that Montgomery suffered from degenerative disc disease not related to her work and not aggravated by her work. Thus, there is substantial credible evidence to support the Commission's decision.

¶8 As we have seen, Montgomery argues the Commission exceeded its authority by deciding an issue that she did not raise, namely the occupational-injury claim. Whether the Commission exceeded its authority and whether Montgomery's due-process rights were violated are legal questions subject to *de novo* review. *See* ***Waste Management Inc. v. Labor & Indus. Review Comm'n***, 2008 WI App 50, ¶8, 308 Wis. 2d 763, 770, 747 N.W.2d 782, 785–786. The Commission did not exceed its authority.

¶9 As noted, Montgomery's application for benefits references both the August (traumatic) and October (occupational) injury dates. At the start of the hearing, the administrative law judge indicated without objection that the hearing would cover both the August and October injury dates. Indeed, Montgomery's lawyer affirmatively acknowledged that the administrative law judge's statement of the hearing's scope was correct. During the hearing, both sides presented medical records referencing both dates. Montgomery testified that there was no one single date to which she could pin her alleged injury. Her doctor's report references involvement of both traumatic and occupational injury.

¶10 Montgomery has not shown, beyond mere assertion, that she was deprived of any due-process rights. As in criminal appeals, "[t]o simply label an alleged procedural error as a constitutional want of due process does not make it so." *See* ***State v. Schlise***, 86 Wis. 2d 26, 29, 271 N.W.2d 619, 620 (1978). Montgomery has not provided any evidence showing how she was harmed nor has she submitted anything indicating she was prevented from introducing additional evidence, or, significantly, what that evidence would have been. She has thus failed to show that she was prejudiced by the Commission's consideration of the date of the alleged occupational injury.[3]

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[3] This case is thus not like ***Waste Management Inc. v. Labor & Industry Review Commission***, 2008 WI App 50, 308 Wis. 2d 763, 747 N.W.2d 782, upon which Montgomery relies. There, we held that the employer's due-process rights were violated when the Commission ruled it had to pay for an occupational injury that the applicant had not asserted. ***Id.***, 2008 WI App 50, ¶11, 308 Wis. 2d at 772, 747 N.W.2d at 786. Indeed, in that case, the parties had stipulated at the start of the hearing that there was no occupational claim against Waste Management; thus, the issue was not litigated, and the Commission's order requiring Waste Management to pay for the unlitigated occupational injury violated Waste Management's due-process rights. ***Id.***, 2008 WI App 50, ¶10, 308 Wis. 2d at 771, 747 N.W.2d at 786. Here, of course, both of Montgomery's alleged injuries were declared, presented, and litigated.