

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 27, 2002

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. 01-2504

Cir. Ct. No. 00-CV-116

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

THOMAS L. KOEBERL,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
EMERSON ELECTRIC COMPANY, A FOREIGN
CORPORATION, D/B/A EMERSON MOTOR COMPANY
STURGEON BAY MOTOR PLANT,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Door County:
PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Thomas Koeberl appeals a judgment affirming a Labor and Industry Review Commission decision that denied certain disability benefits and future treatment expenses that he claimed resulted from a January 4,

1993, work injury. Koeberl argues that there is no legitimate doubt or contrary medical opinion related to his C6-7 disc pathology and its relationship to his work injury and that there is no legitimate doubt as to the causal relationship of his recurrent herniated disc at C5-6. Koeberl further argues that the commission erroneously ruled the surgery he seeks is a “prospective” future medical expense and that he remained in a healing period after surgery was canceled due to his employer’s refusal to pay. Because Koeberl fails to demonstrate grounds for overturning the commission’s determination, we affirm the judgment.

¶2 Koeberl claims disability from a work injury that occurred in January 1993. In January 1995, administrative law judge Mark Shore determined that Koeberl had sustained a right shoulder injury resulting in permanent partial disability at ten percent compared to amputation. He also found an injury to the cervical spine causing a herniation at C5-6, resulting in ninety weeks’ temporary total disability and permanent partial disability at five percent compared to disability to the whole body.

¶3 The cervical injury had two aspects: a cervical disc herniation that was treated surgically and plateaued by September 29, 1993, and cervicogenic headaches that developed from the surgery. Shore awarded medical expenses and retained jurisdiction to allow future awards for disability for the shoulder injury and loss of earning capacity for the cervical injury. No one appealed Shore’s decision.

¶4 Koeberl continued treatment for headaches and complaints affecting both arms. He claimed additional compensation, contending the work injury resulted in cervical disc herniations that caused problems in both arms and headaches. He claimed he needed additional cervical surgery that the employer

refused to provide. In addition to headaches, he claimed disability from continuing radicular symptoms into his arms from a disc problem at C6-7. He claimed he needed fusion surgery to correct symptoms related to his work injury.

¶5 Administrative law judge Joseph Schaeve conducted a hearing on these claims in January 2000 and denied claims for additional disability and medical expense. He did, however, retain jurisdiction for other issues, including those Shore left open earlier.

¶6 On review, the commission agreed in material part with Schaeve. It stated:

[T]here is no evidence of any radiculopathy from the right-side C5-6 disc herniation that is any greater than that already rated by Dr. Gruesen and ordered paid by ALJ Shore. Even Dr. Weinshel's opinions support that conclusion; he primarily associates the applicant's post-surgical radicular complaints with the C6-7 pathology. Further, given the credible opinion of IME Sluss noting that the first objective evidence of a C6-7 pathology was well after the injury, there is legitimate doubt that the left arm symptoms (and any C6-7 pathology) are related to the work injury. Dr. Weinshel himself had no explanation for the left arm symptoms. See exhibit 4, Weinshel note of July 29, 1998. Accordingly, no temporary disability may be awarded based on the C6-7 pathology, nor is the respondent liable for the medical expense incurred to treat that condition after July 28, 1998.

The commission apparently relied on Dr. Michael Sluss's opinion, which stated: "In addition, disc disease at C6-7, I believe was best documented a number of years after the injury and initial surgery and I would not regard this as being secondary to the injury."

¶7 The commission dismissed Koeberl's application, concluding that Sluss's opinion provided legitimate doubt that the disc disease at C6-7 was related

to the work injury. The commission also concluded that there was a lack of evidence of any radiculopathy from the C5-6 disc herniation that was any greater than that already ordered paid.

¶8 Koeberl appealed to the circuit court, which affirmed the commission's decision. The circuit court noted that Koeberl offered a logical and commonsense interpretation of all the medical diagnoses and opinions. The court concluded, however, that Koeberl's interpretation of the evidence had already been considered and rejected by the commission and, given the limited scope of judicial review, there were no grounds to overturn its decision. Koeberl appeals the judgment.

STANDARD OF REVIEW

¶9 As Koeberl acknowledges, our standard of review is narrow in scope. We review the commission's decision, not that of the trial court. ***Local 60 v. WERC***, 217 Wis. 2d 602, 607, 579 N.W.2d 59 (Ct. App. 1998). Our review is limited to determining whether (1) the commission acted without or in excess of its powers; (2) the order was procured by fraud; (3) the findings of fact do not support the order. WIS. STAT. § 102.23(1)(e).

¶10 The claimant has the burden of proving beyond a legitimate doubt all of the facts essential to recovery. ***Leist v. LIRC***, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994); ***Bumpas v. DILHR***, 95 Wis. 2d 334, 342-43, 290 N.W.2d 504 (1980). The determination of the nature and extent of disability are questions of fact. Findings of fact are conclusive on review if supported by credible and substantial evidence. WIS. STAT. § 102.23(6). The weight and credibility of medical testimony is to be decided by the commission. ***Semons Dept. Store v. DIHLR***, 50 Wis. 2d 518, 528-29, 184 N.W.2d 871 (1971). It is the commission's

function to reconcile inconsistencies or conflicts in testimony. *Valadzic v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 598, 286 N.W.2d 540 (1979); *Carr v. Industrial Comm’n*, 25 Wis. 2d 536, 539, 131 N.W.2d 328 (1964). We may not substitute our judgment for that of the agency as to the weight of credibility of the evidence on any finding of fact. *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989).

¶11 In examining the commission’s findings, our role is to review for credible and substantial evidence to support the commission’s determination, rather than to weigh opposing evidence. *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1096-97, 236 N.W.2d 255 (1975). “Substantial evidence is not a preponderance of evidence, but relevant evidence which a reasonable mind might accept as adequate to support a conclusion.” *Bretl v. LIRC*, 204 Wis. 2d 93, 100-01, 553 N.W.2d 550 (Ct. App. 1996).

DISCUSSION

1. The C6-7 disc pathology relationship to the work injury

¶12 Koeberl argues that the only medical opinions that address the existence of the C6-7 disc pathology document its relationship to the work injury. We conclude this argument overstates the record. The commission relied in part on Sluss’s statement that “disc disease at C6-7, I believe was best documented a number of years after the injury and initial surgery and I would not regard this as being secondary to the injury.”

¶13 Koeberl contends, nonetheless, that Schaeve and the commission ignored his own doctor’s statement that

Koeberl did have triceps weakness at that time which would be more likely from a disc problem at the C6-7 level If Mr. Koerberl did not obtain relief from the cervical operation and has discogenic neck pain and headaches then it is very likely that the C6-7 disc pathology at the present time is also related to the work accident of 1993. This pathology of C6-7 in addition to this pathology of C5-6 would help explain his persistent problems since the accident, along with the triceps weakness which did not respond to Dr. Gruesen's operation.

¶14 Koerberl also points to other evidence that supports his position. For example, he asserts that the first cervical X-ray showed slight narrowing of the disc space between C6 and C7 with a diagnosis of "possible disc disruption at C6 and C7" with pain and weakness in the triceps. He asserts that Dr. Robert Swanson stated that the triceps muscle is normally innervated by the seventh cervical nerve. Dr. Philip Yazbak noted that Koeberl's initial symptoms of right triceps weakness, pain and atrophy were inadequately addressed. Dr. Steven Weinshel, based upon the initial symptoms and lack of response following the C5-6 surgery, believed that C6-7 had been part of the initial injury and remained untreated.

¶15 In 1996, an MRI scan showed "small right lateral C6-7 disc protrusion, impinging upon the C7 nerve root in the neural foramen." A July 28, 1998, CT scan showed "evidence of a modest-sized right posterior disc protrusion at the C6-C7 level." Weinshel concluded: "The myelogram confirms that he has a C6-C7 right sided disc herniation and C5-6 right sided postoperative changes."

¶16 Koeberl claims that the best documentation of his injuries was made shortly after his work injury occurred and before the first surgery. Koeberl also claims that Sluss was unaware of the January 12, 1993, cervical X-ray showing evidence of "possible disc disruption at C6-C7." Koeberl argues that Sluss did not have adequate information from which to form his opinion.

¶17 Koeberl argues: “This court can evaluate and determine the credibility of this written statement [referring to Sluss’s] as competently as the Commission might.” He argues: “Would a trial judge in a personal injury case find such a statement standing alone sufficient to present to a jury? We think not.” He contends, without citation to authority, “The commission’s credibility finding based upon its reading of the written report in the absence of Sluss’[s] testimony should carry no more weight than this Court’s own reading of the same report.” He adds that “this Court can equally assess the credibility of Dr. Sluss based upon his written words which is the only thing that the Commission or this Court have to go on.”

¶18 Koeberl’s arguments misperceive our role on appeal. In order to accept Koeberl’s arguments, we would have to substitute our fact-finding for that of the commission, violating our standard of review. Our role is limited to review for credible and substantial evidence to support the commission’s determination, rather than to weigh opposing evidence. *Vande Zande*, 70 Wis. 2d at 1096-97. Where there are inconsistencies and conflicts in the evidence, it is the commission’s function to reconcile them. *Valadzic*, 92 Wis. 2d at 598. We may not substitute our judgment for that of the agency as to the weight of credibility of the evidence on any finding of fact. *Advance Die Casting*, 154 Wis. 2d at 249. Because the commission was entitled to rely on Sluss’s opinion that the C6-7 disc herniation was not a consequence of the work injury, we do not overturn its findings.

2. The causal relationship of the recurrent herniated disc at C5-6 and the work injury

¶19 Koeberl argues that there is no legitimate doubt as to the causal relationship of the recurrent herniated disc at C5-6 and the work injury. He

recounts a number of medical opinions to the effect that there is small right-sided disc herniation that is probably a recurrent disc herniation. Also, he quotes Sluss who stated that it is most appropriate to regard protruding disc disease at C5-6 as most likely arising from the work injury. Sluss stated in his August 4, 1999, report: “Dr. Weinshel’s recommendation for surgery on the right side is in a relatively minor part due to the industrial injury of 1993.”

¶20 Koeberl’s argument fails to advance reversible error. The commission does not dispute that the C5-6 disc herniation was related to the work injury. Instead, the commission concluded that there is no evidence of any radiculopathy from the right side C5-6 disc herniation that is any greater than that already rated by Dr. Robert Gruesen and ordered paid by Shore. Only when the evidence upon which the commission relied is incredible as a matter of law may we reverse its findings of fact. *See State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis. 2d 646, 659, 275 N.W.2d 668 (1979). Because Koeberl does not identify any proofs indicating the commission’s finding is incredible as a matter of law, we do not overturn its determination.

3. Payment of medical expenses and healing period

¶21 Koeberl argues that the commission erroneously ruled, as an alternative basis for denying his claim, that the surgery he seeks is a “prospective” future medical expense. He further contends that he remained in a healing period after surgery was canceled due to employer’s refusal to pay. He also claims that he is entitled to payment of medical expenses when he follows the advice of his physicians in good faith, despite any contrary defense doctor’s conclusion that the proposed treatment is unnecessary. Because these issues are not dispositive, we

need not address them. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

By the Court.—Judgment affirmed.

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

