

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

October 16, 1997

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0621

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SAYOOMPORN OSTRUM,

PLAINTIFF-RESPONDENT,

V.

**STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW
COMMISSION,**

DEFENDANT-CO-APPELLANT,

**ORE-IDA FOODS, INC., AND LIBERTY MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Reversed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. The State of Wisconsin Labor and Industrial Review Commission, Ore-Ida Foods and Liberty Mutual Insurance Co. appeal from a circuit court judgment setting aside a decision and order of the commission. For the reasons set forth below, we reverse the judgment.

The parties agree that on April 13, 1989, respondent Sayoomporn Ostrum suffered a work-related injury to her (dominant) left arm while performing her potato-trimming job at Ore-Ida. Ostrum consulted various doctors¹ and underwent various medical procedures, but was unable to work as of September 1990. Although Ostrum returned to work sporadically over the following few months, she suffered pain and continued to receive various treatments. She was placed on temporary total disability, and was subsequently discharged from Ore-Ida in mid-February 1992. The parties stipulated that as of February 11, 1992, Ostrum had reached her healing plateau. As of that date, Ostrum's temporary total disability ended, and she was determined² to have sustained a scheduled injury³ of "permanent partial disability of 100%, compared to amputation of the left arm at the shoulder." Accordingly, Ostrum received the scheduled benefit for loss of a left arm at the shoulder—500 weeks of benefits at the statutory compensation rate in effect at the time of her injury (\$125 per week).

¹ Doctors hired by both Ostrum and Ore-Ida conducted examinations.

² In the initial finding, an administrative law judge found Ostrum totally permanently disabled. However, on review, the commission found her to have a partial permanent disability.

³ Underlying this appeal is the issue of whether Ostrum has suffered a scheduled or non-scheduled injury. If her injury is scheduled, a predetermined "schedule," as set forth in § 102.52, STATS., defines Ostrum's compensation; if non-scheduled, Ostrum may be eligible for greater compensation because she is entitled to put forth proof of her loss of earnings capacity. See *Mednicoff v. DILHR*, 54 Wis.2d 7, 194 N.W.2d 670 (1972). Generally, injuries to the extremities, eyes and ears are scheduled, while trunk injuries and whole-body debilitations are non-scheduled. See, e.g., § 102.52. Recently the supreme court held loss of function of arm at the shoulder to be a scheduled injury. *Hagen v. LIRC*, 210 Wis.2d 12, 563 N.W.2d. 454 (1997).

Ostrum appealed to the circuit court, arguing that she was entitled to a greater benefit because she suffered non-scheduled injuries of her head and neck. The circuit court held that the commission exceeded its power because the commission adopted the diagnosis of Dr. Stanko—a doctor who testified at the proceeding⁴—which gave an ultimate diagnosis of 20% disability to the body as a whole. Since the commission rejected all other opinions, the circuit court held that it erred in concluding 100% permanent partial disability without medical substantiation. The circuit court set aside and remanded the commission’s holding.

The issue is whether the commission had sufficient grounds to conclude that Ostrum suffered the scheduled injury of 100% permanent partial disability comparable to an amputation at the left shoulder. In a review of a worker’s compensation case, we review the decision of the commission, not the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). We will set the factual findings aside only if: (1) the commission acted in excess of its powers; or (2) the award was procured by fraud; or (3) the commission’s findings do not support the order or award. Section 102.23(1)(e), STATS. We examine the entire record to determine whether there is substantial and credible evidence to support the findings, *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983), not whether there is evidence to sustain a finding not made, *Mednicoff v. DILHR*, 54 Wis.2d 7, 18, 194 N.W.2d 670, 675-76 (1971). If evidence exists on which reasonable people could rely in reaching the conclusion, we must affirm. *Princess House*, 111 Wis.2d at 54, 330 N.W.2d at 173-74.

⁴ Dr. Stanko was hired by Ostrum.

Ostrum stipulates to the facts as set forth in the appellants' briefs. However, she argues that the standard of review for issues of fact does not apply here, because the issue presented is one of law—whether the commission was justified in making the legal conclusion that her injuries are scheduled rather than non-scheduled. Ostrum therefore argues for *de novo* review.

Under long-established Wisconsin law, the extent of an injury is a question of fact, not of law. *Sheehan v. Indus. Comm'n*, 272 Wis. 595, 602, 76 N.W.2d 343, 347 (1956). As Ostrum acknowledges, a finding that injuries are non-scheduled would arise from a finding that the effects of loss of a body part extend to other parts of the body and interfere with their efficient use, such as a missing leg causing shooting pains in the rest of the body. *Mednicoff*, 54 Wis.2d at 15, 194 N.W.2d at 674 (citations omitted). Yet, whether Ostrum's loss of function of her left arm affects the body more extensively is a determination of the extent of her injuries, and hence a finding of fact.

This analysis is bolstered by the supreme court's holding in the recent case of *Hagen v. LIRC*, 210 Wis.2d 12, 563 N.W.2d 454 (1997). *Hagen*, like Ostrum, argued that she suffered both scheduled and non-scheduled injuries. In rejecting her argument, the supreme court characterized the commission's findings regarding the extent of *Hagen's* disability as a "factual determination." *Id.* at 23, 563 N.W.2d at 459. Therefore, we reject Ostrum's argument that the commission's holding was a legal one entitled to *de novo* review.

Ostrum argues that, although the commission has the power to accept some medical opinions and reject others, it is not entitled to reject all opinions but Dr. Stanko's, and then accept only parts of his opinion, with the result that the commission's ultimate determination of 100% permanent partial

disability comparable to amputation at the left shoulder is not based on any medical testimony.

Appellants argue that the commission is entitled to accept some medical opinions, and reject others, and is entitled to reconcile inconsistencies in any medical opinion. Dr. Stanko's opinions are internally inconsistent, but on the whole, support the commission's findings. As a consequence, the commission did not err in finding Ostrum's injury a scheduled injury.

We agree with appellants. Dr. Stanko opined that Ostrum was disabled "20% as compared to the body as a whole," and he made a diagnosis of thoracic outlet syndrome, which may involve the head and neck. However, in functional terms, he opined that Ostrum suffered "left arm dysfunction" and that her "right arm is pretty good, [but] the left arm is totally nonfunctional."

The commission is entitled to draw reasonable inferences from ambiguous medical testimony. *See, e.g., Universal Foundry Co. v. DILHR*, 82 Wis.2d 479, 489-90, 263 N.W.2d 172, 177-78 (1978) (court inferred required comparison to total disability from doctor's statements); *Consolidated Papers, Inc. v. DIHLR*, 76 Wis.2d 210, 222, 251 N.W.2d 69, 75 (1977) (cause of death inferred from doctors' statements). Further, to the extent inconsistency exists in medical expert reports, it is the commission's function to reconcile them, and determine which is entitled to credence. *Hinch v. Indus. Comm'n*, 260 Wis. 47, 49, 49 N.W.2d 714, 715 (1951).

The commission was entitled to resolve the inconsistencies in Dr. Stanko's testimony and determine that, because Ostrum's left arm was non-functional, she sustained a scheduled injury corresponding to 100% permanent partial disability comparable to amputation at the left shoulder. Once reconciled,

Dr. Stanko's opinions comprise substantial and credible evidence which could support the findings, and we must therefore affirm.

By the Court.—Judgment reversed.

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

