

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

July 10, 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. 96-2603**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**MARK N. STACH,**

**PETITIONER-APPELLANT,**

**v.**

**LABOR AND INDUSTRY REVIEW COMMISSION,  
GATEWAY FOODS, INC., AND NATIONAL UNION FIRE  
INSURANCE COMPANY,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Monroe County:  
STEVEN L. ABBOTT, Judge. *Affirmed.*

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

PER CURIAM. Mark Stach appeals from an order affirming a decision of the Labor and Industry Review Commission. The commission denied Stach's application for worker's compensation benefits because it determined that

inconsistencies existed regarding the date and cause of his injury, leaving a legitimate doubt that it was work-related. Because the commission's findings of fact are supported by substantial evidence, we affirm.

Stach worked as a pallet-sorter at Gateway Foods. He had a history of job-related back injuries in 1982 and 1991. On June 24, 1993, he took a break at work and required assistance to return to his feet, because he felt pain in his neck area. He finished his shift, returned home and arranged for an appointment with a chiropractor, Dr. David Bentz. Dr. Bentz treated Stach on June 9, 1993, and between June 24, 1993 and June 30, 1993, initially noting that Stach's pain had increased since lifting rocks on a farm field a few weeks ago. Dr. Bentz's final report indicated that the date of onset for the injury occurred in 1991.

On June 29, 1993, Stach went to the Skemp Walk-In Clinic, and was prescribed with muscle relaxants by Dr. Benson, after reporting continual pain for two weeks. After losing movement in his right foot and feeling numbness in his legs that evening, Stach returned to the clinic the next day, and told Dr. Robinson that he had been "picking stones" a week before the symptoms began. He was admitted that day to St. Francis Medical Center for neurologic deficits in his extremities.

At the hospital, Dr. Robert Gunnink provided a neurological consultation. His consultation note stated that "he (Stach) does not recall any trauma other than falling and landing on his tailbone at the end of May." Dr. Gunnick's report stated that the onset of Stach's injury occurred on June 24, 1993.

Further testing revealed a herniated disc at C5-6, which resulted in surgery being performed on June 30, 1993, by Dr. B.L. Annis. When Stach awoke, he could not use his legs, arms or hands. Stach regained movement of his

extremities after months of intensive therapy, and was able to return to work in December of 1993. Dr. Annis' report indicated that June 24, 1993, was the onset date for Stach's injury. However, like Dr. Bentz's report, it described Stach's injury in 1991 as the event triggering the need for surgery.

On July 13, 1993, Stach made his first report to Gateway Foods indicating he had suffered a work-related injury. Stach continued having pain in his upper extremities, sexual dysfunction and parasthesia in his fingers, which resulted in another surgery on November 30, 1994, for C5-6 corpectomy (vertebral procedure) with C4 through 7 fusion with anterior plating.

Stach returned to work in January of 1995, and on January 25, 1995, saw an independent medical examiner, Dr. Richard Kokemoor. Dr. Kokemoor concluded that Stach's disc herniation did not directly or indirectly result from his work activity on June 23, 1993 or June 24, 1993, and that his "picking stones" or the cervical manipulations of Dr. Bentz most likely aggravated a preexisting condition.

Stach sought worker's compensation benefits, claiming that his neck injury arose from his employment activities on June 24, 1993. The administrative law judge (ALJ) ruled against Stach, finding Dr. Kokemoor's report the most credible medical evidence, and that a legitimate doubt existed as to what traumatic event caused the injury.

The commission affirmed the ALJ, noting that Stach's physicians were unable to agree on a date of injury, that two of their reports indicated that Stach related his physical complaints on June 24, 1993, to "picking stones," and that Stach had made no mention of a work-related injury when he began treatment on June 24, 1993.

On appeal, our standard of review is the same as that of the circuit court. *Boynton Cab Co. v. DILHR*, 96 Wis.2d 396, 405, 291 N.W.2d 850, 855 (1980). The commission's order must be affirmed unless, *inter alia*, the commission's findings of fact do not support the order. Section 102.23 (1)(e)3, STATS. It is the function of the department, and not of this court, to determine the credibility of evidence or witnesses, and it is for the department to weigh the evidence and decide what should be believed. *E.F. Brewer v. DILHR*, 82 Wis.2d 634, 636-37, 264 N.W.2d 222, 224 (1978). Conflicts in testimony of medical witnesses are to be resolved by the department. *Id.* at 637, 264 N.W.2d at 224..

The cause of Stach's neck injury presents a question of fact. *See Manitowoc County v. DILHR*, 88 Wis.2d 430, 437, 276 N.W.2d 755, 757 (1979). The role of this court is to review the record to locate credible and substantial evidence which supports the commission's determination, rather than weighing the opposing evidence. *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975). The court may reverse the commission if the order "depends on any material and controverted finding that is not supported by credible and substantial evidence." Section 102.23(6), STATS. Substantial evidence is "evidence that is relevant, probative, and credible, and which is in a quantum that will permit a reasonable fact-finder to base a conclusion upon it." *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983).

Stach had the burden of proof to establish that he sustained a work-related injury. *Bumpas v. DILHR*, 95 Wis.2d 334, 342, 290 N.W.2d 504, 507 (1980). The commission has a "duty" to deny a claim "if it finds that a legitimate doubt exists regarding the facts necessary to establish a claim." *Id.* (quoting *Erickson v. DILHR*, 49 Wis.2d 114, 118, 181 N.W.2d 495, 497 (1970)).

Stach challenges the commission's findings, claiming that they were not based on credible and substantial evidence. Specifically, Stach contends that Dr. Kokemoor's opinion was not credible, because it was completely discredited by other evidence and testimony including Dr. Bentz's report, and the testimony of Stach and his brother.

Dr. Kokemoor's report expressed his medical opinion that Stach had a preexisting condition that was aggravated by either his "picking stones" or the cervical manipulations of Dr. Bentz, but not by his employment activities on June 23, 1993 and June 24, 1993. This is relevant, probative and credible evidence upon which a reasonable fact-finder may base a conclusion. *See Princess House*, 111 Wis.2d at 54, 330 N.W.2d at 173. We may not weigh the credibility of the medical evidence and other testimony that contradicts Dr. Kokemoor's opinion as Stach asks us to do. *See E.F. Brewer Co.*, 82 Wis.2d at 637, 264 N.W.2d at 224.

The commission also found inconsistencies in the record that provided a legitimate doubt as to the facts necessary to establish Stach's claim. These included the inability of his physicians to agree on a date of injury, Stach's own relation of his physical complaints to "picking stones," and his failure to mention a work-related injury when treatment began on June 24, 1993. This court cannot substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact that is supported by substantial and credible evidence. Section 102.23(6), STATS.

We conclude that credible and substantial evidence supports the commission's findings that Stach did not suffer a compensable injury.

*By the Court.*—Order affirmed.

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

