COURT OF APPEALS
DECISION
DATED AND FILED

January 11, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-0266

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

LINDA PREMEAU,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, NITE CAP INN AND MILWAUKEE MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Linda Premeau appeals from an order affirming a decision by the Labor and Industry Review Commission on her worker's compensation claim. The issues are whether Premeau should have been provided

with a copy of a surveillance videotape before the hearing, whether the hearing should have been adjourned to allow her physician to respond to the videotape, and whether there is credible evidence to support the commission's findings rejecting Premeau's claims. We affirm.

¶2 Premeau first argues that the administrative law judge (ALJ) erred by admitting a surveillance videotape of Premeau. The videotape was made without her knowledge, and shows her performing various tasks. Premeau argues that a copy of the tape should have been provided to her before the hearing, under WIS. ADMIN. CODE § DWD 80.24, as a "statement … taken by a recording device." The commission concluded that admission of the videotape was proper, although it did not directly address her argument based on the above code provision.

¶3 On appeal, the parties disagree over the degree of deference we should give to the commission's conclusion on admission of the videotape. Premeau argues that the commission's "interpretation" of WIS. ADMIN. CODE § DWD 80.24 is entitled to no deference because the commission did not actually interpret that section or otherwise directly respond to her argument. The commission concedes that it only "implicitly" rejected her argument, although it still argues for deferential review. However, we need not decide the appropriate standard of review, because even if we were to review the issue *de novo*, we would reach the same conclusion as the commission.

¶4 Premeau's argument is that the videotape was a "statement" taken by a recording device. To establish that the videotape was a statement, she argues that we should apply the definition of "statement" provided in the hearsay statute,

WIS. STAT. § 908.01(1) (1999-2000).[1] That definition includes "nonverbal conduct of a person, if it is intended by the person as an assertion." Premeau's actions on the videotape include a variety of chores in a farm or ranch setting. She does not provide a convincing description of how this conduct was intended by her as an assertion. Her briefs offer only conclusions such as "[i]t was assertive of activity" and "the act of walking is assertive of the fact that someone is walking." Considering that Premeau did not even know she was under observation, we conclude that the videotape was not an assertion by her and therefore not a statement that must have been disclosed under WIS. ADMIN. CODE § DWD 80.24.

¶5 Premeau next argues that the ALJ erred by failing to continue the hearing to allow her physician to respond to the videotape. She offers no legal support for this argument, other than an appeal to "public policy and rules of fair play." A decision to adjourn the hearing is within the discretion of the Department of Workforce Development. WIS. STAT. § 102.17(1)(a). Premeau has not established that the ALJ erroneously exercised his discretion by not adjourning this hearing. Premeau could have chosen to have her physician present at the hearing.

¶6 Finally, Premeau argues that the evidence does not support the findings made. On appeal, we review the decision of the commission, not the circuit court. *See* ***Liberty Trucking Co. v. DILHR***, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). Our standard of review for factual issues is established by WIS. STAT. § 102.23(6). That statute provides that we may set aside the commission's order if it depends on any material and controverted finding of fact

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that is not supported by credible and substantial evidence. That statute is a relatively recent addition to unemployment compensation practice, but the supreme court has held that it did not make a substantive alteration to the standards of review expressed in earlier judicial opinions. ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 53-55, 330 N.W.2d 169 (1983). "Substantial" evidence is that which is "relevant, probative, and credible, and which is in a quantum that will permit a reasonable factfinder to base a conclusion upon it." ***Id.*** at 54. We will affirm a finding even if it is contrary to the great weight and clear preponderance of the evidence. ***Eastex Packaging Co. v. DILHR***, 89 Wis. 2d 739, 745, 279 N.W.2d 248 (1979). We may not substitute our judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. WIS. STAT. § 102.23(6); ***Princess House***, 111 Wis. 2d at 54.

¶7 The evidence before the ALJ included medical opinions from Premeau's treating physician and from a physician retained by her employer and its insurer. It also included the videotape we described above, and evidence of Premeau's past attempts to claim disability benefits. In the ALJ's decision, he appears to have relied entirely on the videotape to conclude that Premeau "is not as disabled as she claims she is." The commission's decision adopted the findings of the ALJ, and also included a memorandum opinion.

¶8 On appeal, Premeau argues that our review should be confined to the findings made by the ALJ, and that we should not consider the additional findings of the commission, because the commission did not expressly "modify" the ALJ's findings. Premeau offers no legal support for this argument, and we are aware of none. The argument is an excessively technical one that would elevate the form of

the commission's decision over its substance. We will review the findings contained in the commission's memorandum decision.

¶9 Premeau argues that the commission's findings, like the ALJ's, were based solely on the videotape. This is a mischaracterization of the commission's memorandum decision. The decision includes three lengthy sentences summarizing the conclusions of the employer's physician, Dr. Brown, and a sentence noting that Premeau's treating physician may not have been aware of her prior complaints and treatments. The commission then states that it "credits Dr. Brown's assessment" of the injuries and restrictions that Premeau suffers as a result of her work injury. Although the commission also discussed the videotape, its decision was not based on that alone.

¶10 Premeau argues that the commission erred by agreeing with the ALJ that the videotape shows she is not as disabled as she claims. However, even if we were to conclude that the commission misinterpreted the content of the videotape, we would nonetheless affirm. Without the videotape, the commission would still have been forced to resolve the disagreement between the medical opinions of the two physicians. In its memorandum decision, the commission stated that the videotape was contrary to Premeau's own testimony about the extent of her disability, but the commission did not state that the videotape contradicted any specific medical conclusion offered by Premeau's physician. In other words, it does not appear that the commission used the videotape as a significant basis in deciding which *medical* testimony to rely on.

¶11 The commission ultimately chose to rely on the employer's physician. It offered a reason for doing so, specifically, a concern that Premeau's treating physician was not aware of all the relevant history. This is a reasonable

basis to choose between the competing opinions. The standard of review on factual issues, as we discussed above, is highly deferential. The evidence of the opinion held by the employer's physician is credible and substantial evidence, and the commission does not appear to have relied significantly on the videotape in deciding whether to believe that evidence. Therefore, even if the commission erred in its interpretation of the videotape, we would affirm.

By the Court.—Order affirmed.

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