COURT OF APPEALS
DECISION
DATED AND FILED

January 10, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1546

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

JEFFREY R. LARSON,

PLAINTIFF-APPELLANT,

V.

KIMBERLY CLARK CORPORATION, LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jeffrey R. Larson appeals from the circuit court order affirming the decision of the Labor Industry Review Commission. Larson argues on appeal that the decision should be reversed because the Commission

acted in excess of its powers when it reversed the determination of the administrative law judge (ALJ) which found Larson to be permanently and totally disabled. Because we conclude that Larson has not established that the Commission's determination was not supported in the record, we affirm.

¶2 Larson injured his back on June 6, 1995, while he was working as a truck driver for Kimberly Clark Corporation. He underwent quite a lot of medical treatment over the course of the next few years. The ALJ determined that Larson was "odd lot" permanently and totally disabled. His employer appealed the determination to the Commission.

¶3 The Commission set aside the ALJ's determination and determined instead that Larson had sustained a sixty-five percent loss of earning capacity attributable to the injury. The Commission found that "[d]espite continuing treatment, no physician assessed a permanent disability rating or permanent restrictions attributable to the applicant's low back injury." The Commission further found that the medical experts had referred to other factors besides the injury as having affected Larson's condition. These factors included Larson's obesity and general deconditioning as well as psychological factors. The Commission further inferred Larson's "unwillingness to make a reasonable effort at returning to full-time employment." The Commission concluded that the work injury did not result in any permanent disability to Larson's back.

¶4 This court reviews the decision of the administrative agency and not the circuit court. ***Wis. PSC v. PSC***, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). We may "set aside the commission's order or award ... if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence." WIS. STAT.

§ 102.23(6) (1999-2000);[1] ***Gen. Cas. Co. v. LIRC***, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991). "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." ***Cornwell Pers. Assocs., Ltd. v. LIRC***, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (Ct. App. 1993). We will construe the evidence most favorably to the Commission's findings of fact, ***id.***, and we may not overturn the Commission's order if there is credible evidence "sufficient to exclude speculation or conjecture." ***Gen. Cas.***, 165 Wis. 2d at 179.

¶5 Larson argues that the Commission improperly applied the "odd-lot" doctrine to his case. "[T]he 'odd-lot' doctrine is a rule of evidence, and, once the claimant *prima facie* proves 100 percent disability upon the basis of future unemployability, the burden is upon the employer to rebut that *prima facie* showing and to demonstrate 'that some kind of suitable work is regularly and continuously available to the claimant.'" ***Balczewski v. DILHR***, 76 Wis. 2d 487, 497, 251 N.W.2d 794 (1977) (citations omitted).

¶6 Larson argues that since he introduced evidence that he was permanently and totally disabled, the burden was then on the employer to show that there was work available in the community. The Commission concluded, however, that Larson was not permanently and totally disabled.

> [I]n the employment of the odd-lot doctrine for nonscheduled industrial injuries ... the crucial factor in establishing permanent total disability [is] proof of total and permanent impairment of earning capacity. Our appellate courts have held that the agency's "determination of the disability, its cause, its extent, or duration ... [is] conclusive [on courts] if supported by credible evidence."

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

> If evidence of the degree of physical disability coupled with other factors "such as mental capacity, education, training, or age, establish *prima facie* that the employee will be unable to obtain regular and continuous employment and is therefore in the 'odd-lot' category." The burden then switches to the employer to show regular and continuous employment is available.

Advance Die Casting Co. v. LIRC, 154 Wis. 2d 239, 251-52, 453 N.W.2d 487 (Ct. App. 1989) (citations omitted). The Commission found in this case that Larson did not establish permanent and total disability as a result of his work-related injury. Since Larson did not meet the initial burden, the burden did not then switch to the employer.

¶7 In this appeal, Larson has not met his burden of establishing that there was no evidence to support the Commission's finding or that the evidence was so lacking that no reasonable person could reach a decision based on it. ***Id.*** at 249-50. Therefore, we affirm the Commission's decision.

By the Court.—Order affirmed.

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