

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 22, 2009**

David R. Schanker  
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. 2008AP2908**

**Cir. Ct. No. 2008CV515**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**RURAL MUTUAL INSURANCE COMPANY,**

**PLAINTIFF-APPELLANT,**

**J & J RENTALS & CONSTRUCTION,**

**INVOLUNTARY-PLAINTIFF,**

**v.**

**LABOR AND INDUSTRY REVIEW COMMISSION,**

**DEFENDANT-RESPONDENT,**

**JAVIER RAMOS,**

**DEFENDANT.**

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APPEAL from an order of the circuit court for Dane County:  
SHELLEY J. GAYLORD, Judge. *Affirmed.*

Before Vergeront, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Rural Mutual Insurance Company appeals from the order of the circuit court that affirmed the decision of the Labor & Industry Review Commission that Javier Ramos was permanently and totally disabled. Rural Mutual argues that the Commission erred when it made this determination because its factual findings were based on speculation and not credible evidence. Because we conclude that there was credible and substantial evidence to support the Commission's findings, we affirm.

¶2 Ramos was injured when he fell approximately 25-30 feet from a roof on which he was working. In 2007, an administrative law judge determined that Ramos had a fifty-five percent loss of earning capacity, but that he was not permanently and totally disabled. The Commission reversed this decision and concluded that Ramos was permanently and totally disabled. Rural Mutual appealed to the circuit court, and the circuit court affirmed the Commission's decision. Rural Mutual appeals.

¶3 We review the Commission's decision, not that of the circuit court. *Applied Plastics, Inc. v. LIRC*, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984). We uphold the Commission's findings of fact so long as they are supported by credible and substantial evidence. *Id.*; WIS. STAT. § 102.23(6) (2007-08).<sup>1</sup> We do not substitute our judgment for the Commission's in considering the weight or 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

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(1989); WIS. STAT. § 102.23(6). We may not set aside the Commission’s decision even if it is not supported by the preponderance or is against the great weight of the evidence. *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 636, 264 N.W.2d 222 (1978). We do, however, set aside the Commission’s order if that order “depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.” WIS. STAT. § 102.23(6).

¶4 Rural Mutual argues that we should set aside the Commission’s findings because there was no credible or substantial evidence from which the Commission could find that Ramos was totally and permanently disabled. In its first brief, Rural Mutual appears to suggest that the Commission erred because it did not specifically delineate which portion of Ramos’s disability was attributable to his unscheduled injury. However, in its reply brief, Rural Mutual clarifies that its argument is that the Commission relied on mere conjecture or speculation in making its determination. Specifically, Rural Mutual asserts that the Commission relied on opinions that did not distinguish which of the injuries were scheduled or unscheduled, that it relied on a medical opinion that did not assess any permanent disability, and that it credited a medical opinion even though that opinion “entered the realm of vocational opinion.” Rural Mutual is arguing, in essence, that we should not accept the Commission’s findings. Our standard of review does not permit this unless the findings are not supported by credible and substantial evidence.

¶5 Permanent disability benefits are divided into two categories: scheduled and unscheduled injuries. *Secura Ins. v. LIRC*, 2000 WI App 237, ¶6, 239 Wis. 2d 315, 619 N.W.2d 626. Scheduled injuries require that payments be made for a specific number of weeks, while benefits for an unscheduled injury last a lifetime. *Id.*, ¶¶6-7. Injuries to the back and mental health injuries are

considered unscheduled. *Id.*, ¶7. When a worker has both scheduled and unscheduled injuries, an “ascertainable portion” of the total disability must be attributable to the unscheduled injury in order for him or her to receive total and permanent disability benefits. *Id.*, ¶20. Consequently, we must search the record to determine whether the Commission properly found an “ascertainable portion” of Ramos’s disability was attributable to his back and mental health injuries.

¶6 We conclude there was credible and substantial evidence that Ramos sustained a permanent and total disability. Experts on both sides opined that Ramos had unscheduled injuries to his back, limiting his capacity to lift. Rural Mutual’s expert concluded that as a result of his back injury, Ramos was restricted to a permanent twenty pound lifting restriction. Further, there was evidence that Ramos had mental health injuries. Ramos’s psychiatrists stated that Ramos sustained permanent psychological injuries that contributed to his overall total disability, and Rural Mutual’s expert also said that Ramos suffered from depression and post-traumatic stress disorder as a result of his accident. We conclude that this evidence established a sufficient allocation to the unscheduled injuries to support the Commission’s decision.

¶7 Rural Mutual also challenges the opinion of two experts who stated that Ramos was unable to work as a result of his unscheduled injuries. Rural Mutual argues that the Commission should not have relied on the opinions of the expert doctors because the opinions were vocational and not medical. We disagree and conclude that the Commission was free to consider these opinions. *See Bituminous Casualty Co. v. DILHR*, 97 Wis. 2d 730, 736-37, 295 N.W.2d 183 (Ct. App. 1980) (while an employment expert can establish lost earning capacity, no such expert is required under our case law).

¶8 Rural Mutual also argues that the Commission erred when it relied on a medical opinion that declined to assess permanent disability or work restrictions for psychological injuries. The Commission inferred that the doctor declined to answer because he believed he was being asked to assess physical disability and his area of expertise was psychological injuries. There is nothing improper about this inference. Accordingly, the Commission was entitled to credit the opinion.

¶9 Rural Mutual's last argument is that the Administrative Law Judge's decision was based on credible and substantial evidence, and the Commission should have affirmed it. However, we review the Commission's decision, and we have concluded that the Commission did not err when it determined that Ramos was totally and permanently disabled. Consequently, we do not further address this argument.

*By the Court.*—Order affirmed.

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

