

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

August 22, 1995

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.

**NOTICE**

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

**No. 95-0025**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**ST. JOSEPH'S HOSPITAL,**

**Petitioner-Appellant,**

**v.**

**LABOR AND INDUSTRY REVIEW COMMISSION,  
GREGORY OTIS SCOTT,**

**Respondents-Respondents.**

APPEAL from an order of the circuit court for Milwaukee County:  
ARLENE D. CONNORS, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. St. Joseph's Hospital (the Hospital) appeals from an order of the trial court affirming an order of the Labor and Industry Review Commission (the Commission) which awarded Gregory Otis Scott temporary disability benefits totaling \$11,603.20 for the period of January 1, 1991, through August 26, 1992, plus \$2,900.80 in attorney fees, and indemnity for future medical treatment. The issue is whether there is credible and substantial

evidence to support the Commission's conclusion that Scott sustained a temporary disabling injury during his employment, entitling him to disability benefits.

We conclude that the Commission's determination to award Scott temporary disability benefits was supported by credible and substantial evidence in the record and applicable law. Therefore, we affirm the trial court's order.

On June 16, 1990, Gregory Otis Scott slipped and fell on his buttocks when placing a "wet floor" sign in a hallway at St. Joseph's Hospital where he worked as a housekeeping aide. He went to the emergency room and a physician diagnosed him with "acute low back strain." The physician noted that there was "no radiculopathy to legs." Scott filled out an "Employee Incident Report" on that same day. Two days later, Scott told the Hospital he could not work. He began seeing his family physician, Dr. David Amos, for medical care. In August 1990, Dr. Amos referred him to Dr. William McDevitt, an orthopedic surgeon. Dr. McDevitt ordered a lumber spine CT scan which indicated a bulging disc at the L5-S1 spinal level. Dr. McDevitt prescribed physical therapy and told Scott he could return to work. Scott became dissatisfied with Dr. McDevitt's care and began seeing Dr. Michael Major, also an orthopedic surgeon, for treatment. Dr. Major ordered a lumbar myelogram and a post-myelogram CT scan which indicated a central-right disc bulge at L5-S1 and degenerative disc disease at that same level and at the L4-5 level. Dr. Major diagnosed Scott with degenerative disc disease with an acute herniation at the L5-S1 level resulting from his injury at the hospital and recommended surgery. The Hospital denied payment for Scott's surgery based upon Dr. McDevitt's opinion that surgery was necessary to correct pre-existing degenerative problems, not the injury he sustained during his fall while at work.

Scott then received a hearing before an administrative law judge (ALJ). In its interlocutory order, the ALJ adopted Dr. Major's findings and diagnoses concerning Scott's medical condition, concluding that they were more compelling than Dr. McDevitt's. The ALJ then ordered the Hospital to pay Scott temporary total disability benefits, all costs and indemnity related to cure him of the effects of his injury. The Hospital sought review with the Commission, which affirmed and adopted the ALJ's decision and findings. The Hospital then

petitioned the circuit court to review the Commission's order. The circuit court issued an order affirming the Commission's decision, from which the Hospital now appeals.

## STANDARD OF REVIEW

“Judicial review of administrative determinations is purely statutory.” *F.F. Mengel Co. v. Check*, 147 Wis.2d 666, 669, 433 N.W.2d 651, 652 (Ct. App. 1988). Section 102.23 (1)(a), STATS., states: “The order or award granting or denying compensation, either interlocutory or final ... is subject to review only as provided in this section ....” Our scope of review is set forth in § 102.23 (6), STATS.: “The court may ... set aside the commission's order or award and remand the case to the commission 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.” See also *General Casualty Co. v. LIRC*, 165 Wis.2d 174, 178, 477 N.W.2d 322, 324 (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 Personnel Assocs. v. LIRC*, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993). We will uphold this credible and substantial evidence as supporting the Commission's findings of fact even if it is “against the great weight and clear preponderance of the evidence.” *General Casualty Co.*, 165 Wis.2d at 178, 477 N.W.2d at 324. We may not overturn a commission's order if there is credible evidence “sufficient to exclude speculation or conjecture ....” *Id.* at 179, 477 N.W.2d at 324. Also, we will construe this evidence most favorably to the Commission's findings of fact. See *Cornwell*, 175 Wis.2d at 544, 499 N.W.2d at 708.

Upon reviewing the record, and in construing the evidence in a light most favorable to the Commission's findings of fact, see *id.*, we conclude that credible and substantial evidence supported the Commission's finding that Scott's injury caused an acceleration of a pre-existing degenerative disc condition “beyond its normal progression” and that fusion surgery was necessary to correct the problem. The Commission detailed in its memorandum decision its reasons for concluding that Dr. Major's medical opinion was more compelling and credible than Dr. McDevitt's: (1) Scott was asymptomatic prior to his fall and, even during his treatment with Dr. McDevitt, his condition continued to deteriorate; (2) Dr. McDevitt released him to work but without the necessary physical restrictions; and (3) Dr. McDevitt stated that activity could

cause his injury to worsen and therefore Scott's lack of immediate leg pain was not decisive. The above findings were credible and substantial evidence for the Commission to rely on in reaching its decision.

Additionally, while the Hospital argues that Dr. McDevitt's diagnosis was more reliable than Dr. Major's, it is the Commission's function to resolve conflicting evidence. See *L & H Wrecking Co. v. LIRC*, 114 Wis.2d 504, 509, 399 N.W.2d 344, 347 (Ct. App. 1983). We will not weigh the two physicians' testimony in this matter, and we cannot substitute our own judgment of conflicting medical testimony in place of that of the Commission. See *General Casualty Co.*, 165 Wis.2d at 178, 477 N.W.2d at 324. Accordingly, we determine that Dr. Major's testimony as to his opinion of Scott's medical condition was "relevant, credible, probative, and of a quantum upon which" the Commission could base its opinion. *Cornwell*, 175 Wis.2d at 544, 499 N.W.2d at 707. As such, the Commission's order was not based on mere conjecture or speculation; therefore, we may not overturn it. See *General Casualty*, 165 Wis.2d at 179, 477 N.W.2d at 324. Accordingly, we affirm.

*By the Court.* – Order affirmed.

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