

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 7, 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

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No. 95-1023-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CLARK ANDERSON,

Plaintiff-Appellant,

v.

**STATE OF WISCONSIN,
LABOR AND INDUSTRY
REVIEW COMMISSION,**

Defendant-Respondent,

**QUAD GRAPHICS, INC. and
HOME INSURANCE COMPANY,**

Defendants.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL P. SULLIVAN, Judge. *Reversed and cause remanded for further
proceedings consistent with this opinion.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Clark Anderson appeals from the circuit court's order affirming a decision of the Labor and Industry Review Commission. The issue is whether there is credible and substantial evidence to support the commission's finding that Anderson's jaw problems were not causally related to his compensable work injury. Pursuant to this court's order dated May 10, 1995, this case was submitted to the court on the expedited appeals calendar. See RULE 809.17, STATS. Upon review of the briefs and the record, we reverse the commission's decision.¹

Clark Anderson worked as a machine operator and packer for Quad Graphics. He injured his back at work on March 5, 1991. He received temporary total disability from March 5, 1991, until May 4, 1992. He received temporary partial disability from June 21, 1992, until October 4, 1992. At that point, he received a permanent partial disability rating of fifteen percent.

On April 23 and May 3, 1991, Dr. James Stoll performed surgeries on Anderson's back. During each surgery, Anderson was given anesthesia through a ventilation tube in his mouth. On October 22, 1991, Dr. Howard An performed a third surgery on Anderson. Like before, Anderson was given anesthesia through a ventilation tube placed in his mouth. After complaining of jaw pain, Anderson was referred by Dr. An to Dr. Donald Czaplicki, a dentist. Dr. Czaplicki diagnosed Anderson with a temporomandibular joint dysfunction (TMJ).

Anderson filed for worker's compensation benefits based on the problems with his jaw. He contended that the TMJ problem was caused or aggravated by the surgeries he had. At the hearing on the application, Anderson testified that when he awoke after each surgery, his jaws were stiff and caused him pain. He testified that he told the doctor and nurses about the pain, but was told it was "normal." He testified that he also had severe and massive headaches after the surgeries. Finally, he testified that, prior to the surgeries, he never had any injury to his mouth, and did not have any pain or clicking problems with his jaw.

¹ We review the decision of the commission, not that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981).

In support of his claim, Anderson submitted a WC-16-B form from Dr. Czaplicki which was received into evidence. One of the questions on the form asked whether the accident or work exposure directly caused the injury. Dr. Czaplicki replied "yes," and wrote "[t]he TMJ injury may have been a result of his work related injury." Another question on the form asked: "If not directly, is it probable that the accident or work exposure ... caused the disability by precipitation, aggravation and acceleration of a pre-existing condition beyond normal progression?" Dr. Czaplicki responded "yes."

A letter from Dr. An was also received into evidence. In the letter, Dr. An explained that because he was not an expert in TMJ, he referred Anderson to Dr. Czaplicki. Dr. An further stated that he did not think that the TMJ resulted from the anesthesiology because that was not common.

After considering the testimony and other evidence, the hearing examiner found that Dr. Czaplicki's opinions were probative and consistent with Anderson's testimony. The hearing examiner concluded that it was "likely that [Anderson's] jaw problem [was] an after effect of the treatment and the pain."

On appeal, however, the commission reversed the hearing examiner's decision and denied Anderson compensation. The commission concluded that Anderson had not provided medical support for his claim, as explained more fully below. The circuit court affirmed the commission's decision.

When a party seeks review of the commission's decision, our function is to review the record to determine whether there is credible and substantial evidence to support the commission's determination. *Kimberly-Clark Corp. v. LIRC*, 138 Wis.2d 58, 67, 405 N.W.2d 684, 688 (Ct. App. 1987). We do not weigh the opposing evidence, and we will reverse the commission's order or award only if it "depends on any material and controverted finding of fact that is not support by credible and substantial evidence." Section 102.23(6), STATS. "Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion. Facts of mere conjecture or a mere scintilla of evidence are not enough to

support LIRC's findings." *Cornwall Personnel Assn. v. LIRC*, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993) (citation omitted).

As a preliminary matter, we conclude that the commission erred by relying on materials that had not been admitted into evidence. In reaching its conclusion that Anderson was not entitled to compensation, the commission relied on a letter by Dr. Stoll that Anderson did not complain of jaw problems following the surgeries. The commission stated:

Further, Dr. Stoll, one of the applicant's surgeons, indicated that the applicant did not complain during his surgical recovery period of any jaw problems following his back surgery. Dr. Stoll stated that in fact the applicant was fairly articulate after surgery and spent a great deal of time harassing and haranguing the nursing staff.

Dr. Stoll's letter, however, was not received into evidence at the hearing. The commission exceeded its authority in relying on the letter because it had not been received into evidence. *California Packing Co. v. Indus. Comm'n*, 270 Wis. 72, 76, 70 N.W.2d 200, 202 (1955) (materials which have not been put into evidence may not be relied upon to support a decision).

Without the Stoll letter, the commission's decision is not supported by credible and substantial evidence. The commission relied on Dr. An's letter in which he stated that he did not believe the TMJ was caused by the surgeries. However, Dr. An specifically stated in the letter that he was not an expert of TMJ and that he would defer opinions to Dr. Czaplicki. Dr. An's letter stated:

I am not an expert of TMJ condition and this is the reason why I referred Mr. Anderson to Dr. Czaplicki. I believe that TMJ has not resulted from anesthesiological procedure during his surgery, since this is a very uncommon episode after anesthesia intubation. **However, I am not an expert of TMJ condition, and I**

will refer any opinions to Dr. Czaplicki. (Emphasis added).

Dr. An's failure to opine that Anderson's surgeries caused his TMJ's problem is not evidence "of a quantum upon which a reasonable fact finder could base a conclusion" because Dr. An specifically stated that he was not an expert in TMJ and was not competent to give an opinion. See *Cornwall Personnel Ass'n*, 175 Wis.2d at 544, 499 N.W.2d at 707.

The commission discounted the evidence submitted by Dr. Czaplicki that the TMJ was a result of the work injury because the commission concluded that Dr. Czaplicki was "inconsistent and equivocal." The commission reached this conclusion based on Dr. Czaplicki's responses to questions 11 and 12 on the WC-16-B form. Question 11 referred to direct causation and question 12 referred to aggravation beyond normal progression.

We conclude that it was not inconsistent for Dr. Czaplicki to state that the TMJ was both directly caused by the work injury and that it was aggravated beyond normal progression by the work injury. The surgery may have triggered a condition to which Anderson was predisposed, thus both directly causing the condition and aggravating it beyond normal progression. It was unreasonable for the commission to disregard Dr. Czaplicki's report as inconsistent based on these answers.

According to the uncontroverted evidence -- Dr. Czaplicki's report and Anderson's testimony -- Anderson's TMJ problem resulted from the treatments he received for his back injury. Dr. Czaplicki was the only medical professional to submit evidence who was an expert on the TMJ condition and it was his opinion that Anderson's problem was caused by or aggravated by his back surgeries. The commission's conclusion that Anderson failed "to provide medical support to establish that his jaw problems were related to his back surgeries [or] to the treatments required to cure and relieve him from his work-related back injury" is not supported by credible and substantial evidence. Accordingly, we reverse.

By the Court.--Order reversed and cause remanded for further proceedings consistent with this opinion.

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