

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 25, 1996

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(1), 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. 95-2310

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAMES W. OLSEN,

Plaintiff-Respondent,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION,
KEENE TECHNOLOGY, INC.,
and CINCINNATI INSURANCE COMPANY,**

Defendants-Appellants.

APPEAL from an order of the circuit court for Rock County:
JAMES WELKER, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. The Labor and Industry Review Commission, Keene Technology, Inc. and Cincinnati Insurance Company appeal from a circuit court order vacating and remanding a decision of the Commission. We reverse.

James W. Olsen applied for worker compensation. So far as this appeal is concerned, the only disputed issue at the hearing before the administrative law judge (ALJ) was the extent of Olsen's disability. Olsen testified and the ALJ received medical reports from four physicians. In his decision the ALJ referred to three of those reports, but not the report of Dr. H. Najat, which was the one most favorable to Olsen.

Olsen filed a petition for review by the Commission. He sought modification of the ALJ's order or a remand for further hearing on the ground that the ALJ overlooked Najat's report. The Commission amended the ALJ's findings to include a review of the Najat report. The Commission substituted its own reasoning for that of the ALJ, included a discussion of the Najat report, and reached the same conclusion. The circuit court reversed the Commission order. We review the decision of the Commission, not the circuit court. *Liberty Trucking Co. v. DILHR*, 57 Wis.2d 331, 342, 204 N.W.2d 457, 463-64 (1973).

Olsen's argument on appeal is based in part on a letter by the physician whose determination the Commission found most credible. According to Olsen, the letter states that the physician agrees with Najat's report. However, the letter was not before the Commission when it made the decision under review. Judicial review of Commission decisions shall be "upon the record." See § 102.23(1)(d), STATS. The proper method to introduce newly discovered evidence is by motion to the Commission. *Hopp v. LIRC*, 146 Wis.2d 172, 175-77, 430 N.W.2d 359, 360-61 (Ct. App. 1988). Therefore, we do not consider the letter. We express no opinion as to what relevance it might have in subsequent proceedings before the Commission.

Olsen's primary argument on appeal is that the Commission deprived him of due process by not allowing him "the right to be heard on the probative value of the evidence that [the Commission] considered but the ALJ ignored." This argument is contrary to the record. Olsen argued the point in a memorandum accompanying his petition for Commission review of the ALJ decision.¹ If Olsen's argument now is that he should have been provided an

¹ Olsen wrote:
[Najat's report] is the most recent WC-16-B and follows the most comprehensive examination of the applicant. The entire purpose of having Dr. Najat's inspection was because ...

additional opportunity to argue before the Commission, he had that opportunity. He could have requested oral argument or a briefing schedule under WIS. ADM. CODE §§ LIRC 1.06 and 1.07. There is no indication that he did so. Nor can Olsen claim that he did not make such a request because he did not expect the Commission to review the evidence and modify the decision of the ALJ. Olsen himself requested such relief, although in his favor.

Olsen argues that the Commission order should be reversed because the ALJ did not consider the Najat report. However, it is the Commission, not the ALJ, that is ultimately responsible for making credibility determinations. *Hakes v. LIRC*, 187 Wis.2d 582, 589, 523 N.W.2d 155, 158 (Ct. App. 1994). It is the decision of the Commission that is subject to judicial review, and the Commission considered all the relevant evidence. Its review and modification of the ALJ decision cured whatever error may have occurred before the ALJ.

Olsen does not appear to argue on appeal that the Commission's decision was unsupported by the evidence that was before it at the time. Therefore, we do not address that issue.

On remand, the circuit court shall enter an order affirming the decision of the Commission.

(.continued)

[the] widely varied opinions of [the physician upon whom the Commission relied] did not have substantial weight.

....

The applicant respectfully requests that this order be modified or that this be remanded for further hearings. It was apparent that [Najat's report] which was admitted into evidence was overlooked by the ALJ.

... The [ALJ's] decision wholly ignores the opinion of the treating physician who is a fellow in the American College of Surgeons.

By the Court.—Order reversed and cause remanded with directions.

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