

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 8, 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, STATS.

NOTICE

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No. 95-2451

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

WADE HAYES,

Plaintiff-Appellant,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION
and BRIGGS & STRATTON CORPORATION,**

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County:
LOUISE M. TESMER, Judge. *Affirmed.*

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

PER CURIAM. Wade Hayes, a former Briggs and Stratton employee, appeals from the circuit court's order affirming the Labor and Industry Review Commission's conclusion that Hayes's back injury did not arise from his employment at Briggs and Stratton and did not occur at a time while he was performing services incidental to his employment. Hayes argues that the administrative law judge and the Commission acted in excess of their

powers when they failed to reconcile inconsistencies and conflicts in the medical testimony and failed to discredit the opinion of the employer's expert because it allegedly lacked a proper factual foundation. Thus, Hayes argues that there is no substantial and credible evidence to support the Commission's decision as a matter of law. The circuit court rejected this same argument, and we agree that there was sufficient evidence to support the Commission's determination. Accordingly, we affirm.

According to the record, Hayes began his employment with Briggs and Stratton in January of 1968. Several years prior to that, he suffered a back injury while playing football in the Army. He underwent surgery for this injury in 1963. As a result of the injury and surgery, he was awarded a service-related disability rating of 20%.

Hayes testified at the hearing before the ALJ that he did not have problems with his back while working on the job until 1985. Hayes claimed that he suffered a back injury on October 25, 1985, while at work after doing some bending. No permanent partial disability was assessed for this injury.

Hayes was transferred to a different department on January 6, 1986, where he worked until October 16, 1992. Hayes testified that he was unable to return to work after that date because he was too stiff and sore. Hayes saw several doctors, one of which recommended surgery, but Hayes declined. He has permanent restrictions of no bending or lifting over 20 to 35 pounds. Briggs and Stratton does not have work available under these restrictions.

Hayes's treating physicians submitted reports for the administrative hearing stating that the wear and tear of the lifting and bending of Hayes's job between 1985 and 1992 worsened his pre-existing condition. Dr. Steven Blatnick reported that Hayes suffered from a traumatic injury and also from an occupational disease. Dr. Charles Supapodok reported that Hayes's disability was due to a traumatic incident as well as to his occupational exposure, and that his 1985 and 1992 injuries accelerated, precipitated, and aggravated his pre-existing condition.

Briggs and Stratton's physician, Dr. David S. Haskell, reported that Hayes had a long history of back pain dating back to the 1960's and that the symptoms beginning in October 1992 related solely to pre-existing problems. Dr. Haskell opined that Hayes sustained no work-related aggravation or acceleration of his pre-existing condition.

In addition, a videotape shown at the hearing indicated that Hayes's job involved minimal bending and lifting parts that generally weighed under 5 pounds. Both Hayes and an assistant safety manager testified that this videotape did not accurately show Hayes's job duties.

The ALJ found that the opinions of Hayes's physicians were based on the assumption that Hayes did frequent bending and lifting of 20-50 pounds, and did not find that Hayes's work between 1985 and 1992 required extensive repetitive lifting and bending. The ALJ accepted the opposing medical opinion of Dr. Haskell that Hayes's problems were due to a naturally degenerating back and not due to an occupational injury, and therefore denied worker's compensation benefits.

Hayes petitioned the Commission for review of the ALJ's decision, asserting that the ALJ erred in determining that Hayes did not sustain a new injury on October 16, 1992. After a review of the videotape and other evidence in the record, the Commission found that, based on Hayes's history of back complaints, pre-existing condition and Dr. Haskell's report, a legitimate doubt existed that Hayes's back problems were caused by his employment. Hayes subsequently brought an action in the circuit court to review the Commission's decision. The circuit court affirmed the Commission's decision because the Commission's findings were based on credible evidence. Hayes now brings this appeal.

The issue on appeal is whether there is substantial and credible evidence to support the Commission's findings that Hayes did not suffer a compensable injury while employed at Briggs and Stratton.

Our review of findings of fact is governed by statute and is limited in scope. *R. T. Madden, Inc. v. DILHR*, 43 Wis.2d 528, 536, 169 N.W.2d 73, 76

(1969); § 102.23(6), STATS. We are to affirm the Commission's decision if there is any credible evidence which supports such findings. *E.F. Brewer Co. v. DILHR*, 82 Wis.2d 634, 636, 264 N.W.2d 222, 223 (1978). We are required only to find that the evidence is sufficient to exclude speculation or conjecture. *Bumpas v. DILHR*, 95 Wis.2d 334, 343, 290 N.W.2d 504, 508 (1980). Even if we were to conclude that the findings of the Commission were contrary to the great weight and clear preponderance of the evidence, we may not reverse on that ground, as we may not substitute our opinion for that of the Commission. *Goranson v. DILHR*, 94 Wis.2d 537, 554, 289 N.W.2d 270, 278 (1980); § 102.23(6), STATS. In order to withstand reversal, "[i]t is not required that the evidence be subject to no other reasonable, equally plausible interpretations." *Hamilton v. DILHR*, 94 Wis.2d 611, 617, 288 N.W.2d 857, 860 (1980).

Whether Hayes sustained a compensable injury was a question of fact for the Commission to decide. *Bumpas*, 95 Wis.2d at 342, 290 N.W.2d at 507. In addition, the credibility and weight of the testimony of medical witnesses is for the Commission to decide. *Semons Dept. Store v. DILHR*, 50 Wis.2d 518, 528-29, 184 N.W.2d 871, 876 (1971). If there are inconsistencies or conflicts in medical testimony, the Commission, not the reviewing court, reconciles such inconsistencies or conflicts. *Valadzic v. Briggs and Stratton Corp.*, 92 Wis.2d 583, 598, 286 N.W.2d 540, 547 (1979). Further, the Commission has a duty to deny compensation if the evidence is sufficient to raise a legitimate doubt as to the existence of facts necessary to establish a claim. *Leist v. LIRC*, 183 Wis.2d 450, 457, 515 N.W.2d 268, 270 (1994). In order for the Commission to entertain a legitimate doubt, some inherent inconsistency or conflict must exist in the testimony. *Bumpas*, 95 Wis.2d at 344, 290 N.W.2d at 508.

Our review of the record makes clear that the ALJ's and the Commission's decision was based on credible evidence that is sufficient to exclude speculation or conjecture, even though the evidence may be subject to another reasonable, equally plausible interpretation. The decision to deny benefits was based mainly on expert medical opinion. The ALJ and the Commission chose to believe the testimony of Dr. Haskell, and it is the Commission's role to determine the weight and credibility of the testimony of medical witnesses. See *Semons*, 50 Wis.2d at 528-529, 184 N.W.2d at 876. Only where the evidence relied upon by the Commission is incredible as a matter of law may we reverse a finding of the Commission. *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis.2d 646, 659, 275 N.W.2d 668, 675 (1979). Although the expert opinions of Hayes's treating physicians are inconsistent

with the opinion of Dr. Haskell, we do not find that those opinions render the opinion of Dr. Haskell's opinion inherently incredible.

Hayes argues that Dr. Haskell's opinions must be disregarded as based upon assumed facts that have not been proven. As the Commission's brief properly points out, if Hayes wanted to test the validity of Dr. Haskell's opinions, he could have exercised his right to subpoena the doctor for cross-examination. *See* WIS. ADM. CODE § DWD 80.22(2).

Hayes also argues that the videotape presented by the employer did not accurately show his job duties. Both Hayes and an assistant safety supervisor testified to that effect. The ALJ, who could observe the demeanor of the witnesses and therefore was in a good position to judge their credibility, however, did not find that Hayes's work required extensive lifting and bending. The Commission found nothing to warrant overturning the ALJ's credibility determination, and we may not substitute our judgment for that of the Commission.

In sum, the information contained in the record, particularly the expert opinion of Dr. Haskell and the videotape of Hayes's duties, was sufficient to provide credible and substantial evidence or reasonable inferences therefrom to support the Commission's conclusions. Therefore, we affirm the circuit court's order that upheld the conclusions of the Commission.

By the Court. – Order affirmed.

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