COURT OF APPEALS
DECISION
DATED AND RELEASED

June 11, 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

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

No. 95-2622

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

FREDERICK T. WEST,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and ROADWAY EXPRESS, INC.,

Defendants-Respondents.

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

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

PER CURIAM. Frederick T. West appeals from the circuit court order[1] affirming the decision of the Labor and Industry Review Commission

[1] Judge Frank T. Crivello entered the July 14, 1995 memorandum decision regarding the Commission's decision; Judge Jacqueline D. Schellinger signed the final order dated August 18,

that concluded West was 80% permanently partially disabled. West argues that the Commission erred in modifying the administrative law judge's decision, which held that West was 100% permanently totally disabled under the "odd-lot" doctrine. We affirm.

West injured his back on June 7, 1991, while working as a truck driver for Roadway Express, Inc. West began working for Roadway in 1965. He injured his back while moving a 55-gallon drum that was filled with a liquid. West was 63 when he was injured. West had back surgery as a result of the injury. He never returned to work. He subsequently retired and reached his healing plateau at 65.

The ALJ found that West was permanently totally disabled under the "odd-lot" doctrine. The Commission, however, concluded that West had not met his burden of establishing a *prima facie* case that he was 100% unemployable or, even if he had, that Roadway rebutted that showing by the testimony of its vocational expert, Donald M. Modder. The Commission concluded that the vocational opinion of West's expert was "too conclusory" because, while it did discuss West's medical condition and employment history, it did not explain why West falls under the "odd-lot" doctrine. The Commission also noted that the functional capacity reports filed by the doctors who examined West allowed him to work full-time, albeit with restrictions that the Commission noted did not "alone make him unemployable." Finally, the Commission noted that West possessed the skills and could perform the jobs that Modder mentioned in his report.

On appeal, this court reviews the decision of the administrative agency, not that of the circuit court. ***Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n.***, 156 Wis.2d 611, 616, 457 N.W.2d 502, 504 (Ct. App. 1990). We may "set aside the commission's order or award ... 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* § 102.23(6), STATS.; *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

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1995.

conclusion." ***Cornwell Personnel Assocs., Ltd. v. LIRC***, 175 Wis.2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993). We will construe the evidence most favorably to the Commission's findings of fact, ***id.*** at 544, 499 N.W.2d at 708, and we may not overturn the Commission's order if there is credible evidence "sufficient to exclude speculation or conjecture." ***General Casualty***, 165 Wis.2d at 179, 477 N.W.2d at 324.

"[T]he 'odd-lot' doctrine is a rule of evidence, and, once the claimant *prima facie* proves 100 percent disability upon the basis of future unemployability, the burden is upon the employer to rebut that *prima facie* showing and to demonstrate 'that some kind of suitable work is regularly and continuously available to the claimant.'" ***Balczewski v. DILHR***, 76 Wis.2d 487, 497, 251 N.W.2d 794, 799 (1977) (citations omitted). In the application of the odd-lot doctrine for nonscheduled industrial injuries, proof of total and permanent impairment of earning capacity is the critical factor in establishing permanent total disability. ***Id.*** "If evidence of the degree of physical disability coupled with other factors 'such as mental capacity, education, training, or age, establish *prima facie* that the employee will be unable to obtain regular and continuous employment and is therefore in the "odd-lot" category,'" the burden then shifts to the employer to show regular and continuous employment is available to the claimant. ***Advanced Die Casting Co. v. LIRC***, 154 Wis.2d 239, 251-252, 453 N.W.2d 487, 492 (Ct. App. 1989).

West was born on December 29, 1927. He completed tenth grade and joined the military. After World War II, he briefly entered college, but later dropped out. His employment history consists of working as a police officer from 1952-1960 and subsequently working as a maintenance man in a bakery. In 1965, West began working for Roadway as a truck driver. During the 1970s, West suffered a herniated disk and had back surgery. He returned to work without restrictions and worked until June 7, 1991.

Following his June 7, 1991 injury, West had a laminectomy and bilateral fusion on January 15, 1992. According to an estimated functional capacity form dated December 8, 1992, Dr. Sam Nesemann stated that West: could occasionally lift and carry up to ten pounds; could occasionally push or pull while seated and reach above shoulder level; could never push or pull while standing, bend, squat, crawl or climb; could sit for four hours per day; could alternatively sit and stand for four hours a day; could stand for two hours

a day; and could walk for two hours a day. Dr. Nesemann also stated that West had a total restriction against working at unprotected heights, a moderate restriction against driving, and a mild restriction against being around machinery or being exposed to changes in temperature and humidity. He stated that these restrictions were permanent. Dr. Nesemann also concluded in a separate practitioner's report that West should engage in "[e]ssentially sedentary work only."

West was also examined on October 7, 1992, by Dr. Jerome Lerner. Dr. Lerner opined that West had reached a healing plateau and could perform sedentary activities. Dr. Lerner further stated: "Beyond sedentary activities, I would recommend that he be limited to occasional lifting and carrying of a maximum of 10 pounds. He can stand and walk a maximum of two hours per day. He should avoid all bending, squatting, twisting, crawling, pushing and pulling activities." Dr. Lerner subsequently stated that West could "sit for 45 minutes every hour, following which he should be given the opportunity to stand and move. He may be allowed to sit a maximum of six hours per day."

West was also examined by Roadway's expert, Dr. William P. McDevitt, who stated: "I would rate [West]'s capabilities of returning to work as doing no more than medium work with a lifting restriction of 40 pounds and to avoid frequent bending, twisting and turning." The estimated functional capacity form filled out by Dr. McDevitt indicated that West could: frequently lift up to 20 pounds and occasionally lift up to 35 pounds; continuously reach above shoulder level; frequently push and pull while seated and squat; that he could occasionally push and pull while standing, bend, drawl and climb; and that he could continuously sit during an eight-hour workday, but stand or walk only four hours.

West's vocational expert, Henry M. Lenard, offered the following opinion based on the restrictions imposed by Dr. Lerner:

1.The client is age 65, has primarily been involved in the type of work which required him to do dexterous activities. Additionally, the restrictions imposed upon him by Dr. Lerner would be considered substantial

> and indeed the only opportunity that this person would have of becoming vocationally productive would be through the processes of odd-lot.
>
> 2.Obviously then the client is 100 percent disabled for any type of vocational activity when one takes into consideration all of the factors which are bearing upon this case.

Roadway's vocational expert, Modder, noted that West had told him that he was not looking for work and that "it's time I sat back." Modder also noted a number of "transferrable skills which would be useful in identifying alternative, lighter employment," which included: good eye-hand-foot coordination; knowledge of interstate commerce and Department of Transportation rules; the ability to read and follow written and verbal instructions; effective communication skills; the ability to work independently; the ability to organize and synthesize information, knowledge and experience in police work, military and veterans affairs, and union activities; knowledge of electrical and mechanical systems; and the ability to effectively use power and hand tools.

Modder concluded that in light of the physical restrictions imposed by Drs. Lerner and Nesemann, although West would have a "constricted labor market to choose from," nevertheless he could seek employment in such jobs as telephone solicitor, expediter, dispatcher or travel agent. Using Dr. McDevitt's restrictions, Modder concluded that West could seek employment in such jobs as traffic agent, credit collector, messenger, parts clerk or guard. Modder testified that these jobs "exist on a continuing basis" in the Milwaukee area job market. Modder also concluded that based on the physical restrictions imposed by Drs. Lerner and Nesemann, West suffered a 65-75% loss in earning capacity, and based on the physical restrictions imposed by Dr. McDevitt, West suffered a 55-65% loss in earning capacity.

Finally, West testified that but for his injury, he would have worked until 1995 in order to increase his pension by an additional $600 a month. West's testimony about his pain and physical abilities was consistent

with the opinions of his doctors. In addition to the $2,500 he receives monthly for his pension and social security, West receives approximately $100 a month for expenses for volunteer work he does for the VFW. Finally, West also testified that he did not believe he could work.

Review of the record amply supports the Commission's order. At the outset, we reject West's argument that "[t]he Commission's main reason for finding that Mr. West had not sustained his burden of proof in regard to the odd-lot doctrine was that he had not engaged in a work search," which he alleges improperly shifted the burden of proof from Roadway to him. Although the Commission's order notes that "[West's] failure to look for work undercuts his ability to show that no work is available to him," the order also reflects that the Commission properly considered West's failure to seek employment as but one of many factors in determining loss of earning capacity. *See* WIS. ADMIN. CODE § IND. 80.34.

West has failed to meet his burden on appeal, which requires him to show that there was no evidence to support the Commission's findings or that the evidence was so lacking that no reasonable person could reach a decision based on it. ***Advance Die Casting***, 154 Wis.2d 239 at 249-250, 453 N.W.2d at 491. Modder identified numerous sedentary jobs that exist in the Milwaukee area that West would have a reasonable opportunity of being hired to do in light of his skills and despite his physical restrictions. Modder also testified that an older worker also provides advantages to an employer by virtue of a stable work history, a strong work ethic and substantial practical experience. The Commission accurately noted that the doctors' reports do not preclude West from working, despite the imposition of various physical restrictions. Finally, the Commission was correct in characterizing Lenard's report as "conclusory" because his report does not explain why West would fall into the category of 100% future unemployability. Therefore, we affirm the circuit court's order affirming the Commission's decision.

By the Court. – Order affirmed.

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