

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-3493
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000245

**IN COURT OF APPEALS
DISTRICT IV**

LOUIS H. KNIPFEL,

PLAINTIFF-APPELLANT,

V.

**LABOR & INDUSTRY REVIEW COMMISSION, BIG CHIEF
ENTERPRISES AND UNITED WISCONSIN C/O UNITED
HEARTLAND, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Juneau County:
DENNIS C. SCHUH, Judge. *Reversed and cause remanded with directions.*

Before Deininger, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Louis Knipfel appeals an order affirming the Labor and Industry Review Commission's decision to deny him additional permanent partial disability benefits and treatment expenses under the worker's compensation

program. Knipfel challenges the Commission's determination that back problems he was having were not related to an accident Knipfel had at work several years earlier. We conclude that the Commission's determination was based in part upon a material fact not supported by the record and, therefore, we reverse and remand to the Commission for further consideration.

BACKGROUND

¶2 Knipfel was employed as a carpenter for Big Chief Enterprises on November 29, 1996, when he fell about 18 feet off a raised platform in a go-cart while testing a new track. Knipfel testified that the nearly-500-pound go-cart first landed right-side up, then bounced and flipped, pinning him underneath it, breaking seven of his ribs, puncturing his left lung, collapsing his right lung, and injuring his knee, shoulder, neck, and back. Only the back complaint is at issue on this appeal.

¶3 The ambulance report noted that Knipfel complained of back and chest pain with each bump in the road while en route to the hospital. Once at the hospital and on pain medication, however, treatment records indicate that Knipfel complained only of difficulty breathing and pain in his chest, shoulder, and leg. Med Flight and emergency room records also show that Knipfel had a history of chronic back pain prior to the accident.

¶4 A radiologist examined X-rays of Knipfel's cervical spine, thoracic spine, and lumbar spine taken shortly after his admission to the hospital. The radiologist saw no "definite" or "gross" spinal fractures on any of those X-rays, although he noted that the thoracic area was "only grossly visualized" and the seventh cervical vertebra, the cervicothoracic junction, and the first three thoracic vertebrae were not imaged well enough to fully evaluate. The radiologist

recommended additional spinal X-rays, but we cannot locate any documents in the record showing that such X-rays were taken. When Knipfel was released from the hospital on December 9, 1996, his discharge summary noted that his “C-spine was cleared clinically” and his “T and L spines were clear.”

¶5 Knipfel began physical therapy for his shoulder in January of 1997. A therapist’s note dated March 14, 1997, indicates that Knipfel’s initial treatment plan also included hot packs for his back and neck. A therapist’s note dated April 10, 1997, indicated that back extension exercises would be added to Knipfel’s regimen and that Knipfel would be instructed in the application of hot packs to the neck and back at home. A therapist’s note dated May 5, 1997, indicates that Knipfel “relates lessened back/leg discomfort since [lowering] time on [an exercise] bike.”

¶6 On May 13, 1997, Knipfel’s primary treating physician, Dr. Frank Salvi, noted that Knipfel had last been seen on March 20, 1997, for evaluation of the right shoulder and “upper back symptoms,” and that “upper back extension” exercises had been added at his last clinical visit. He also noted that Knipfel “continues to note some low back and bilateral hip discomfort” and that “[l]umbar range of motion notes 85 degrees of flexion, which results in low back tightness and some hip discomfort,” and further observed that Knipfel’s “[m]ild low back” symptoms “have significantly improved with ongoing physical therapy.”

¶7 From 1997 on, Knipfel’s medical records show ongoing therapy and treatment primarily for his shoulder, with increasing references to back problems.

¶8 On March 29, 2000, Knipfel had an MRI taken which showed degenerative disc disease at T12-L1, L1-L2, L4-L5, and L5-S1; mild anterior wedge compression fractures at T12 and L1; mild disc bulge and mild facet

hypertrophy at L4-L5; and a right posterolateral disc protrusion at L5-S1. The radiologist noted that endplate irregularity and the anterior wedging “may represent a previous trauma or old Scheuermann’s disease.” Upon receiving the MRI results, Dr. Salvi went back and reviewed Knipfel’s X-rays “from shortly after his go-cart crash in 1996” and noted “some mild anterior wedging at T12 and L1 suggesting that compression fractures did appear to occur at the time of his accident.” In a deposition, which Dr. Salvi subsequently incorporated into his WKC-16-B practitioner’s report, Dr. Salvi opined that the compression fractures which he believed Knipfel suffered in the accident “exacerbated some underlying degenerative disk disease” which was “not functionally limiting” before the accident. By “exacerbated,” Dr. Salvi meant that, as a result of the go-cart accident, “the disease process was accelerated or changed somehow beyond what would be normally expected.”

¶9 Dr. Paul Cederberg performed an independent medical evaluation. He did not personally review Knipfel’s X-rays from 1996 or the MRI films. Based on Cederberg’s examination and review of other medical records, he concluded that Knipfel’s back problems were solely the result of “age-related degenerative disc disease.” Cederberg’s report indicates he based his opinion that the back problems were unrelated to the go-cart accident largely on his perceived lack of any medical notations of back complaints during Knipfel’s initial hospitalization and early physical therapy sessions from March 24-June 10, 1997.

¶10 The Commission considered Cederberg’s report credible based upon its own factual findings that Knipfel had pre-existing back problems; that Knipfel’s “objective tests” (which we understand to refer to the radiologist’s initial interpretation of the 1996 spinal X-rays) “were within normal limits and without evidence of breakage,” and that Knipfel’s “first back complaints [following the

accident] did not occur until May 13, 1997.” Based on those findings and the Independent Medical Evaluation report, the Commission concluded that Knipfel had failed to establish beyond a legitimate doubt that his current back problems resulted from the 1996 accident.

DISCUSSION

¶11 On appeal, Knipfel challenges the sufficiency of the evidence to support the Commission’s denial of benefits. Specifically, he claims that the existence of compression fractures was unrefuted and that no cause other than the go-cart accident was offered for the fractures. He also details the notations in his medical records which contradict the Commission’s assertion that he did not complain of back pain until May 13, 1997.

¶12 This court “shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact.” WIS. STAT. § 102.23(6) (2001-02).¹ However, we 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.” *Id.*

¶13 We disagree with Knipfel’s assertion that the causation of his compression fractures was uncontested in the record. It is true that Cederberg’s report did not explicitly discuss the fractures first identified in the 2000 MRI as the possible result of a “previous trauma,” and that there was no evidence presented of

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

any trauma Knipfel suffered other than the go-cart accident. However, the record does contain the radiologist's initial interpretation of the 1996 X-rays, which indicated no definite or gross spinal fractures. Therefore, the Commission needed to decide whether the radiologist had missed the compression fractures on his initial review in 1996, due to the poor image quality of the film or some other reason, or whether the treating physician Salvi had later misinterpreted the X-rays. The Commission could properly sort through the conflicting evidence regarding whether Knipfel's 1996 X-rays showed compression fractures and, in particular, evaluate the relative credibility of Cederberg's report (which accepted the radiologist's initial assertion that the 1996 X-rays showed no gross spinal fractures) and Dr. Salvi's report (which was based on Salvi's own review of the 1996 X-rays and his conclusion that they revealed the same compression fractures which were later identified in the MRI).

¶14 This comparison, however, was not the only basis for the Commission's credibility determination. The Commission also deemed Cederberg's report more credible than Salvi's because the Commission believed that Knipfel *first* complained of back pain six months after the accident. This factual assumption is not supported by credible and substantial evidence. It was documented that Knipfel first complained of back pain in the ambulance immediately following the accident. In addition, treatment records show that Knipfel was receiving hot packs for his back during his earliest physical therapy sessions and that he was reporting "improvement" in his back symptoms about four months after the accident. Given those medical records, we conclude that the Commission made a factual finding regarding the timing of Knipfel's first back complaints that is unsupported by the record.

¶15 We deem this mistake of fact to be material because the Commission appears to have relied heavily upon its mistaken belief that Knipfel failed to complain of back pain until six months after the accident. Based in part on this reliance, the Commission rejected Dr. Salvi's opinion that Knipfel's fall had resulted in mild anterior wedge fractures of two vertebrae which exacerbated and accelerated Knipfel's pre-existing back problems. If the Commission had been aware that Knipfel complained of back pain while en route to the hospital and was treated for back pain during the ensuing months, it may have given more weight to Dr. Salvi's opinion and interpretation of the X-rays and MRI films.

¶16 Accordingly, we conclude that this matter should be remanded to the Commission under WIS. STAT. § 102.23(6) for reconsideration of whether Knipfel is entitled to additional benefits for spinal compression fractures under WIS. ADMIN. CODE § DWD 80.32(11) or for other aggravation of Knipfel's pre-existing back problems.

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

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

