

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 13, 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. 04-0641-FT
STATE OF WISCONSIN**

Cir. Ct. No. 03-CV-102

**IN COURT OF APPEALS
DISTRICT III**

**EMERSON ELECTRIC COMPANY, D/B/A EMERSON MOTOR
COMPANY, STURGEON BAY MOTOR PLANT,**

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
JOSEPH H. DEGRAND,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Door County:
D. TODD EHLERS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Emerson Electric Company appeals a judgment affirming the decision of the Labor and Industry Review Commission pertaining

to Joseph DeGrand's claim for worker compensation benefits.¹ Emerson argues that no credible evidence supports the Commission's decision. We disagree and affirm the judgment.

¶2 Joseph DeGrand claimed he injured his back on or about October 6, 1998, while working at Emerson. He saw a number of health care providers over the course of several years, ultimately receiving a two-level fusion performed by Dr. Dennis Maiman in August 2001.

¶3 Emerson relies on two independent medical examinations performed by Dr. Allen E. Kagen on March 28 and October 25, 2000. Based on Kagen's opinion, Emerson conceded 3% permanent partial disability and paid all temporary disability to November 1, 2000. Emerson denied that DeGrand's back injury after November 1, 2000, was worked-related.

¶4 Emerson denied DeGrand's claim for permanency benefits and medical expenses due to his August 20, 2001, surgery. At the hearing, DeGrand described that he injured his back when attempting to pull a box on a swivel cart that could have weighed between 1,000 and 1,500 pounds. DeGrand testified that he does feel better following surgery but still has significant pain.

¶5 The administrative law judge found in Emerson's favor and DeGrand appealed to the Commission. The Commission determined that Emerson had conceded a work-related injury had occurred on October 6, 1998, and that concession "rendered moot any concern over inconsistencies in the description of

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All statutory references are to the 2001-02 version unless otherwise noted.

exactly how the work incident occurred.” The Commission further found that “even the physician chosen by the self-insured employer to render an opinion regarding causation, Dr. Kagen, opined that the applicant sustained a work-related injury on October 6, 1998,” resulting in a 3% permanent partial disability to his back. The Commission observed that Kagen “attempted to qualify his opinion” by drawing a distinction between the effects of the work injury and DeGrand’s subsequent back condition, which Kagen attributed to a preexisting degenerative disc disease.

¶6 The Commission concluded:

[Kagen] further asks the commission to believe that somehow, after November 1, 2000, the cause of the applicant’s ongoing back problems changed over from the work injury to the preexisting degenerative disc disease.

The commission finds this medical scenario to be incredible. The applicant’s history subsequent to the work injury was one of an ongoing and worsening back condition. It ultimately led to a two-level fusion. There is no credible evidence of any change in the applicant’s condition on or about November 1, 2000, which might explain a change in causation. Consistent with Dr. Maiman’s opinion and the credible portion of Dr. Kagen’s opinion, the applicant’s preexisting back condition was aggravated, accelerated, and precipitated beyond normal progression by the work injury of October 6, 1998. This aggravation and acceleration caused the fusion surgery performed on August 20, 2001.

¶7 The Commission found that the surgery was reasonable and necessary and the result of the industrial accident and awarded the medical expenses associated with the surgery. In addition, it awarded 20% permanent partial disability for the two-level fusion. It remanded for hearing on the issue of temporary disability. Emerson appealed to the circuit court, which affirmed the Commission’s decision.

¶8 Emerson argues that the circuit court erred when it relied on portions of Kagan’s and Maiman’s opinions, stating that neither “provides a credible basis for LIRC’s decision.” Well-established standards of review resolve Emerson’s arguments. We review the Commission’s decision, not the circuit court’s. *Langhus v. LIRC*, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996). Whether DeGrand’s additional disability was the result of his October 6, 1998, injury presents a question of ultimate fact for the Commission to decide. *See Manitowoc v. DILHR*, 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979). The scope of judicial review is governed by WIS. STAT. § 102.23. The reviewing court must affirm if there is credible and substantial evidence to support the findings. *L & H Wrecking Co., v. LIRC*, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983). “In reviewing the sufficiency of credible evidence, we need find only that the evidence is sufficient to exclude speculation or conjecture.” *Id.* Witness credibility is solely for the Commission, as trier of fact, to decide. *Vasquez v. DILHR*, 39 Wis. 2d 10, 18, 158 N.W.2d 331 (1968). The Commission, not the court, resolves conflicts or inconsistencies in testimony. *Kohler v. DILHR*, 81 Wis. 2d 11, 16, 259 N.W.2d 695 (1977).

¶9 We agree with the Commission that to the extent Emerson argues the Commission should have accepted Kagen’s opinion, rather than Maiman’s, its argument is rejected. We do not substitute our notions of credibility for those of the Commission. *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 636-37, 264 N.W.2d 222 (1978).

¶10 Emerson replies that there is no credible evidence to support the Commission’s decision. Emerson complains that neither portion of Kagan’s nor Maiman’s reports support the Commission’s decision as a matter of law. Emerson

contends that Maiman's report is merely conclusory and contains no analysis and therefore is incredible as a matter of law. We are unpersuaded.

¶11 Emerson's argument implicitly asks us to weigh the conflicting medical opinions. We review the record to locate credible and substantial evidence that supports the Commission's determination, rather than to weigh evidence opposed to it. *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975). Maiman attributed DeGrand's back pain to the October 1998 work injury. Maiman's June 6, 2001, office note reported that in 1998, DeGrand injured his back at work and has been in excruciating back pain ever since. Maiman recounted DeGrand's previous unsuccessful treatments and opined that lumbar instability contributed to his pain. Subsequently, Maiman recommended fusion. We are satisfied that DeGrand's history, portions of Kagen's reports and Maiman's opinions support the Commission's determination.

¶12 Emerson's argument contravenes the legal standards of appellate review. If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to an opposite conclusion, we must affirm. "There must be, however, such credible evidence that the findings will rest on facts and not on conjecture or speculation." *Valadzić v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 594, 286 N.W.2d 540 (1979). The record upon which the Commission relies cannot be said to fall within the realm of conjecture or speculation.

¶13 Emerson does not define "incredible as a matter of law." It has been held that incredible as a matter of law is to be inherently or patently incredible; that is, in conflict with the uniform course of nature or with fully established or conceded facts. See *In re Estate of Neuman*, 2001 WI App 61, ¶27, 242 Wis. 2d

205, 626 N.W.2d 821. Because the record fails to support this characterization, Emerson's argument fails.

By the Court.—Judgment affirmed.

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

