COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 12, 1995

NOTICE

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.

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

No. 94-3309-FT

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

ROGELIO CABRAL,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION, PIONEER CONTAINER CORPORATION and EMPLOYERS INSURANCE OF WAUSAU,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Reversed and cause remanded with directions*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Rogelio Cabral was injured in the course of his employment. He sought worker's compensation benefits, claiming total permanent disability. After a hearing on his claim, an administrative law judge (ALJ) found that Cabral had sustained a 65% permanent partial disability.

Cabral appealed to the Labor and Industry Review Commission (LIRC), which affirmed the ALJ's decision. Cabral sought circuit court review of LIRC's decision pursuant to § 102.23, STATS. The circuit court affirmed, and Cabral appeals. Pursuant to this court's order dated February 3, 1995, this case was submitted to the court on the expedited appeals calendar. Cabral contends that he established at the hearing before the ALJ a *prima facie* case that he had sustained a permanent total disability, and that the employer failed to rebut that claim. We agree with Cabral, and reverse the circuit court's judgment.

Many of the relevant facts are undisputed. Cabral was born in Mexico, and lived much of his life there. He moved to the Milwaukee area in 1973, but he had obtained little formal education in Mexico or in the United States. Cabral injured his back in December 1988 while lifting a box in the course of his employment at Pioneer Container Corporation. At the time of his injury, Cabral was fifty-one years old.

A few months after suffering the injury, Cabral underwent back surgery. When he did not improve, Cabral went to another doctor, who determined that the initial surgery had been performed incorrectly and that Cabral needed additional surgery. Cabral underwent the second surgery, but his symptoms were not relieved.

Although Cabral continued to seek treatment from several doctors, he was unable to obtain relief. He sought worker's compensation benefits for a permanent total disability caused by the work-related injury.

The reports of Cabral's treating doctors were unanimous in stating that Cabral had suffered a serious injury that limited his ability to work. The doctors differed, however, in their assessments of the limitations on Cabral's abilities. A doctor who treated Cabral in 1989 stated that Cabral had a 25-pound lifting restriction; a doctor from 1990 stated that Cabral could perform sedentary to light-duty work if he undertook an exercise program. Other doctors from 1990 stated that Cabral had restrictions on his ability to lift that ranged from fifteen to thirty pounds.

At the hearing in March 1993, Cabral testified that he wished to work, but that he was unable to find any work he could do. Aileen Cardona, a vocational counselor at the Department of Vocational Rehabilitation (DVR), testified that DVR was unable to assist Cabral because of his disability, his limited education, and his limited command of English. Although Cardona conceded that Cabral might be employable if an employer was willing to make accommodations for his disability, she testified that she was not aware of any employment suitable for Cabral.

Cabral filed a report prepared in September 1991 by Dr. Henry Lenard, a vocational expert. Dr. Lenard opined that Cabral had sustained a permanent total disability. Dr. Lenard based his opinion on his interview with Cabral, Cabral's age and educational background, and the reports submitted by the various treating physicians. Dr. Lenard indicated that he had tested Cabral academically. He found that Cabral was unable to read Spanish or English, and that his arithmetic skills were "woefully inadequate."

The employer filed a report prepared by Timothy Riley, a vocational expert, approximately 18 months after Dr. Lenard's report. Riley opined that Cabral, whom he had interviewed in November 1992, had sustained a 60-to-70% loss of earning capacity.

In his report, Riley noted that Cabral had worked for a number of companies since his arrival in the United States, but that he had usually been employed as a laborer, a molder, or a machine operator. Riley noted that, as a result, Cabral had "minimal transferable skills and abilities." Riley noted, however, that Cabral's treating physicians had indicated that Cabral could work with restrictions on lifting, repeated bending, twisting, or movement of his trunk. Riley noted that, other than lifting restrictions, there was no limitation on Cabral's use of his hands. In assessing the vocational impact of Cabral's injury, Riley conceded that the injury eliminated Cabral "from many of the ... past jobs that he has performed in the general labor market."

Riley concluded that, given the restrictions on Cabral's physical activity, and given Cabral's "educational background, illiteracy, age, and skills," Cabral "would be available for a limited number of jobs in the local economy." He opined that Cabral "would qualify" for work as a "small parts assembler,

cashier, fast food worker, dishwasher, food service worker, cleaner/custodian, messenger, hand grinder, and plastics trimmer." Because these jobs paid substantially less than Cabral was earning at the time of injury, and because of the treating physicians' assessments of Cabral's condition, Riley concluded that Cabral had sustained a "60 to 70 percent loss of earning capacity" as a result of his work-related injury.

In holding that Cabral had sustained only a permanent partial disability, the ALJ first noted that Dr. Lenard's report was from 1991, while Riley's was completed shortly before the hearing. The ALJ concluded that Riley's report therefore "best reflect[ed Cabral's] present capacities." The ALJ noted Cabral's lifting restrictions, but stated that the evidence indicated that Cabral could perform sedentary work. The ALJ also noted that Riley's report listed specific jobs available in the labor force that Cabral could perform, and that the list tended to rebut Cabral's claim of permanent total disability. The ALJ noted that Riley's report conceded a permanent partial disability of from 60-to-70%, and he found that Cabral had sustained a 65% permanent partial disability.

Cabral appealed to LIRC. In its decision affirming the ALJ's decision, LIRC noted that it had reviewed the record and agreed with the ALJ that "[Riley]'s report best reflects [Cabral's] present capabilities." Cabral then sought circuit court review of LIRC's decision. The circuit court affirmed, holding that LIRC's decision was reasonable and had been based on credible and substantial evidence.

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). This court 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

conclusion." ***Cornwell Personnel Assocs. 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.***, 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.

Cabral notes that the conclusion of partial disability was based on Riley's opinion that certain jobs would be available for him in the local economy. He contends that he made a *prima facie* showing that he was unable to secure any continuing employment, and that Riley's opinion regarding the availability of employment to him was speculative. We agree.

In ***Balczewski v. DILHR***, 76 Wis.2d 487, 251 N.W.2d 794 (1977), the supreme court explained the meaning of "total disability" relative to the question of availability of employment for a disabled worker. In doing so, the court clarified what must be proven to establish the availability of employment justifying a reduction from total disability to partial disability. In ***Balczewski***, the court quoted liberally from Professor Arthur Larson's treatise, 2 *Worker's Compensation Law*, § 57.51, page 10-107:

> "`Total disability' in compensation law is not to be interpreted literally as utter and abject helplessness. Evidence that claimant has been able to earn occasional wages or perform certain kinds of gainful work does not necessarily rule out a finding of total disability nor require that it be reduced to partial. The task is to phrase a rule delimiting the amount and character of work a man can be able to do without forfeiting his totally disabled status. The rule followed by most modern courts has been well summarized by Justice Matson of the Minnesota Supreme Court in the following language:
>
> "`An employee who is so injured that he can perform no services other than those which are so limited in quality, dependability, or quantity that a reasonably stable

> market for them does not exist, may well be classified as totally disabled.'"

Id. at 493, 251 N.W.2d at 797.

The supreme court further noted that:

> Professor Larson characterizes this [odd-lot] doctrine as a rule of evidence. He concludes that, where a claimant makes a *prima facie* case that he has been injured in an industrial accident and, because of his injury, age, education, and capacity, he is unable to secure any continuing and gainful employment, the burden of showing that the claimant is in fact employable *and that jobs do exist for the injured claimant* shifts to the employer. Larson states:

"A suggested general-purpose principle on burden of proof in this class of cases would run as follows: If the evidence of degree of obvious physical impairment, coupled with other factors such as claimant's mental capacity, education, training, or age, places claimant *prima facie* in the odd-lot category, the burden should be on the employer to show that *some kind of suitable work is regularly and continuously available to the claimant. Certainly in such a case it should not be enough to show that claimant is physically capable of performing light work, and then round out the case for noncompensability by adding a presumption that light work is available*....

> We think it clear that what Larson refers to as the "odd-lot" doctrine is a statement of the Wisconsin

> law as it has existed at least since the 1923 amendments to the Workmen's Compensation Act.

Id. at 495-96, 251 N.W.2d at 798 (emphasis added).

Balczewski is dispositive. In that case, the claimant Balczewski was an unskilled worker with limited education when, at age fifty-seven, she was injured during the course of her employment. ***Id***. at 490, 251 N.W.2d at 796. She presented the testimony of an expert familiar with the labor market in her area that her physical limitations prevented further industrial employment. Further, her expert testified that:

> [Balczewski] was not qualified educationally or by experience to perform any type of service in a sustained and reliable manner, and that her condition, together with her age and lack of any more than a rudimentary education, made any training program of no consequence.

Id. at 492, 251 N.W.2d at 796. The expert opined that Balczewski was totally disabled. ***Id***.

Although the employer did not challenge Balczewski's expert on cross-examination, it presented its own expert, who opined that Balczewski was 55 percent disabled. ***Id***. at 497, 251 N.W.2d at 799. The employer's expert indicated that he believed Balczewski "`could work' in a supervisory position and she could tell `new people how to do certain types of work.'" ***Id***. The expert conceded that he was not familiar with the job market in Balczewski's area, but he speculated that the market "`should be pretty good.'" ***Id***. The supreme court held that Balczewski had presented a *prima facie* case of permanent total disability, and that the employer's rebuttal of that case under the "odd-lot doctrine," was insufficient because it was based on speculation. ***Id***. at 497-98, 251 N.W.2d at 799-800.

Here, just as Balczewski did, Cabral presented expert testimony of permanent total disability based on his injury and education, and based on the labor market in the area. The employer attempted to rebut that showing with Riley's report, which stated that:

> Mr. Cabral *would be available* for a limited number of jobs in the local economy, given his educational background, illiteracy, age, and skills. *He would qualify* for select positions such as: small parts assembler, cashier, fast food worker, dishwasher, food service worker, cleaner/custodian, messenger, hand grinder, and plastics trimmer.

(Emphasis added.) This opinion, however, offered nothing more than speculation and presumption relative to the question of the availability of work for Cabral. As ***Balczewski*** explains, the odd-lot doctrine presents two questions: (1) Is the claimant available for work?; and (2) Is work available for the claimant? *See* ***id***. at 495, 251 N.W.2d at 798. Riley's report answered the first question, but failed to answer the second with anything beyond a statement implying a presumption that light work was available for Cabral. According to ***Balczewski***, such a presumption is insufficient to establish that "some kind of suitable work is regularly and continuously available to the claimant." ***Id***. The ALJ's finding that Riley's report rebutted Cabral's claim of total disability because it "lists specific jobs in the labor force that *are available* to [Cabral]" is erroneous. Riley's report simply presumes the availability of the jobs it lists.

Finally, we note that the supreme court in ***Balczewski*** reversed the judgment, but remanded the matter for a hearing at which the employer would have the opportunity to present evidence to demonstrate that Balczewski was not unemployable. ***Id***., 76 Wis.2d at 498-99, 251 N.W.2d at 800. The court gave the employer an opportunity to rebut Balczewski's claim because, even though the odd-lot doctrine was part of Wisconsin law at the time, "it was not recognized or perceived by the employer or the examiner at the time of hearing, nor was it recognized by the department on review." ***Id.*** at 498, 251 N.W.2d at 800. Here, even though Cabral did not specifically argue to the ALJ or the commission the applicability of ***Balczewski***, the ALJ, the commission, and the employer appear to have been aware of the odd-lot doctrine throughout the underlying proceedings. Even if they were not, however, they should have

been, given the doctrine's obvious status as Wisconsin law since ***Balczewski***. We therefore reverse the judgment, and remand this matter to the circuit court with directions to enter judgment in favor of Cabral.

By the Court.--Judgment reversed and cause remanded with directions.

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