

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 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. 04-0040
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000124

**IN COURT OF APPEALS
DISTRICT III**

JERRY PERSON,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION,
McCORMICK & McCORMICK, INC. AND
GREAT WEST CASUALTY COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sawyer County:
NORMAN L. YACKEL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jerry Person appeals a judgment affirming a decision of the Labor and Industry Review Commission. The Commission found Person twenty-five percent permanently disabled based on a cervical neck injury

he suffered at work, rejecting his claim that he was totally permanently disabled. Person argues that (1) the court's decision does not adequately identify the supporting facts; (2) the Commission's decision should be reviewed de novo; (3) the Commission failed to consider all pertinent information; (4) Person made a prima facie case of being totally disabled thereby shifting the burden of proof to his employer; and (5) Person established his total disability by evidence of injury and preexisting conditions that render him permanently unemployable. We reject these arguments and affirm the judgment.

¶2 This court and the trial court employ the same standards of review. We review the Commission's decision. See *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). Therefore, any deficiency in the trial court's memorandum decision is irrelevant.

¶3 The role of this court is limited to reviewing the record to locate credible and substantial evidence that supports the Commission's determination rather than weighing the evidence opposed to it. See *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975). The Commission's findings on a question of fact are conclusive if supported by credible and substantial evidence. *Bumpas v. DILHR*, 95 Wis. 2d 334, 342, 290 N.W.2d 504 (1980). The weight of the evidence is a matter for the Commission to decide. *E.F. Brewer v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). While Person argues that this appeal presents questions of law that this court should decide de novo, he does not identify any particular question of law and he cites no authority that would allow this court to substitute our judgment for the Commission's.

¶4 Person argues that the Commission failed to consider all of the factors enumerated in WIS. ADMIN. CODE § DWD 80.34 when making its

decision. Particularly, it failed to consider “other pertinent evidence” including Person’s living in a sparsely populated, job-deficient area and the effect of narcotic pain medication on his ability to drive and work. The Commission relied on a report by a vocational expert, Thomas Herro, concluding that Person could find employment despite his injury. Herro’s report states that he considered the factors listed in the administrative code, which include the factors Person raises. Furthermore, Person’s expert witness, Jack Casper, did not contradict Herro’s conclusion. Casper gave five opinions on Person’s employability, depending on which of five doctors’ reports correctly stated his condition. Accepting the medical reports most favorable to Person, Casper concluded that he was unemployable. The Commission, however, found other medical reports more credible. Casper’s own analysis based on those reports defeat his claim of total permanent disability.

¶5 Person did not make a prima facie case for total permanent disability. Therefore, the burden did not shift to his employer to show that regular and continuous employment is available. To establish a prima facie case, Person was required to produce evidence that, in the absence of adequate rebuttal, satisfies the burden of persuasion on the issue. *See Beecher v. LIRC*, 2004 WI 88, ¶52, ___ Wis. 2d ___, 682 N.W.2d 29. Casper’s own report did not support Person’s claim of total permanent disability based on the medical reports the Commission found credible.

¶6 Finally, Person asks this court to “extend the law” to allow consideration of his other existing unscheduled injuries when deciding whether he is totally permanently disabled. He faults the Commission for not considering the

combination of his cervical neck injury with his carpal tunnel problems and lower back pain. WISCONSIN STAT. § 102.44(2)¹ does cover an injury that is part of a total disability that includes an unscheduled injury. *See Mireles v. LIRC*, 2000 WI 96, ¶63, 237 Wis. 2d 469, 613 N.W.2d 875. No extension of the law would be necessary to allow the Commission to consider Person's total medical condition when deciding whether he is permanently disabled. Person's claim fails because he presented no evidence that his back and carpal tunnel problems, in combination with his cervical spine injury, render him totally permanently disabled. He relies on medical reports that the Commission found to be less credible than other reports and on Casper's conclusions that are derived from utilizing the less credible medical reports. The Commission appropriately found the report of Dr. Stephen Barron credible because his evaluation closely matched the results of Person's functional capacity exams. Those exams appropriately consider Person's total medical condition when determining his suitability for employment.

By the Court.—Judgment affirmed.

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

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

