COURT OF APPEALS
DECISION
DATED AND FILED

June 21, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1989 **Cir. Ct. No. 2015CV98**

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

TRACIE L. FLUG,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, WAL-MART ASSOCIATES, INC. AND NEW HAMPSHIRE INSURANCE COMPANY C/O CLAIMS MANAGEMENT, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Reversed and cause remanded for further proceedings*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. Tracie Flug appeals an order affirming a decision of the Labor and Industry Review Commission that denied Flug's worker's

compensation claim. The Commission concluded Flug was not entitled to temporary total disability benefits, permanent partial disability benefits, and medical treatment expenses that she alleged were related to a workplace injury. Flug contends the Commission made several errors of law, and she also argues the evidence was insufficient to support the Commission's decision.

¶2 We reject Flug's arguments, with one exception. For the reasons explained below, we conclude the Commission erroneously determined Flug was not entitled to disability benefits under WIS. STAT. § 102.42(1m)[1] without first considering whether she underwent invasive treatment for a compensable injury in good faith. We therefore reverse the circuit court's order affirming the Commission's decision. We remand the matter to the Commission for additional fact-finding on the issue of good faith and, if necessary, for a determination of the damages to which Flug is entitled.

BACKGROUND

¶3 In February 2013, Flug was employed by Wal-Mart Associates, Inc., working as a department supervisor in one of its stores. On February 20, 2013, Flug sought medical treatment from Dr. Sabina Morissette. Morissette's treatment note contains the following history:

> Tracie Flug … reports that she had some neck pain and shoulder pain after doing some repetitive activity above her shoulder height at work. This happened last Thursday approximately February 14. She repeatedly raised her right arm to scan boxes for scanning with a rather heavy scanner. … She is more weak in her right arm and finds it very difficult to move against resistance with that

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> extremity. … She also has a certain amount of decrease [sic] sensation in different parts of her arm. These are mostly in the upper arm and also the forearm.

¶4 Morissette ordered a cervical spine x-ray, which showed "[l]oss of disc space height at C5-C6 with anterior spurring." In her treatment note, Morissette diagnosed Flug with "[r]ight arm and shoulder strain with possible relation to the cervical spine itself." On a form releasing Flug to return to work with restrictions, Morissette described Flug's condition as "neck, arm strain—severe" and diagnosed her with "[right] arm neuropathy possibly secondary to cervical stenosis."[2]

¶5 Flug saw physical therapist Debora Stow on February 25, 2013. Stow's note states:

> Patient … presents with the diagnosis of right shoulder pain. Patient stated that on Thursday, February 14 she started work without any pain but towards the end of her day she started getting really sore through her shoulder, neck and back. When she woke up Friday morning she had a lot of really intense pain and had to leave work early secondary to the pain. … She does feel the pain starts in her neck and goes down the back portion of her shoulder down into her arm. She does report having a little bit of pain in her wrist but no numbness and tingling.

¶6 On March 6, 2013, Flug saw Dr. Andrew Floren. Floren's note states that Flug "was doing a good deal of overhead work scanning some boxes in the Shoes Department. She developed a severe sudden pain in her right upper back area. This pain went down the posterior shoulder and arm to the wrists." Floren further noted that Flug had seen Morissette, "whose history concurs." Flug

[2] Stenosis refers to the "constriction or narrowing of a passage or orifice." TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1964 (19th ed. 2001).

told Floren her symptoms were "slowly resolving," but she had an "aching burning pain in the upper back" that "radiat[ed] into the posterior right shoulder and down the arm just a bit." Flug denied experiencing any numbness or tingling in her right arm or hand. Floren noted the February 20 cervical spine x-ray showed "mild degenerative changes." Floren's assessment was that Flug had right upper back and shoulder pain, with no sign of cervical involvement.

¶7 Flug saw Floren again on March 22, 2013. Floren's note from that date states the pain in Flug's neck and upper back was slowly resolving, but the pain in her shoulder was not resolving, and she continued to have pain down her arm to her hand. Flug also told Floren she had begun to experience tingling and numbness in her right hand and fingers. Flug returned to Floren on April 2, 2013, and reported that her condition was not improving. Floren ordered an MRI, which revealed moderate spondylotic change in the cervical spine, as well as "[m]oderate ventral disc osteophyte complex" at the C6-C7 level.[3]

¶8 Floren recommended a steroid injection, which was administered by Dr. Stephen Endres on April 19, 2013. Endres' note from that date states that Flug was

> doing some auditing of stock at Wal-Mart. With her head down and her arm up, she felt something give in her right arm and since that time she has been having unrelenting burning/shooting pain when she puts her head in certain ways, going across her shoulder and down into her middle finger and little finger.

[3] Cervical spondylosis refers to "[d]egenerative arthritis, osteoarthritis, of the cervical or lumbar vertebrae and related tissues." TABER'S CYCLOPEDIC MEDICAL DICTIONARY, *supra,* 1949. An osteophyte is "[a] bony excrescence or outgrowth, usually branched in shape." ***Id.*** at 1468.

¶9 Flug returned to Floren on May 2, 2013, and reported the steroid injection had not helped "in any way." Floren then referred Flug to Dr. Eduardo Perez, a neurosurgeon. Perez recommended surgery, specifically, an anterior cervical discectomy with fusion/fixation at the C5-C6 and C6-C7 levels. The surgery was performed on June 4, 2013. Approximately one month after the surgery, Flug reported to Perez that she was "doing excellent" and was feeling "almost 100%." Floren released Flug to return to work on July 17, 2013, with a twenty-pound lifting restriction. That restriction was increased to thirty pounds in August 2013 and was eliminated in November 2013.

¶10 Wal-Mart initially paid Flug worker's compensation benefits. However, Wal-Mart's worker's compensation carrier ultimately retained Dr. Morris Soriano to conduct an independent review of Flug's medical records. On June 24, 2013, a claims manager wrote to Flug, stating:

> We have received the results of your IME[4] by Dr. Morris Soriano, MD performed on 6/18/13. He has determined that you had reached end of healing for your work related injury prior to surgery on 6/4/13 and that no more medical treatment is required. You have been allowed 0% permanent partial disability.
>
> Therefore, we will cease all medical payments as of 5/9/13 and all disability payments as of 6/22/13. If permanent disability has been determined, then the Wisconsin Workmen's Compensation Board will calculate your benefits and a check will be sent to you.

¶11 In August 2013, Flug filed a hearing application with the Worker's Compensation Division of the Department of Workforce Development. She

[4] Although the claims manager stated Soriano performed an "IME," or independent medical examination, it is undisputed that Soriano merely reviewed Flug's medical records and did not physically examine her.

sought medical expenses, temporary total disability benefits from June 22, 2013 through August 8, 2013, and permanent partial disability benefits.

¶12 A hearing on Flug's claim was conducted on April 1, 2014, before an administrative law judge (ALJ). Flug's medical records were introduced into evidence at the hearing. In addition, Flug submitted a "Practitioner's Report on Accident or Industrial Disease in Lieu of Testimony" signed by Floren on August 13, 2013. In the report, Floren concluded Flug's work activity on February 14, 2013, directly caused her disability. He further opined that: (1) the "extensive degenerative condition" of Flug's spine was not directly caused by any single work incident; and (2) Flug's work activity on February 14, 2013, did not precipitate, aggravate, or accelerate a preexisting progressively deteriorating or degenerative condition beyond normal progression. In an addendum to his report dated December 13, 2013, Floren assigned Flug a permanent partial disability rating of 22%.

¶13 In a subsequent addendum dated February 26, 2014, Floren changed his opinion regarding the cause of Flug's disability. Contrary to his previous opinion, Floren concluded Flug's work activity on February 14, 2013, did not directly cause her disability but, instead, precipitated, aggravated, or accelerated a preexisting progressively deteriorating or degenerative condition beyond normal progression. Floren conceded Flug's work activities did not cause the "degenerative disc disease in her cervical spine." However, he stated that, given the "sudden onset" of Flug's symptoms while at work, "rather than a slow progressive onset of symptoms over time," it was "medically probable" her work activities caused a cervical disability requiring surgery. Floren opined that all of Flug's medical treatment since February 14, 2013, including the surgery

performed by Perez, had been reasonable and necessary to treat the symptoms caused by her work activity.

¶14 Soriano's June 18, 2013 report was also submitted into evidence at the administrative hearing. In that report, Soriano opined that the work activity on February 14, 2013, directly caused only a soft tissue cervical and shoulder strain. Soriano further opined that Flug's "subjective complaints of numbness, tingling, pain, and weakness in the right upper extremity" were "not documented objectively on physical examination in relationship to any specific nerve root." Soriano noted that Flug suffered from "multilevel moderate degenerative disk disease," but he opined that condition was not aggravated or exacerbated by Flug's work activity on February 14, 2013.

¶15 Soriano concluded the medical treatment Flug received prior to the June 4, 2013 discectomy was reasonable and necessary to treat her cervical strain. However, he opined that the surgery was "unrelated to the work incident or work exposure." He explained, "It is not physically possible that scanning a product on a shelf could have aggravated or worsened two levels of a previously arthritic condition at C5-C6 and C6-C7 to the point where it became symptomatic. The surgery proposed clearly has no relationship to any documentable, repetitive, objective neurological findings."[5]

¶16 An additional report by Soriano, dated February 5, 2014, was also admitted into evidence. In that report, Soriano opined Flug's work activity on

[5] Flug's surgery had already occurred by the time Soriano authored his June 18, 2013 report. However, Soriano's report was based on a review of Flug's medical records, and he was not provided with records pertaining to the June 4, 2013 surgery.

February 14, 2013, caused a mild to moderate soft tissue cervical strain, which was fully healed in four to six weeks. Soriano reiterated that the work activity did not cause any permanent disability, either directly or by the precipitation, aggravation, or acceleration of a preexisting degenerative condition beyond normal progression.

¶17 In support of his opinions, Soriano noted there was "no evidence on the radiological studies of an acute objective structured aggravation or herniation," and there were "no findings other than mild degenerative changes on the MRI scan." Soriano further stated Flug's reported symptoms of numbness and tingling in her middle, ring, and small fingers had no relationship to the C5-C6 disc and "basically" no relationship to the C6-C7 disc. He continued:

> Moreover, review of the operative report clearly indicates no evidence of disc herniation, no evidence of neurological impingement and the only finding noted at C6-7 were osteophytes. It is a fact that the operative report does not even mention whether there are osteophytes at C5-6 and this physician is wondering why C5-6 was even included [in the surgery] since it does not pertain to any of the symptomatology offered by the petitioner.
>
> ….
>
> It is not probable or even possible that reaching up with a 25-ounce scanner[6] over a period of time could have aggravated these osteophytes since they are made of solid calcium deposits and could not have been moved, fractured, aggravated or worsened acutely on a physiological basis.

Soriano opined that the June 4, 2013 discectomy was "not reasonable, necessary or related to the injury of February 14, 2013."

[6] Other evidence introduced at the hearing indicated the scanner Flug was using weighed twenty-five ounces, or approximately 1.5 pounds.

¶18 Flug was the only witness to testify at the administrative hearing. She testified that, on the date in question, while scanning a box above her head, she experienced "[p]ain, instant pain, just shooting down from my neck down into my shoulder and into my arm." She described the pain as "radiating, more of the needles going through your shoulder blade and then radiating down into the arm. … Hundreds and thousands of needles just picking at you." When asked whether the pain's onset was sudden or gradual, Flug responded, "Oh, this one was sudden." Flug acknowledged she continued working after the injury occurred. She testified she left work early the next day because the pain was too great, but she conceded she did not actually report the injury to anyone at work until February 20, 2013, six days after it occurred.

¶19 The administrative law judge determined Flug had failed to establish beyond a legitimate doubt that she sustained a compensable work-related injury on February 14, 2013, beyond that which had already been conceded and paid for by Wal-Mart. The ALJ explained:

> There is significant doubt as to the accuracy of the history upon which Dr. Floren rendered his opinions. The history as testified to was that of a sudden pain on the date of injury with pain going down the posterior shoulder and arm to the wrists and that Dr. Morissette's history of February 20, 2013 concurs. However, Dr. Morissette's history on that date was only that "she had some neck pain and shoulder pain after doing some repetitive work above shoulder height" causing her to leave work the following day. The applicant informed her physical therapist on February 25, 2013 that "she started work without any pain but towards the end of the day started getting really sore through her shoulder, neck and back." The applicant testified she immediately felt pain like needle pricks. That was not mentioned in the contemporaneous records. On the contrary in the initial reports she denied any numbness or tingling. There was no mention of tingling in the extremity until April 15, 2013. The applicant provided no explanation for this significant difference in histories. Dr. Floren predicated his opinion upon the sudden onset of

> symptoms and that "… since that time she has been having unrelenting burning/shooting pain when she puts her head in certain ways …." Again the medical records contradict this. The applicant reported significant improvement in her condition through March 28, 2013.
>
> The opinions of a practitioner can be no better than the history upon which the opinion is rendered. Here the significant variance in the history as given from that reflected in the contemporaneous records raise[s] a legitimate doubt as to the compensability of the claim as a traumatic injury beyond that already conceded and paid by the respondents. While Dr. Floren also reported the appreciable workplace exposure was causative, this was not developed at hearing particularly given the inconsistency in history of injury on February 14, 2013.

¶20 Flug petitioned the Commission for review of the ALJ's decision, which the Commission affirmed in February 2015. The Commission reasoned Flug "failed to present credible medical evidence to establish that she suffered a work-related injury because the history upon which Dr. Floren relied when making his determination as to whether the incident on February 14, 2013, resulted in a work injury was incorrect." The Commission therefore stated the ALJ "was left with legitimate doubt as to whether [Flug] suffered any work injury, so he dismissed the application."

¶21 The Commission rejected Flug's argument that Wal-Mart was required to pay her benefits under WIS. STAT. § 102.42(1m). The Commission also rejected Flug's claim that the ALJ erred by concluding Flug gave different accounts of her injury to Morissette and Floren. The Commission agreed with the ALJ's conclusion "that the variance in history raises a legitimate doubt as to the compensability of the claim."

¶22 Flug sought judicial review of the Commission's decision. The circuit court affirmed the Commission, and Flug now appeals.

DISCUSSION

¶23 On appeal, we review the Commission's decision, not the circuit court's. ***ITW Deltar v. LIRC***, 226 Wis. 2d 11, 16, 593 N.W.2d 908 (Ct. App. 1999). The scope of our review is narrow. "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive." WIS. STAT. § 102.23(1)(a)1. We may set aside the Commission's order only if: (1) the Commission acted without or in excess of its powers; (2) its order was procured by fraud; or (3) its findings of fact do not support the order. Sec. 102.23(1)(e).

¶24 Flug argues the Commission acted in excess of its powers in three respects. *See* WIS. STAT. § 102.23(1)(e)1. First, she contends the Commission erred by determining WIS. STAT. § 102.42(1m) was inapplicable. Second, she argues the Commission placed an improper evidentiary burden on her. Third, she contends the Commission denied her the opportunity to be heard on a crucial issue. In addition, Flug asserts the evidence was insufficient to support the Commission's decision. *See* WIS. STAT. § 102.23(1)(a)1., (e)3.

I. WISCONSIN STAT. § 102.42(1m)

¶25 Flug first argues the Commission erred by concluding she was not entitled to benefits under WIS. STAT. § 102.42(1m). At the outset, we observe that Flug's appellate brief could be read as arguing she is entitled to both disability benefits and medical expenses under § 102.42(1m). However, the statute, by its plain language, applies only to disability benefits, stating: "If an employee who has sustained a compensable injury undertakes in good faith invasive treatment that is generally medically acceptable, but that is unnecessary, *the employer shall*

pay disability indemnity for all disability incurred as a result of that treatment."[7] (Emphasis added.)

¶26 The interpretation of WIS. STAT. § 102.42(1m) is a question of law. *See* ***County of Dane v. LIRC***, 2009 WI 9, ¶14, 315 Wis. 2d 293, 759 N.W.2d 571. Depending on the circumstances, we accord the Commission's legal conclusions either great weight deference, due weight deference, or no deference. ***Id.*** Under great weight deference, we will uphold the Commission's interpretation of a statute as long as it is reasonable, even if there are other, more reasonable interpretations. ***Id.***, ¶16. Under due weight deference, we will uphold the Commission's interpretation as long as another interpretation is not more reasonable. ***Id.***, ¶17. When we apply no deference, we independently review the Commission's interpretation. ***Id.***, ¶18.

¶27 The Commission presents a developed argument that its interpretation of WIS. STAT. § 102.42(1m) is entitled to great weight deference. Flug does not respond to this argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). As a result, we defer to the Commission's determination that "[i]n order for … § 102.42(1m) to apply the applicant must first establish that she sustained a

[7] The Wisconsin Administrative Code sets forth the minimum permanent partial disability ratings to which employees are entitled following various back surgeries. *See* WIS. ADMIN. CODE § DWD 80.32(11) (Oct. 2015). Under the code, an employee who undergoes a surgery of the type performed on Flug is entitled to a permanent partial disability rating, even if the surgery was completely successful. *See* ***id.*** That permanent partial disability would be a disability incurred "as a result of" invasive treatment, under WIS. STAT. § 102.42(1m). Temporary disability incurred while the employee was recovering from his or her surgery would also constitute disability incurred "as a result of" invasive treatment.

compensable injury." However, the Commission's decision to deny Flug benefits under § 102.42(1m) was based on its erroneous factual belief that Flug did not sustain a compensable injury. That determination was contrary to the ALJ's decision, which the Commission purported to adopt. Rather than finding that Flug did not sustain a compensable injury, the ALJ found Flug had failed to establish a compensable injury *beyond that conceded and paid for by Wal-Mart*.

¶28 On appeal, the Commission concedes Flug sustained a compensable injury—namely, a neck and shoulder strain. Therefore, its conclusion that WIS. STAT. § 102.42(1m) does not apply to Flug's claims because she did not sustain a compensable injury is incorrect. In recognition of this error, the Commission advances an alternative argument—raised for the first time in the circuit court—in support of its decision to deny Flug benefits under § 102.42(1m). It contends the statute allows an employee who has sustained a compensable injury to recover compensation for all disability incurred as a result of medically acceptable treatment that is undertaken in good faith *as a result of* the compensable injury, even if the treatment was unnecessary. In other words, the Commission focuses on causation, arguing an employee must show that a compensable injury *caused* him or her to undergo invasive treatment.

¶29 The Commission observes that, in this case, Soriano opined the only injury Flug sustained as a result of her work activity on February 14, 2013, was a soft tissue cervical and shoulder strain. Soriano noted that Flug suffered from "multilevel moderate degenerative disk disease," but he opined that condition was not aggravated or exacerbated by the incident in question, and the strain had "no relationship" to the degenerative changes in Flug's cervical spine. Soriano further opined the nature of Flug's work on February 14, 2013, could not have caused the symptoms she reported. As a result, he concluded the discectomy Flug underwent

was "unrelated to the work incident or work exposure." Based on Soriano's opinions, the Commission asserts it could reasonably find that the discectomy was not the result of the compensable injury Flug sustained on February 14, 2013—in other words, that the compensable injury did not cause Flug to undergo the surgery. Accordingly, the Commission argues it could properly conclude § 102.42(1m) did not apply.

¶30 The Commission's interpretation is unreasonable. By its plain language, WIS. STAT. § 102.42(1m) sets forth five elements that are required for an employee to recover disability benefits: (1) the employee sustained a compensable injury; (2) he or she undertook invasive medical treatment; (3) the treatment was undertaken in good faith; (4) the treatment was generally medically acceptable, but unnecessary; and (5) the employee incurred a disability as a result of the treatment. By arguing that an employee must show his or her treatment was the result of a compensable injury, the Commission reads an additional causation requirement into the statute. *See* ***Fond Du Lac Cty. v. Town of Rosendale***, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989) (courts should avoid adding words to a statute to give it a certain meaning). The only causation requirement apparent in the statute's plain language relates to the fifth element—i.e., the employee must show that he or she sustained a disability *as a result of* invasive treatment.

¶31 In addition to being unsupported by the statutory text, the Commission's interpretation of WIS. STAT. § 102.42(1m) would lead to unreasonable results. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutory language should be interpreted to avoid absurd or unreasonable results). The record shows that Flug underwent the discectomy based on Perez's recommendation. Both Floren and

Perez clearly believed the surgery was needed to treat the workplace injury Flug sustained on February 13, 2014. The surgery was performed on June 4, 2013, two weeks before Soriano rendered his opinion that the surgery was unnecessary and unrelated to Flug's workplace injury. Based on the record before us, it appears the only information Flug had at the time she chose to undergo the surgery were her treating physicians' opinions that the surgery was necessary and related to her workplace injury. Assuming that Flug had no reason to doubt those opinions and that they were not based on misinformation she provided to the physicians, she could reasonably rely on them to proceed with the surgery. Under those circumstances, it would be unreasonable to deny Flug benefits under § 102.42(1m) simply because the Commission subsequently determined, based on other evidence later discovered, that the surgery was not actually related to Flug's injury.

¶32 Rather than requiring an employee to establish that his or her invasive treatment was actually the result of a compensable injury, we believe, consistent with its plain language, that WIS. STAT. § 102.42(1m) simply requires the employee to show he or she acted in good faith by obtaining the treatment. Good faith is generally defined as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage." BLACK'S LAW DICTIONARY 808 (10th ed. 2014); *see also* NEW OXFORD AMERICAN DICTIONARY 731 (2001) (defining good faith as "honesty or sincerity of

intention").[8] Applying these definitions, we conclude that, to establish good faith under WIS. STAT. § 102.42(1m), an employee must show that he or she reasonably believed the proposed treatment was both necessary and the result of a compensable injury.

¶33 Consider, for instance, a case in which an employee sustained a compensable work-related injury to his or her hand. If the employee subsequently underwent a knee replacement and attempted to recover compensation for that invasive treatment under WIS. STAT. § 102.42(1m), the employee's claim would properly be denied because he or she would be unable to establish a good faith belief that the knee replacement was the result of the compensable injury. The same employee would similarly be unable to establish that he or she underwent a hand surgery in good faith if the evidence showed the employee's treating physician informed the employee the surgery was needed to treat a preexisting condition, rather than the compensable injury. Conversely, if the employee's treating physician opined that the proposed hand surgery was necessary to treat the compensable injury, and the employee had no other information to contradict that opinion, the employee would be able to show good faith. Under each of these scenarios, the dispositive fact is not whether the invasive treatment was actually caused by the employee's compensable injury, but whether the employee had a reasonable, good faith basis to believe the need for the treatment was caused by the injury.

[8] *See* ***Door Cty. Highway Dep't v. DILHR***, 137 Wis. 2d 280, 293-94, 404 N.W.2d 548 (Ct. App. 1987) (when a statutory term is undefined, its ordinary and accepted meaning can be established by reference to a recognized dictionary).

¶34 Because the Commission concluded Flug did not sustain any compensable injury, it never addressed whether she underwent the discectomy in good faith, as required by WIS. STAT. § 102.42(1m). As discussed above, the record before us shows that Flug underwent the discectomy based on Perez's and Floren's opinions. Soriano did not render his contrary opinion until two weeks after the surgery was performed. These facts suggest Flug underwent the surgery in good faith. However, there may be other facts that negate that inference, which are either not present in the current record or not readily apparent. It is the role of the Commission, not this court, to find facts. *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980) (court of appeals cannot find facts). A remand to the Commission is therefore necessary for it to determine whether Flug acted in good faith by undergoing the surgery.[9]

¶35 Flug argues she established her entitlement to benefits under WIS. STAT. § 102.42(1m) because both Floren and Soriano opined that she sustained a

[9] As noted above, it is unclear whether Flug believes she is entitled to recover medical expenses under WIS. STAT. § 102.42(1m), in addition to disability benefits. To the extent Flug claims an entitlement to medical expenses under that statute, she is mistaken. By its plain language, § 102.42(1m) applies only to disability benefits.

An argument could be made that Flug is entitled to medical expenses under WIS. STAT. § 102.42(1), which requires an employer to "supply such medical, surgical, … and hospital treatment … as may be reasonably required to cure and relieve from the effects of the injury." Although § 102.42(1) "ordinarily permits compensation only when medical treatment and expenses are reasonably required and necessary," our supreme court has created an exception to this general rule allowing recovery even if the treatment was unnecessary or unreasonable, as long as the employee underwent the treatment in good faith. ***Honthaners Rests., Inc. v. LIRC***, 2000 WI App 273, ¶15, 240 Wis. 2d 234, 621 N.W.2d 660 (citing ***Spencer v. LIRC***, 55 Wis. 2d 525, 532, 200 N.W.2d 611 (1972)). However, Flug has not argued on appeal that she is entitled to medical expenses under § 102.42(1), as interpreted in ***Spencer*** and ***Honthaners***. Accordingly, we do not address her entitlement to benefits under that statute.

compensable injury and underwent surgery as a result.[10] In support of that assertion, Flug cites a single sentence from Soriano's February 5, 2014 report, in which he stated, "My diagnosis of Ms. Flug's condition is status post cervical strain, preexisting mild degenerative disc disease C6-7 and C5-6, and status post two-level cervical fusion performed for a cervical strain."

¶36 We disagree with Flug's interpretation of this statement. Rather than stating the surgery was actually related to the cervical strain, Soriano was opining that the surgery appeared to have been recommended as a result of the cervical strain. In addition, Flug's citation to this single sentence from one of Soriano's reports fails to take into account the entirety of his opinions. As noted above, Soriano clearly opined elsewhere that Flug's surgery was "unrelated to the work incident or work exposure." We therefore reject Flug's assertion that both medical experts opined her surgery was the result of her compensable injury.

II. Improper evidentiary burden

¶37 Flug also argues the Commission erred by placing an improper evidentiary burden on her. In a worker's compensation case, the claimant has the burden to prove, beyond a legitimate doubt, all facts essential to the recovery of compensation. ***Leist v. LIRC***, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994). "It is [the Commission's] duty to deny benefits if it finds that a legitimate doubt exists regarding the facts necessary to establish a claim." ***Id.***

[10] If undisputed evidence established that Flug's surgery actually was the result of her compensable injury, she would be able to establish the good faith required by WIS. STAT. § 102.42(1m). *See supra*, ¶¶32-33.

¶38 Flug cites WIS. STAT. § 102.17(1)(d), which states that "[t]he contents of certified medical and surgical reports by physicians … licensed in and practicing in this state … presented by a party for compensation constitute prima facie evidence as to the matter contained in those reports, subject to any rules and limitations the division prescribes." Flug asserts that both Floren and Soriano offered certified medical opinions that she suffered a workplace injury on February 14, 2013, for which she later underwent a discectomy. Flug contends those certified opinions were prima facie evidence under § 102.17(1)(d), and Wal-Mart did not present any evidence to refute them. Flug therefore argues the Commission placed an improper evidentiary burden on her by requiring her to make an additional showing in order to recover.

¶39 Flug's argument regarding the burden of proof relies on her contention, which we have already rejected, that Soriano opined the discectomy was a result of the workplace injury Flug sustained on February 14, 2013. As discussed above, Soriano plainly concluded that Flug sustained only a mild to moderate soft tissue cervical strain as a result of her work activity, which resolved in four to six weeks, and that the subsequent surgery was "unrelated to the work incident or work exposure." Thus, there is no support for Flug's assertion that she presented unrefuted, prima facie evidence to support her claim. We therefore reject Flug's argument that the Commission erred by requiring her to bear an improper evidentiary burden.

III. Opportunity to be heard

¶40 Flug next argues the Commission violated her right to due process by denying her "an opportunity to be heard on the issue it used to deny her claims." As discussed above, the ALJ rejected Floren's opinion that the

discectomy Flug underwent was a reasonable and necessary treatment for the workplace injury she sustained on February 14, 2013. In so doing, the ALJ noted inconsistencies between the medical history Flug provided to Floren and the histories she had previously provided to Morissette and Stow. Specifically, the ALJ noted that Flug told Floren she suffered a sudden pain on the date of injury going down her shoulder and arm into her wrist. Flug did not, however, describe a similar sudden pain to Morissette or Stow. The ALJ reasoned that a physician's opinions "can be no better than the history upon which [they are] rendered." The ALJ therefore concluded the "significant variance" between the histories given to Floren and the other treatment providers "raise[d] a legitimate doubt as to the compensability of the claim as a traumatic injury beyond that already conceded and paid by [Wal-Mart]."

¶41 Flug contends she was unaware before reading the ALJ's decision that the accuracy of the medical history she provided to Floren was in dispute or was part of the controversy between the parties. She therefore contends she was denied due process because she was not afforded an opportunity to be heard on that issue. Whether a party in an administrative proceeding has received due process

> turns on the presence or absence of "fair play," which includes the right to reasonably know the charges or claims, the right to meet such charges or claims with competent evidence, and the right to be heard by counsel regarding the applicable law and the probative force of the evidence presented.

LaBeree v. LIRC, 2010 WI App 148, ¶29, 330 Wis. 2d 101, 793 N.W.2d 77.

¶42 All three of these elements are met in the instant case. First, Flug knew the claim. It is undisputed that the controversy between the parties was

whether Wal-Mart was liable for Flug's medical expenses after May 9, 2013; for temporary total disability benefits from June 22, 2013, through August 8, 2013; and for permanent partial disability benefits. Flug relied on Floren's opinion to support her assertion that the medical treatment she received after May 9—specifically, the discectomy—was necessary and related to her workplace injury. The accuracy of the medical history on which Floren relied to form his opinion was plainly material to the opinion's credibility. Flug cannot reasonably claim she could not have foreseen that Wal-Mart would attempt to undermine Floren's opinion by pointing out inconsistencies between the description of the injury Flug provided to Floren and the accounts she had previously given to other practitioners.

¶43 Second, Flug possessed the right to pursue her claim by the submission of competent evidence. Flug testified at the administrative hearing and submitted as exhibits Floren's original report in lieu of testimony, two supplemental reports, and over 130 pages of medical records. Aside from Flug's claim, which we have already rejected, that she did not know the accuracy of the medical history provided to Floren was at issue, there is no reason Flug could not have presented evidence or argument on that topic.

¶44 Third, Flug was represented by counsel in the proceedings before the ALJ and in the subsequent proceedings before the Commission. It appears counsel fully participated in the proceedings and was not barred from presenting evidence or being heard regarding the accuracy of the medical histories Flug provided to various physicians. On these facts, we cannot conclude Flug's right to due process was violated during the administrative proceedings.

IV. Sufficiency of the evidence

¶45 Flug's final argument on appeal is that the evidence was insufficient to support the Commission's decision. In rejecting Flug's claim for benefits, the Commission stated there was "significant doubt as to the accuracy of the history upon which Dr. Floren rendered his opinions." Flug contends there was no evidence to support the Commission's finding that the history relied on by Floren was inaccurate.

¶46 We disagree. When Flug was seen by Morissette on February 20, 2013, she reported she "had some back pain and shoulder pain after doing some repetitive activity above her shoulder height at work." Flug similarly told Stow on February 25, 2013, that she "started work without any pain but towards the end of her day she started getting really sore through her shoulder, neck and back. When she woke up [the next day] she had a lot of really intense pain." These accounts are consistent with Flug's behavior during the days immediately following the injury. Despite experiencing back and shoulder pain on the day of the injury, Flug finished her shift and did not report any injury to her supervisor. She left work early the next day because of pain, but she did not inform anyone her pain was caused by a workplace injury. She did not allege a workplace injury or seek medical attention until six days after the injury occurred. This behavior, along with the accounts of the injury that Flug provided to Morissette and Stow, supports Wal-Mart's position that the only workplace injury Flug sustained was a moderate neck and shoulder sprain that resolved in four to six weeks.

¶47 By the time she saw Floren on March 6, 2013, however, Flug's version of the injury had changed. Flug told Floren she "was doing a good deal of overhead work scanning some boxes in the Shoes Department" when she

developed a "*sudden pain* in her right upper back area" that "went down the posterior shoulder and arm to the wrists." (Emphasis added.) Flug similarly told Endres on April 19, 2013, that she was "doing some auditing of stock at Wal-Mart" when she "*felt something give* in her right arm and since that time she has been having unrelenting burning/shooting pain when she puts her head in certain ways." (Emphasis added.) At the administrative hearing, Flug testified she felt "[p]ain, instant pain, just shooting down from my neck down into my shoulder and into my arm" on the date of the injury. She described the pain as "[h]undreds and thousands of needles just picking at you." She expressly testified the pain's onset was "sudden."

¶48 The Commission was not required to accept Flug's testimony regarding the sudden onset of her pain. Rather, it was free to conclude that Flug's initial accounts to Morissette and Stow describing a gradual onset of pain were more credible because they were closer in time to the injury and were consistent with Flug's postinjury behavior. Once the Commission rejected Flug's "sudden onset" account of her injury, it was free to disregard Floren's opinions, which were expressly based on Flug's "sudden onset" account. The Commission could then reasonably find, based on Soriano's reports, that the only workplace injury Flug sustained was a neck and shoulder strain, which resolved in four to six weeks and was unrelated to the later discectomy.

¶49 Flug argues the Commission's decision in this case is inconsistent with our supreme court's decision in ***Leist***. Leist, a police officer, asserted he injured his back at work while subduing a suspect. ***Leist***, 183 Wis. 2d at 456. He later underwent surgery for a herniated disc. ***Id.*** at 455. The physician who performed the surgery opined the herniated disc was caused by the workplace incident. ***Id.*** at 455-56. However, other evidence showed that, following the

workplace incident, Leist continued participating in physical activities such as golf, basketball, and weightlifting, and continued to perform his regular work responsibilities. ***Id.*** at 456, 458. On this record, the Commission concluded there was a legitimate doubt regarding Leist's entitlement to benefits because Leist's testimony regarding the injury and his physician's opinion were inconsistent with the evidence regarding his "physical lifestyle." ***Id.*** at 456.

¶50 Our supreme court reversed the Commission's decision, concluding there was no evidence in the record to challenge the veracity of either Leist's testimony regarding the injury or his physician's opinion. ***Id.*** at 458. The court stated the Commission "cannot reject a medical opinion unless there is something in the record to support its rejection." ***Id.*** at 460. The court then explained there was no evidence in the record "as to whether someone suffering from a herniated disc could engage in the activities recited by Leist." ***Id.*** at 461. As a result, the court stated the Commission's decision denying benefits was improperly based on the Commission's own "cultivated intuition," instead of the evidence. ***Id.*** at 462.

¶51 ***Leist*** is inapposite. There, the Commission rejected the employee's claim based on sheer speculation that the employee's purported injury was inconsistent with the physical activities he reported performing. There was no evidence in the record to support the Commission's conclusion in that regard. Here, in contrast, the Commission's decision to reject Floren's conclusions was amply supported by the inconsistencies between the histories provided to Floren and the other practitioners, as well as Soriano's contrary opinion.

¶52 Flug relies heavily on the statement in Floren's March 6, 2013 note that Flug saw Morissette on February 20, and Morissette's "history concurs." Flug asserts the Commission could not disregard Floren's conclusion that the history

Flug provided to Morissette was consistent with the history Flug provided to him. To the contrary, we conclude the Commission, by reviewing and comparing the histories provided to Floren and Morissette, could reasonably determine there was an "inherent inconsistency" between them. *See* ***id.*** at 457 ("There must be in the testimony some inherent inconsistency before the commission is warranted in entertaining a legitimate doubt. It cannot rely solely upon its cultivated intuition." (quoting ***Richardson v. Industrial Comm'n***, 1 Wis. 2d 393, 396-97, 84 N.W.2d 98 (1957) (emphasis omitted))). The Commission's decision was not based on its "cultivated intuition" alone.

¶53 Flug also argues the controversy over whether the onset of her symptoms was sudden or gradual is irrelevant because both Floren and Soriano opined her injury was the result of workplace exposure. However, Flug ignores the fact that Soriano expressly opined the discectomy was unrelated to the work incident *or* work exposure. Flug also ignores the fact that Floren's opinions were expressly based on his belief that the onset of Flug's pain was sudden, rather than gradual. Floren did not explain how that belief squared with a theory that Flug's injury was caused by a period of workplace exposure, rather than a single incident. On this record, the Commission reasonably concluded Floren's opinion regarding exposure was "not developed at hearing."

¶54 Finally, Flug contends the Commission failed to base its review on the evidence submitted, in violation of WIS. STAT. § 102.18(3). She asserts the Commission ignored prima facie evidence supporting her claim. Again, however, this argument relies on Flug's mistaken assertion that both Floren and Soriano opined her surgery was a result of her workplace injury. As discussed above, Soriano clearly opined the two were unrelated. *See supra*, ¶¶35-36. Flug's

argument that the Commission erred by failing to base its review on the evidence submitted is therefore meritless.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.