

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 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. 03-3427
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000414

**IN COURT OF APPEALS
DISTRICT III**

DAVID OTT,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND CITY
OF MARINETTE (FIRE DEPARTMENT),**

DEFENDANTS-RESPONDENTS,

V.

DEPARTMENT OF EMPLOYEE TRUST FUNDS

DEFENDANT.

APPEAL from an order of the circuit court for Marinette County:
DAVID G. MIRON, Judge. *Affirmed.*

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

¶1 PER CURIAM. David Ott appeals an order affirming a decision of the Labor and Industry Review Commission (commission). The commission concluded there was a legitimate doubt that Ott was entitled to duty disability benefits after he left his job as a firefighter due to neck and back injuries. As a result, the commission dismissed Ott's claim. Ott argues that three findings of fact the commission made are not supported by credible and substantial evidence: (1) Ott did not report any work-related neck or back injuries prior to 1996; (2) Ott worked on the side as a carpenter thirty to forty hours per week and suffered many injuries as a result; and (3) Ott was able to return to work in August 1997. We disagree with Ott and affirm the order.

BACKGROUND

¶2 Ott began serving with the City of Marinette Fire Department in January 1978. In 1988, he was promoted to lieutenant. During his time with the fire department he also worked part-time as a carpenter. Over the course of his employment with the fire department, Ott alleges that he suffered from neck and back injuries, which eventually inhibited his ability to perform his job. Ott's last day with the fire department was February 2, 1998.

¶3 Ott underwent a functional capacity evaluation on February 17, 1998. As a result of the evaluation, Dr. Thomas Mack concluded that Ott's performance was not sufficient for the lifting requirements of his job. Therefore, Mack advised Ott he could no longer work as a firefighter. By November 1998, Ott had depleted all his paid leave and vacation time, as well as leave under the Family and Medical Leave Act. Thus, Ott's employment with the fire department was terminated as of November 18.

¶4 In December 1999, Ott filed a claim for duty disability benefits with the Department of Employee Trust Funds under WIS. STAT. § 40.65.¹ His petition was supported by reports from two physicians, Dr. Kris Chan and Dr. Kaarn Heida. Both physicians stated that Ott's back and neck problems were the result of a series of work-related injuries and that he was permanently partially disabled as a result. However, neither Chan nor Heida reviewed Ott's contemporaneous treatment records. Instead, their opinions were based on Ott's verbal recollection of his injuries. Heida also reviewed Chan's report when doing her evaluation.

¶5 At the request of the City's worker's compensation carrier, Dr. Lester Owens reviewed Ott's medical records and determined that Ott's injuries did not restrict him from his duties as a firefighter. Owens also stated that Ott's work as a carpenter contributed to his neck and back problems more than did his job as a firefighter.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. WISCONSIN STAT. § 40.65(2)(b) states, in relevant part:

1. This paragraph applies to participants who first apply for benefits under this section on or after May 3, 1988.
2. An applicant for benefits under this section shall submit or have submitted to the department an application that includes written certification of the applicant's disability under sub. (4) by at least 2 physicians, as defined in s. 448.01 (5), who practice in this state and one of whom is approved or appointed by the department, and a statement from the applicant's employer that the injury or disease leading to the disability was duty-related.
3. The department shall determine whether or not the applicant is eligible for benefits under this section on the basis of the evidence in subd. 2. An applicant may appeal a determination under this subdivision to the department of workforce development.

¶6 Dr. Ahmad Haffar examined Ott and reviewed his records, also at the request of the worker's compensation carrier. Haffar stated he could not state to a reasonable degree of medical certainty that working as a firefighter was a material contributory causative factor in Ott's neck and back problems. Haffar concluded that Ott had no permanent disability and required no permanent restrictions.

¶7 The Department of Employee Trust Funds denied the application. Ott appealed and filed an application for a hearing with the Worker's Compensation Division of the Department of Workforce Development. The administrative law judge (ALJ) dismissed Ott's application as well. The ALJ concluded that Owens' and Haffar's opinions were more credible because they reviewed Ott's actual medical records rather than simply relying on the history Ott reported. Thus, the ALJ concluded there was legitimate doubt as to Ott's claims and dismissed the application.

¶8 Ott then petitioned the commission to review the ALJ's decision. The commission affirmed the ALJ, also finding Owens' and Haffar's opinions to be more credible. Thus, the commission concluded Ott's claim was appropriately dismissed. Ott appealed to the circuit court, which affirmed the commission. The court concluded that the commission's findings were supported by credible and substantial evidence in the record.

DISCUSSION

¶9 Ott had the burden of proof to establish that he sustained a work-related injury. See *Bumpas v. DILHR*, 95 Wis. 2d 334, 342, 290 N.W.2d 504 (1980) (citation omitted). The commission has a "duty" to deny a claim "if it finds a legitimate doubt exists regarding the facts necessary to establish a claim." *Id.*

(quoting *Erickson v. ILHR Dept.*, 49 Wis. 2d 114, 118, 181 N.W.2d 495 (1970)). A legitimate doubt is demonstrated by “some inherent inconsistency or conflict in the testimony.” *Kowalchuk v. LIRC*, 2000 WI App 85, ¶8, 234 Wis. 2d 203, 610 N.W.2d 122 (citation omitted).

¶10 We review the decisions of an administrative agency, not those of the trial court. *Public Serv. Corp. v. Public Serv. Comm’n*, 156 Wis. 2d 611, 616, 457 N.W.2d 502 (Ct. App. 1990). We may set aside a commission decision only upon the following grounds: (1) when the commission acted without or in excess of its powers; (2) the commission’s order or award was procured by fraud; or (3) its findings of fact do not support the order or award. See WIS. STAT. § 102.23(1)(e). The standards of review of a commission’s decision differ depending upon whether the issue under review is a question of fact or one of law. *United Way of Greater Milwaukee, Inc. v. DILHR*, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981).

¶11 Here, Ott takes issue with the commission’s findings of fact. An agency’s findings of fact are conclusive on appeal if they are supported by credible and substantial evidence. See WIS. STAT. § 102.23(6). Credible evidence is that evidence which excludes speculation or conjecture. See *Bumpas*, 95 Wis. 2d at 343-44. Evidence is substantial if a reasonable person relying on the evidence might make the same decision. See *Bucyrus-Erie Co. v. ILHR Dept.*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979).

¶12 The weight and credibility of testimony is to be solely determined by the commission. *E.F. Brewer Co. v. IHLR Dept.*, 82 Wis. 2d 634, 636-37, 264 N.W.2d 222 (1978). This court’s role is to search the record to locate credible evidence that supports the commission’s determination, rather than weighing the

evidence opposed to it. *See Kannenberg v. LIRC*, 213 Wis. 2d 373, 384, 571 N.W.2d 165 (Ct. App. 1997). Where more than one reasonable inference may be drawn from the evidence, the drawing of one such inference by the commission is an act of fact-finding and the inference derived is conclusive on the court. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 301-02, 558 N.W.2d 874 (Ct. App. 1996). Because we conclude that the commission's findings of fact in this case are supported by credible and substantial evidence in the record, we affirm its decision.

COMPLAINTS PRIOR TO 1996

¶13 The commission stated that the “medical records from [Ott’s] work injuries in 1986, 1987, 1988 and thereafter, do not reflect [Ott] reported any neck or back problems as a result of those incidents until his work injury in 1996” Ott contends this statement is not supported by credible and substantial evidence. He points to portions of the record that he argues support his argument that he did report work-related injuries before 1996. However, the fact that Ott’s physicians’ opinions might support his argument is not a sufficient basis for reversal given the limited scope of our review. *See E.F. Brewer Co.*, 82 Wis. 2d at 636-37. Instead, we look only to whether there is sufficient evidence in the record to support the commission’s findings.

¶14 The commission based its conclusion on its review of the physicians’ reports and hearing testimony. It stated that it found “Dr. Haffar’s assessment to be persuasive” because Haffar “had an accurate history of [Ott’s] prior work and non-work-related injuries.” Haffar stated that Ott’s medical problems were unrelated to Ott’s work with the fire department. The commission further noted that Chan and Heida “did not have an accurate history of [Ott’s]

prior work-related injuries” because they did not review contemporaneous records when they formed their opinions.

¶15 The commission’s determination is based on its conclusions regarding the credibility of the physicians’ reports. Ott disagrees with the commission’s conclusions and asks us to substitute his conclusions for those of the commission. However, Ott fails to recognize our limited standard of review. The weight and credibility of testimony is to be solely determined by the commission. *E.F. Brewer Co.*, 82 Wis. 2d at 637. The commission was entitled to conclude that Haffar’s conclusion was more credible regarding Ott’s diagnosis as compared to Chan’s and Heida’s. This is a reasonable determination given that Chan and Heida did not have Ott’s full medical history when making their conclusions regarding Ott’s condition. We therefore must uphold the commission’s finding.

OTT’S WORK AS A CARPENTER

¶16 The commission concluded that Ott did carpentry work up to between thirty and forty hours per week and sustained many injuries as a result. Ott disputes this finding, arguing he only worked twelve to fifteen hours per week and only sustained one injury as a result of his carpentry work.

¶17 Here again, the commission’s conclusion is the result of a credibility determination. Thus, we need only search the record for evidence to support its finding, *see Kannenberg*, 213 Wis. 2d at 384, and we find this support in the medical records. For example, an April 21, 1994, clinical note from the Marinette Menominee Clinic indicates that Ott tried to work six hours at night. If he did this five days a week, it would amount to thirty hours a week. Additionally, a June 18, 1996, clinical note by Dr. Kent Partain of the LaSalle Clinic states that Ott “is a firefighter who works up to 35/40 hours weekly as a carpenter on the side.”

Partain further noted that Ott “may well have to give up [his] job related to his carpentry work” because of injuries Ott sustained from carpentry. Ott may not agree with these physicians’ statements and conclusions. However, the commission was entitled to review all the records and determine which it thought most credible. It agreed with the physicians who indicated Ott worked up to thirty to forty hours per week. This conclusion is supported by the evidence in the record, and we may not disturb it. *See id.*

FUNCTIONAL CAPACITY EXAMINATION

¶18 The commission concluded that Ott “was able to pass a functional capacity evaluation on August 13, 1997 in which he was capable of performing heavy work” Ott, however, argues that the August 13 examination was not a functional capacity evaluation, but a return to work authorization. Instead, Ott points to a functional capacity evaluation in February 1998. Based on this evaluation, Dr. Thomas Mack concluded that Ott’s performance on the Functional Capacity Assessment “would not be comparable to the lifting requirements of this individual’s job.” Ott argues that Mack’s report shows that he is no longer able to work as a firefighter.

¶19 Once again, this issue involves the commission’s credibility determination. It concluded, “there were non-work-related problems, including illness, weakness and problems from a prior surgery, which made it difficult for [Ott] to perform adequately in the functional capacity evaluation. Dr. Mack admitted he was not aware of these other problems [Ott] was suffering at the time of the functional capacity evaluation in February 1998.” Thus, the commission concluded that Mack’s opinion regarding whether Ott could return to work was not reliable.

¶20 Whether Ott’s examination on August 13, 1997, is called a functional capacity examination or a return to work authorization, the result was that Ott was “currently functioning in heavy-very heavy work classifications.” Furthermore, regardless of his lifting ability, the only test the City of Marinette requires firefighters pass is a hazardous material test. Ott passed this test in November 1997. Thus, there is credible evidence to support the commission’s finding that Ott was authorized to return to work in August 1997. Therefore, we must uphold that finding. *See id.*

CONCLUSION

¶21 The commission was required to deny Ott’s claim if it found that a legitimate doubt existed regarding the facts necessary to establish the claim. *See Bumpas*, 95 Wis. 2d at 342. Here, there were conflicts in the medical records and testimony. Based on its determinations regarding the credibility of the records and testimony, the commission concluded there was legitimate doubt that Ott established he was entitled to duty disability benefits. This conclusion is supported by credible evidence in the record, and we therefore must uphold the commission’s determination. *See Kannenberg*, 213 Wis. 2d at 384.

By the Court.—Order affirmed.

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

