

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 29, 2007**

David R. Schanker  
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. 2006AP1794**

**Cir. Ct. No. 2005CV2371**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**COLOR INK, INC. AND EMCASCO INSURANCE CO.,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**LABOR & INDUSTRY REVIEW COMMISSION, RANDY C. FOX AND**

**TRANSPORTATION INSURANCE CO.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Waukesha County:  
MARK GEMPELER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 PER CURIAM This is an appeal of a worker's compensation decision. Color Ink, Inc., and its insurer, Emcasco Insurance Co., challenge the Labor and Industry Review Commission's factual finding that Randy C. Fox's date of injury was August 1, 2001, and that his subsequent work exposure did not

materially contribute to his occupational disease. Appellants Color Ink and Emcasco argue that there is no credible evidence in the record to support the Commission's finding that Fox's employment following the August 1, 2001, date of injury did not materially contribute to his occupational disease. Appellants also argue that August 1, 2001, is not the correct date of injury because it was neither Fox's last day of work nor his first day of wage loss, as mandated by WIS. STAT. § 102.01(2)(g)2. (2005-06).<sup>1</sup> We affirm because we find credible and substantial evidence in the record to support the Commission's factual finding that August 1, 2001, was the date of the ripening of Fox's occupational disease. Given this date of injury, August 1, 2001, was also the first day of missed time related to the occupational disease.

¶2 Fox worked for Color Ink from February 1995 until August 2002 as a cutter machine operator. He injured his neck in May 1999 while lifting a stack of paper. Fox sought treatment on February 15, 2000, for pain in his trapezius area and low back. Fox injured his low back on May 5, 2000, while lifting paper at work. He again sought treatment on August 1, 2001, for low back pain after pulling a roll of paper at work. Fox also sought treatment for upper back pain on February 15, 2002. The Commission found that Fox had developed an occupational back disease caused by the cumulative effects of his everyday work duties and the May 1999, February 2000, May 2000 and July 2001 work injuries. The Commission found the date of injury to be August 1, 2001, for the occupational back disease. The Commission also found that Fox's 2002 work

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

exposure did not materially contribute to his occupational disease. The circuit court affirmed the Commission.

¶3 We first turn to the proper standard of review. We note that the date of injury is a factual determination. *General Cas. Co. of Wis. v. LIRC*, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991). The cause of a disability is also a question of fact. *Shelby Mut. Ins. Co. v. DILHR*, 109 Wis. 2d 655, 659, 327 N.W.2d 178 (Ct. App. 1982). The Commission's findings of fact are conclusive so long as credible and substantial evidence exists to support them. *Ide v. LIRC*, 224 Wis. 2d 159, 165, 589 N.W.2d 363 (1999); WIS. STAT. § 102.23(1) and (6). This court will not substitute its judgment for the Commission's as to the weight or credibility of the evidence on any finding of fact. Sec. 102.23(6). Our role involves the narrow task of searching the record for evidence that would support the Commission's findings. *Ide*, 224 Wis. 2d at 165.

¶4 Color Ink and Emcasco argue that there is no credible evidence to support the Commission's finding that August 1, 2001, was the date that Fox's back problems ripened into an occupational disease. They note that none of the several medical opinions presented in this case specifically identified August 1, 2001, as the date of injury. They further note that the only physician who opined that Fox's back condition was an occupational disease, Dr. Reddy, stated that Fox's injuries were based on "an entire history of work exposure involving many events, incapable of precise allocation between them" rather than being the result of one particular injury. They argue that Fox's mid-back complaints of early 2002 must be included within this "entire history of work exposure," and thus Fox's occupational disease must have ripened in 2002, when Emcasco was no longer on the risk.

¶5 But even if Dr. Reddy's questionnaire response can be read specifically to reference the 2002 back problems, the Commission is not required to accept or reject a physician's opinion in toto. See *Manitowoc County v. DIHLR*, 88 Wis. 2d 430, 440-41, 276 N.W.2d 755 (1979). Thus, the Commission was free to accept Dr. Reddy's opinion that Fox had an occupational back disease caused by long-term work exposure, but rely on other evidence to find that the relevant exposure occurred before August 1, 2001.

¶6 And despite Color Ink and Emcasco's claim to the contrary, this is what the Commission did—stating that it “agreed with the [ALJ] that the credible evidence does not support an inference that [Fox] sustained any permanent injury at work ... in 2002, and ... that the 2002 work exposure did not materially contribute to [Fox's] occupational back disease.” There was ample evidence in the record to support this conclusion. Dr. Richard Karr, Emcasco's independent medical examiner, stated:

Randy Fox incurred workplace lumbar strains within the May, 2000 and July 2001 time frames, serving to aggravate the preexisting degenerative condition beyond expected progression. Subsequent and ongoing difficulties with low pain/intermittent leg symptoms are a direct sequela of these injuries. No new workplace low back injury had occurred in January, 2002.

Dr. Karr further stated, “In my view, no significant workplace neck or low back injuries had occurred in January 2002. Flares of symptoms within that time frame, and subsequently, are the product of injury/degenerative pathology predating January, 2002.” The Commission was free to accept these opinions as credible, even while rejecting some of the doctor's other conclusions.

¶7 Color Ink and Emcasco next contend that the date of injury selected is not correct because it was not Fox's last day of employment or the first day of

wage loss. WIS. STAT. § 102.01(2)(g)2. defines the “date of injury” for cases of occupational disease: “In the case of disease, the date of disability or, if that date occurs after the cessation of all employment that contributed to the disability, the last day of work for that last employer whose employment caused disability.”

¶8 When disability occurs before the termination of employment the first lost time due to the disease may serve as the date of disability. *See General Cas. Co.*, 165 Wis. 2d at 177-79. “Whether an employee has sustained a disabling occupational disease arising out of his employment—and the date on which it is sustained—are questions of fact for the commission to determine.” *Id.* at 178. Appellants argue that Fox’s lost time from earlier back injuries was the first lost time and thus establishes his date of disability. However, the Commission found that Fox’s condition first ripened into an occupational disease following the July 2001 work injury, and we have found credible evidence supporting that conclusion. When Fox was placed on work restriction in August 2001, it was thus the first date of treatment and the first time lost following the ripening. Thus, it was the correct date of injury under WIS. STAT. § 102.01(2)(g)2.

¶9 Appellants also suggest that the Commission is obligated to use the last day of work as Fox’s date of disability. However, under WIS. STAT. § 102.01(2)(g)2., the last day of work establishes a date of disability when it occurs “after the cessation of all employment that contributed to the disability,” which is not the case here.

¶10 Beyond this, Appellants point to various pieces of evidence that they contend demonstrate that the Commission was wrong in its conclusion that August 2001 was the date that Fox’s occupational disease ripened. They invite this court to reweigh the evidence and replace a supported factual finding with other possible

inferences. This is beyond the scope of our review. The Commission's findings are supported by credible and substantial evidence, and those findings are affirmed.

*By the Court.*—Order affirmed.

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