COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2140

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

WILLIAM KUMPREY,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, J.P. JANSEN CO., INC. AND UNITED STATES FIDELITY & GUARANTY CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. William Kumprey appeals from a circuit court order that upheld a Labor and Industry Review Commission's decision denying him worker's compensation benefits. Kumprey argues that the Commission erred

when it: (1) applied the second clause of WIS. STAT. § 102.01(2)(g)2 (1995-96) to determine "date of injury"; and (2) determined that his employment with Jansen did not cause his disability.[1] We affirm.

I. BACKGROUND

¶2 William Kumprey was employed as a drywaller for many years with different companies. His last date of "actual work" was May 3, 1996, with J.P. Jansen Company, Inc.[2] Kumprey developed a knee disease, and, as a result, had two knee replacement surgeries on June 26, 1996. Kumprey never returned to work.

¶3 Kumprey subsequently applied for worker's compensation benefits from Jansen, claiming that since his last day of employment was with Jansen, that Jansen was liable for the progression of injuries throughout his career. The Commission denied his claim, however, determining that Kumprey failed to meet his burden of proof by not providing "any credible medical evidence to support his assertion." The Commission specifically indicated that "[n]one of the physicians offered into evidence have *[sic]* opined that [Kumprey's employment at Jansen] caused his disability." The Commission also found Kumprey to be less than credible as a result of contradictions in his testimony, noting that "during cross-examination [Kumprey] admitted that he had applied for disability benefits from the Carpenter's Health Fund and claimed on that application that his work with

[1] All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

[2] As we will discuss, Kumprey acknowledges that his last day of "actual work" was May 3, 1996, but claims that "he was on lay-off status and still an employee when he … had surgery on June 26, 1996."

J.P. Jansen had not caused his bilateral knee surgery." The circuit court upheld the Commission's decision. We affirm.

II. DISCUSSION

¶4 This court reviews the Commission's decision, not that of the circuit court. *See* ***Langhus v. LIRC***, 206 Wis. 2d 494, 501, 557 N.W.2d 450, 454 (Ct. App. 1996). "When the question on appeal is whether a statutory concept embraces a particular set of factual circumstances, the court is presented with mixed questions of fact and law." ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241, 243 (Ct. App. 1995) (citation omitted). Whether an employee's injury arose out of his or her employment and the date on which it is sustained are questions of fact for the Commission to determine. *See* ***General Cas. Co v. LIRC***, 165 Wis. 2d 174, 178, 477 N.W.2d 322, 324 (Ct. App. 1991). The application of a statute to the facts, however, is a question of law. *See* ***Michels Pipeline***, 197 Wis. 2d at 931, 541 N.W.2d at 243. We agree with the parties that the proper level of deference to be given to the Commission's legal conclusions and statutory interpretations is "due weight." Under this standard, "we will sustain the agency's reasonable determination unless an opposing interpretation is more reasonable." ***Jackson v. Employe Trust Funds Bd.***, 230 Wis. 2d 677, 686–687 n.3, 602 N.W.2d 543, 548 n.3 (Ct. App. 1999).

¶5 Judicial review of the Commission's decision is limited by WIS. STAT. § 102.23(1)(a), which provides that the "findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive." We will uphold the Commission's order as long as it is supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6); ***United Parcel Service, Inc. v. Lust***, 208 Wis. 2d 306, 321, 560 N.W.2d 301, 306–307 (Ct. App. 1997).

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). "Credible evidence is that which excludes speculation or conjecture." ***Lust***, 208 Wis. 2d at 321, 560 N.W.2d at 307. "It is not our role on review to evaluate conflicting evidence to determine which should be accepted; we will affirm if there is credible evidence to support the finding regardless of whether there is evidence to support the opposite conclusion." ***Id.***; *see also* WIS. STAT. § 102.23(6).

A. Date of Injury.

¶6 Under the Worker's Compensation Act, the "date of injury" in cases involving a disease is the same as the "date of disability." WIS. STAT. § 102.01(2)(g)2.[3] If, however, the date of disability "occurs after the cessation of all employment that contributed to the disability," the "date of injury" becomes "the last day of work for the last employer whose employment caused disability." ***Id.*** It is undisputed that Kumprey had a knee disease. Kumprey argues that the Commission erred in not applying the first clause of § 102.01(2)(g)2, under which, he claims, he was entitled to benefits because it "only requires a plaintiff to prove

[3] WISCONSIN STAT. § 102.01(2)(g)2 provides:

> (g) Except as provided in s. 102.555 with respect to occupational deafness, "time of injury", "occurrence of injury", or "date of injury" means:
>
> 2. 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 the last employer whose employment caused disability.

that he has an **occupational disease** and the **date of disability**." (emphasis by Kumprey). We disagree.

¶7 The Commission found that Kumprey's last day of employment was May 3, 1996, and correctly analyzed his claim under the second clause of WIS. STAT. § 102.01(2)(g)2. Evidence in the record, namely a stipulation entered into by Kumprey that May 3, 1996, was "the applicant's last day of work," clearly supports this finding. Although Kumprey argues, for the first time on appeal, that his lay-off status constituted employment, he did not make this argument before the Commission, and has, therefore, waived the argument. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (Appellate court will generally not review issue raised for first time on appeal.).

B. Whether employment at Jansen caused Kumprey's disability.

¶8 Kumprey next argues that, even applying the second clause of WIS. STAT. § 102.01(2)(g)2, his employment at Jansen was a material contributory causative factor in the progression of occupational disease to his knees. Consequently, Kumprey contends that the record does not support the Commission's determination that his work for Jansen was not work "whose employment caused disability." On review, we search the record to locate credible evidence that supports the Commission's determination. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255, 260 (1975). Here, the record contains ample credible evidence to support the Commission's determination.

¶9 First, the Commission properly relied on the medical opinion of Dr. James B. Stiehl, who believed that Kumprey's employment at Jansen "was not causative of his knee conditions or of the knee surgeries." Moreover, Kumprey

conceded that his claim lacked medical support.[4] Although Kumprey contends on appeal that he presented credible and substantial evidence that his employment at Jansen caused his knee disease because "his treating physician clearly state[d] it was his employment as a drywaller which led to his occupational disease, and his over two years of employment at Jansen logically had to apply," the Commission disagreed. *See* ***Manitowoc County v. DILHR***, 88 Wis. 2d 430, 437, 276 N.W.2d 755, 758 (1979) (In evaluating medical testimony, the Commission is the sole judge of the weight and credibility of the witnesses.).

¶10 Second, Kumprey's own testimony supports the Commission's conclusion that his employment with Jansen did not cause his knee disability. During cross-examination, Kumprey admitted that on a previous application for disability benefits he claimed that "his work with J.P. Jansen had not caused his bilateral knee surgery." Accordingly, we conclude that the record contains credible and substantial evidence supporting the Commission's reasonable decision to deny Kumprey's application for worker's compensation benefits.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

---

[4] At the hearing, Administrative Law Judge Sherman C. Mitchell asked Kumprey's lawyer:

> JUDGE MITCHELL: So then what I'm hearing is I don't have any reports that you can point me to that – where a doctor has opined that this last employer is the cause of the need for the knee replacement.
>
> MR. WILKOSKI: That's true.