

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 2010

A. John Voelker
Acting 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. 2009AP2053

Cir. Ct. No. 2008CV188

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DONALD MILLER,

PETITIONER-APPELLANT,

V.

**SAWYER COUNTY, STATE OF WISCONSIN DEPARTMENT OF EMPLOYEE
TRUST FUNDS AND LABOR AND INDUSTRY REVIEW COMMISSION,**

RESPONDENTS-RESPONDENTS.

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

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Donald Miller appeals a judgment affirming a Labor and Industry Review Commission decision that denied Miller duty

disability benefits under WIS. STAT. § 40.65.¹ Miller contends he has satisfied the statute's severity requirement, and is therefore eligible for benefits, because his disability has caused a reduction in his pay and has adversely affected his promotional opportunities. The Commission's findings to the contrary are supported by credible evidence, and we affirm.

BACKGROUND

¶2 Miller began working as a deputy sheriff for Sawyer County in 1994. On May 24, 1996, Miller dislocated his left shoulder while subduing a suspect. Miller was treated at a hospital and missed approximately six weeks of work. His physician, Dr. John Sauer, allowed him to return to work with no restrictions on July 1, 1996.

¶3 Miller suffered periodic subluxations of the left shoulder after he returned to full duty.² In early 1997, a CT scan revealed a tear in Miller's anterior glenoid labrum. Miller received treatment from Dr. Scott Warren in 1997 and 1998. During that time, both Dr. Sauer and Dr. Warren suggested surgery might eventually be necessary.

¶4 Miller was promoted to patrol sergeant in 1999. That year, Dr. Sauer estimated Miller's permanent partial disability from the work injury totaled eight percent of his body as a whole. Dr. Sauer again noted Miller was at risk for recurrent instability, and might require future surgery.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² "Subluxation" refers to complete or partial dislocation.

¶5 In May 2002, Miller saw a third physician, Dr. Joseph Hebl, who largely agreed with Dr. Sauer's assessment. Dr. Hebl added, "The patient will be allowed to continue at his current job, however, I would recommend he avoid DAAT [Defense and Arrest Tactics] training exercises, as these are likely to put the left shoulder at significant risk for subluxation." Dr. Hebl referred Miller to Dr. James O'Connor, an orthopedist, who noted that, without surgery, Miller was likely to continue to have episodes of subluxation.

¶6 Miller missed five days of work between October 18 and 25, 2002, one with the flu and four because of shoulder pain. On October 28, 2002, Miller's superiors met with him to discuss their concerns about sick leave abuse. Two days later, Miller again met with Dr. Hebl, who recommended Miller continue at his job, but "be allowed time away from his work should the shoulder pain flare-up to the intolerable level." Miller was suspended for sick leave abuse for five days beginning on November 1, 2002.

¶7 Miller never returned to work. On November 7, 2002, Miller was placed on paid administrative suspension based on allegations that he had falsely claimed a work injury in December 2001, or failed to report the injury within seventy-two hours. Miller was placed on unpaid administrative leave on November 30, 2002. On September 16, 2003, an arbitrator determined the sheriff's department had cause to terminate Miller, citing un rebutted evidence of Miller's lack of candor or misrepresentations concerning the December 2001 injury. Miller was discharged effective November 30, 2002.

¶8 Miller had his shoulder surgically repaired on March 11, 2003, while on administrative leave. Dr. Hebl declared Miller's shoulder healed on January 21, 2004, and rated his permanent partial disability at seven percent. Both

Dr. Hebl and Dr. O'Connor imposed medical restrictions that effectively prohibited Miller from returning to police work.

¶9 Miller applied for duty disability benefits under WIS. STAT. § 40.65. The statute permits individuals in protective occupations who are injured in the line of duty to apply for lifetime disability benefits if the disability is likely to be permanent and causes: (1) the employee to retire; (2) a reduction in the employee's pay or position, or reassignment to light duty; or (3) an adverse effect on the employee's promotional opportunities, if promotion is specifically prohibited by state or local employer rules, ordinances, policies or written agreements. WIS. STAT. § 40.65(4). An application for duty disability benefits must be filed with the Department of Employee Trust Funds (the Department), and must include "a statement from the applicant's employer that the injury or disease leading to the disability was duty-related." WIS. STAT. § 40.65(2)(b)2.; *see also* WIS. ADMIN. CODE § ETF 52.06(7)(a) (May 2010).

¶10 Sawyer County refused to provide a statement that Miller's injury was duty-related. It argued Miller was not under any medical restrictions at the time his employment was terminated for cause, and asserted his injury did not impact his pay, position or promotional opportunities. The Department denied Miller's claim because Sawyer County refused to certify his injury.

¶11 Miller appealed to the Department of Workforce Development.³ The administrative law judge (ALJ) concluded Miller was undisputedly a "protective occupation participant" whose duty-related disability was likely to be

³ An applicant may appeal the DETF's determination pursuant to the review procedures specified in the worker's compensation laws. WIS. STAT. § 40.65(2)(b)4.

permanent. The ALJ further determined that, because of his shoulder injury, Miller suffered a reduction in pay and his promotional opportunities were adversely affected. Accordingly, the ALJ granted Miller's request for benefits.

¶12 Sawyer County and the Department petitioned the Commission for review, asserting Miller met neither the pay reduction nor the adversely-affected promotional opportunity criteria. The Commission agreed. It found that Miller's suspensions had not reduced his base pay as required by WIS. ADMIN. CODE § ETF 52.07(3)(c) (May 2010). The Commission further found that Miller was ineligible for benefits under WIS. ADMIN. CODE § ETF 52.07(3)(e) because his promotional opportunities were not limited by any state or local employer rule, ordinance, policy, or written agreement.

¶13 The circuit court affirmed, concluding the Commission's interpretation of WIS. STAT. § 40.65 is entitled to great weight deference. It further concluded the Commission's decision was supported by credible and substantial evidence in the record.

DISCUSSION

¶14 On appeal, we review the agency's decision, not the circuit court's. *Wright v. LIRC*, 210 Wis. 2d 289, 292, 565 N.W.2d 221 (Ct. App. 1997). We may set aside the Commission's order only if it acted without, or in excess of, its powers, its order was procured by fraud, or its findings of fact do not support its order. WIS. STAT. § 102.23(1)(e). We do not substitute our judgment for that of the Commission as to the weight or credibility of the evidence on any finding of fact. WIS. STAT. § 102.23(6).

¶15 An applicant for duty disability benefits under WIS. STAT. § 40.65 must show his or her injury is: (1) related to his or her duty as a protective occupation participant; (2) likely, to a reasonable degree of medical certainty, to be permanent; and (3) sufficiently severe. *See* WIS. ADMIN. CODE §§ ETF 52.07(1)-(3). The Commission concedes the only element in dispute is the “severity” element, which requires the applicant to show that the disability causes the employee to retire from his or her job; the employee’s pay or position is reduced or he or she is assigned to light duty; or the employee’s promotional opportunities are adversely affected by state or local employer rules, ordinances, policies or written agreements that specifically prohibit promotion because of the disability. WIS. STAT. § 40.65.

¶16 Here, Miller contends he has satisfied the severity requirement by showing his injury reduced his pay and limited his promotional opportunities. Whether Miller’s pay was reduced or his promotional opportunities adversely affected are factual matters that Miller bears the burden of proving beyond a legitimate doubt. *See Leist v. LIRC*, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994). We will not upset the Commission’s factual findings if they are supported by credible evidence in the record. *Id.* “For evidence to be credible, it must be evidentiary in nature and not a conclusion of law. It also must not be so discredited by other evidence that a court could find it incredible as a matter of law.” *Goranson v. DILHR*, 94 Wis. 2d 537, 554, 289 N.W.2d 270 (1980). We will uphold the Commission’s findings even if they are contrary to the great weight and clear preponderance of the evidence. *Id.*

I. Eligibility Based On Pay Reduction

¶17 Under WIS. STAT. § 40.65(4)(c)2., an applicant for duty disability benefits may demonstrate the severity of his or her injury by showing that his or her pay was reduced. However, not all wage loss qualifies as a pay reduction for purposes of WIS. STAT. § 40.65. “Only a reduction in base pay meets the criterion [set forth in § 40.65(4)(c)2.]” WIS. ADMIN. CODE § ETF 52.07(3)(c). Loss of collateral payments is not a reduction of pay within the meaning of § 40.65(4)(c)2. *Id.*

¶18 The Commission concluded Miller failed to show his base pay was reduced because of his injury. We agree. Miller’s injury caused him to use some of his sick leave time, and he was subsequently suspended five days for sick leave abuse. These actions did not reduce Miller’s base pay. Further, his unpaid suspension and termination were for cause and were unrelated to his shoulder dislocation. The Commission’s finding that Miller has not suffered a reduction in his base pay is supported by credible evidence.

¶19 Miller does not attempt to explain, in his brief to this court, how he sustained a reduction in base pay. Instead, he contends that his November 1, 2002 unpaid suspension resulted in a “qualifying date” pursuant to WIS. ADMIN. CODE § ETF 52.08 (May 2010). WISCONSIN ADMIN. CODE § ETF 52.08(1) defines an individual’s qualifying date as “the date on which he or she becomes disabled *within the meaning of s. 40.65(4), Stats., and s. ETF 52.07*” It further provides that, when eligibility for duty disability benefits is based on a reduction of pay, “the qualifying date is the date on which the employee began *the permanent reduction*” WIS. ADMIN. CODE § ETF 52.08(3). These subsections do not

apply to Miller because, as we have explained, he did not become disabled within the meaning of § 40.65, and did not suffer a reduction in pay.

II. Eligibility Based On Adversely Affected Promotional Opportunities

¶20 An applicant may also demonstrate the severity of his or her injury by showing that the “employee’s promotional opportunities within the service are adversely affected if state or local employer rules, ordinances, policies or written agreements specifically prohibit promotion because of the disability.” WIS. STAT. § 40.65(4)(c)3. Though the statute is awkwardly written, the DETF has clarified that a person qualifies for duty disability benefits if the disability is so severe that

[t]he employer prohibits the applicant from promotion for which the applicant is otherwise fully qualified, solely on the basis of the applicant’s disability and under the express terms of a valid state or local employer rule, ordinance, policy, or written agreement which is not superseded by state or federal law.

WIS. ADMIN. CODE § ETF 52.07(3)(e).

¶21 Miller argues that the work restrictions imposed by his physicians, which prohibited him from undergoing Defense and Arrest Tactics training exercises, hindered his promotional opportunities. Although DAAT training is often included in a mandatory twenty-four-hour recertification course for all law enforcement officers, it is not specifically required “under the express terms of a valid state or local employer rule, ordinance, policy, or written agreement.” The choice to include DAAT training in the recertification course rests entirely with the course instructor. Indeed, sheriff James Meier testified he has been with the sheriff’s department for twenty-seven years, and has never taken DAAT training. The Commission found that, based on the absence of a policy requiring DAAT

training, Miller failed to establish the severity of his injury. The Commission's finding is supported by credible evidence in the record.

III. Reversal in the Interest of Justice

¶22 Miller claims, in the final section of his brief-in-chief, that permitting the Commission's decision to stand would result in a "gross injustice." Though Miller does not cite it, we construe this argument as invoking our discretionary reversal authority under WIS. STAT. § 752.35, which permits us to reverse a judgment or order when the real controversy has not been fully tried, or when it is probable that justice has for any reason miscarried. We exercise our discretionary reversal power only sparingly. *State v. Prineas*, 2009 WI App 28, ¶11, 316 Wis. 2d 414, 766 N.W.2d 206. Indeed, the case must be "exceptional." *Vollmer v. Luety*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990). Miller's perfunctory argument on this point has not convinced us his is such a case.

By the Court.—Judgment affirmed.

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

