

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0193

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**ROEHL TRANSPORT, INC., AND LIBERTY MUTUAL
INSURANCE COMPANY,**

PLAINTIFFS-APPELLANTS,

V.

**LARRY O. LOKEN, AND LABOR AND
INDUSTRY REVIEW COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Wood County:
EDWARD F. ZAPPEN, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Roehl Transport, Inc. and Liberty Mutual Insurance Company appeal from an order affirming the decision of the Labor and

Industry Review Commission.¹ The issues are: (1) whether the commission's finding that Larry Loken sustained a work-related injury on May 27, 1993, is supported by credible and substantial evidence; and (2) whether the commission properly concluded that Loken had reasonable cause for refusing Roehl Transport's offer of alternative employment. We resolve these issues in favor of the commission and, therefore, affirm.

Loken worked as a long-distance truck driver for Roehl Transport. He filed a disability claim based on an injury to his back he stated occurred when he was driving through Ohio on May 27, 1993. After reviewing the record and consulting with the administrative law judge regarding the credibility and demeanor of the witnesses, the commission reversed the administrative law judge and determined that Loken had injured his back when his truck hit a bump in the road in Ohio and his seat bottomed out. The commission further determined that Loken had reasonable cause for refusing Roehl Transport's offer that he take alternative employment at a desk job in Marshfield, Wisconsin, and that he was therefore entitled to an award for a 35% loss of earning capacity.

The determination of the cause and extent of an applicant's disability is a question of fact. *Vande Zande v. DILHR*, 70 Wis.2d 1086, 1097, 236 N.W.2d 255, 260 (1975). The commission's factual findings are conclusive on appeal if supported by credible and substantial evidence. *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173 (1983). We search the record to locate credible and substantial evidence to support the commission's determination, rather than weighing the evidence opposed thereto. *Vande Zande*,

¹ We review the commission's decision, not the trial court's decision. See *Stafford Trucking, Inc. v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981).

70 Wis.2d at 1097, 236 N.W.2d at 260. We may not substitute our judgment in evaluating the weight or credibility of the evidence. *Princess House*, 111 Wis.2d at 54, 330 N.W.2d at 173. In an action to review an agency's decision, the burden is on the party seeking to overturn the agency's action, not on the agency to justify its action. See *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 661, 539 N.W.2d 98, 102 (1995).

Roehl Transport first argues that the credible and substantial evidence does not support the commission's determination that Loken sustained a work-related injury on May 27, 1993. The crux of Roehl Transport's argument is that the evidence, when all of it is considered, supports its position that Loken did not suffer a compensable injury. However, we do not review all of the evidence, weighing it and evaluating its credibility. Rather, we search the record for evidence to sustain the commission's decision. We agree with the trial court that there is credible and substantial evidence in the record to support the commission's determination:

The evidence is undisputed that at some time Loken reported the injury to his dispatcher Dennis Koch. The Commission found that Koch did recall that the applicant phoned and reported the injury to his back as a result of bottoming out in the truck. Koch testified that Loken told him at the time he was on the Ohio Turnpike. That is consistent with Loken's log that he was on the Ohio Turnpike at about the time the injury would have occurred. Another witness, Dennis Wreps, has indicated that when Loken returned to Marshfield he was in pain and appeared to have been injured. There is no evidence to support the inference reached by the administrative law judge that the injury was faked. Although there were differences in the testimony with regard to the reporting of the accident, it appears to this Court from review of the record that the accident, in fact, did occur as described on or about the date found by the Commission. The fact that there are discrepancies does not negate the fact that the injury occurred.

Roehl Transport next argues that Loken's refusal of their offer of alternative employment was without reasonable cause. Roehl Transport offered Loken a sedentary job in Marshfield, Wisconsin, in which he would have earned 85% of his prior earnings. Loken refused the job because he did not want to travel 220 miles round trip to Marshfield from his home in Dodge, Wisconsin. He also did not want to relocate to Marshfield because he cares for his ailing parents who live close to his home in Dodge and he has lived in Dodge for a long time.

Whether Loken reasonably refused Roehl Transport's offer to work in Marshfield, and thus is entitled to an award for loss of earning capacity pursuant to § 102.44(6), STATS., is a question of law. Because the commission has extensive experience interpreting this statute, however, we give great weight to the commission's determination. *Harnischfeger*, 196 Wis.2d at 660-61, 539 N.W.2d at 102. We will sustain the commission's decision as long as it is reasonable. *Id.* at 661, 539 N.W.2d at 102.

The commission found that Loken refused to take the job because he would have either had a daily commute in excess of 200 miles or he would have had to relocate from his long time home in Dodge and leave his ailing parents. Although Roehl Transport argues that Loken's refusal was unreasonable because he was regularly on the road as a truck driver for five or more days at a time, as a truck driver, Roehl was not required to maintain a residence outside of Dodge. In order to take the job offered by Roehl Transport, Loken would have had to move to Marshfield or commute a substantial amount each day with an injured back. Therefore, we believe that the commission reasonably determined that Loken's refusal to take the job did not bar him from an award for loss of earning capacity.

By the Court.—Order affirmed.

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

