

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 16, 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. 04-0997
STATE OF WISCONSIN**

Cir. Ct. No. 03CV001693

**IN COURT OF APPEALS
DISTRICT III**

SCHNEIDER NATIONAL CARRIERS, INC.,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
ERIC M. MALIKOWSKI,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County:
J. D. McKAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Schneider National Carriers, Inc., appeals a judgment affirming a decision by the Labor and Industry Review Commission. The commission concluded that Eric Malikowski suffered a work-related injury and that he was entitled to reimbursement for medical expenses incurred in

Minnesota. The commission further determined that there was insufficient evidence regarding Malikowski's medical restrictions and loss of earning capacity. Therefore, it remanded to the Department of Workforce Development, Workers' Compensation Division for a new hearing on these issues. Schneider argues (1) there was insufficient evidence to support the commission's determination that Malikowski's injury was work-related, (2) there was insufficient evidence to support the commission's finding that Malikowski's supervisor gave Malikowski permission to obtain medical treatment in Minnesota and therefore Malikowski is not entitled to reimbursement, and (3) the commission did not have the authority to remand the case. We disagree and affirm the judgment.

BACKGROUND

¶2 Malikowski was employed by Schneider as a truck driver. On December 6, 2000, Malikowski was moving trailers from a loading dock at Johnson Controls in Hudson, Wisconsin. This involved hooking up and unhooking trailers from the tractor. He then delivered a load of materials to a Ford plant in St. Paul, Minnesota, and returned to Johnson Controls. While he was at Johnson Controls this second time, he felt a stabbing pain in his upper back. However, he continued working and drove back to the Ford plant. As he was driving, the pain increased to the point where he was unable to shift gears.

¶3 Malikowski contacted his lead driver, Bob Stevens, who told him to go home and "contact me once you find something out." Malikowski contacted his family physician, Dr. Michael Oldenburg, and set up an appointment for later that day. Oldenburg's office is located in Minnesota. Malikowski then contacted Stevens again to tell him about the appointment. Oldenburg determined Malikowski's injury was work-related. Oldenburg referred Malikowski to

Dr. Terry Hood and Dr. Benjamin Gulli. Both Hood's and Gulli's offices are also located in Minnesota.

¶4 Malikowski saw Hood on December 27, 2000, regarding back and shoulder pain associated with his injury. Hood determined the injury was work-related and recommended conservative therapy. On January 19, 2001, Malikowski saw Gulli for evaluation of his shoulder pain. Gulli found no pathology in the shoulder and determined Malikowski could return to work without restrictions. Gulli did not recommend surgery.

¶5 On February 23, 2001, at Schneider's request, Malikowski saw Dr. James Gmeiner for an adverse medical examination. Gmeiner determined there was no work-related injury and that no surgery was necessary.

¶6 Nevertheless, Hood eventually recommended surgery after there was no reduction in Malikowski's pain in his back and shoulder. Malikowski underwent surgery on April 13, 2001. On May 14, Hood recommended Malikowski begin physical therapy. Hood stated that after two weeks of therapy, Malikowski would be able to return to work. On January 25, 2002, Hood assessed Malikowski a 5% permanent partial disability as a result of the surgery and indicated that he placed no restrictions on Malikowski's activity.

¶7 In April 2002, Gmeiner reviewed Malikowski's medical records again and stated that the surgery had not been necessary, nor was it related to any injury sustained on December 6, 2000.

¶8 Schneider terminated Malikowski's employment on February 23, 2001. Malikowski applied for a hearing before the Department of Workforce Development. The administrative law judge determined that Malikowski suffered

a compensable work-related injury. The judge ordered Schneider to pay Malikowski benefits, including loss of earning capacity, and to repay his out-of-state treatment expenses.

¶9 Schneider filed for review with the commission. The commission determined that Malikowski's injury arose from his employment and affirmed payment of out-of-state medical expenses. However, it further determined that there was insufficient evidence to show whether Malikowski was entitled to loss of earning capacity benefits. It remanded to the Workers' Compensation Division for a new hearing on permanent physical restrictions and loss of earning capacity. Schneider appealed to the circuit court, which affirmed the commission.

STANDARD OF REVIEW

¶10 We review the decisions of an administrative agency, not those of the trial court. *WPSC v. PSC*, 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).¹

¶11 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). We may not substitute our weight and credibility determinations for those of the commission. *Valadzic v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 598, 286

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

N.W.2d 540 (1979). This court's role is to search the record to locate credible evidence, which 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 so derived is conclusive on the court. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 301-02, 558 N.W.2d 874 (Ct. App. 1996).

DISCUSSION

1. Whether Malikowski's injury was work-related

¶12 Schneider argues that the commission's determination that Malikowski suffered a work-related injury is not supported by credible evidence. The causal relationship between an injury and the disability is a question of fact. *Lewellyn v. ILHR Dept.*, 38 Wis. 2d 43, 52, 155 N.W.2d 678 (1968).

¶13 In its decision, the commission found credible Hood's opinion that Malikowski's injury was work-related. However, Schneider contends that the commission should have rejected Hood's opinion because Malikowski's testimony regarding the onset of pain differs from the account in Hood's records. Schneider points to the opinions of Gmeiner and Gulli, who both stated that Malikowski's injury was not work-related, and argues these are more credible opinions.

¶14 Schneider essentially asks us to substitute our judgment for the commission's regarding which doctor's opinion is most credible. However, this argument ignores our standard of review. See *Valadzic*, 92 Wis. 2d at 598. The commission acknowledged Schneider's argument regarding inconsistency between Malikowski's testimony and Hood's records. However, it determined any

inconsistencies were insignificant. The commission then went on to conclude that Hood's records were credible and it agreed with Hood that Malikowski's injury was work-related. These are credibility determinations that we do not disturb.

2. Whether Malikowski is entitled to reimbursement for medical expenses incurred in Minnesota

¶15 WISCONSIN STAT. § 102.42(2)(a) states:

Where the employer has notice of an injury and its relationship to the employment the employer shall offer to the injured employee his or her choice of any physician, chiropractor, psychologist, dentist or podiatrist licensed to practice and practicing in this state for treatment of the injury. By mutual agreement, the employee may have the choice of any qualified practitioner not licensed in this state. ... Treatment by a practitioner on referral from another practitioner is deemed to be treatment by one practitioner.

The commission determined that Malikowski's un rebutted testimony showed that Malikowski received permission from his lead driver, Stevens, to treat with Oldenburg, a Minnesota doctor. Oldenburg then referred Malikowski to Gulli and Hood. Schneider argues this determination is not supported by credible and substantial evidence. It argues there is no evidence that Stevens knew Malikowski was going to go to an out-of-state doctor.

¶16 Malikowski testified that he called Stevens to tell him of the injury, saying, "I need to get home and go to my doctor." Stevens responded "okay" and told him to call back once he "knew something." It is a reasonable inference that Stevens knew Malikowski lives in Brooklyn Park, Minnesota. It is also a reasonable inference that, because Malikowski lives in Minnesota, his doctor would also be in Minnesota. Therefore, when Stevens told him it was okay for him to go to his doctor, a reasonable inference is that Stevens permitted him to see

his own doctor in Minnesota. The commission's conclusion that Malikowski had permission to see an out-of-state doctor is not contrary to the evidence.

3. Whether the commission had authority to remand

¶17 In order to award benefits for loss of earning capacity, Malikowski had to show that he sustained wage loss due to restrictions resulting from his injury. *See* WIS. STAT. § 102.44(6)(b). The commission found that the record contained no assessment regarding whether Malikowski had permanent restrictions resulting from the injury and surgery. It noted that Hood stated there were no restrictions as of November 16, 2001. However, on January 25, 2002, Hood assigned Malikowski a 5% permanent partial disability rating. Malikowski testified that Hood had given him restrictions but there was no documentation to support that statement. The commission awarded the 5% permanent partial disability, but stated: “Based on the lack of definitive evidence from either side regarding permanent restrictions, the commission will exercise its discretion to remand the matter for additional hearing with respect to the issues of permanent physical restrictions and loss of earning capacity.”

¶18 Schneider argues that the commission did not have the discretion to remand. Instead, it maintains the commission should have denied the benefits for loss of earning capacity because there was not enough evidence to support an award. Schneider argues that the commission remanded simply “because it did not like the evidence in the case.” Schneider's argument implies that the commission thought there was no basis to award benefits for loss of earning capacity, but remanded so that the department could find some evidence to support an award. However, the record shows the commission remanded simply because

it did not have enough evidence from which to make a decision either way—whether to award or to deny benefits.

¶19 Under WIS. STAT. § 102.18(3), the commission has the authority to affirm, reverse, set aside or modify the order. It may also direct the taking of additional evidence. Here, the commission emphasized that in November 2001, Malikowski had no restrictions. But there was no evidence whether, in January 2002, when Hood assigned a 5% permanent partial disability, he gave Malikowski restrictions that had not been in place before that time. For this reason, the commission remanded for the taking of additional evidence, something it has the authority to do.

By the Court.—Judgment affirmed.

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

