

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 25, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2586

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**BRAKEBUSH BROTHERS, INC.,
and EMPLOYERS INSURANCE OF WAUSAU,**

Plaintiffs-Respondents,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant,

RICHARD ALAN ENGEL,

Defendant.

APPEAL from an order of the circuit court for Marquette County:
DONN H. DAHLKE, Judge. *Reversed.*

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. The Labor and Industry Review Commission appeals from an order reversing its decision in a worker's compensation

dispute. The commission determined that Richard Alan Engel remained eligible for worker's compensation after his former employer, Brakebush Brothers, Inc., fired him for cause. We review that determination in the same manner as the trial court. *Gilbert v. Medical Examining Bd.*, 119 Wis.2d 168, 194, 349 N.W.2d 68, 79-80 (1984). Because we conclude that the commission properly ruled Engel eligible, we reverse the trial court's order setting aside its decision.

Engel suffered a work-related compensable injury in April 1990. He eventually returned to work but reinjured himself in September 1991. In November 1991, Brakebush Brothers learned that Engel was engaging in recreational activities that appeared to be inconsistent with his claimed injury. When confronted, Engel falsely denied or minimized his participation in those activities. As a consequence he was suspended and then fired. As of November 5, 1991, Engel's physician considered him still injured but available for light duty. The physician subsequently deemed Engel to be fully healed as of April 1992, with a permanent five percent partial disability.

The dispute in this proceeding concerns Engel's eligibility for worker's compensation between the date of his firing in November 1991 and the date he was found to be maximally healed in April 1992. A Department of Industry, Labor and Human Relations hearing examiner, and subsequently the commission, concluded that Engel remained disabled during this period, and that he remained entitled to disability benefits, despite the fact that he was legitimately fired in November.

The commission properly determined that Engel remained in a healing state until April 1992. That was his treating physician's conclusion, and his employer introduced no medical evidence to rebut it. The decision to believe the physician's diagnosis was a credibility determination that was solely the commission's to make. *Manitowoc County v. DILHR*, 88 Wis.2d 430, 437, 276 N.W.2d 755, 758 (1979).

Brakebush Brothers argues that because Engel lied to virtually everyone else concerning his activities while recuperating, it necessarily follows that he lied to his physician. The company argues that we "can and should rule that the opinions of a doctor who is unaware of the extent of his patient's

significant physical activities and capabilities do not constitute credible and substantial evidence sufficient to support the Commission's award." However, the commission reasonably chose not to infer that Engel lied to his physician, and that determination is conclusive. *Vocational, Technical & Adult Educ., Dist. 13 v. DILHR*, 76 Wis.2d 230, 240, 251 N.W.2d 41, 46 (1977). Additionally, when Brakebush Brothers' insurer informed the physician of Engel's activities and asked for comment, the physician responded that he had never advised Engel to refrain from recreational activities, and he did not indicate that the information on Engel's activities would cause him to change his conclusions. As a result, in the absence of any medical evidence that Engel's activities were inconsistent with disability, the commission necessarily found him disabled. *Leist v. LIRC*, 183 Wis.2d 450, 462, 515 N.W.2d 268, 272 (1994).

The commission properly determined that, if disabled, Engel was entitled to compensation despite the circumstances of his termination. Section 102.43, STATS., provides that temporary disability payments after an injured employee leaves work shall continue "during such disability." The meaning of that provision is plain. It allows for no exception where the employee is subsequently fired for misconduct during the period of disability. Similarly, WIS. ADM. CODE § IND 80.47 provides that "[e]ven though an employe[e] could return to a restricted type of work during the healing period, unless suitable employment within the physical and mental limitations of the employe[e] is furnished by the employer or some other employer, compensation for temporary disability shall continue during the healing period." Again, the meaning is plain that compensation continues during the healing period even if the employee is fired for cause.

By the Court. — Order reversed.

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