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**DISTRICT II/IV**

April 13, 2015

To:

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Circuit Court Judge  
Fond du Lac County Courthouse  
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You are hereby notified that the Court has entered the following opinion and order:

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2014AP1581

Bruce W. Clausing v. LIRC (L.C. # 2013CV572)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Bruce Clausing appeals an order affirming a decision by the Labor and Industry Review Commission. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

We review the decision of the commission, not the circuit court. *Target Stores v. LIRC*, 217 Wis. 2d 1, 11, 576 N.W.2d 545 (Ct. App. 1998). In the commission's decision, it affirmed a decision by an administrative law judge denying Clausing's application regarding a back injury. Clausing argues that we should reverse the decision because the commission's findings on medical issues were not supported by "credible and substantial evidence," as we are allowed to do under WIS. STAT. § 102.23(6).

After reviewing conflicting medical evidence, the administrative law judge found the opinion of Dr. Rolnick most credible and denied Clausing's application based on that opinion. For purposes of our review under the above statute, a doctor's report is substantial evidence as to the matter contained in the report. *See* WIS. STAT. § 102.17(1)(d)4. The only remaining question, then, is whether the report was credible. However, we may not substitute our judgment for the commissions as to the credibility of the evidence on any finding of fact. WIS. STAT. § 102.23(6). Therefore, we are unable to conclude that the order was not supported by credible and substantial evidence.

Clausing also argues that we should use our authority under WIS. STAT. § 102.23(1)(e)2. to set aside the commission's order on the ground that it was "procured by fraud." He appears to imply that some of the medical reports and opinions were so inconsistent with the record that they must have been the result of fraud, and he argues that the administrative law judge and the commission committed fraud.

The commission's brief on appeal does not provide any meaningful response to this argument. The commission acknowledges the argument, but then asserts only that "this appeal is really just a challenge to the sufficiency of the evidence supporting the Commission's decision."

Although a respondent is free to suggest alternate framings of an appellant's argument, the respondent cannot assume we will agree with that alternate framing. A respondent that fails to provide a substantive response to the appellant's argument, as framed by the appellant, faces the peril that we will consider the argument conceded.

However, respondents Brenner Tank and its insurer have addressed Clausing's fraud argument. They cite case law to the effect that the "procured by fraud" provision applies only to fraud by the commission itself. *See Borello v. Industrial Comm'n*, 26 Wis. 2d 62, 69-70, 131 N.W.2d 847 (1965). Clausing did not file a reply brief that disputes that view of the statute, and therefore we accept it. Therefore, any fraud in the medical reports, if it occurred, is not a basis for reversal.

The fraud that Clausing claims was committed by the commission appears mainly to be what he regards as the failure of the administrative law judge and commission to fully and correctly read and understand the content of the record. However, Clausing does not cite any case law holding that this kind of conduct, if it occurred, qualifies as fraud. This alleged conduct does not fit within the normal meanings of the word "fraud." We see no basis to set aside the commission's order due to fraud.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*