

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 22, 2005

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. 2005AP640

Cir. Ct. No. 2004CV94

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**FABRICATING ENGINEERS AND
LIBERTY INSURANCE CORPORATION,**

PLAINTIFFS-APPELLANTS,

V.

**GEORGE ANDERSON AND LABOR
AND INDUSTRY REVIEW COMMISSION,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Fabricating Engineers and its insurer, Liberty Insurance Corporation, appeal an order affirming a decision by the Labor and Industry Review Commission pertaining to George Anderson's claim for workers'

compensation benefits. Fabricating Engineers argues that no credible evidence supports the Commission's decision that the occupational disease portion of Anderson's disability was caused by his employment with Fabricating Engineers. We disagree and affirm the order.¹

BACKGROUND

¶2 Anderson worked as a heavy equipment operator for approximately twenty-five years. On November 12, 1999, he was working as a forklift operator for Fabricating Engineers. He was manually adjusting the width of the metal tongs on the forklift when he felt his back pop. Anderson lost all feeling in his legs, collapsed, and was unable to get up.

¶3 Anderson received hospital and follow-up care for his back injury, primarily by Dr. Thomas Rieser and Dr. Timothy DeFlorian. On February 17, 2000, Dr. Stephen Barron examined Anderson at the request of Fabricating Engineers. Barron concluded Anderson had reached a healing plateau and could work with no restrictions or need for further treatment.

¶4 On March 2, Rieser examined Anderson. At that time, Anderson was still experiencing pain, but wanted to try to return to work. Rieser released Anderson to return to work without restrictions. On March 18, Anderson began working for Louis Leustek & Sons, Inc. He rotated tasks with a co-worker,

¹ Fabricating Engineers raises additional arguments regarding the manner in which the entire disability award should be allocated. However, because those arguments were contingent on its contention that it was not responsible for the occupational disease portion of Anderson's disability, we do not address those arguments. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

working one hour in a crane and one hour reading gauges. Anderson continued to experience back pain and quit working entirely on September 9.

¶5 Anderson underwent back surgeries on November 9, 2000, and May 14, 2001. In a July 2002 certified medical report, Rieser opined Anderson was disabled, with a disability date of November 12, 1999. Rieser apportioned the cause of that disability, with 30% due to preexisting conditions and 70% work-related. He further apportioned the work-related portion, with 30% due to the trauma sustained on November 12, 1999, and 70% due to long-term industrial exposure. DeFlorian likewise opined that Anderson was disabled, stating that Anderson had “some degenerative discs per past records, but barring the injury he had 11-12-99 he should have been able to continue his normal work duties until retirement.”

¶6 At a May 15, 2003 hearing, the administrative law judge found Rieser’s opinion, supported by DeFlorian’s opinion, more credible than Barron’s. The ALJ found that, as a result of the November 12, 1999 injury, Anderson sustained permanent partial disability on a functional basis, as well as permanent and total disability based on a loss of earning capacity.

¶7 Fabricating Engineers sought review of the order by the Commission. The Commission affirmed and adopted the ALJ’s findings as its own. It concluded that Fabricating Engineers was

liable for the disability arising not only from [Anderson’s] traumatic injury of November 12, 1999, but also from his occupational exposure or disease. The date of disability from the occupational exposure or disease occurred with the November 12, 1999 traumatic injury, as Dr. Rieser indicates at box 8 of his form practitioner’s report, and the insurer was on the risk on that date.

¶8 Fabricating Engineers commenced this action for review in the circuit court. The circuit court upheld the Commission’s findings.

STANDARD OF REVIEW

¶9 We review the decision of the commission, not that of the circuit court. *Virginia Surety Co. v. LIRC*, 2002 WI App 277, ¶11, 258 Wis. 2d 665, 654 N.W.2d 306. We may only reverse if: (1) 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).²

¶10 “Whether an employee has sustained a disabling occupational disease arising out of his employment—and the date on which it is sustained—are questions of fact for the commission to determine.” *General Cas. Co. v. LIRC*, 165 Wis. 2d 174, 178, 477 N.W.2d 322 (Ct. App. 1991). The commission’s findings of fact are conclusive on appeal if they are supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6). Therefore, we may not substitute the weight and credibility determinations of the commission with our own. *See Valadzic v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 598, 286 N.W.2d 540 (1979). We search the record to locate credible evidence that 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).

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

DISCUSSION

¶11 On appeal, Fabricating Engineers challenges only the Commission's findings regarding Anderson's disability based on loss of earning capacity, specifically the occupational disease component of that disability. It argues there is no credible evidence to support the Commission's finding that Anderson's occupational disease began with the November 12, 1999 injury, rather than exposure at Anderson's subsequent employer, Leustek & Sons.³ Thus, it contends Leustek & Sons is responsible for the occupational disease component of Anderson's disability.

¶12 Fabricating Engineers repeatedly asserts that Anderson's occupational disease was "caused by" or "relates to" his last employer, Leustek & Sons. However, the date of injury for occupational disease is defined as "the date of disability or, if that date occurs after the cessation of all employment that contributed to the disability, the last day of work for the last employer whose employment caused disability." WIS. STAT. § 102.01(2)(g)2. Therefore, that Leustek & Sons was Anderson's last employer is relevant only if his date of disability occurred "after the cessation of all employment." *See* WIS. STAT. § 102.01(2)(g)2. Here, the Commission found Anderson's date of disability was

³ In its reply brief, Fabricating Engineers contends that the ALJ, whose findings were adopted by the Commission, never made a finding of a November 12, 1999 disability date for Anderson's occupational disease. However, its own brief-in-chief stated, "ALJ Smith found Anderson to have sustained functional permanent partial disability to the body as a whole as a result of a November 12, 1999 industrial injury while employed by Fabricating Engineers. Further, the ALJ found Anderson to be permanently and totally disability [sic] on the basis of loss of earning capacity as a result of a November 12, 1999 industrial injury while employed by Fabricating Engineers." Moreover, while the Commission adopted the ALJ's findings, it also issued a written opinion that clarified the November 12, 1999 disability date applied to both the traumatic injury and occupational disease components of Anderson's disability.

prior to Anderson's cessation of all employment in September 2000. Additionally, there is credible evidence to support the Commission's finding of a November 12, 1999 disability date for Anderson's occupational disease. Rieser's report allocates Anderson's disability between traumatic injury and occupational disease, but fixes a single date of disability: November 12, 1999.

¶13 Fabricating Engineers recognizes that Rieser did not apportion Anderson's occupational disease between it and Leustek & Sons. However, it contends that Rieser's reports indicate he was "under the mistaken impression" that Anderson continued to work for Fabricating Engineers after he returned to work in March 2000 and before he quit work entirely in September 2000. Fabricating Engineers does not explain why the identity of Anderson's employer would be medically relevant to Rieser in determining a date of disability. Further, we search the record for evidence to support the findings made by the Commission, not findings the Commission could have made but did not. *See Kannenberg*, 213 Wis. 2d at 384. The record reveals that Rieser was aware that Anderson returned to work after the November 1999 injury. Rieser also apportioned Anderson's disability between traumatic injury and industrial injury. Nonetheless, he fixed a single date of disability: November 12, 1999.⁴ Credible evidence supports the Commission's finding that Anderson's date of disability for his occupational disease began on November 12, 1999.

By the Court.—Order affirmed.

⁴ Fabricating Engineers also argues that the Commission misapplied *Green Bay Soap v. ILHR Dept.*, 87 Wis. 2d 561, 275 N.W.2d 190 (Ct. App. 1979). However, its *Green Bay Soap* arguments hinge on its assertion, which we rejected above, that Anderson's occupational disease was caused by his employment at Leustek & Sons. Therefore, Fabricating Engineer's reliance on *Green Bay Soap* is unavailing.

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

