

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 01-0562-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JOSEPH R. PARENTEAU,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

**D & G TRUCKING AND CREDIT GENERAL INSURANCE
COMPANY,**

DEFENDANTS-CO-APPELLANTS.

APPEAL from an order of the circuit court for Bayfield County:
THOMAS J. GALLAGHER, Judge. *Reversed and cause remanded with
directions.*

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

¶1 HOOVER, P.J. D & G Trucking, its insurer and the Labor and Industry Review Commission appeal an order that reverses the commission's decision denying worker's compensation benefits to Joseph Parenteau.¹ They argue that credible and substantial evidence supports the commission's decision. The appellants contend that the facts showed a legitimate doubt that Parenteau's claimed back injury occurred at work on February 12, 1997. We agree and affirm the commission. The circuit court's order is therefore reversed.

BACKGROUND

¶2 Parenteau claimed that he sustained a lower back injury while in the course and scope of his employment with D & G Trucking. He stated that on February 12, 1997, he delivered a load of steel bars. After the bars were unloaded from the trailer by others, Parenteau was required to reattach cargo-securing ratchet straps by using a large metal bar to pull down and tighten the straps. As he was in the process of doing this, the strap either broke or came off. Parenteau fell backward from a knees-bent standing position onto his buttocks. He believed that he had severely injured his tailbone and reported acute shooting pain down his right leg. Parenteau contacted his dispatcher and informed him of the fall and that he was injured. He told the dispatcher that he could function and would try to continue. With the help of others, Parenteau replaced the tarp on the truck and drove to the next stop, three hours away.

¶3 At this stop, Parenteau went to the local hospital's emergency room. The hospital staff x-rayed his back and, finding no fractures, prescribed pain

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version.

medication and released him. Parenteau called D & G Trucking and asked for an alternate way to get home because of his pain. He reported that D & G Trucking said that he had to drive the truck back to Duluth, Minnesota. Although the trip normally would have taken eight hours, Parenteau traveled the distance over two days to allow for breaks and resting. He saw several doctors upon his return. Within six months, Parenteau underwent back surgery.

¶4 D & G Trucking contested Parenteau's worker's compensation claim. At the hearing, the administrative law judge awarded Parenteau benefits. On appeal, the commission reversed, denying benefits. It concluded that there was a legitimate doubt that Parenteau sustained a compensable injury based upon his medical history, credibility and evidence that he was injured in a snowmobile accident. Parenteau sought certiorari review in the circuit court, which reversed the commission and reinstated his benefits award. This appeal then ensued.

DISCUSSION

¶5 Parenteau contends that the commission erred when it reversed the ALJ's award of worker's compensation benefits. He argues that the commission lacked sufficient evidence to conclude that a legitimate doubt prevented a benefits award.

¶6 We review the commission's decision, not the circuit court's. *Town of Russell Volunteer Fire Dept. v. LIRC*, 223 Wis. 2d 723, 729, 589 N.W.2d 445 (Ct. App. 1998). Judicial review of commission decisions is governed by WIS. STAT. § 102.23, which states:

(1) (a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether

judgment has been rendered on it or not, is subject to review only as provided in this section

(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

....

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

¶7 The employee bears the burden of proving the elements of a worker's compensation claim. *Kowalchuk v. LIRC*, 2000 WI App 85, ¶8, 234 Wis. 2d 203, 610 N.W.2d 122. On appeal, the employee also has the burden to show that the commission's decision should be overturned. *Id.* "LIRC has a duty to deny compensation where the evidence raises a legitimate doubt as to the existence of facts essential to establish a claim." *Id.* On review, we must determine whether sufficient evidence supports the commission's conclusion that a legitimate doubt of the employee's injury claim exists. *Id.* A legitimate doubt is demonstrated by "some inherent inconsistency ... or conflict in the testimony." *Id.* (citations omitted). The commission may not rely solely on its "cultivated intuition." *Id.*

¶8 Whether Parenteau sustained an injury while performing services growing out of and incidental to his employment, as required under WIS. STAT. §102.03(1)(a), is an issue of fact. *See Bumpas v. DILHR*, 95 Wis. 2d 334, 342, 290 N.W.2d 504 (1980). This court is limited in its power to review the commission's findings of fact. "The question is not whether there is credible evidence in the record to sustain a finding the commission did not make, but whether there is any credible evidence to sustain the finding the commission did make." *R.T. Madden, Inc. v. DILHR*, 43 Wis. 2d 528, 537, 169 N.W.2d 73 (1969). "If there is credible, relevant, and probative evidence and that evidence construed most favorably would justify [a person] of ordinary reason and fairness to make that finding, the evidence is sufficient." *Id.* at 548. The commission is the sole judge of the weight and credibility of the witnesses. WIS. STAT. § 102.23(6); *Manitowoc County v. DILHR*, 88 Wis. 2d 430, 437, 276 N.W.2d 755 (1979) (citations omitted).

¶9 Neither the employer nor the commission is required to produce countervailing expert testimony to establish a legitimate doubt. *Kowalchuk*, 2000 WI App 85 at ¶24. The commission is justified in dismissing Parenteau's doctors' opinions if those opinions are based on incorrect or incomplete facts. *See id.* at ¶26 (opinions and conclusions of medical witnesses based upon a claimant's statements are to be disregarded if the commission does not believe such statements are true).

¶10 The medical records show that Parenteau injured his back when he fell eight to ten feet from a tanker truck in 1992, that he injured his back in a motor vehicle accident in 1993, and that he reported intermittent back pain in 1996. However, Parenteau testified at the hearing that nothing was wrong with his back in 1992 and that he did not have any follow-up treatment for his back. He

told Dr. David Boxall during an independent medical examination that he did not have any prior back problems. Further, his treating physician, R.E. Freeman, did not demonstrate any knowledge of the 1992 fall when he stated, “[Parenteau’s] only previous accident was in 1993 where he had some bumps and bruises from a truck vehicle accident.” The commission noted that the prior medical records also provided insight into Parenteau’s credibility.

¶11 The commission concluded:

After reviewing the record and consulting with the ALJ concerning witness credibility and demeanor, the commission is left with considerable doubt as to whether the work injury happened as the applicant alleged. The record amply demonstrates that the applicant has either denied his prior significant back problems, or minimized them to the point of concealment. The commission realizes that the applicant injured other parts of his body as well in the 1992 and 1993 accidents. However, the fact remains that a back strain was diagnosed and that the applicant had significant back pain after both incidents. Indeed, the applicant complained of continuing intermittent pain to a doctor as recently as 1996. The demonstrated inaccuracy of the applicant’s testimony regarding his prior back complaints leads the commission to question his testimony about the work injury as well.

¶12 The commission was also presented with evidence that Parenteau injured his back in a snowmobile accident shortly before February 12. A co-worker, Dale Frear, whose appearance at the hearing was compelled by subpoena, testified that Parenteau told him and others that he injured his back in a snowmobile accident a week or so before February 12. At the hearing, Parenteau denied injuring his back in a snowmobile accident or telling Frear the story, claiming that Frear had him confused with another co-worker. The commission concluded that Frear had “no apparent motive to lie or to offer testimony about which he was not certain.” Frear was able to specifically testify how the

snowmobile accident was said to have occurred and who was present to hear Parenteau's story.

¶13 The commission did not explicitly reject Parenteau's story that he fell backward as described on February 12, or that he was injured. It did implicitly acknowledge the difficulty in ascertaining when the type of back injury Parenteau claimed occurred and what caused it. The record supports the commission's conclusion that Parenteau lacked credibility when he testified that he did not injure his back previously. Further, Frear presented an alternative cause of Parenteau's claimed injury. Together, this evidence supports the commission's conclusion that a legitimate doubt existed whether Parenteau sustained an injury while at work on February 12, 1997. We will not disturb the commission's credibility determinations that resolved the inherent inconsistency in the evidence. Therefore, we reverse the circuit court's order and remand for reinstatement of the commission's decision.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

