

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 30, 2002**

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. 02-1210-FT  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CV-41**

**IN COURT OF APPEALS  
DISTRICT III**

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**GEORGE E. THORNTON,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION,**

**DEFENDANT-APPELLANT,**

**GOODMAN FOREST INDUSTRIES AND EMPLOYERS  
INSURANCE OF WAUSAU,**

**DEFENDANTS-CO-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Forest County:  
JAMES P. JANSEN, Judge. *Reversed.*

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

¶1 PER CURIAM.<sup>1</sup> Goodman Forest Industries, Employers Insurance of Wausau and the Labor and Industry Review Commission<sup>2</sup> appeal a judgment reversing a commission decision and granting George Thornton disability benefits. Goodman argues that the trial court incorrectly applied the standard of review to reverse the commission's decision. We agree and reverse the judgment.

### BACKGROUND

¶2 On February 6, 1997, Thornton was working as an electrician at Goodman. He sharply inhaled wood dust and developed respiratory symptoms including coughing, difficulty breathing and chest pain. Thornton filed for worker's compensation benefits alleging in part a permanent disability from a compensable injury. An administrative law judge (ALJ) considered testimony from Thornton's medical expert, Dr. Carl Smoot, and Goodman's experts, Drs. Richard Effros and Richard Potts. The ALJ determined that Thornton did not sustain a permanent respiratory disability. On review, the commission affirmed the ALJ's decision.

¶3 Smoot testified that since treatment in 1997, Thornton's lungs had been generally clear. Smoot also admitted that Thornton had no physical restrictions as long as he was not exposed to wood dust and isocyanate vapor. Goodman presented Effros and Potts as its medical experts. Potts noted that Thornton's most recent methacholine test showed no significant reduction of vital

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

<sup>2</sup> Goodman Forest Industries and Employers Insurance of Wausau filed a brief in this case. The Labor and Industry Review Commission also filed a brief. We refer to the appellants collectively as Goodman.

capacity and that pulmonary function studies were normal. Potts noted that Thornton did not suffer from “reactive airway dysfunction syndrome” and had not developed hypersensitivity to any dust or particles in the workplace. Potts opined that Thornton suffered no permanent disability as a result of his work injury.

¶4 In addition, Effros indicated in his report that there was no evidence that Thornton had bronchial asthma and said Thornton’s previous airway hyperactivity had resolved. Effros also opined that Thornton suffered no permanent disability because “his pulmonary function tests have essentially been within normal limits and the methacholine test recently completed was now normal.”

¶5 The commission credited the opinions of Potts and Effros and explicitly said it found nothing in the record to undercut Potts’ credibility. In contrast, the commission deemed Smoot’s testimony and reports “ambiguous and equivocal.” Smoot initially opined that Thornton suffered fifty percent permanent partial disability, but then changed his testimony to suggest ten to twenty percent permanent partial disability. The commission found that Thornton has continued to work as an electrician for an extended period of time and in a number of different environments. He has been able to work as long as he avoids certain types of dust and particulates. The commission found:

Based on Dr. Potts assessment as well as Dr. Effros opinion, and given the fact that the applicant’s most recent methacholine challenge test was negative, and given the fact that the applicant has been able to continue to work as an electrician, and given the ambiguity in Dr. Smoot’s assessment, the evidence was sufficient to raise a legitimate doubt that the applicant suffered any permanent disability as a result of his occupational asthma.

¶6 Thornton petitioned the trial court for review. The court reversed the commission's decision. It concluded that the commission erred as a matter of law because, based on its review of the record, the court determined that there was insufficient credible and substantial evidence to support the commission's denial of benefits. The court directed the commission to award Thornton a ten percent permanent disability.

### DISCUSSION

¶7 Goodman appeals and argues that credible and substantial evidence supports the commission's findings that Thornton did not sustain any permanent disability as a result of his compensable injury.<sup>3</sup> We agree and conclude that substantial evidence supports the commission's decision and that the trial court improperly weighed the evidence in the record when it granted Thornton benefits. We therefore reverse the judgment.

¶8 We apply the same standard of review as the trial court. *Nelson v. LIRC*, 123 Wis. 2d 221, 224, 365 N.W.2d 629, 630 (Ct. App. 1985). We independently review the commission's decision. *Local 60, Am. Fed. Of Mun. Employees v. WERC*, 217 Wis. 2d 602, 607, 579 N.W.2d 59 (Ct. App. 1998). *C.W. Transport, Inc. v. LIRC*, 128 Wis. 2d 520, 525, 383 N.W.2d 921 (Ct. App. 1986). Our task is to determine whether the commission's decision was correct. *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981).

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<sup>3</sup> Goodman also correctly contends that the trial court does not have the authority to amend the commission's findings and order benefits.

¶9 The determination of the nature and extent of permanent disability is a question of fact. WIS. STAT. § 102.23(6). “Substantial evidence is not a preponderance of evidence, but relevant evidence which a reasonable mind might accept as adequate to support a conclusion.” *Bretl v. LIRC*, 204 Wis. 2d 93, 100-01, 553 N.W.2d 550 (Ct. App. 1996). In examining the commission’s findings, our role is to review for credible and substantial evidence to support the commission’s determination, rather than to weigh opposing evidence. *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶10 We assume, absent affirmative proof to the contrary, that the commission acted regularly in making its determination. *Davis v. Industrial Comm’n*, 22 Wis. 2d 674, 678-79, 126 N.W.2d 611 (1964). The burden of proof in an action to review an agency decision is on the party seeking to overturn the agency action, not on the agency to justify its action. *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995). A party seeking benefits has the burden of proving beyond a reasonable doubt all the facts essential to the recovery of compensation. *Leist v. LIRC*, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994).

¶11 Here, the burden was on Thornton to establish that he sustained a permanent disability as a result of his injury on February 6, 1997. If the commission had a legitimate doubt that Thornton’s compensable injury caused a permanent disability, it was the commission’s duty to deny compensation because Thornton did not sustain the necessary burden of proof. *See Fitz v. Industrial Comm’n*, 10 Wis. 2d 202, 205, 102 N.W.2d 93 (1960).

¶12 In a battle of experts, the commission decides the weight and credibility of the testimony of the medical witnesses. *Semons Dept. Store v.*

*DILHR*, 50 Wis. 2d 518, 528-29, 184 N.W.2d 871 (1971). Here, Thornton's expert contradicted Goodman's two experts, and the commission deemed Goodman's experts more credible and gave their testimony greater weight. Where there are inconsistencies or conflicts in medical testimony, the commission, not the reviewing court, reconciles the inconsistencies and conflicts. *Valadzic v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 598, 286 N.W.2d 540 (1979). We therefore need not consider the contrary medical evidence Thornton highlights on appeal. See *Employers Mut. Liab. Ins. Co. v. DILHR*, 62 Wis. 2d 327, 331-32, 214 N.W.2d 587 (1974).

¶13 Only where evidence the commission relied upon is incredible as a matter of law may we reverse its findings of fact. *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis. 2d 646, 659, 275 N.W.2d 668 (1979). Smoot's expert opinions cannot render the opinions of Potts and Effros inherently incredible. See *Consolidated Papers, Inc. v. DILHR*, 76 Wis. 2d 210, 219, 251 N.W.2d 69 (1977). Although Smoot's opinions might justify a conclusion contrary to that reached by the commission, this is not a sufficient basis for reversal under our limited scope of review. See *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 636, 264 N.W.2d 222 (1978). The commission chose to rely on the opinions of Potts and Effros. To alter the commission's findings of weight and credibility and elevate Smoot's opinions above those of Potts and Effros would be to substitute our judgment for the commission's. We cannot do that. See *Burks v. DILHR*, 45 Wis. 2d 1, 8, 172 N.W.2d 27 (1969).

¶14 Thornton argues that everyone agrees that he has a permanent disability and that he cannot be exposed to dust. However, he offers no record cites to support that contention, and we will not scour the record for evidence to

support Thornton's arguments. *Tam v. Luk*, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990).

¶15 The parties presented medical experts with differing opinions. The commission resolved those differences and gave more weight and credibility to Goodman's experts. The changes in Smoot's testimony regarding the percentage of Thornton's partial permanent disability undermined his credibility. The ALJ found that very little analysis supported Smoot's percentage and that it "does not rise above the level of guesswork and suggestion." The commission found Smoot "ambiguous and equivocal." It also found credible Goodman's experts who testified to Thornton's normal test results. Given Potts' and Effros' credible opinions, Thornton's normal test results and Smoot's ambiguity, Thornton failed to meet his burden to establish his disability beyond a legitimate doubt.

¶16 Thornton also argues that Smoot's opinion that methacholine, a diagnostic test, was not a reliable diagnostic tool is unrefuted and that the commission, by not considering unrefuted evidence, was essentially substituting its medical judgment for a doctor's. It is, however, incorrect to state that the opinion is unrefuted because two other doctors, Potts and Effros, rested their opinions in part on the test results. Their use of the test and reliance on its results implicitly shows that they consider it a valid diagnostic tool.

*By the Court.*—Judgment reversed.

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

