

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 22, 1997

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. 97-0763

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

MICHAEL'S FURNITURE & DESIGN,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
GREGORY L. BAILEY,**

DEFENDANTS-RESPONDENTS,

CASUALTY RECIPROCAL EXCHANGE,

DEFENDANT.

APPEAL from an order of the circuit court for St. Croix County:
C.A. RICHARDS, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Michael's Furniture & Design appeals a circuit court decision affirming an order by the Wisconsin Labor and Industry Review Commission awarding lost wages to Gregory Bailey because of Michael's unreasonable refusal to rehire. Michael's argues that the commission's reversal of the hearing examiner's decision denies it due process of law and that there is no credible evidence to support the commission's findings of an unreasonable refusal to rehire Bailey. We reject Michael's arguments and affirm the circuit court.

This is a worker's compensation action where Bailey claims that his discharge following a work-related back injury violates § 102.35, STATS., the "unreasonable refusal to rehire" provision. The case has a rather lengthy legal history which this court will summarize for its relevant background.

Initially, Michael's disputed Bailey's claim of a work injury allegedly occurring on March 12, 1990. The commission affirmed the hearing examiner's, H.F. Benkert, finding that Bailey had suffered a compensable work injury and held Michael's liable under the worker's compensation law. Subsequently, a second hearing was held before another hearing examiner, Janine Smiley, who imposed bad faith and delayed payment penalties against Michael's because of certain misrepresentations by an owner of Michael's. The commission affirmed the examiner's findings and penalties.

The issue presently on appeal arises from a third hearing before another hearing examiner, James Lawrence, who found that Michael's had discharged Bailey because of his substandard performance as a manager and, therefore, did not unreasonably refuse to rehire Bailey because of his work injury. However, after consulting with Lawrence concerning the credibility and demeanor of witnesses, the commission set aside his findings and found that Michael's had

unreasonably discharged Bailey following a work injury and, therefore, violated the unreasonable refusal to rehire provision of § 102.35(3), STATS. As part of its review, the commission, without consulting with examiner Smiley, also referred to the evidence and her findings at the second hearing.

Whether an employer was guilty of an unreasonable refusal to rehire under § 102.35(3), STATS., presents a question of fact for the commission to determine. *See Link Ind., Inc. v. LIRC*, 141 Wis.2d 551, 558, 415 N.W.2d 574, 577 (Ct. App. 1987). As the commission notes, in *L&H Wrecking Co. v. LIRC*, 114 Wis.2d 504, 339 N.W.2d 344 (Ct. App. 1983), we stated the following well-established rules:

Judicial review of findings of fact by the Department is governed by statute and is limited in scope. *R.T. Madden, Inc. v. Department of Industry, Labor & Human Relations*, 43 Wis.2d 528, 536, 169 N.W.2d 73, 76 (1969). Section 102.23(1), STATS., sets out the limitations on the scope of this review. The purpose of these limitations is to ensure speedy justice under the Workmen's Compensation Act by limiting appeals and extensive litigation. *Id.*

... This court is to affirm the findings of the Commission if there is any credible evidence in the record to support those findings. *Madden*, 43 Wis.2d at 547, 169 N.W.2d at 82. In reviewing the sufficiency of credible evidence, we need find only that the evidence is sufficient to exclude speculation or conjecture. *Bumpas v. Department of Industry, Labor & Human Relations*, 95 Wis.2d 334, 343, 290 N.W.2d 504, 508 (1980). The Commission's findings must be upheld even if against the great weight and clear preponderance of the evidence. *Goranson v. Department of Industry, Labor & Human Relations*, 94 Wis.2d 537, 554, 289 N.W.2d 270, 278 (1980).

... The credibility of a witness or the persuasiveness of the testimony rendered are for the Department to determine. Sec. 102.23(6), STATS.; *Goranson*, 94 Wis.2d at 556, 289 N.W.2d at 279. In applying the credible evidence test to findings of the Department, a reviewing court does not

weigh conflicting evidence to determine which should be believed. If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to the opposite conclusion, a court must affirm. *Valadzic v. Briggs & Stratton Corp.*, 92 Wis.2d 583, 592-94, 286 N.W.2d 540, 544-45 (1979).

Id. at 507-09, 339 N.W.2d at 346-47 (footnote omitted).

Michael's first argument is that the commission denied it due process by taking administrative notice of examiner Smiley's findings and credibility determinations made at the second hearing. It somehow arrives at the conclusion that, therefore, the commission must accept examiner Lawrence's findings of credibility as he is the agency that observed and heard the witnesses in this proceeding.

We are not persuaded. The three elements of a fair hearing in worker's compensation hearings are: (1) The right to seasonably know the charges or claims proffered; (2) the right to meet such charges or claims by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides and upon the law. *Nelson Mill & Agri-Center, Inc. v. DILHR*, 67 Wis.2d 90, 96, 226 N.W.2d 435, 438 (1975). Here, the commission noted in its factual findings that Michael's acknowledged examiner Lawrence taking administrative notice of the hearing before examiner Smiley. The commission continued to note that Michael's then invited it to also review the testimony at the hearing before examiner Benkert who presided over the first hearing. We are unable to see how this procedure has denied Michael's due process. Michael's knew what Bailey was claiming, it met the charges by presenting competent evidence and the commission carefully reviewed the evidence. It simply disagreed with the version presented by Michael's. Also, it is the commission that is the ultimate finder of fact, not the hearing examiner.

Transamerica Ins. Co. v. DILHR, 54 Wis.2d 272, 281-83, 195 N.W.2d 656, 661-62 (1972).

Also, Michael's argues incorrectly that the commission could not rely on examiner Smiley's findings and rejection of Michael's testimony at the second hearing. The commission had affirmed Smiley's previous findings which found Bailey more credible than Michael's testimony and, therefore, under the holding in *Transamerica Ins. Co.*, the commission needs to confer with the hearing examiner only when it reverses the examiner on a finding of credibility of witnesses. It did not reverse any findings of Smiley. We see no violation of due process when the commission bases its decisions on previous hearings where it affirmed the examiner's factual findings.

Finally, Michael's contends the record is insufficient to support the commission's determination that Bailey had been unreasonably discharged following a work injury. We disagree.

To establish an employer's liability under § 102.35(3), STATS.,¹ the following conditions must be met: the claimant must (1) be an employee; (2) have been injured in the course of employment; and (3) be able to work within

¹ Section 102.35(3), STATS., provides:

(3) Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.

stated physical and mental limitations. Additionally, the employer must have work available within the claimant's physical and mental limitations and refuse to rehire the claimant without reasonable cause. The unreasonable refusal to rehire statute applies to unreasonable discharges following a work injury, as well as simple failure to rehire. *Dielectric Corp. v. LIRC*, 111 Wis.2d 270, 278, 330 N.W.2d 606, 610 (Ct. App. 1983).

Michael's relies on the evidence which gave it a basis to discharge Bailey; namely, that Bailey was fired because of his poor work performance. If that is true, then it is not in violation of § 102.35(3), STATS. See *Great Northern Corp. v. LIRC*, 189 Wis.2d 313, 318-19, 525 N.W.2d 361, 364 (Ct. App. 1994). However, that evidence is merely contradictory to evidence relied upon by the commission. The fact that the evidence is in conflict is not a sufficient basis for the reversal of the commission. *Eastex Packaging Co. v. DILHR*, 89 Wis.2d 739, 745, 279 N.W.2d 248, 250 (1979).

There is no dispute that a compensable injury occurred, that Bailey was performing services at the time of the injury and that an employer and employee relationship existed. Michael's submitted testimony that it fired Bailey because he was an inadequate manager, and not because of his work injury. However, the commission rejected this testimony and found more credible Bailey's testimony that he had not been discharged because of his work performance, thereby violating the refusal to rehire provision of the worker's compensation act. The commission relied on the fact that Michael's gave Bailey no reason for terminating his employment and found it incredible that Michael's would deliberately falsify an injury report on a worker's compensation form to help out a worker it had just fired for poor performance.

As we previously stated, the test applied by the reviewing court is to determine whether there is any credible evidence to support the commission's

findings. We do not weigh conflicting evidence to determine the credibility of witnesses. Consequently, the commission could reject Michael's evidence that it fired him because of his substandard performance as a manager and not because of any work injury. Under this standard of review, we conclude there is sufficient evidence to support the commission's finding that Michael's had unreasonably refused to rehire Bailey because of his work injury.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

