

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 8, 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. 2004AP2145

Cir. Ct. No. 2003CV743

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**WISCONSIN WORKER'S COMPENSATION UNINSURED
EMPLOYERS FUND,**

PLAINTIFF-APPELLANT,

KV CONSTRUCTION, LLC,

INVOLUNTARY-PLAINTIFF,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION, ERIC K.
VAUGHN AND HARLEYSVILLE/LAKE STATES INS. CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. Wisconsin Worker’s Compensation Uninsured Employers Fund (Fund) and KV Construction, LLC (KVC) appeal from an order affirming a Labor and Industry Review Commission (LIRC) decision imposing liability on the Fund for a worker’s compensation award LIRC made to Eric Vaughn, an employee of KVC. LIRC held the Fund responsible for the award based on a finding that KVC’s worker’s compensation policy with Harleysville/Lake States Insurance Company (Lake States) was not in effect on the date of Vaughn’s injury.

¶2 The Fund contends Lake States should be equitably estopped from asserting a policy cancellation defense because Lake States’ inconsistent business practices led KVC to believe that its policy was in effect on the date of the injury. Because we conclude LIRC already considered and rejected the Fund’s equitable arguments in its findings of fact, and these findings do not support the application of estoppel, we affirm.¹

¹ Neither party addresses whether LIRC has the authority to apply an equitable doctrine in a worker’s compensation case even if the elements of estoppel were present. Because we conclude that LIRC’s factual findings do not support estoppel, we need not address this issue. However, we note that at least two cases indicate that common law remedies such as estoppel are not available in a worker’s compensation proceeding. See *Borello v. Industrial Comm’n*, 26 Wis. 2d 62, 66, 131 N.W.2d 847 (1965) (affirming LIRC’s rejection of employee’s argument that employer should be estopped from asserting a statute of limitations defense where employer fraudulently concealed cause of employee’s injury, concluding a worker’s compensation claim was “not [an] action at law nor in equity as recognized by the common law. It is a statutory proceeding where the rights, remedies and procedures are established by statute. The relief sought must be within the statute....”); *Yunker v. Labor and Industry Review Comm’n*, 115 Wis. 2d 525, 531, 341 N.W.2d 703 (Ct. App. 1983) (“Since ch. 102, Stats., does not provide an equitable remedy, [the agency] cannot create one.”); but see *Harrison v. Labor and Industry Review Comm’n*, 187 Wis. 2d 491, 523 N.W.2d 138 (Ct. App. 1994) (where LIRC applied doctrine of judicial estoppel to dismiss a state age discrimination claim, we concluded—without discussing the existence or scope of LIRC’s power to apply equitable doctrines in a Chapter 111 (Wisconsin Fair Employment Act) proceeding—that the record was insufficiently developed to support judicial estoppel and directed LIRC to take additional testimony to determine if estoppel was appropriate).

BACKGROUND

¶3 The following was established by testimony and documentary evidence in proceedings before the Worker's Compensation Division of the Department of Workforce Development. KVC took out a worker's compensation policy with Lake States for a term beginning on May 1, 1998, and ending May 1, 1999. KVC opted to pay the policy premium in quarterly installments. KVC missed its first payment, which was due on May 1, 1998. Lake States sent a notice of termination to take effect June 12, 1998, to the Wisconsin Compensation Rating Bureau (Rating Bureau) and KVC. Lake States received KVC's payment on May 18, and KVC was issued a notice of reinstatement.

¶4 The second quarterly installment was due August 3. KVC again missed the payment and received another notice of termination, effective September 15. Lake States received a check from KVC for this quarter on October 26, approximately six weeks after the termination date. Lake States nonetheless reinstated KVC's policy without an interruption in coverage, and a reinstatement notice was issued. On November 12, Lake States discovered that the October 26 check was returned due to insufficient funds. Lake States issued another notice of termination to KVC and the Rating Bureau with an effective date of December 30, 1998.

¶5 On January 4, 1999, Kelly Vaughn, the proprietor of KVC, contacted insurance agent Tom Strangstalien about the status of his worker's compensation policy. Strangstalien told Vaughn that Lake States' accounting department advised him that they would resubmit the October 26 check and that Vaughn was responsible for a \$25 not sufficient funds fee. Vaughn provided Strangstalien the \$25 check that day, and Strangstalien testified that he sent it to

Lake States. Vaughn testified that he had believed his coverage had been reinstated.

¶6 On January 8, 1999, Lake States cashed the \$25 check. However, Lake States did not resubmit the October 26 check. Lake States issued another notice of termination on January 15 to KVC and the Rating Bureau. The Rating Bureau sent KVC two notices of termination with an effective date of February 21, 1999, on January 26 and February 14, respectively. KVC took no additional action to reinstate its coverage.

¶7 On March 1, 1999, Eric Vaughn, a carpenter for KVC and brother of Kelly Vaughn, injured his back while lifting a stack of lumber. Vaughn stopped working and sought medical treatment the next day. KVC submitted a claim for Vaughn's injury to Lake States. Lake States denied the claim for non-payment of premium.

¶8 Eric Vaughn requested a hearing with the Worker's Compensation Division of the Department of Workforce Development. Among the issues in dispute was whether Lake States' policy was in effect on the date of Vaughn's injury. An administrative law judge (ALJ) took testimony and found that KVC's policy with Lake States was not in effect because the Rating Bureau had notified KVC that the policy was cancelled. The Fund appealed the ALJ's decision to LIRC.

¶9 LIRC affirmed the ALJ's decision but substituted its own factual findings. LIRC's relevant findings and conclusions are as follows:

[I]t is clear that on January 15, 1999, Lake States sent out a notice of cancellation to both KVC and to the [Rating Bureau], indicating KVC's policy would terminate effective February 16, 1999, unless the outstanding

premium was paid. On January 15, 1999, premiums were still outstanding for the August-through-October policy quarter, as well as for the November-through-January policy quarter. The notice only asked for the balance due on the earlier quarter in order to avoid cancellation. The [Rating Bureau] received its copy of the cancellation notice on January 22, 1999, thereby making the effective date for the policy cancellation February 21, 1999 (WIS. STAT. § 102.31(2)).

... [T]he department sent “cancellation alerts” to KVC on January 26, 1999 and February 14, 1999. KVC’s owner testified that he did not know whether he received a copy of the cancellation notice sent on January 15, 1999, and at the hearings he was not asked about the department’s cancellation alerts. After the January 1999 notice of cancellation was sent, KVC’s owner did not send any money or contact Lake States until the applicant was injured on March 1, 1999. The owner asserts that it was not until that date that he learned coverage had lapsed.

It is not credible that KVC failed to receive the notice of cancellation sent on January 15, 1999. Nor is it likely that KVC failed to receive the two cancellation alerts sent to that business by the department on January 26 and February 14, 1999. KVC had been able to get by in the first and second quarters of the insurance contract by making late premium payments, one of which was made with an insufficient funds check, and then benefiting from discretionary reinstatement by Lake States. KVC was given further leeway in January of 1999, when the insurance agent, Strangstalien, told KVC’s owner that Lake States would resubmit his insufficient funds check if he paid the \$25 “NSF” fee. It is inferred from the evidence that the owner decided that he could ignore the cancellation notice and the department alerts based on the prior history of discretionary reinstatements.

[The Fund] argues that Lake States should be held liable because that company failed to resubmit the \$3,525.00 check to the bank as Strangstalien had indicated Lake States would do [The Fund] asserts that KVC’s owner gave credible testimony that there were sufficient funds in KVC’s bank account to cover the \$3,525.00 check, had Lake States resubmitted it. Of course, had Lake States resubmitted the check and had it cleared the bank, that payment would only have covered the premium through October 31, 1998. An additional premium payment had been due on November 1, 1998.

While Lake States' business procedures were inconsistent, and from a layman's perspective Lake States was anything but blameless in this matter, there can be no disputing the legal effect of the notice of cancellation sent out on January 15, 1999, pursuant to WIS. STAT. § 102.31(2)(a). The statute defines when cancellation is effective, and the statutory notice was given to effect cancellation on February 21, 1999. KVC did not submit payment as required by the notice, and as a result, the policy was legally cancelled pursuant to the statute. The notice of cancellation was received *after* Strangstalien's representation concerning resubmission of the check, and that notice gave an unambiguous date for policy cancellation, consistent with WIS. STAT. § 102.31(2)(a). At a minimum, KVC should have responded to that notice by immediately contacting Strangstalien or Lake States to determine the status of the policy.

Pursuant to WIS. STAT. § 102.81, [the Fund] is liable for the applicant's compensation attributable to the work injury of March 1, 1999, with rights for recovery against KVC and its officers and directors as provided in WIS. STAT. §§ 102.82 and 102.83.

The Fund appealed to the circuit court, which affirmed LIRC's decision. The Fund appeals.

DISCUSSION

¶10 The Fund contends that Lake States should be equitably estopped from asserting a policy cancellation defense because its contradictory and confusing business practices led KVC to reasonably believe its worker's compensation policy was in effect. LIRC counters that the Fund did not argue this point before the department, LIRC or the circuit court and therefore has waived its right to raise it here. The Fund replies that though neither it nor KVC used the words "equitable estoppel" in prior proceedings, the substance of its argument on appeal is identical to that of KVC's argument at the department hearing and the Fund's own before LIRC and the circuit court.

¶11 When addressing waiver issues, we will not elevate form over substance. *State v. Neudorff*, 170 Wis. 2d 608, 616, 489 N.W.2d 689 (Ct. App. 1992). Before LIRC, the Fund argued that the “alleged lapse of coverage [was] attributable to the[] actions [of] Lake States,” which included “assurances made by its agent that coverage would be reinstated through a second reprocessing of the premium payment” and Lake States’ “fail[ure] to reprocess the premium payment.” Before the circuit court, the Fund argued that “policy considerations favor reforming an insurance contract to provide coverage, where, as here, an insurance company’s inconsistent action led an insured to reasonably believe he ha[d] coverage.”

¶12 These arguments acknowledge the possibility that KVC may not have had coverage on the date of the injury but that, nonetheless, Lake States should be liable for the claim because of its inconsistent actions. In effect, this is the same argument that the Fund makes here. Because the only real difference is the use of the term equitable estoppel, we conclude the Fund has not waived the issue.

¶13 We turn now to the Fund’s estoppel argument. We review the decision of the LIRC and not the judgment of the circuit court. *Erickson v. Labor and Industry Review Comm’n*, 2005 WI App 208, ¶13, __ Wis. 2d __, 704 N.W.2d 398, *review denied* (WI Oct. 14, 2005) (No. 2004AP3237). The scope of judicial review of a worker’s compensation order is defined within Chapter 102. We may set aside a LIRC worker’s compensation order or award only when: (1) LIRC has acted without or in excess of its powers; (2) the order or award was procured by fraud; (3) LIRC’s findings of fact do not support the order or award.

WIS. STAT. § 102.23(1)(e) (2003-04).² We will affirm LIRC’s findings of fact and reasonable inferences drawn therefrom as long as “there is credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings.” *Doepke-Kline v. Labor and Industry Review Comm’n*, 2005 WI App 209, ¶10, ___ Wis. 2d ___, 704 N.W.2d 605, *review denied* (WI Nov. 11, 2005) (No. 2005AP106).

¶14 A party asserting equitable estoppel must show: (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment. *Milas v. Labor Ass'n of Wisconsin, Inc.*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997). “For purposes of claiming estoppel, a party’s reliance must be reasonable.” *Mews v. Wisconsin Dept. of Commerce*, 2004 WI App 24, ¶28, 269 Wis. 2d 641, 676 N.W.2d 160.

¶15 The Fund casts the issue in this appeal as one of pure law. It contends that on the facts as found by LIRC estoppel must be applied to preclude Lake States’ policy cancellation defense. The Fund states that it is not asking that we reverse LIRC’s findings of fact. Instead, it argues that on these undisputed facts, the elements of estoppel are established, and that we may make such a determination as a matter of law, citing *Nugent v. Slaughter*, 2001 WI App 282, 249 Wis. 2d 220, 638 N.W.2d 594. It further asserts that because the record is developed we may exercise discretion for LIRC and apply estoppel.

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

¶16 The problem with the Fund’s argument is that LIRC has already considered and rejected the Fund’s equitable arguments in its factual findings. In essence, LIRC concluded that KVC was largely to blame for the termination of the policy because it repeatedly made late payments, then chose to ignore multiple notices of cancellation, including two official notices from a state agency. LIRC determined that it was “not credible” that KVC failed to receive the January notice of cancellation from Lake States and the two cancellation alerts from the Rating Bureau. LIRC inferred from this evidence that “the owner decided that he could ignore the cancellation notice and department alerts based on the prior history of discretionary reinstatements.” It also noted that while Lake States’ business practices were inconsistent, KVC should have immediately responded to the notices of cancellation to determine the status of its policy. LIRC thus weighed the equities and determined that KVC was largely responsible for the cancellation of its policy.

¶17 On these undisputed findings, the Fund cannot demonstrate that its reliance on Lake States’ inconsistent business practices was reasonable, and therefore estoppel cannot lie.³ LIRC found that because KVC did not pay its bills

³ To the extent that a determination of reasonableness is a question of law as well as fact, *see, e.g., Wassenaar v. Panos*, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983), we apply great weight deference to LIRC’s implicit determination that KVC’s reliance was not reasonable. *See Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 660, 539 N.W.2d 98 (1995) (“Great weight deference is appropriate once a court has concluded that: (1) the agency was charged by the legislature with the duty of administering the statute; (2) that the interpretation of the agency is one of long-standing; (3) that the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) that the agency’s interpretation will provide uniformity and consistency in the application of the statute.”).

As the agency charged with resolving worker’s compensation disputes, LIRC has great expertise in applying Chapter 102 and knowledge of the practices of worker’s compensation insurers and policyholders. It therefore is well suited to determine what is reasonable behavior in this area.

on time and failed to take action after receiving multiple cancellation notices it bore most of the responsibility for the cancellation. On the full record before us, we can conceive of an interpretation of the facts that would support the Fund's view of the case. However, our task is not to find facts but to determine if LIRC's factual findings are supported by credible and substantial evidence. *See Doepke-Kline*, 704 N.W.2d 605, ¶10. We conclude that they are.

¶18 The Fund contends that our decision in *Nugent*, *supra* ¶15, controls. There, we concluded that the elements of estoppel were established when an insurer cancelled Slaght's policy three days prior to an accident, but acted for the next three years as though Slaght were still covered. *See Nugent*, 249 Wis. 2d 220. We determined that the elements of equitable estoppel had been established and remanded for the circuit court to exercise its discretion as to whether to actually apply estoppel. *Id.*, ¶35.

¶19 But *Nugent* is inapposite. Unlike *Nugent*, which was an appeal from a circuit court order, this is an appeal from a circuit court review of an administrative agency order in a Chapter 102 case. In *Nugent*, the trial court had not addressed the equitable arguments. *Id.*, ¶35. Here, LIRC considered and rejected the Fund's equitable arguments in its findings of fact, which were supported by credible and substantial evidence. We therefore affirm the circuit court's order upholding the LIRC decision.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

