COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2000

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. 00-0280

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WOODLAND/ALLOY CASTING, INC.,

PLAINTIFF-RESPONDENT-
CROSS-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-CROSS-RESPONDENT,

ALFONSO G. ARROYO,

DEFENDANT-APPELLANT-
CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Racine County: RICHARD J. KREUL, Judge. *Reversed and cause remanded with directions; cross-appeal dismissed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Alfonso G. Arroyo appeals from a judgment reversing a decision of the Labor and Industry Review Commission (LIRC). LIRC ruled that Woodland/Alloy Casting, Inc. (the employer) owed back wages to its former employee, Arroyo, for failing to rehire him in violation of WIS. STAT. § 102.35(3) (1997-1998).[1] The employer filed a cross-appeal, asserting that § 102.35(3) should not apply because Arroyo was rehired in good faith following his initial injury.[2] We conclude that LIRC's factual findings are supported by credible and substantial evidence and involve a proper application of § 102.35(3). Therefore, we reverse the judgment of the circuit court, which set aside LIRC's award, and direct the circuit court to reinstate LIRC's order. The cross-appeal is dismissed.

¶2 Arroyo was employed at the employer's foundry from 1991 until October 18, 1996. In February 1996, he sustained a work injury that necessitated partial amputation of the small finger on his left hand. He returned to work on restricted status after two weeks and returned to work with no restrictions after another two weeks. Several months later, the stub of Arroyo's previously injured finger became painful and swollen. On the afternoon of Friday, October 11, 1996, Arroyo telephoned his doctor seeking medical advice. The doctor's office advised Arroyo that he could not be seen that day but scheduled an appointment for the following Monday morning. Arroyo requested an appointment later in the day, after his shift, but the nurse advised him that he should see the doctor in the morning.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] LIRC did not file a brief, but filed a letter stating that it concurs with the position of Arroyo in his cross-respondent's brief.

¶3 On Monday morning, Arroyo informed his supervisor, plant manager Ray Avila, that he needed to leave work for the doctor's appointment. Arroyo's physician diagnosed and treated an abscess in the stump of the amputated finger and provided Arroyo with a note relieving him from work for two days. Arroyo returned to work that afternoon and presented the medical excuse to Avila and Kerry Malak, the foundry's vice president and general manager. Malak expressed displeasure with Arroyo for scheduling the appointment during the morning, rather than at the end of his shift as company policy dictated. Arroyo responded angrily, raising his voice and daring them to fire him or lay him off if they did not like what he had done. Malak told him to go home since he had his medical excuse. When Arroyo returned to work on Thursday, he was sent home for two days with pay. The next day, Arroyo was laid off. Arroyo applied for and received unemployment compensation. The employer did not contest his application.

¶4 At the outset, Arroyo was told he was laid off due to a reduction in workforce and lack of work. In the ensuing months, Arroyo contacted his employer on several occasions, indicating that he was willing and able to work without restriction. The employer repeatedly told Arroyo that no work was available and he was not rehired.

¶5 After Arroyo filed this action, he learned, through discovery, that he was the only employee laid off. He also learned that employees worked a substantial amount of overtime during the period he was "laid off" and that several new employees were hired after his discharge. Not until after Arroyo subpoenaed the employer's records and obtained this information did the employer assert that Arroyo was discharged for insubordination. The employer then asserted that

Arroyo was told his discharge was due to lack of work to make it easier for him to obtain new employment.

¶6 Arroyo was initially denied benefits following a hearing before the administrative law judge. He filed a petition for review with LIRC, which concluded that the employer had unreasonably refused to rehire Arroyo and awarded Arroyo back pay. The employer then brought an action for judicial review pursuant to WIS. STAT. § 102.23(1)(a). The circuit court set aside LIRC's award. Arroyo appeals. The employer filed a cross-appeal challenging the applicability of WIS. STAT. § 102.35(3). Indeed, the employer challenges virtually every aspect of LIRC's factual findings and raises several questions about the legal standard applicable to this case.

¶7 In reviewing a circuit court order reversing an order of an administrative agency, an appellate court's scope of review is the same as that of the circuit court. *See* ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 117, 438 N.W.2d 823 (1989). Thus, we do not deal with the correctness of the circuit court's decision brought to us on review, nor do we owe that decision any deference. We review the decision of the agency. *See* ***id.***

¶8 The statute at issue, WIS. STAT. § 102.35(3), provides:

> 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.

To make a prima facie case under § 102.35(3), the employee must show that he or she sustained an injury while on the job and that the employer refused to rehire the

employee because of the injury. *See* ***West Bend***, 149 Wis. 2d at 126. If the employee makes that showing, the burden shifts to the employer to show a reasonable cause for the refusal to rehire. *See* ***id***. Whether an employer is guilty of an unreasonable refusal to rehire under § 102.35(3) presents a mixed question of law and fact for LIRC. *See* ***Ray Hutson Chevrolet, Inc. v. LIRC***, 186 Wis. 2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994).

¶9 LIRC's factual findings are entitled to substantial deference. We are to affirm LIRC's findings if there is any credible evidence in the record to support them. *See* ***L & H Wrecking Co. v. LIRC***, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983). "In reviewing the sufficiency of credible evidence, we need find only that the evidence is sufficient to exclude speculation or conjecture." ***Id.*** If more than one reasonable inference can be drawn from the facts, the drawing of that inference is still a finding of fact and conclusive on review. *See* ***Sauerwein v. DILHR***, 82 Wis. 2d 294, 300, 262 N.W.2d 126 (1978). LIRC has leeway in determining and drawing inferences from conflicting evidentiary facts. *See* ***Milwaukee County v. DILHR***, 48 Wis. 2d 392, 399, 180 N.W.2d 513 (1970). LIRC's findings must be upheld even if against the great weight and clear preponderance of the evidence. *See* ***L & H Wrecking***, 114 Wis. 2d at 508.

¶10 We first address the issue raised in the employer's cross-appeal because it concerns the legal standard applicable to this case. We reject the employer's assertion that once there has been a single, good faith rehire after a workplace injury, the employer has wholly fulfilled its obligation under WIS. STAT. § 102.35 such that the statute ceases to apply. Here, the record supports LIRC's finding that the infection in Arroyo's finger was causally linked to his original workplace injury. Thus, this case does not require us to decide whether § 102.35 would apply to a case where a previously injured and rehired employee

was subsequently discharged with no medical issues surrounding that discharge. And while there are certainly hypothetical scenarios whereby a subsequent infection or collateral injury might be too far removed to be considered as occurring "in the course of employment," that is not the case before us either. We properly decline to decide a case on hypothetical or future rights. *See* ***Pension Management, Inc. v. DuRose***, 58 Wis. 2d 122, 128, 205 N.W.2d 553 (1973). LIRC determined that § 102.35 applies to the facts of this case and we agree.

¶11 LIRC found that Arroyo established a prima facie violation of WIS. STAT. § 102.35(3). It is undisputed that the employer rehired Arroyo shortly after he injured his finger, nearly seven months before he was discharged, and the employer vigorously argues that this initial rehire was made in good faith. However, some seven months later, the stump of Arroyo's amputated finger became infected. The record supports LIRC's finding that the infection was closely and causally related to his prior workplace injury.[3] The record also supports LIRC's finding that the infection required prompt medical attention and that Arroyo was following medical advice in scheduling an appointment during the morning of his shift. It is also clear from the record that the employer refused to rehire Arroyo and initially lied to Arroyo about the true reason for its refusal to rehire him. And although it may not be the only permissible inference from these facts, there is evidence to support LIRC's finding that the employer's decision to terminate Arroyo was linked to his need to leave work during his shift to seek

[3] It is clear from LIRC's order that it considered the infection that developed in Arroyo's finger to be casually linked to his previous work-related injury. The memorandum opinion following the order states: "He had sustained a serious work injury which resulted in an infection requiring prompt medical attention."

medical attention for that work-related injury. Consistent with our deferential role on review, we affirm LIRC's factual findings.

¶12 The employer argues that Arroyo failed to make a prima facie case under WIS. STAT. § 102.35(3), asserting that the burden is on Arroyo to demonstrate a causal nexus between a work-related injury and his termination and that Arroyo failed to meet that burden. We disagree. It is undisputed that Arroyo's outburst at work following his doctor's appointment triggered the employer's decision to terminate him. As LIRC stated, "[I]t was as a consequence of the work injury that the dispute arose." We affirm LIRC's finding that Arroyo established a prima facie case for the application of § 102.35(3). *See* ***West Bend***, 149 Wis. 2d at 126.

¶13 Therefore, we turn to the question of whether LIRC erred, as a matter of law, when it determined that the employer failed to establish reasonable cause for refusing to rehire Arroyo. Determining whether an employer has unreasonably refused to rehire an employee injured in the course of employment presents a mixed question of law and fact for LIRC. *See* ***Ray Hutson Chevrolet***, 186 Wis. 2d at 122. Once the facts are established, whether they give rise to reasonable cause is a question of law. *See* ***id***. In the context of this statute, "reasonable cause" means whether the conduct of the employer was "fair, just or fit under the circumstances." *See* ***West Allis Sch. Dist. v. DILHR***, 116 Wis. 2d 410, 426, 342 N.W.2d 415 (1984).

¶14 The employer asserted that it had reasonable cause because Arroyo was vocally insubordinate to his supervisors in the presence of other employees.[4] Specifically, the employer points to the scene after Arroyo returned to work following his medical appointment. The employer also suggests that Arroyo had become "argumentative" in recent months, although the employer admitted that Arroyo was only orally reprimanded once, and that incident was not documented. We conclude that LIRC's finding that Arroyo's outburst at work was intimately linked with his need to seek medical attention for a work-related injury was not wholly speculative. Ultimately, LIRC concluded that the occurrence of an infection requiring medical treatment during work hours was a primary reason for the outburst that led to Arroyo's termination.[5] LIRC has leeway to draw such inferences from conflicting evidentiary facts, *see* ***Milwaukee County***, 48 Wis. 2d at 399, and our review of the record indicates that this finding is not based wholly on speculation or conjecture. Therefore, we must affirm LIRC's findings.

¶15 Next, we address whether the facts as found by LIRC support a conclusion that the employer violated WIS. STAT. § 102.35(3). Here, LIRC concluded that, under the circumstances, the reason offered by the employer was inadequate to constitute "reasonable cause" for Arroyo's discharge. Generally, we give great weight to LIRC's interpretation, if reasonable, of a worker's

[4] We reject the employer's suggestion that a lower standard of "reasonableness" should apply to cases where an employee is discharged after a good faith rehire has occurred. We also reject the employer's contention that whether the employer had "reasonable cause" to refuse to rehire the employee must be evaluated subjectively, from the perspective of the employer. These assertions are not supported by existing law.

[5] LIRC stated: "[Arroyo] had sustained a serious work injury which resulted in an infection requiring prompt medical attention. The employer resisted his legitimate request to see his physician, and it was as a consequence of the work injury that the dispute arose. The employer acted unreasonably in discharging [Arroyo] over this matter, and in lying to him concerning the nature of the discharge."

compensation statute, which it has the duty to apply. *See* ***Pigeon v. DILHR***, 109 Wis. 2d 519, 524-25, 326 N.W.2d 752 (1982).

¶16 The employer asserts that "[t]he case is simple: the fact that Arroyo raised his voice and dared his supervisors to fire him in front of coworkers establishes reasonable cause for his discharge." Whether this was, in fact, "reasonable cause under the circumstances" was a question of law for LIRC. LIRC concluded that, under the circumstances, it was not reasonable cause. It specifically found that the employer had not established that Arroyo was insubordinate, stating that "given the circumstances, [Arroyo's] behavior did not reach the level of providing reasonable cause for discharge. The credible inference is that even [Arroyo's employer] recognized that the decision to discharge [Arroyo] was questionable, given the fact that they lied to him concerning the reason for the discharge." LIRC further found that the employer's assertion that Arroyo had become "argumentative" was also too vague and insubstantial to support a finding of a reasonable cause for discharge.[6] We affirm LIRC's conclusion that the employer failed to provide a reasonable basis for refusing to rehire Arroyo, and thus violated WIS. STAT. § 102.35(3).

¶17 Contrary to the employer's protestations, our holding does not grant injured employees immunity from standard workplace rules. Nor does it result in "a lifetime employment guarantee to injured workers." We properly reject "hyperbolic" arguments based upon speculation about the possible mischief a

[6] The record reflects the inconsistencies in the employer's arguments. In one breath, the employer asserts that Arroyo had become argumentative in the months since his initial injury to support its claim that he was discharged for insubordination. In the next breath, the employer claims that the seven months following his rehire were "uneventful." These factual inconsistencies were for LIRC to resolve, and it did so—in favor of Arroyo. We will not disturb LIRC's findings on these points.

decision might work in future hypothetical cases. *See* ***State ex rel. Angela M.W. v. Kruzicki***, 197 Wis. 2d 532, 566, 541 N.W.2d 482 (Ct. App. 1995), *reversed on other grounds*, 209 Wis. 2d 112, 561 N.W.2d 729 (1997).

¶18 Certainly, violation of a work rule could furnish "reasonable cause" to refuse to rehire an employee. *See* ***West Allis***, 116 Wis. 2d at 427. However, as the Wisconsin Supreme Court stated in ***West Allis***, the focus must be on the circumstances surrounding the termination. *See* ***id.*** This focus maintains the requirement imposed by statute that the employer must provide a reasonable basis for failing to rehire an employee who suffers a work-related injury. *See, e.g.,* ***Dielectric Corp. v. LIRC***, 111 Wis. 2d 270, 330 N.W.2d 606 (Ct. App. 1983) (where the employee was rehired in good faith, but employer later demonstrated it had "reasonable cause" to discharge the employee several months later for excessive absenteeism). Here, LIRC found that the employer refused to rehire Arroyo because of an incident closely linked with his need to seek medical attention for a work-related injury, and concluded that this did not, as a matter of law, constitute "reasonable cause." We conclude that LIRC's factual findings are supported by credible and substantial evidence and involve a proper application of WIS. STAT. § 102.35(3).

¶19 Therefore, we reverse and remand with directions that the circuit court reinstate LIRC's award. The cross-appeal is dismissed.

By the Court.—Judgment reversed and cause remanded with directions; cross-appeal dismissed.

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