COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3260

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

MARK JOHNSON (DECEASED), C/O THERESA JOHNSON-BUHRANDT,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, CITY OF MILWAUKEE PUBLIC WORKS, AND CITY OF MILWAUKEE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, J.J.

¶1 PER CURIAM. Theresa Johnson-Buhrandt, the widow of Mark Johnson, appeals from the circuit court order that upheld the Labor & Industry Review Commission's decision denying her a fifteen per cent increase in compensation benefits under WIS. STAT. § 102.57 (1993–94) based on its

determination that the City of Milwaukee did not violate the safe-place statute in connection with Mark Johnson's death.[1] Johnson-Buhrandt claims that the Commission erred by finding no substantial and credible evidence that the safe-place statute was violated. We affirm.

I. BACKGROUND.

¶2 As we noted in an earlier decision, ***Johnson v. LIRC***, No. 97-2666, unpublished slip op. (Wis. Ct. App. March 2, 1999), Johnson was employed by the City of Milwaukee as an arborist. While working as the foreman of a tree-cutting crew, he was killed when a tree fell on him during a tree-felling operation. Johnson's widow received worker's compensation benefits as a result of her husband's death. In addition to the worker's compensation benefits Johnson's widow received, she sought additional benefits under WIS. STAT. § 102.57, which increases the compensation and death benefits by fifteen per cent if an employer fails to "comply with any statute."[2] Johnson-Buhrandt alleged that the City—by failing to adequately train the tree-cutting crew—failed to comply with WIS. STAT. § 101.11, otherwise known as the safe-place statute. Section 101.11 provides, as material here:

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[1] All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

[2] WISCONSIN. STAT. § 102.57 provides, as material here:

> **Violations of safety provisions, penalty.** If injury is caused by the failure of the employer to comply with any statute … compensation and death benefits provided in this chapter shall be increased 15%….Failure of an employer reasonably to enforce compliance by employe[e]s with that statute … constitutes failure by the employer to comply with that statute….

> **Employer's duty to furnish safe employment and place. (1)** Every employer shall furnish employment which shall be safe for the employe[e]s therein … and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employe[e]s….
>
> **(2)** (a) No employer shall require, permit or suffer any employe[e] to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employe[e]s….

¶3 The testimony of many of Johnson's co-workers supported the determination that the tree-cutting crew was not adequately trained. The administrative law judge agreed with Johnson-Buhrandt and determined the City had violated the safe-place statute. The Commission, however, reversed this decision and ultimately concluded on remand that no safe-place violation occurred, finding, "[T]he employer did not fail to furnish a safe place of employment and did not fail to adopt methods and processes reasonably adequate to render such employment safe." The Commission, therefore, denied Johnson-Buhrandt's claim for increased compensation benefits under WIS. STAT. § 102.57.

Immediately following its conclusion, the Commission added a memorandum opinion in which it stated:[3]

> The commission did consult with the administrative law judge regarding witness credibility and demeanor. The administrative law judge indicated that Mr. Prickril was angry that his co-worker was killed. The administrative law judge believed that Mr. Pacala was attempting to cover up at the hearing and noted that his testimony was at odds with his initial statement to police. The commission finds that Mr. Prickril's and Mr. Pacala's statements following the accident were more credible than their testimony at the hearings. In both cases, though perhaps for different reasons, the opinions and recollections have changed significantly between the date of the accident and the dates of hearing. The commission disagrees with the administrative law judge's conclusion that the safe place statute was violated.

The circuit court affirmed the Commission's decision. Johnson-Buhrandt now appeals from the circuit court's order.

II. DISCUSSION.

¶4 This court reviews the Commission's decision, not that of the circuit court. ***Langhus v. LIRC***, 206 Wis. 2d 494, 501, 557 N.W.2d 450, 454 (Ct. App.

[3] "Where credibility of witnesses is at issue, it is a denial of due process if the administrative agency making a fact determination does not have the benefit of the findings, conclusions, and impressions of the testimony of each hearing officer who conducted any part of the hearing." ***Hermax Carpet Marts v. LIRC***, 220 Wis. 2d 611, 617, 583 N.W.2d 662, 665 (Ct. App. 1998) (quoted source omitted). Thus, whenever the Commission overrules an administrative law judge's credibility determination, the Commission must hold a credibility conference in order to obtain the administrative law judge's impressions concerning the witnesses' demeanor and credibility. ***Id.***; *see also* ***Hoell v. LIRC***, 186 Wis. 2d 603, 614, 522 N.W.2d 234, 239 (Ct. App. 1994) (Commission "is expressly empowered to reject the ALJ's recommendations in rendering a final decision, provided that it consults the ALJ to determine his or her impressions of the credibility of witnesses and explains in a memorandum opinion why it disagreed with the ALJ").

1996).[4] The Commission's determination that the City did not violate the safe-place statute in connection with Mark Johnson's death is a finding of fact. ***RTE Corp. v. DILHR***, 88 Wis. 2d 283, 288, 276 N.W.2d 290, 293 (1979). "[F]indings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive." WIS. STAT. § 102.23(1)(a). We will uphold the Commission's order as long as it is supported by credible and substantial evidence. WIS. STAT. § 102.23(6); ***United Parcel Serv., Inc. v. Lust***, 208 Wis. 2d 306, 321, 560 N.W.2d 301, 306–307 (Ct. App. 1997). Substantial evidence is "evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion." ***Cornwell Personnel Assocs. v. LIRC***, 175 Wis. 2d 537, 544, 499 N.W.2d 705, 707 (Ct. App. 1993). "Credible evidence is that which excludes speculation or conjecture." ***Lust***, 208 Wis. 2d at 321, 560 N.W.2d at 307. "It is not our role on review to evaluate conflicting evidence to determine which should be accepted; we will affirm if there is credible evidence to support the finding regardless of whether there is evidence to support the opposite conclusion." ***Id.***; *see also* WIS. STAT. § 102.23(6).

¶5 Johnson-Buhrandt argues that the Commission erred by finding no substantial and credible evidence that the safe-place statute was violated. She claims that the Commission "chose to believe testimony of the witnesses given at the hearings before [the administrative law judge] over evidence given by these same individuals in direct contradiction to their hearing testimony at a time much

[4] As noted, this case was remanded to the Commission by the circuit court. Pursuant to the remand, the Commission determined that no safe-place violation had occurred. Our review is limited to the determinations made in this order. See ***M & M Realty Co v. Industrial Comm.***, 267 Wis. 52, 61, 64 N.W.2d 413, 416 (1954) (on remand from circuit court, the Commission "started with a clean slate").

closer to the accident and before they were in contact with the City's lawyers." In response, the Commission maintains that "there is credible and substantial evidence or reasonable inferences therefrom to support the Commission's findings of fact." The Commission does not address the specific evidence pointed to by Johnson-Buhrandt.[5] Indeed, its brief does not point to any evidence—other than quoting the Commission's entire decision—nor does it make any argument as to specifically what evidence was substantial and credible. Nevertheless, on review, we must search the record to locate credible evidence that supports the Commission's determination. ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255, 260 (1975). Based on our review of the record, we conclude that credible and substantial evidence supports the Commission's decision.

¶6 It is the applicant's burden to prove that the employer failed to comply with the safe-place statute and that such violation was a substantial factor in causing the applicant's injury. ***Milwaukee Forge v. DILHR***, 66 Wis. 2d 428, 434, 225 N.W.2d 476, 479 (1975). Johnson-Buhrandt quotes extensively from the hearing testimony, highlighting numerous instances of support for her argument that the City failed to adequately train the tree-cutting crew, and thus, violated the safe-place statute. Johnson-Buhrandt essentially argues that the Commission

[5] In its response brief, the Commission argues in its heading that "[t]here is credible and substantial evidence to support the Commission's findings that the deceased's compensable fatal injury … was not *caused by* Milwaukee's violation of the safe-place statute." (Emphasis added, uppercasing omitted). This, of course, is incorrect. The issue is whether the Commission erred in finding that no safe-place violation *occurred*, not whether any such violation was *causative*. Although the heading of the Commission's brief misstates the issue, the Commission later makes the general assertion that "there is credible and substantial evidence or reasonable inferences therefrom to support the Commission's findings of fact," and goes on to address cases cited by Johnson-Buhrandt "for the proposition that an employer's failure to properly train its employe[e]s can constitute a violation of the safe-place statute." Thus, the Commission's brief, albeit confusing, eventually responded to the correct issue.

believed the wrong evidence and inexplicably rejected the evidence that supported her claim. This, however, was a credibility determination. *See* ***Manitowoc County v. DILHR***, 88 Wis. 2d 430, 437, 276 N.W.2d 755, 758 (1979) (Commission's decision on the credibility of the evidence is not subject to review). We must affirm if credible and substantial evidence supports the contrary conclusion of the Commission. *See* ***Lust***, 208 Wis. 2d at 321, 560 N.W.2d at 307 (we will affirm if there is credible evidence to support the finding regardless of whether there is evidence to support the opposite conclusion). Here it does.

¶7 The Commission readily acknowledged in its decision that it "does not disagree with [Johnson-Buhrandt] that the training given arborists on tree removal, including communication to be utilized could have been better." It determined, however, that "[t]he training and procedures utilized by the employer to workers involved in tree removal were reasonably designed to keep the employment safe." The Commission noted that the Arborist II on each crew—in this case Johnson—"was responsible for establishing the form of communication that would take place" during a tree-felling operation. This made sense to the Commission because "[t]here is nothing unreasonable about leaving the decision of what signal to use to an experienced and safety conscious worker and expecting the worker to exercise the authority given to him." Moreover, the Commission described Johnson's reaction when the tree began to fall the wrong way:

> At some point [Johnson] stood up from his crouched position and, seeming to sense that the tree was going in the wrong direction, to the southeast across the sidewalk, started to run with the saw in his hand. [Johnson] appeared to initially take some steps in the northerly direction and, in an arcing motion, ran back onto the sidewalk, heading south. [Johnson] stooped to set the saw down in the middle of his motion to get away from the tree. *[Johnson] appeared to have his eyes on the tree at all times but ran*

> *into its path*. [Johnson] was killed when the tree fell on his back.

(Emphasis added.) Accordingly, we conclude that credible and substantial evidence supports the Commission's findings that the safe-place statute was not violated.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-00).