

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2011

A. John Voelker
Acting 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. 2010AP1997

Cir. Ct. No. 2010CV131

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ADVANCED TRANSMISSION SERVICE, LLC,

PETITIONER-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND BRADLEY J.
WOODFORD,**

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Advanced Transmission Service, LLC, (ATS) appeals a judgment affirming a decision of the Labor and Industry Review Commission. The Commission determined ATS unreasonably refused to rehire

Bradley Woodford following a workplace injury, contrary to WIS. STAT. § 102.35(3).¹ ATS argues it had reasonable cause for the refusal to rehire because Woodford asked ATS's owner to participate in a fraudulent scheme, and ATS did not want to employ someone who would "propose and perpetuate a fraud." However, the Commission determined that ATS's refusal to rehire Woodford was not actually motivated by the alleged fraud, and substantial and credible evidence supports the Commission's finding. In the alternative, ATS argues it had no continuing obligation to rehire Woodford four months after it terminated him because he did not present himself for rehire. ATS forfeited this argument by failing to raise it before the Commission. We therefore affirm.

BACKGROUND

¶2 ATS, a small automobile repair business, hired Woodford in 2005 as an automobile repair technician. In January 2008, Woodford injured his right elbow at work. His doctor placed him on light duty status and instructed him not to perform any work with his right arm. ATS initially accommodated Woodford's work restrictions, but after about one week it ran out of light duty tasks for him to perform. As a result, Woodford went off work in mid-January and began receiving temporary total disability benefits. In March 2008, ATS hired another technician to replace Woodford.

¶3 In July 2008, Woodford's physician released him to work without restrictions. When Woodford returned to work on the morning of July 21, 2008, his employment was terminated. ATS's owner, John Effertz, informed Woodford

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

that ATS did not have enough work to employ both Woodford and the replacement technician ATS had hired in March. Effertz stated that he would contact Woodford in the future if a position became available. ATS added another technician position in November 2008, but Effertz did not contact Woodford about the open position, and ATS hired someone else.

¶4 In January 2009, Woodford filed a claim with the Department of Workforce Development, contending ATS unreasonably refused to rehire him following a workplace injury. At a hearing before the administrative law judge (ALJ), Effertz testified that he laid Woodford off in July 2008 because ATS did not have enough work for both Woodford and the new technician. He testified that, as of July 21, he fully intended to rehire Woodford if a position became available. However, he decided not to rehire Woodford after a subsequent conversation made him believe Woodford wanted ATS to engage in fraud. According to Effertz, Woodford returned to ATS on July 24 and

[asked] why didn't I tell him that I was going to lay him off because then he would have stayed on workman's comp, and then he said to me after that, ... Why don't I come back to work on Monday the 28th of July, work the week, say my arm still hurts, and then go back on workman's comp.

Effertz testified he knew Woodford was "being fraudulent" and he "couldn't believe" Woodford would ask him to do that. He stated he did not contact Woodford about the open technician position in November 2008 "[b]ecause [he] didn't want anybody working for [him] that is wanting to get into dishonesty or fraudulent claims."

¶5 Woodford's testimony cast the July 24 conversation in a different light. Woodford admitted saying that if he had known Effertz planned to lay him off, he would have stayed on worker's compensation instead of returning to work.

However, Woodford testified that, when he returned to work on July 21, his elbow still hurt and he only “figured [himself] about 80/85 percent.” He had convinced his physician to release him to work without restrictions, even though his elbow was not fully healed, because he wanted to earn his normal wages, which were higher than his disability benefits. After ATS terminated him, Woodford believed he would no longer be able to receive disability benefits, despite the fact that his elbow was still injured. He therefore proposed that Effertz place him back on the payroll for a week, so that he could reinstitute his existing worker’s compensation claim. Woodford testified he was not trying to do anything fraudulent. He simply thought that he needed to go back to work in order to reinstitute his existing claim.

¶6 On cross-examination, Effertz admitted he knew that Woodford’s elbow was still injured when Woodford returned to work on July 21, 2008. He also admitted he knew that Woodford “pretty much forced the doctor to release him back to work” without restrictions and that Woodford wanted to get back to work “because of the income.” Effertz further stated that he would not have allowed Woodford to come back to work if Woodford still had work restrictions. Finally, Effertz conceded he knew that “there’s nothing fraudulent about remaining on worker’s compensation if you haven’t reached an end of healing and you’re not offered suitable work[.]”

¶7 The ALJ concluded ATS had reasonable cause for refusing to rehire Woodford in July 2008 because WIS. STAT. § 102.35(3) does not require an employer to rehire an injured employee if no position is available. However, the ALJ determined ATS unreasonably refused to rehire Woodford in November 2008 when it failed to contact him about the open technician position. The ALJ found that Woodford did not intend to propose anything fraudulent during the July 24 conversation, and that ATS’s refusal to rehire Woodford was not actually

motivated by the alleged fraud. The ALJ therefore concluded ATS did not have reasonable cause for refusing to rehire Woodford. The Commission affirmed the ALJ's decision, and the circuit court affirmed the Commission.

DISCUSSION

¶8 On appeal, we review the Commission's decision, not the circuit court's. *Hill v. Labor & Indus. Review Comm'n*, 184 Wis.2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994). ATS contends the Commission erred because ATS had reasonable cause for refusing to rehire Woodford in November 2008. In the alternative, ATS argues it had no continuing obligation to rehire Woodford in November 2008 because he did not present himself for rehire at that time.

I. Reasonable cause

¶9 WISCONSIN STAT. § 102.35(3) provides in pertinent part:

Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, ... has exclusive liability to pay to the employee the wages lost during the period of such refusal, not exceeding one year's wages.

To recover under § 102.35(3), an employee must show that he or she sustained an injury in the course of employment and was subsequently terminated or denied rehire. *Ray Hutson Chevrolet, Inc. v. Labor & Indus. Review Comm'n*, 186 Wis.2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994). "If the employee makes [this] showing, the burden shifts to the employer to show a reasonable cause for the refusal to rehire." *Id.* Reasonable cause is "a cause or reason that is fair, just, or fit under the circumstances." *West Allis Sch. Dist. v. Department of Indus., Labor & Human Relations*, 116 Wis. 2d 410, 426, 342 N.W.2d 415 (1984).

¶10 The reasonable cause inquiry presents a mixed question of fact and law. *Ray Hutson*, 186 Wis. 2d at 122. We sustain the Commission’s findings of fact if they are supported by substantial and credible evidence. *Id.*; *see also* WIS. STAT. § 102.23(6). In other words, “if there is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion, the [Commission’s] finding must be upheld.” *Princess House, Inc. v. Department of Indus., Labor & Human Relations*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). Furthermore, “[i]t is the function of the [C]ommission, not the reviewing courts, to determine the credibility of witnesses, and it is for the [C]ommission to weigh conflicting testimony and decide who should be believed.” *Link Indus., Inc. v. Labor & Indus. Review Comm’n*, 141 Wis. 2d 551, 558, 415 N.W.2d 574 (Ct. App. 1987).

¶11 Once the facts are established, whether they give rise to reasonable cause under WIS. STAT. § 102.35(3) is a question of law. *Ray Hutson*, 186 Wis. 2d at 122. We have previously held that the Commission’s interpretation of § 102.35(3) is entitled to great weight deference. *See Hill*, 184 Wis. 2d at 109-10. Under the great weight deference standard, we uphold the Commission’s legal conclusion as long as it is reasonable. *Harnischfeger Corp. v. Labor & Indus. Review Comm’n*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995).

¶12 Here, the Commission made the following factual findings in support of its conclusion that ATS lacked reasonable cause for refusing to rehire Woodford: (1) Woodford’s elbow was still sore in July 2008; (2) Woodford convinced his physician to release him to return to work, even though his elbow was still sore; (3) Woodford would not have asked to be released had he known ATS did not have enough work for him; (4) during the July 24 conversation, Woodford told Effertz that his elbow was not fully healed and he wanted to go

back to work for a week in order to reinstitute his existing worker's compensation claim; (5) by making this proposal, Woodford did not intend to do anything fraudulent; (6) Woodford did not realize that he did not need to return to work in order to reinstitute his worker's compensation claim; and (7) Effertz knew on July 24 that Woodford's elbow was not fully healed and that Woodford had "forced" his doctor to release him to return to work.

¶13 The Commission also adopted the ALJ's findings and order. The ALJ noted:

At the hearing [Woodford] was extremely honest and truthful. ... He did not deny that in July 2008, he told [Effertz] about going back to work so that he can go back to his doctor and then continue his eligibility to receive temporary disability benefits. He did not need to go back to work to receive temporary disability benefits and what he actually needed was for his doctor to state that he did not reach maximum medical improvement. On the other hand, Effertz was calculating and unconvincing. He was programmed to answer his questions in a manner to always include such terms as "fraudulent" and dishonesty. He calculated every step to see that he would have what he perceived to be legitimate reason so that he would not hire [Woodford] again. ... Simply, Effertz[']s testimony that he did not call [Woodford] to work for him in November 2008, because he was not willing to participate in a potential fraudulent scheme, is not convincing. [Woodford] wanted to go back to work so that he would receive wages which are higher than the temporary total disability benefits he was receiving.

(Emphasis added.) In its memorandum opinion, the Commission stated that it had "discussed the witnesses' credibility" with the ALJ, and the ALJ "did not credit Mr. Effertz[']s testimony that the only reason he refused to rehire [Woodford] in November 2008 was because of the proposal [Woodford] made in July 2008." Additionally, the ALJ "indicated that he found [Woodford] to be very credible and straightforward in his testimony that he did not intend anything dishonest or

fraud[ulent.]” Based on its independent review of the record, the Commission “found nothing to warrant overturning the [ALJ’s] credibility determination[s].”

¶14 Substantial and credible evidence supports the Commission’s findings of fact, including its finding that Effertz’s refusal to rehire Woodford was not actually motivated by Woodford’s alleged fraud.² *See supra*, ¶¶4-6. Admittedly, ATS points to some evidence supporting the contrary conclusion. However, even if the Commission’s findings “appear contrary to the great weight and clear preponderance of the evidence, we must uphold them if they are supported by any credible evidence.” *Hill*, 184 Wis.2d at 111. Here, the Commission’s findings meet the credible evidence standard. Moreover, the Commission’s findings are based in large part upon its conclusion that Woodford’s testimony was more credible than Effertz’s. We must accept the Commission’s credibility determinations. *See Link Indus.*, 141 Wis. 2d at 558; *see also* WIS. STAT. § 102.23(6).

¶15 Based on its factual findings, the Commission reasonably concluded ATS lacked reasonable cause for refusing to rehire Woodford. The only reason ATS presented for the refusal to rehire was that Effertz “didn’t want anybody working for [him] that is wanting to get into dishonesty or fraudulent claims.” However, the Commission concluded Woodford did not intend to propose any sort of fraudulent scheme. More importantly, the Commission and ALJ “did not credit” Effertz’s testimony that he refused to rehire Woodford because of the allegedly fraudulent proposal. Because the Commission determined Woodford’s

² The Commission essentially found that ATS’s stated reason for refusing to rehire Woodford was pretextual, which is a question of fact. *See Ray Hutson Chevrolet, Inc. v. Labor & Indus. Review Comm’n*, 186 Wis. 2d 118, 124, 519 N.W.2d 713 (Ct. App. 1994).

alleged fraud was not the actual reason ATS refused to rehire him, and because ATS did not present any alternative reason for the refusal, the Commission could reasonably conclude ATS lacked reasonable cause.

II. Continuing obligation to rehire

¶16 In the alternative, ATS contends the Commission erred because, regardless of whether ATS had reasonable cause for refusing to rehire Woodford, it did not have any continuing obligation to rehire him in November 2008. ATS argues that, after it reasonably refused to rehire Woodford in July 2008, it was no longer obligated to rehire him unless he actually presented himself for rehire. ATS contends that WIS. STAT. § 102.35(3) does not require an employer to “keep injured employees on some sort of call list and ... find and locate them whenever a position bec[omes] available in the future to avoid rehire liability.”

¶17 ATS did not raise this argument before the Commission. “It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.” *Bunker v. Labor & Indus. Review Comm’n*, 2002 WI App 216, ¶15, 257 Wis. 2d 255, 650 N.W.2d 864. Ordinarily, failure to raise an issue before the administrative agency constitutes a forfeiture of the right to raise that issue before the reviewing court. *Id.*

¶18 ATS points out that the forfeiture rule is one of administration, not jurisdiction, and we therefore have the power to decide issues that were not raised before the Commission. *See id.* We decline to do so in this case. ATS asks us to determine the scope of an employer’s continuing duty to rehire under WIS. STAT. § 102.35(3)—a statute the Commission is charged with administering. *See Beverly Enters., Inc. v. Labor & Indus. Review Comm’n*, 2002 WI App 23, ¶20, 250 Wis. 2d 246, 640 N.W.2d 518. We conclude the Commission should have the

first opportunity to make this determination. Had the Commission done so, we would have been able to review its decision by applying one of the three levels of deference for agency legal conclusions. However, absent an administrative ruling on the issue, we decline to consider it.

By the Court.—Judgment affirmed.

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

