COURT OF APPEALS
DECISION
DATED AND FILED

September 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2532 **Cir. Ct. No. 2010CV19765**

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

MOFOCO ENTERPRISES, INC.,

PLAINTIFF-APPELLANT,

V.

WISCONSIN STATE LABOR & INDUSTRY REVIEW COMMISSION AND LUIS SANTOS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Mofoco Enterprises, Inc., appeals from a trial court order affirming a decision of the Labor and Industry Review Commission (LIRC). LIRC upheld the decision of an administrative law judge that Luis Santos

is entitled to a year's wages because he sustained a work-related injury and Mofoco Enterprises thereafter refused to rehire him. We affirm.

BACKGROUND

¶2 We rely for background on the facts developed at the hearing held before the administrative law judge. Santos worked for Mofoco Enterprises as an automobile mechanic building Volkswagen engines. He alleged that he injured his right wrist at work on June 16, 2008, when he lifted a motor casting. He went to the hospital, where he was treated for an apparent wrist sprain. He was released to work on June 17, 2008, with the limitation that he use only his left hand. He reported to work on each of the next four business days, and his employer told him that no work was available. On June 24, 2008, he reported for work, and he worked for several hours. He alleged that he then asked Randy Henning, one of the company's principals, about wages for the previous week. According to Santos, Henning responded by saying that he had never paid a worker's compensation claim and "wasn't about to start now." After some heated words, Henning said, "get out of here, you're fired, go home." Mofoco Enterprises's personnel records reflect that Santos was "termed," which the administrative law judge interpreted as "terminated."

¶3 Medical reports in the record reflect the opinion of Dr. Lewis Chamoy, Santos's treating physician, that Santos suffered a work-related injury to his wrist on June 16, 2008. Additionally, Dr. William Moore, the medical examiner retained on Mofoco Enterprises's behalf, prepared a report dated September 17, 2008, reflecting his opinion that Santos was injured at work. The administrative law judge concluded that Santos suffered a work-related injury and

that, on June 24, 2008, Mofoco Enterprises refused to rehire him within the meaning of the worker's compensation statutes.

¶4 The administrative law judge rejected Mofoco Enterprises's defenses that Santos walked off the job upon learning about an anticipated IRS tax levy against his wages and that Mofoco Enterprises had no work available for Santos. The administrative law judge therefore ordered Mofoco Enterprises to pay a penalty to Santos of one year's wages for wrongly refusing to rehire him.

¶5 Mofoco Enterprises appealed to LIRC. LIRC affirmed the decision of the administrative law judge and adopted the judge's findings.[1] Mofoco Enterprises then sought trial court review of LIRC's decision. The trial court upheld LIRC's decision, and Mofoco Enterprises now appeals to this court.

DISCUSSION

¶6 Our scope of review is identical to that of the trial court. ***Hill v. LIRC***, 184 Wis. 2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994). We review LIRC's decision, not the decision of the trial court. ***Id.***

¶7 "We may not substitute our judgment for LIRC's as to the credibility of witnesses or the weight to be accorded to the evidence." ***Id.*** at 111. Further, we must uphold LIRC's findings of fact if they are supported by any credible

[1] The record is unclear as to whether Santos's last date at work was Monday, June 23, 2008, or Tuesday, June 24, 2008. The administrative law judge found that Santos was discharged on June 24, 2008. LIRC adopted the administrative law judge's findings but noted a discharge date of June 23, 2008. For purposes of this appeal, the discrepancy is not important. Mofoco Enterprises explicitly relies on the determination that Santos's last day at work was June 24, 2008, and LIRC does not contest that position. We therefore proceed under the same premise. *See* ***Raz v. Brown***, 2003 WI 29, ¶25, 260 Wis. 2d 614, 660 N.W.2d 647 (party cannot complain if unrefuted propositions are taken as admitted).

evidence, "even if LIRC's findings appear contrary to the great weight and clear preponderance of the evidence." ***Id.*** We search the record for credible evidence that supports LIRC's findings. ***Mireles v. LIRC***, 2000 WI 96, ¶36, 237 Wis. 2d 69, 613 N.W.2d 875.

¶8 As to LIRC's legal conclusions, no dispute exists that this case involves application of WIS. STAT. § 102.35(3) (2009-10),[2] which governs rehiring after an employee suffers a workplace injury. We afford great weight deference to LIRC's interpretation of the statute in light of LIRC's expertise in applying this aspect of the worker's compensation laws. *See* ***Hill***, 184 Wis. 2d at 110. Therefore, we will affirm LIRC's reasonable interpretation of the statute even when an alternative interpretation is also reasonable. ***Id.***

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

> [a]ny 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.

LIRC determined that the statute rendered Mofoco Enterprises liable for Santos's lost wages.

¶10 Mofoco Enterprises's argument on appeal consists of four paragraphs. In the first of those paragraphs, Mofoco Enterprises asserts that "Santos did not suffer a work-related injury." According to the company, "Santos,

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

worried that the IRS was poised to levy his wages, feigned a work-related injury." LIRC concluded otherwise, finding that "the medical evidence submitted at the hearing substantiates that [Santos] was injured while working for the employer."

¶11 The rule is well settled that "[t]he commission's findings regarding the determination, cause, extent and duration of a disability are findings of fact, and are conclusive if supported by credible evidence." ***Shelby Mut. Ins. Co. v. DILHR***, 109 Wis. 2d 655, 659, 327 N.W.2d 178 (Ct. App. 1982). Here, LIRC credited the opinions of two physicians (one of whom was retained by Mofoco Enterprises) that a workplace incident on June 16, 2008, caused Santos an injury. This court "cannot substitute [its] judgment for that of the commission in respect to the credibility of a witness or the weight to be accorded to the evidence supporting any finding of fact." ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 118, 438 N.W.2d 823 (1989). Accordingly, we must reject Mofoco Enterprises's contention that Santos feigned an injury.

¶12 Next, Mofoco Enterprises contends that "the administrative law judge made no finding that a refusal [to rehire] occurred or that suitable work for Santos existed." Mofoco Enterprises's decision to advance these claims is disturbing. The administrative law judge stated: "on June 24, Santos appeared for and was put to work." Thus, the administrative law judge found that Mofoco Enterprises had work for Santos. The administrative law judge went on: "I find that Mofoco Enterprises, Inc., refused to rehire Luis Santos within the meaning of WIS. STAT. § 102.35(3)." We are unable to imagine how Mofoco Enterprises could construe that statement as something other than a finding that "a refusal occurred." We conclude that Mofoco Enterprises misstated the record.

¶13 Mofoco Enterprises complains next that "the trial court failed to make a finding that on June 24, 2008[,] a refusal to rehire occurred or that suitable work existed. These were necessary elements of the claim." Mofoco Enterprises's contentions in this regard ignore the procedural posture of this case. The trial court was not the fact finder here. The trial court reviewed LIRC's decision, and so do we. *See* ***Hill***, 184 Wis. 2d at 109.

¶14 Finally, Mofoco Enterprises contends that the record supports the positions that Mofoco Enterprises did not refuse to rehire Santos and that it had no suitable work for him. Mofoco Enterprises argues that Santos's treating physician "cleared Santos to use the injured hand in December of 2008," that Santos's job no longer existed in December 2008 due to economic conditions, and that "in all events, after June 24, 2008, Santos never asked for his job back." As the administrative law judge explained, "Mofoco [Enterprises] is apparently confused. Santos'[s] claim for lost wages does not begin in December of 2008, but rather on June 24, 2008. It is that date that is determinative in imposing liability."

¶15 The rule is long settled that "'rehire' under [WIS. STAT. §] 102.35(3) means that if an employee is absent from work because of an injury suffered in the course of employment, the employee must be allowed the opportunity to return to work if there are positions available and the previously injured employee can do the work." ***Link Indus., Inc. v. LIRC***, 141 Wis. 2d 551, 556, 415 N.W.2d 574 (Ct. App. 1987). Here, LIRC credited Santos's testimony that, on June 24, 2008, Santos tried to return to his job after an absence caused by a work-related injury, and he "was put to work." Thus, Mofoco Enterprises had "positions available" that day. LIRC further credited Santos's testimony that Henning fired Santos after he asked about his pay for the previous week. LIRC thus found that Santos was not given the opportunity to return to work, explaining: "Santos did not quit. He

was discharged by Randy Henning on Tuesday, June 24, 2008, because they got in a row over the reporting of the injury and lost wages when suitable work was available."

¶16 Although Mofoco Enterprises insists that "reasonable persons" must conclude both that Santos voluntarily left his employment and that the company had no suitable work for him, Mofoco Enterprises offers no legal basis for us to reach such conclusions. LIRC believed Santos's testimony that he was fired at a time when Mofoco Enterprises had work for him. "The commission is the sole judge of the credibility of the witnesses in work[er]'s compensation cases." ***Casey v. Industrial Comm'n***, 30 Wis. 2d 542, 546, 141 N.W.2d 232 (1966).

¶17 In short, Mofoco Enterprises offers nothing that permits this court to set aside LIRC's decision. The decision is based on a reasonable view of the law and on testimony and evidence that the agency deemed credible.

¶18 Before we end our discussion of this case, we must directly address the quality of the brief submitted by Attorney Douglas H. Frazer on behalf of Mofoco Enterprises. LIRC uses the word "frivolous" to describe that brief. Mofoco Enterprises and its counsel are fortunate indeed that LIRC chose not to file a motion for frivolous costs on appeal. *See* ***Howell v. Denomie***, 2005 WI 81, ¶¶19-20 & n.8, 282 Wis. 2d 130, 698 N.W.2d 621 (describing the procedure for pursuing a request to deem an appeal frivolous). Similarly, we have elected not to prolong this litigation or to consume additional judicial resources by considering on our own motion whether the appeal in this matter was frivolous. We are

nonetheless compelled to observe that Mofoco Enterprises's submission was woefully inadequate.[3] We expect better from members of the bar.

[3] We note, first, that Mofoco Enterprises's opening brief was less than six pages long, and Mofoco Enterprises declined the opportunity to submit a reply brief. This court has no quarrel with an appellate submission that is efficiently drafted and compact, but an appellate brief must have enough substance to develop the issues and support them with citations to authority. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Mofoco Enterprises's brief included a single case citation, solely to establish the standard of review when considering LIRC's findings of fact. Mofoco Enterprises offered no governing authority to support any of its substantive propositions. Although we have addressed Mofoco Enterprises's contentions in this case, we normally do not consider submissions that are so inadequately briefed. *See* ***id.***

Second, Mofoco Enterprises offered misleading statements in support of its position. As discussed in the body of this opinion, Mofoco Enterprises asserted that the administrative law judge did not make some of the very findings that the administrative law judge expressly made. Additionally, Mofoco Enterprises began its argument by asserting that "the revised report of Dr. William Moore dated December 11, 2008, established that Santos did not suffer a work-related injury." The referenced report, however, states that a work incident "did directly cause a mild sprain of the right wrist." As the trial court pointed out, Dr. Moore's supplemental report reflects a conclusion that Santos suffered a work-related injury, albeit an injury that was less serious than the doctor had at first believed. Misleading statements, "'whether deliberate or careless, misdirect the attention of other lawyers and the ... judge.'" ***Mogged v. Mogged***, 2000 WI App 39, ¶22, 233 Wis. 2d 90, 607 N.W.2d 662 (citation omitted; ellipsis in ***Mogged***).

Third, Mofoco Enterprises's brief contains a footnote advising: "Mofoco [Enterprises] adopts and incorporates by reference its briefs filed with the Labor and Industry Review Commission." We consider arguments based on reasons stated elsewhere than in the parties' appellate briefs to be insufficiently developed. *See* ***Calaway v. Brown Cnty.***, 202 Wis. 2d 736, 750-51, 553 N.W.2d 809 (Ct. App. 1996) (discussing and rejecting efforts to incorporate by reference arguments presented in another section of the appellate brief). A party cannot reasonably expect this court "to select and apply cases and arguments" that the party submitted to another forum. *See* ***id.***

Fourth, Mofoco Enterprises did not prepare an appendix in conformity with the requirements of WIS. STAT. RULE 809.19(2)(a). The rule requires that when an appeal is taken in a matter seeking judicial review of an administrative decision, the appendix shall "contain the findings of fact and conclusions of law, if any, and final decision of the administrative agency." ***Id.*** Here, Mofoco Enterprises included LIRC's one-page order that affirmed the decision of the administrative law judge, but Mofoco Enterprises omitted the memorandum opinion released with LIRC's order. We acknowledge appellate counsel's later apology for the omission, but we agree with LIRC that failing to include the decision challenged on appeal is not a minor oversight, particularly in the context of Mofoco Enterprises's submission as a whole.

(continued)

By the Court.—Order affirmed.

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

Fifth, and relatedly, Mofoco Enterprises included in the appendix a document, captioned "ergonomic report," that was not admitted as an exhibit during the hearing before the administrative law judge. The record indicates that Mofoco Enterprises offered the report to LIRC as an attachment to a brief challenging the administrative law judge's decision. When LIRC reviews the decision of an administrative law judge, however, LIRC must base its action on a review of the evidence before that administrative law judge, unless LIRC directs the taking of additional evidence. *See* WIS. STAT. § 102.18(3); *see also* ***Northwestern Insulation v. LIRC***, 147 Wis. 2d 72, 79, 432 N.W.2d 620 (Ct. App. 1988). Because LIRC affirmed the administrative law judge's decision here without ordering a further hearing, LIRC was limited to the record made before the administrative law judge, and this court's review of the record is similarly limited. *See* ***Northwestern Insulation***, 147 Wis. 2d at 79-80.

Appellate counsel's apology for Mofoco Enterprises's defective appendix advised us that "Mofoco[Enterprises]'s trial records had suggested that the [ergonomic] report had been an attachment to Exh. 1." Mofoco Enterprises's appellate counsel, not this court, should have determined the contents of the record, and, if appropriate, addressed by motion any perceived need for flexibility in assembling the appendix. *See* ***State v. Aderhold***, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979). "Time is scarce, and judicial resources must 'not be frittered away' attempting to ascertain the true state of the record." ***Mogged***, 233 Wis. 2d 90, ¶22 (citation and one set of brackets omitted).

Last, an appellant's appendix "shall include a table of contents." WIS. STAT. RULE 809.19(2)(a). Mofoco Enterprises's failure to include the required table of contents here hampered our efforts to find the documents relevant to this appeal and also served to cloak the errors and omissions in the appendix.

We do not lightly catalogue deficiencies in appellate briefs. We anticipate that future submissions from Mofoco Enterprises's appellate counsel will not again require us to do so.