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DISTRICT IV

September 23, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2532 Horst Josellis v. LIRC and Ho-Chunk Nation (L.C. # 2014CV567)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Horst Josellis appeals an order of the circuit court affirming a decision of the Labor and Industry Review Commission (LIRC). In its decision, LIRC adopted an administrative law judge's determination that Josellis was discharged for substantial fault connected with his employment and, thus, was ineligible for unemployment insurance benefits until he requalified. *See* WIS. STAT. § 108.04(5g) (2013-14).[1] On appeal, Josellis challenges the sufficiency of the evidence to support LIRC's decision. Based upon our review of the briefs and record, we

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

conclude at conference that this case is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21.

On appeal, this court reviews LIRC's decision, not that of the circuit court. ***City of Kenosha v. LIRC***, 2011 WI App 51, ¶7, 332 Wis. 2d 448, 797 N.W.2d 885. "'LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence.'" ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995) (quoted source omitted). When we review the sufficiency of credible evidence to support an administrative agency's decision, we need find only that the evidence is sufficient to exclude speculation or conjecture. ***L & H Wrecking Co., Inc. v. LIRC***, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983). The reviewing court's task is to search the record to locate evidence that supports the commission's decision, rather than weighing evidence opposed to the decision. ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

We are not bound by an agency's conclusions of law in the same manner as we are by its factual findings. ***Begel v. LIRC***, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. However, we may nonetheless defer to the agency's legal determinations, according those determinations great weight deference, due weight deference, or de novo review. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996). Here, we need not discuss or decide what level of deference is due because the level of deference does not affect the outcome. On appeal, Josellis does not challenge, in any coherent manner, LIRC's application of the law to the facts or its interpretation of the relevant statute, WIS. STAT. § 108.04(5g), focusing instead on contesting the agency's factual findings.

Background

Josellis was a casino employee of the Ho-Chunk Nation from 2003 until June 2014. As an employee, Josellis received a copy of Ho-Chunk's employment relations act. The act contains a provision stating that an employee may be suspended or terminated for unacceptable conduct. Unacceptable conduct, as defined in the act, includes violation or neglect of safety rules.

On August 15, 2013, Josellis received a written counseling report for confrontational behavior toward an onsite safety officer. Josellis signed a performance improvement plan acknowledging that failure to comply with the terms of the plan could result in immediate termination of his employment. On February 19, 2014, Josellis received another counseling report for driving at a high speed and failing to observe a stop sign in the employee parking lot. One of the terms of the performance improvement plan was to "follow all safety precautions while completing duties." On May 7, 2014, Josellis was suspended from work for three days because he failed to properly place "wet floor" signs when mopping a restroom floor, in violation of Ho-Chunk's safety rules. In June 2014, Josellis was discharged from Ho-Chunk after going without a hard hat into an area that was undergoing construction work, despite posted signs stating that hard hats were required.

Decision of the administrative law judge

After an unemployment insurance hearing and an appeal to a tribunal, an administrative law judge (ALJ) found that, with respect to the August 2013 counseling and May 2014 suspension, Ho-Chunk did not offer sufficient evidence to establish that Josellis engaged in the conduct for which he was disciplined. As to the February 2014 counseling, the ALJ found that Ho-Chunk had offered persuasive evidence that Josellis failed to stop at a parking lot stop sign. The ALJ also found that, on June 3, 2014, Josellis entered a restricted area without a hard hat,

despite being on notice that hard hats were required. The ALJ concluded that Josellis's failure to comply with the safety requirement of wearing a hard hat constituted substantial fault connected with his work, such that he was ineligible for unemployment insurance benefits until he requalified. *See* WIS. STAT. § 108.04(5g).

LIRC's decision

Upon review, LIRC adopted the findings and conclusions of the ALJ. We have searched the record to locate evidence that supports LIRC's decision, and we conclude that the record contains substantial and credible supporting evidence. *See* ***Michels Pipeline***, 197 Wis. 2d at 931.

Josellis testified at his unemployment insurance hearing that the hard hat area at Ho-Chunk was not identified clearly. He also testified that he asked Loretta Wrezenski, his acting supervisor, whether he could enter the restricted area without a hard hat and that Wrezenski answered "yes." Josellis testified that he did not wear a hard hat because he had never been given one.

The hearing testimony of other Ho-Chunk employees conflicted in some aspects with Josellis's version of the events. Wrezenski denied that she gave permission to Josellis to enter a restricted area without a hard hat and, rather, testified that she told him he needed the proper equipment to enter the area. Wrezenski also testified that both she and Josellis had been present at daily end-of-shift meetings where safety procedures regarding construction had been discussed, including the need to wear hard hats in restricted areas. Wrezenski testified that employees were instructed at those meetings that they could approach their supervisors if they needed hard hats. Jennifer Field, the environmental services manager at Ho-Chunk casino, also testified that, beginning on May 5, 2014 until the end of construction, supervisors discussed hard hats and the restricted areas at every end-of-shift meeting.

LIRC credited the testimony of Wrezenski, while noting that Josellis's testimony contained inconsistencies. Specifically, LIRC noted that Josellis first testified that he was not sure whether he had crossed a line into a restricted area, but later testified that he asked Wrezenski whether he could go without a hard hat through a door marked "do not enter" and was told that he could do so. In his appellant's brief, Josellis now asserts that there was no restricted area. We note that Josellis does not provide us with any record cites to aid in our interpretation of his argument.

In light of all of the above, we are satisfied that it was reasonable for LIRC to credit and give weight to the hearing testimony in the manner that it did. It is the function of LIRC, and not the reviewing courts, to determine the credibility of witnesses and to weigh conflicting testimony and decide who should be believed. ***Link Indus., Inc. v. LIRC***, 141 Wis. 2d 551, 558, 415 N.W.2d 574 (Ct. App. 1987). Where, as here, there is substantial and credible evidence to support LIRC's findings, we are bound to accept those findings. ***Palombi v. LIRC***, 140 Wis. 2d 520, 522-23, 410 N.W.2d 654 (Ct. App. 1987). We therefore accept LIRC's findings that Josellis entered a restricted area without a hard hat in violation of Ho-Chunk's safety rules, that his decision to enter the area was not inadvertent, and that his decision was not attributable to a lack of skill, ability, or equipment. Accordingly, it was reasonable for LIRC to conclude from the record that Josellis was discharged for substantial fault connected with his employment.

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals