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October 9, 2019

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

2018AP2415 Mikhail L. Vaserman v. Labor and Industry Review Commission (L.C. # 2018CV2562)

Before Brash, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Mikhail L. Vaserman, *pro se*, appeals a December 14, 2018 circuit court order that affirmed a decision by the Labor and Industry Review Commission (LIRC). LIRC's decision in turn affirmed the decision of an administrative law judge (ALJ) as to the amount of Vaserman's weekly unemployment benefit and the maximum unemployment benefit amount he could claim for a designated fifty-two-week period. Upon consideration of the briefs and record, we

conclude at conference that this matter is appropriate for summary disposition. We summarily affirm. *See* WIS. STAT. RULE 809.21(2017-18).[1]

Multiple interrelated administrative and circuit court proceedings are relevant to our resolution of Vaserman's contentions on appeal. An overview of those proceedings is required.

The Department of Workforce Development (the Department) calculates unemployment benefits for a designated period by applying a statutory formula to the wages that a claimant earned during a prior period. *See* WIS. STAT. §§ 108.05-06. Vaserman sought unemployment benefits for a benefit year beginning in mid-October 2015 and ending in late October 2016. He received an award but he challenged the Department's conclusions that his benefit rate for the designated period was $83 and that his maximum benefit was $1705. An administrative hearing was scheduled for January 24, 2017. Based on Vaserman's conduct at the outset of the hearing, however, an ALJ issued a decision that same day determining that he had voluntarily withdrawn his challenges. LIRC upheld that determination, but Vaserman sought judicial review, and the circuit court reversed. In a decision and order dated September 14, 2017, the circuit court concluded that Vaserman had not withdrawn his challenges, and it remanded the matter back to LIRC for further proceedings. *See* ***Vaserman v. LIRC*** (***Vaserman I***), No. 2017CV1396 (Milw. Cty. Cir. Ct. Sept. 14, 2017).

Three weeks later, on October 6, 2017, LIRC entered an order setting aside the ALJ's decision because "the circuit court found that the record did not support the conclusion that the claimant had withdrawn his appeal." LIRC further directed the Department to conduct a new

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

hearing before a successor ALJ. The October 6, 2017 order, however, mistakenly stated that the original ALJ's decision issued on January 5, 2017. Therefore, by order dated November 14, 2017, LIRC set aside its October 6, 2017 order and went on to set aside the ALJ's January 24, 2017 decision that the circuit court had reversed in ***Vaserman I***. LIRC then reinstated the requirement that the Department conduct a new hearing before a successor ALJ.

In accord with ***Vaserman I*** and LIRC's directive, a successor ALJ held a hearing to address Vaserman's challenges to the unemployment benefit rate and maximum benefit that the Department had established for the designated benefit year. At the hearing, Vaserman contended that the Department erred by calculating his benefits without taking into account $1153 that he claimed he received as back pay from one of his employers. The ALJ declined to consider this claim, however, because it was previously resolved in earlier proceedings. *See* ***Vaserman v. LIRC*** (***Vaserman II***), No. 2017CV1612 (Milw. Cty. Cir. Ct. Oct. 3, 2017). In ***Vaserman II***, the circuit court affirmed a January 5, 2017 administrative decision that the $1153 did not constitute back pay but rather was a settlement of claims that Vaserman filed against the employer. After determining that ***Vaserman II*** precluded consideration of the $1153 as back pay, the ALJ went on to decide that the Department correctly calculated Vaserman's benefit rate and maximum benefits based on the actual wages he earned.

Vaserman appealed to LIRC, alleging again that the benefits calculation should include the disputed $1153. He also raised a claim that the Department wrongly withheld $111 in benefits that should have been paid to him.

LIRC—like the ALJ—declined to consider whether the disputed $1153 was back pay for purposes of calculating unemployment benefits, agreeing with the ALJ that the issue was

resolved by ***Vaserman II***. LIRC also declined to consider whether the Department withheld $111 in benefit payments. LIRC determined that the allegation of wrongful withholding was previously resolved in yet another circuit court proceeding, ***Vaserman v. LIRC*** (***Vaserman III***), No. 2017CV217 (Milw. Cty. Cir. Ct. Sept. 27, 2017), in which the circuit court affirmed a December 30, 2016 administrative decision that Vaserman was not underpaid $111. Accordingly, by order dated March 20, 2018, LIRC found that: (1) Vaserman had previously litigated both the characterization of the $1153 and the allegation of wrongful benefit withholding; (2) circuit court orders resolved both questions; and (3) Vaserman had failed to pursue an appeal to the court of appeals following entry of the final circuit court orders in ***Vaserman II*** and ***Vaserman III***. LIRC went on to conclude that, based on the wages that Vaserman earned and the statutory formula set forth in WIS. STAT. §§ 108.05-06, the Department correctly determined that Vaserman's unemployment benefit rate for the relevant period was $83 and his maximum benefit amount was $1705.

Vaserman petitioned for judicial review and renewed both his claim that $1153 that he received from one of his employers should be characterized as back pay and his claim that the Department wrongfully withheld $111 in employment benefits. By order of December 14, 2018, the circuit court concluded that the doctrine of issue preclusion barred Vaserman from

relitigating these claims. The circuit court further concluded that Vaserman presented no other viable basis for relief and affirmed LIRC's order. Vaserman appeals. [2]

We review LIRC's factual findings and legal conclusions, not those of the circuit court. ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 930, 541 N.W.2d 241 (Ct. App. 1995). We may set aside LIRC's decision only upon a showing: "a. [t]hat [LIRC] acted without or in excess of its powers[;] b. [t]hat the order was procured by fraud"; and/or "c. [t]hat the findings of fact by [LIRC] do not support the order." *See* WIS. STAT. § 108.09(7)(c)6.

Vaserman argues in his brief-in-chief that the proceedings before LIRC demonstrate that "the [D]epartment [owes him] $111 that was withheld as overpayment on September 9, 2016, and that $1153 must be included as back pay wages" when calculating his benefits. LIRC responds that these issues are precluded. We agree with LIRC.

"The doctrine of issue preclusion ... is designed to limit the relitigation of issues that have been actually litigated in a previous action." ***Aldrich v. LIRC***, 2012 WI 53, ¶88, 341 Wis. 2d 36, 814 N.W.2d 433. Application of the doctrine involves a two-step process, and the party asserting issue preclusion has the burden to establish that the doctrine applies. *See* ***id.***, ¶¶88-89. Whether the doctrine should be applied to a particular issue is a question of law that we review *de novo*. *See* ***id.***, ¶96.

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[2] Both LIRC and the Department are respondents to this appeal. LIRC filed a respondent's brief, and the Department filed a statement pursuant to WIS. STAT. RULE 809.19(3)(a)3., advising that LIRC's brief adequately represented the Department's interests. Vaserman concludes his reply brief with an argument that he should prevail because the Department did not file a brief. The argument is perilously close to frivolous. A statement under RULE 809.19(3)(a)3., is an entirely proper way for a party to discharge its briefing obligation. *See* ***id.***

"The first step in the analysis of issue preclusion is to determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." ***Id.***, ¶97 (citation omitted). Here, the record plainly shows that in the administrative proceedings underlying ***Vaserman II***, Vaserman litigated his claim that the $1153 he received from a prior employer should be viewed as back wages. When he did not prevail, he sought judicial review. The circuit court addressed his arguments in a fourteen-page decision and order rejecting his position and affirming LIRC's conclusion that the money constituted a settlement. Additionally, the record shows that in the administrative proceedings underlying ***Vaserman III***, Vaserman unsuccessfully litigated his claim that he was underpaid $111 in benefits. On review, the circuit court addressed his arguments in a six-page decision and order that affirmed LIRC's decision and rejected Vaserman's claim. Vaserman failed to appeal either of the final circuit court orders to this court within the statutory deadline and cannot do so now. *See* WIS. STAT. § 808.04(1); WIS. STAT. RULE 809.82(2)(b). Accordingly, the questions presented in ***Vaserman II*** and ***Vaserman III*** were resolved by final orders entered in prior actions.[3]

Generously construed, Vaserman's appellate briefs include an argument disputing the validity of the final order in ***Vaserman II***.[4] Specifically, he asserts that the January 5, 2017 administrative decision affirmed in ***Vaserman II*** was set aside by LIRC's order of October 6,

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[3] Historically, an order determined a special proceeding and a judgment determined an action. *See* ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶18 n.7, 299 Wis. 2d 723, 728 N.W.2d 670. The historic distinction between orders and judgments has become blurred and is not relevant to our analysis here. *See* ***id***; *see also* ***Fredrick v. City of Janesville***, 92 Wis. 2d 685, 686-87, 285 N.W.2d 655 (1979) (order issued by circuit court determined the action and was a judgment).

[4] Vaserman does not cite any legal authority in support of his contentions on appeal, nor does he tie his contentions to any cognizable legal theory.

2017. We reject this contention because Vaserman's argument relies on a gross mischaracterization of the record. As the circuit court explained, and as the record plainly shows, the October 6, 2017 order *referred to* an ALJ decision entered on January 5, 2017, but actually *described* the ALJ decision entered on January 24, 2017. The references to a January 5, 2017 decision are mere scrivener's errors. Moreover, LIRC issued a subsequent order, acknowledging the errors in the October 6, 2017 order and vacating it. In sum, nothing in the record undermines the validity of ***Vaserman II***.

Vaserman's appellate briefs do not suggest any other basis on which Vaserman disputes that ***Vaserman II*** resolved the characterization of the $1153 he received from a former employer. Nor do his briefs suggest a basis on which Vaserman disputes that ***Vaserman III*** resolved and rejected the claim that the Department underpaid him $111 in benefits. Because the record shows that ***Vaserman II*** and ***Vaserman III*** constitute valid final orders resolving his contentions about both disputed sums, we conclude that step one of the issue preclusion analysis is satisfied.

We next turn to the second step in the issue preclusion analysis: determining "whether applying issue preclusion comports with principles of fundamental fairness." *See* ***Aldrich***, 341 Wis. 2d 36, ¶98 (citation omitted). The question involves five factors:

> (1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law; (2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) Do significant differences in the quality or extensiveness of proceedings between two courts warrant relitigation of the issue; (4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and (5) Are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to

> be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Id., ¶110.

The circuit court considered the five factors, stating:

> First, Vaserman had the right to appeal the previous decisions [and] the circuit court rulings. Second, Vaserman raises identical transactions before this [c]ourt, making the same arguments about the $111 payment being withheld from him and that [the Department] should have included the $1,153 payment in his base period wages. The arguments he makes to this [c]ourt are not distinct and the law regarding unemployment under Wisconsin Statutes chapter 108 has not changed. Third, the previous circuit court decisions were thorough and clearly considered the relevant law and factual findings. Fourth, the LIRC has the same burden of persuasion at each of these judicial reviews. And [fifth,] with respect to public policy, Vaserman's apparent frustration with the process does not implicate an issue of fundamental fairness. The record clearly provides that he has had adequate opportunity and incentive to adjudicate these issues. Furthermore, the losses he alleges are unfounded by the record. The $111 was not withheld from him. If the $1,153 payment were considered a payment that underlies base wages for unemployment benefits, it would most likely be applied to the dates he earned the wages in September 2013, not the date when he received the check from [the employer] many months later. Therefore, adhering to these prior decisions is fundamentally fair.

On appeal, LIRC makes substantially the same points about the five factors in its brief as did the circuit court in its opinion. Vaserman offers no direct response. Once again generously construing his submissions, however, they suggest an argument that the proceedings underlying the decision in ***Vaserman II*** did not afford him an opportunity to litigate his dispute—and therefore do not satisfy the fifth factor—because his employer did not appear for the administrative hearing conducted by the ALJ. This contention, however, was itself litigated and resolved in ***Vaserman II***. The circuit court concluded in ***Vaserman II*** that WIS. STAT. § 108.09(4)(e) required the ALJ to proceed with the hearing, notwithstanding the employer's absence. If Vaserman wished to challenge that conclusion, his remedy was to pursue an appeal

from the circuit court's decision in ***Vaserman II***. *See* § 108.09(7)(g). He did not do so. Accordingly, neither public policy nor the individual circumstances of this case militate against the application of issue preclusion.

Vaserman's briefs, no matter how generously construed, do not offer any argument to refute the contentions that LIRC satisfied the other factors relevant to step two of an issue preclusion analysis. He says nothing to dispute LIRC's contentions that: (1) Vaserman had the right to appeal the circuit court decisions in ***Vaserman II*** and ***Vaserman III***; (2) Vaserman presents the same questions in his current litigation as in those earlier proceedings and no intervening contextual shifts in the law affect the resolution of those questions; (3) the circuit court decisions in ***Vaserman II*** and ***Vaserman III*** reflect thorough consideration of the law and facts relevant to the questions he raises; and (4) LIRC's burden of persuasion regarding the amount of Vaserman's wages and benefits never changed. *See* ***Aldrich***, 341 Wis. 2d 36, ¶110. We deem Vaserman's failure to address those factors as a concession that they favor applying issue preclusion to his current claims. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (holding that "when an appellant ignores the ground upon which the [circuit] court ruled" and does "not undertake to refute the [circuit] court's ruling," the appellant cannot complain if the accuracy of those rulings is deemed conceded). In light of the record and Vaserman's concession, we conclude that step two of the issue preclusion analysis favors application of the doctrine.

In sum, our review persuades us that both steps of the issue preclusion analysis are satisfied: (1) Vaserman previously litigated his claim that he received $1153 in back pay from a former employer and his claim that the Department withheld $111 of his unemployment compensation benefits, and both of those claims are resolved by valid final orders; and

(2) prohibiting further litigation of those claims is not fundamentally unfair. Accordingly, the doctrine of issue preclusion bars Vaserman from further litigating the claims.

LIRC asserts in its respondent's brief that "the remaining issue for judicial review is whether Vaserman's weekly benefit rate and maximum benefits allowed were correctly determined by applying WIS. STAT. §§ 108.05(1) and 108.06 to the findings of fact reached by [LIRC]." We have carefully examined Vaserman's handwritten briefs and the attached exhibits. We are satisfied that Vaserman does not challenge the calculations used to determine his unemployment benefit rate and maximum benefit amount. Rather, his arguments are directed entirely towards his twin beliefs that "the Department [owes him] $111 that the Department withheld as overpayment ... and that $1153 must be included as back pay wages." Because Vaserman does not pursue any argument that the Department otherwise erred in determining his benefits, we deem any such argument abandoned and, accordingly, we do not address the matter. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) ("[I]n order for a party to have an issue considered by this court, it must be raised and argued within its brief."). For all the foregoing reasons, we affirm.

IT IS ORDERED that the circuit court order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals