

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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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.

No. 99-2187

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

FRISCH WEATHERSTRIP COMPANY,

PLAINTIFF-APPELLANT,

v.

**LABOR & INDUSTRY REVIEW COMMISSION
AND JEFF KOLOKITHAS,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
PATRICK L. SNYDER, Judge. *Affirmed.*

Before Nettesheim, Anderson and Snyder, JJ.

¶1 PER CURIAM. Frisch Weatherstrip Company appeals from an order affirming a determination by the Labor and Industry Review Commission (LIRC) that Frisch must pay Jeff Kolokithas lost wages occasioned by Frisch's unreasonable refusal to rehire Kolokithas after a work-related injury. Frisch

argues that there was not sufficient evidence that it had knowledge that Kolokithas's injury was work related and that LIRC failed to find that Frisch terminated Kolokithas because of a work-related injury. We affirm the circuit court order.

¶2 While working for Frisch on July 1, 1996, Kolokithas began to experience back pain and informed a coworker about it. When Kolokithas picked up his paycheck later that same day, he told Steve Frisch about the back pain. Kolokithas missed the next day of work in order to be examined by a doctor. After the holiday weekend, Kolokithas consulted with a chiropractor up north and was told not to return to work for another week. Kolokithas stayed up north and was treated there. Kolokithas was released to return to work without restrictions on July 29, 1996. When Kolokithas inquired whether he should return to work, Frisch indicated that there was no work for him and suggested that it was time for them to “part ways.” Kolokithas did not return to work on July 29 and Frisch sent him a letter terminating his employment “[d]ue to the fact that you haven’t been back to work since July 1st.” In the letter Frisch indicated that “since this wasn’t a work-related accident, I was very considerate about all the delays in returning to work I do appreciate the fact that after you hurt your back up north you did come in to work on that following Monday.”

¶3 It is the employee's burden to prove that he or she had a work-related injury and was not rehired because of the injury. See *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis. 2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994). The determination of whether an employer has unreasonably refused to rehire an employee injured in the course of employment presents a mixed question of fact and law for LIRC. See *id.* The conduct of the parties is a question of fact on which LIRC's findings are conclusive so long as they are supported by credible

and substantial evidence. See *Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995). We cannot substitute our judgment for that of LIRC regarding the credibility of witnesses or the weight to be accorded to the evidence supporting factual findings. See *West Bend Co. v. LIRC*, 149 Wis. 2d 110, 118, 438 N.W.2d 823 (1989).

¶4 Frisch argues that because it did not have knowledge that Kolokithas sustained a work-related injury, the termination was not caused by the work-related injury. It claims that LIRC's decision implies that the employer's lack of knowledge is irrelevant. At the outset of its opinion, LIRC acknowledged that it was asked to address whether Frisch knew before terminating Kolokithas that the injury was work related. It did not ignore that issue.

¶5 Kolokithas testified that he felt a pull in his back when he reached down to pick up a caulk tube and leftover materials. He indicated that he told Frisch that he had felt something pull and that it happened on the job. Frisch responded that it was probably a pulled muscle, that Kolokithas should probably not claim it as a worker's compensation injury, and that Frisch would rather the claim be run through the health insurance company. Kolokithas explained that he had not filed a worker's compensation claim prior to being terminated because he thought he and Frisch had an understanding and that not filing would benefit Frisch. He had offered to mail Frisch the excuse slips provided by his chiropractor, but Frisch said it was not necessary because "he trusted me."

¶6 Frisch testified that he first learned that Kolokithas was claiming the back injury to be work related when he got a letter from Kolokithas's attorney. Frisch said he asked Kolokithas twice during his July 1 conversation with Kolokithas whether the injury was work related and Kolokithas had said it was

not. When Kolokithas indicated that he would probably be going to see a doctor, Frisch replied that that is what insurance is for. Frisch also related a conversation with Kolokithas after his visit to the chiropractor in which Kolokithas inquired whether the claims should be on workman's compensation or health insurance. In that conversation Kolokithas said that nothing had happened on the job to cause the injury and Frisch advised Kolokithas to use his health insurance. Frisch explained that he suggested it was time for he and Kolokithas to "part ways" because he knew Kolokithas wanted to live up north and he thought the time was right for Kolokithas to make that break. He indicated that he sent the termination letter because Kolokithas had hung up on him during their last telephone conversation.

¶7 Faced with two different versions of what transpired between Kolokithas and his employer, LIRC was required to make a credibility determination. LIRC found that Kolokithas experienced a pull in his back while picking up leftover materials, that he reported the injury to Frisch, that Frisch replied that he preferred the injury be run through the health insurance rather than as a work-related injury, and that Kolokithas kept Frisch informed about the course of his medical treatment. Implicit is LIRC's finding that Kolokithas was more credible. Relying on Kolokithas's testimony, LIRC could reasonably find that Frisch knew that the injury was work related and that was the reason he suggested Kolokithas run the claim through the health insurance and why Kolokithas believed he was helping his employer out by not making a worker's compensation claim right away. LIRC further found that Frisch caused the ambiguity as to whether Kolokithas's injury was work related. It was not improper to have Frisch bear the consequences of the resulting ambiguity.

¶8 The finding that Frisch knew the injury was work related is based on a credibility determination that we are without authority to overturn. Upon Kolokithas's release to return to work, Frisch was obligated to offer him work, which it failed to do when a parting of the ways was suggested.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

