

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 25, 2016**

Diane M. Fremgen  
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. 2014AP1897**

**Cir. Ct. No. 2013CV177**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**DYLAN LORD,**

**PLAINTIFF-APPELLANT,**

**V.**

**LABOR AND INDUSTRY REVIEW COMMISSION AND MODERN  
JANITORIAL, LLC,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Clark County:  
JON M. COUNSEL, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

¶1 HIGGINBOTHAM, J. Dylan Lord appeals a circuit court order affirming a decision by the Labor and Industry Review Commission (LIRC) denying Lord unemployment compensation benefits on the ground that he was

discharged from his employment for misconduct connected with his work, rendering him ineligible for benefits under WIS. STAT. § 108.04(5) (2013-14).<sup>1</sup> Lord argues that LIRC erred in considering in its findings evidence consisting of global positioning system (GPS) reports, because the reports were inadmissible and unreliable. We conclude that Lord forfeited the evidentiary issues he now raises for the first time on appeal. For these reasons, we affirm LIRC's decision.

## BACKGROUND

¶2 Lord was an hourly employee with Modern Janitorial LLC ("the employer"). At the end of each work shift, Lord telephoned the employer and left a voice message indicating the hours he had worked that shift.

¶3 The employer suspected that Lord was falsifying his work hours and installed a GPS device on the company vehicle that Lord drove, without Lord's knowledge, to determine whether its suspicions were correct. The GPS reports purportedly showed that Lord was falsifying his hours and Lord was terminated.

¶4 Lord applied for unemployment insurance benefits with the Department of Workforce Development (DWD). DWD denied Lord's request for unemployment benefits because it determined that Lord had been discharged for misconduct, specifically falsification of time, in connection with his employment in violation of WIS. STAT. § 108.04(5).

¶5 At Lord's request, a hearing on the adverse determination was held before an administrative law judge (ALJ), and at the hearing the ALJ received the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

GPS reports into the record without objection by Lord.<sup>2</sup> No expert testimony was offered by either side at the hearing. The ALJ reversed DWD's determination and awarded Lord unemployment compensation benefits.

¶6 The employer petitioned LIRC for review of the ALJ's decision. Before rendering a decision, LIRC sent a letter to the parties that posed the following inquiry:

One of the issues in this case is whether the Global Positioning System (GPS) records proffered by the employer are admissible evidence and, if so, what weight they are entitled to. More specifically, it is whether GPS technology is so unusually complex or esoteric that expert testimony is necessary to describe it. *See State v. Kandutsch*, 2011 WI 78, ¶¶43-44, 336 Wis. 2d 478, 799 N.W.2d 865. In resolving this question, the commission will be considering the following articles, copies of which are enclosed: Diane Cooksey, MSU GPS Laboratory, Department of Land Resources and Environmental Sciences, Montana State University-Bozeman, *Understanding the Global Positioning System (GPS)* <http://www.montana.edu/gps/understd.html>; Timothy S. Stombaugh and Brian R. Clement, *Unraveling the GPS Mystery* <http://ohioline.osu.edu/aex-fact/0560.html>; and Peter H. Dana, Department of Geography, University of Texas at Austin, *Global Positioning System (GPS) Time Dissemination for Real-Time Applications*, Real-Time Systems, 12, 9-40 (1997 Kluwer Acad. Publishers, Boston) [http://pdana.com/PHDWWW\\_files/Rtgps.pdf](http://pdana.com/PHDWWW_files/Rtgps.pdf).

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<sup>2</sup> Explaining more fully, Lord criticized aspects of the reports at the hearing, calling them "false," but when the ALJ directly asked Lord, "do you have any objection to them being received into the record?" Lord responded, "No, I don't." Moreover, during the hearing, Lord did not refer to a lack of necessary expert testimony, raise any hearsay objections, or raise a question about the authenticity of the reports. In sum, it is clear from the hearing transcript that Lord questioned the evidentiary weight of the reports by complaining that they were inaccurate, but that he failed to object to their admissibility.

While we recognize that Lord proceeded pro se before the ALJ, his self-representation status did not absolve him of the obligation to comply with all pertinent rules of procedural and substantive law, and we may not abandon our neutral role in applying the law equally to both sides in this appeal. *See Waushara Cnty. v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992).

¶7 In response, both parties submitted letter briefs to LIRC. The employer provided argument in support of its positions that no expert testimony was needed and that the reports were admissible. In contrast, Lord argued that, based on his personal experience, GPS technology is not “100% accurate,” and also contended that there were various “inaccuracies” in the reports in this case. On this topic, Lord stated, “I guess when you see the inaccuracies a GPS expert is needed.”

¶8 In its written decision, LIRC concluded that GPS technology was not so unusually complex or esoteric as to require expert testimony as foundation for the admission of the reports, that the GPS reports were not hearsay, and that authentication of the GPS reports was not necessary given the ubiquitousness of GPS technology. LIRC reversed the decision of the ALJ and ordered Lord to repay the unemployment compensation he had received.

¶9 Lord filed a petition for judicial review of LIRC’s decision, which the circuit court affirmed. Lord appeals.

## DISCUSSION

¶10 On judicial review of an administrative agency decision, we review the decision of the agency, in this case LIRC, not the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). While the parties appear to dispute the applicable standard of review, we need not resolve this dispute because, although LIRC has not argued that Lord forfeited the arguments that he now makes for the first time on appeal, we conclude that he has. Thus, we do not reach the merits of LIRC’s decision.

¶11 On appeal, Lord argues that LIRC erred in admitting into evidence the GPS reports, citing three grounds: (1) the GPS reports were admitted without establishing the proper foundation for admitting the evidence through the testimony of an expert witness; (2) the GPS reports constituted inadmissible hearsay; and (3) the employer failed to lay an adequate foundation establishing the authenticity, accuracy, and reliability of the GPS technology and reports, which WIS. STAT. §§ 909.01 and 909.15 require. In what appears to be a separate argument, Lord argues that LIRC’s findings of fact are not supported by substantial and credible evidence. As we will now explain, we conclude that Lord has forfeited<sup>3</sup> his right to appellate review of these arguments.

¶12 This court has summarized the pertinent legal principles as follows:

It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency. Judicial review of an administrative agency decision contemplates review of the record developed before the agency. Ordinarily a reviewing court will not consider issues beyond those properly raised before the administrative agency, and a failure to raise an issue generally constitutes a [forfeiture] of the right to raise the issue before the reviewing court. However, this rule is one of administration, not of power, and therefore the reviewing court has the power to decide issues that were not raised before the administrative agency.

Where all the necessary facts are of record and the issue is a legal one of great importance, reviewing courts may choose to decide that issue. The principle behind this exception to the [forfeiture] rule is that the reviewing tribunal decides a legal issue on undisputed facts de novo,

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<sup>3</sup> For ease of reference, we use the term “forfeiture” although this case involves both forfeiture and waiver. Lord explicitly waived objections to the ALJ receiving the GPS reports into the record, and he forfeited the particular objections that he now raises by failing to raise them before the administrative agency. See *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (explaining the distinctions between waiver and forfeiture).

and therefore it is not essential to the court's review that the agency had an opportunity to address the issue.

On the other hand, when objections to evidence or procedure are not made before the fact-finding tribunal, the trier of fact does not have the opportunity to correct possible errors. Also, when the objections, if made to the trier of fact, would have called for the exercise of discretion, the appellant is in effect asking the reviewing court to exercise its discretion, when that is exclusively the role of the trier of fact. Although the reasons for applying the [forfeiture] rule strictly to the failure to object to evidence and procedure have developed in the context of an appellate court reviewing a trial court, we consider them equally applicable to a court reviewing an administrative agency's decision.

***Bunker v. LIRC***, 2002 WI App 216, ¶¶15-17, 257 Wis. 2d 255, 650 N.W.2d 864 (citations omitted).

¶13 Based on these principles, we see multiple reasons not to depart from our ordinary practice, and we decline to address Lord's forfeited arguments. After Lord forfeited before the ALJ the issues he now raises, LIRC, on its own initiative, gave him an explicit opportunity to explain why LIRC should conclude that expert testimony is necessary to describe evidence produced by GPS technology in general, or as offered in this case. Instead of addressing that topic, Lord stated only that he "guess[ed]" that expertise was needed, because his personal opinion is that GPS technology is not "100% accurate," and that there were various "inaccuracies" in the reports in this case. Lord failed to argue in his letter brief to LIRC that expert testimony was required in order for the employer to lay the foundation for the admission of evidence pertaining to GPS technology in general, or pertaining to the GPS device used in this case in particular. In sum, Lord had two opportunities to object to the admissibility of the GPS reports before the administrative agency but failed to do so in either instance, thereby denying

the ALJ and LIRC the opportunity to properly exercise discretion in addressing any particular concerns regarding this evidence.

¶14 Separately, Lord argues that LIRC's findings of fact are not based on substantial and credible evidence. This argument falls because it hinges primarily on Lord's forfeited arguments above, and on credibility determinations made by LIRC, which this court is not at liberty to review. *See* WIS. STAT. § 227.57(6); ***Painter v. Dentistry Exam. Bd.***, 2003 WI App 123, ¶18, 265 Wis. 2d 248, 665 N.W.2d 397.

### CONCLUSION

¶15 Based on the foregoing reasons, we affirm the circuit court's decision affirming LIRC's decision that Lord was properly denied unemployment compensation benefits because of misconduct connected with his work.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

