

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 10, 2010

David R. Schanker
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. 2009AP1022

Cir. Ct. No. 2008CV2732

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ELECTRO-CONNECT, INC.,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-CO-APPELLANT,

COREY J. WEED,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. The Labor and Industry Review Commission (LIRC) appeals a circuit court order reversing LIRC’s award of worker compensation benefits to Corey J. Weed.¹ At issue in this appeal is whether, under WIS. STAT. §102.35(3) (2007-08),² Electro-Connect, Inc. (ECI) wrongly refused to rehire Weed and return him to suitable employment. We conclude that LIRC’s factual findings regarding the availability of “suitable employment” are not supported by credible and substantial evidence. We therefore affirm the order of the circuit court.

¶2 We recite the relevant facts as found by LIRC. ECI is an electro-mechanical assembly business comprising three assembly areas: circuit board, wire harness and mechanical. Weed was a lead worker or supervisor in the wire harness area. On October 18, 2005, Weed was involved in a motor vehicle accident in ECI’s parking lot. Weed asked Deborah Hamedi, who worked in ECI’s office and is the wife of ECI’s owner, Hassan Hamedi, for the name of the

¹ Weed, pro se, also appeals the order. Because Weed’s arguments essentially track LIRC’s, we refer to the appellants collectively as LIRC.

² The relevant portion of the Wis. Stat. § 102.35(3), provides:

(3) Any 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, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employee the wages lost during the period of such refusal, not exceeding one year’s wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered

All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

worker's compensation carrier. LIRC credited Weed's testimony that Deborah refused to give him the information and that he had to file the claim on his own.

¶3 On October 21, Weed's doctor took him completely off work. Hamedy assumed Weed's duties, which took time from his own responsibilities. On November 7, while Weed still was off work, ECI hired a production manager, Paul Goral, not necessarily to replace Weed, but as Hamedy had considered doing for some time. Hamedy asked Goral to assume Weed's duties and cross-train workers in the wire harness area. Weed's position therefore ceased to exist.

¶4 On November 13, 2005, Hamedy sent Weed a letter advising him that, since he had been off work nearly four weeks and "according to your physician report" still was unable to return, ECI had "no choice but to fill your position so we can meet our business needs." Weed testified that Hamedy later told him he was discharged for filing the worker's comp claim. Hamedy denied it, and testified that he terminated Weed because his position no longer existed.

¶5 Weed's doctor authorized him to return to work on November 23, subject to no pushing, pulling or repetitive bending and a twenty-pound lifting and carrying limit. Weed faxed this information to ECI. When ECI refused to rehire him, Weed filed an application for worker's comp benefits, claiming that ECI violated WIS. STAT. § 102.35(3). Determining that ECI's decision to terminate Weed was made for valid economic reasons, the ALJ dismissed Weed's application. Weed petitioned LIRC for review. He argued his dismissal was pretextual because suitable work for which he was qualified existed within his restrictions. LIRC agreed with the ALJ that it was "not unreasonable" to hire someone to fulfill Weed's duties when he could not do so. It concluded, however,

that ECI unreasonably refused to rehire Weed for other suitable employment that was available, namely, soldering or assembling circuit boards:

[ECI] did not place [Weed] in a circuit board soldering job because it did not want to, or because it did not understand that—having fired him from his pre-injury job in the wire harness area—it had the continuing duty to rehire him in suitable work within his physical and mental limitations.

LIRC also based its decision, in part, on ECI's failure to report Weed's claim to its insurer. LIRC thus reversed the ALJ's decision and ordered ECI to pay Weed one year's wages.³ ECI sought judicial review. The trial court reversed LIRC's decision and set aside the award. LIRC and Weed appeal.

¶6 When a circuit court order reverses an order of LIRC, we review LIRC's decision; we do not address the correctness of or owe any deference to the decision of the circuit court. *See West Bend Co. v. LIRC*, 149 Wis. 2d 110, 117, 438 N.W.2d 823 (1989). LIRC's factual findings are conclusive if they are supported by credible and substantial evidence and LIRC did not act fraudulently or in a manner exceeding its powers. *Wisconsin Elec. Power Co. v. LIRC*, 226 Wis. 2d 778, 786, 595 N.W.2d 23 (1999); *see also* WIS. STAT. § 102.23(1)(a). "Substantial evidence" is evidence that is relevant, probative and credible, and in an amount sufficient to permit a reasonable factfinder to base a conclusion upon it. *Cornwell Personnell Assocs., Ltd. v. LIRC*, 175 Wis. 2d 537, 544, 499 N.W.2d 705 (1993).

³ LIRC consulted the ALJ to determine her impressions of the witnesses' credibility and explained in a memorandum opinion why it disagreed with the ALJ. *See Hoell v. LIRC*, 186 Wis. 2d 603, 613, 522 N.W.2d 234 (Ct. App. 1994).

¶7 To make a prima facie case under WIS. STAT. § 102.35(3), Weed had to show that he sustained an injury while on the job and that ECI refused to rehire him because of the injury. See *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis. 2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994). Since Weed undisputedly made this showing, the burden shifted to ECI to show a “reasonable cause” for the refusal to rehire. See *id.* Reasonable cause presents a mixed question of fact and law. *Id.*

¶8 To establish reasonable cause, ECI had to show that Weed could not do the work applied for and that no other suitable work was available within his physical and mental limitations. See *Universal Foods Corp. v. LIRC*, 161 Wis. 2d 1, 7, 467 N.W.2d 793 (Ct. App. 1991). Hamedi testified that the business decision to hire Goral in Weed’s absence resulted in increased efficiency and that Weed’s position no longer existed. The reasonableness of the decision not to rehire Weed for his former position therefore is not at issue. See *Ray Hutson Chevrolet*, 186 Wis. 2d at 123. Also not at issue is whether there were openings in the wire harness and electromechanical areas. Hamedi testified that there were not and Weed did not dispute it.

¶9 Rather, Weed argued that he could have been rehired to “stuff[] circuit boards.” LIRC concluded that ECI failed to show reasonable cause because ECI did not bear the burden of showing that Weed could not do circuit board assembly or that no positions were available. The LIRC decision states:

Mr. Hamedi testified that [ECI’s] production department included jobs doing circuit board assembly, and that it was not necessary for these production employees to do heavy lifting. Mr. Hamedi does not appear to testify as to whether any of these jobs were open at any point after [Weed] was discharged in November 2005. However, Mr. Hamedi also did not testify that [Weed] could not be placed in a circuit board assembly job because there were no available openings, as he did with respect to the electromechanical work or work in the wire harness area. Indeed, Mr.

Hamedi's testimony about using a temporary help service to obtain circuit board assembly workers leads to the inference that there were openings after [Weed's] discharge. Rather, Mr. Hamedi testified [Weed] could not do circuit board assembly work because he lacked the necessary training and skills.

¶10 Our review of the record does not confirm that Hamedi testified that the production department included “jobs” doing circuit board assembly. Rather, Hamedi testified that the lead person in the wire harness, circuit board and electromechanical areas remains in his or her assigned area, but assembly people switch around among them. There is no dedicated circuit board assembly job. Instead, Weed himself testified that it is a task, a part of the job of working in multiple areas and which is done when workers have extra time. And to switch to the other areas—where Hamedi testified that there were no openings—would require that Weed rotate to the wire harness area. Both Hamedi and Weed testified that work in that area involved activities outside Weed's limitations, including heavy lifting. We fail to see how occasionally engaging temporary help to assist with a task that Weed testified Hamedi termed “women's work” leads to a reasonable inference that circuit board assembly is a full-time position.

¶11 Nothing in the record convinces us that circuit board assembly is a dedicated position. Weed testified that stuffing circuit boards was a task for regular employees “if there was time to fill.” The dispute over whether Weed possessed adequate expertise and training to solder circuit boards therefore is a side issue, and Hamedi's failure to testify that no jobs existed in the circuit board area is of no moment.

¶12 Thus, although there were some tasks Weed could perform when he sought rehiring, we conclude that there was no “suitable employment” available within his “physical and mental limitations.” *See* WIS. STAT. § 102.35; *see also*

West Bend, 149 Wis. 2d at 126. Weed’s ability to perform part of a job is not equivalent to being able to discharge the requirements of “employment,” and employment that entails performing duties prohibited by physician’s orders is not “suitable” because it is not within his “limitations.”

¶13 LIRC’s decision also rested in part on its findings that ECI failed to report Weed’s claim to its worker’s compensation insurer. We accept those findings, and agree with LIRC that ECI’s failure to honor its duty is not laudable.⁴ Nonetheless, we conclude that it has no bearing on whether suitable employment actually was available when Weed sought to be rehired.

¶14 We conclude that ECI’s business purpose reorganization was non-pretextual; that circuit board assembly is not a job position at ECI but a task done as part of other work assignments; that there are no openings in the electromechanical or wire harness areas; and that Weed’s work restrictions would prevent him from working at least in the wire harness area. These facts are undisputed. Since the only reasonable inference that can be drawn from them is contrary to the conclusion drawn by LIRC, we must overrule LIRC. See *Leist v. LIRC*, 183 Wis. 2d 450, 458, 515 N.W.2d 268 (1994).

⁴ Weed requests that we penalize ECI’s “bad faith” failure to report his claim. We need not address issues raised for the first time on appeal. See *Brooks v. Hayes*, 133 Wis. 2d 228, 241, 395 N.W.2d 167 (1986).

By the Court.—Order affirmed.

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

