

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 8, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2011AP1113

Cir. Ct. No. 2010CV1086

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PRENT CORPORATION,

PLAINTIFF-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION AND REGINA LEACH,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County:
JAMES WELKER, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 LUNDSTEN, P.J. This appeal concerns a decision by the Labor and Industry Review Commission (LIRC) granting a former Prent Corporation employee a bad faith award against Prent. The employee, Regina Leach, petitioned LIRC for the bad faith award after Prent failed to timely pay Leach a

previously ordered award based on Prent's unreasonable refusal to rehire Leach after she was injured. Prent sought judicial review of the bad faith award, and the circuit court affirmed the award. Prent then filed this appeal. As we explain, Prent's argument on appeal does not address the basis for LIRC's bad faith decision and, accordingly, provides no reason to reverse that decision. We affirm the circuit court's order affirming LIRC's decision.

Background

¶2 Leach suffered an injury related to her job with Prent. Leach's injury prevented her from working for a period of time and, when Leach sought to return to work, Prent refused to rehire her. Leach sought lost wages based on Prent having unreasonably refused to rehire her. LIRC agreed that Prent had unreasonably refused to rehire Leach, and awarded Leach the maximum penalty allowed by statute, which totaled \$30,706.52. Prent did not seek judicial review of LIRC's refusal-to-rehire award.

¶3 After Prent failed to pay the award by the imposed deadline, Leach petitioned LIRC for a bad faith award based on Prent's failure to pay. Prent responded, arguing for the first time that it was justified in not paying the award because it believed it was entitled to a partial offset based on disability payments it had made to Leach. An administrative law judge rejected this argument, found bad faith on the part of Prent, and awarded Leach \$30,000 on her bad faith claim pursuant to WIS. STAT. § 102.18(1)(bp).¹

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 LIRC affirmed the \$30,000 award in a written decision. Prent sought judicial review, and the circuit court affirmed LIRC's decision.

Discussion

A. LIRC's Bad Faith Decision

¶5 Prent appeals the circuit court's order affirming LIRC's bad faith decision. In this circumstance, we review LIRC's decision, not the circuit court's decision. *Madison Gas & Electric v. LIRC*, 2011 WI App 110, ¶7, 336 Wis. 2d 197, 802 N.W.2d 502, *review denied*, 2012 WI 2, 338 Wis. 2d 323, ___ N.W.2d ___ (No. 2010AP1849). In a proceeding to review an agency action, the burden of proof is on the party seeking to overturn that action. *Racine Educ. Ass'n v. Commissioner of Ins.*, 158 Wis. 2d 175, 182, 462 N.W.2d 239 (Ct. App. 1990). We set aside a LIRC order or award only if the challenging party shows: (1) that the commission acted without or in excess of its powers; (2) that the order or award was procured by fraud; or (3) that the findings of fact by the commission do not support the order or award. *See* WIS. STAT. § 102.23(1)(e).

¶6 As to the underlying bad faith proceeding, Prent asserts, and we assume for purposes of this decision, that Leach had the burden of showing that Prent "had no reasonable basis for [not paying the award to Leach] and knew or recklessly disregarded that there was no reasonable basis for [not paying]." *See Brown v. LIRC*, 2003 WI 142, ¶23, 267 Wis. 2d 31, 671 N.W.2d 279. This test requires the employee to show that the obligation to pay was not "fairly debatable." *Id.*, ¶24. On appeal, Prent argues that its obligation to pay Leach the full \$30,706.52 refusal-to-rehire award was "fairly debatable" and, therefore, LIRC's determination that Prent acted in bad faith in failing to pay the award was erroneous.

¶7 Prent’s challenge to the bad faith award is based on the proposition that LIRC incorrectly calculated the underlying \$30,706.52 refusal-to-rehire award. Prent’s argument relates to certain language in a worker’s compensation statute, WIS. STAT. § 102.35(3), stating that such an award should be based on “the wages lost” during the relevant period of time.

¶8 Prent argues that the award did not reflect Leach’s actual lost wages because the award did not account for disability payments Prent made to Leach. Prent asserts that those disability payments should be treated as “wages” under WIS. STAT. § 102.35(3). Thus, according to Prent, Leach’s actual lost wages were \$30,706.52 (i.e., wages Leach would have earned in a year) minus \$5,857.22 in disability payments (i.e., partial wages already paid to Leach by Prent). According to Prent, it is at least “fairly debatable” whether Prent was entitled to the \$5,857.22 offset against the \$30,706.52 award and, therefore, error for LIRC to find that Prent’s failure to pay was in bad faith.² We disagree.

¶9 LIRC’s decision explains that it assumed “for the sake of argument” that Prent’s offset legal theory was correct. That is, LIRC assumed that the law generally permits an offset for disability payments when calculating lost wages because disability payments should be treated as “wages.” But LIRC also explained that Prent’s offset argument did not help Prent under the particular facts

² Prent makes other assertions and arguments that we choose not to address in detail because they plainly lack merit. For example, Prent attributes a statement to the “Department” (“[t]he unreasonable to rehire sum is in addition to any temporary disability paid during concurrent periods”) and then argues that the statement is incorrect. This argument by Prent, however, does not address LIRC’s decision. Rather, the statement Prent quotes appears in correspondence with an administrative law judge that was not a basis for LIRC’s decision.

in this case because Leach's actual lost wages greatly exceeded the \$30,706.52 award.

¶10 LIRC's reasoning was based on certain language in WIS. STAT. § 102.35(3) that caps an award for wage loss at "one year's wages." LIRC explained its view that the statutory language sets the upper "monetary" limit, but not "temporal" limit, on refusal-to-rehire awards at one year's wages. Thus, LIRC explained, actual lost wages may accrue over a longer period of time, and may in fact be greater than one year's wages, but the award will be capped at the *dollar amount* equivalent to one year's wages for that employee.

¶11 Applied here, LIRC explained that Leach suffered reduced earnings "during two years of employment for another employer" and, in addition, lost wages during "several months of unemployment." Although Leach's award was statutorily capped at the equivalent of one year's wages, Leach's actual loss was greater. LIRC explained that the "uncontested evidence" presented in the refusal-to-rehire proceedings showed that Leach's "total wage loss greatly exceeded the \$30,70[6].52 [maximum] liability." This meant that Leach "still had a wage loss of more than \$30,70[6].52" even granting Prent a \$5,857.22 offset against the actual total wage loss. That is, LIRC explained that Leach, with or without the offset, would still have been entitled to the maximum award because the offset was more than accounted for by additional actual lost wages to which Leach would have been entitled but for the cap. Thus, LIRC rejected Prent's justification for withholding payment as insufficient, regardless whether Prent's legal premise was correct.

¶12 On appeal, Prent ignores this reasoning underlying LIRC's decision. Prent makes no effort to explain why its offset argument undercuts LIRC's reasoning and, therefore, leaves untouched the basis for LIRC's bad faith award.

¶13 We also reject a related assertion by Prent. Prent asserts that LIRC's decision must be reversed because that decision was not based on substantial evidence in the record. This proposition fails because it ignores how LIRC actually resolved the claim. That is, Prent does not address the adequacy of the actual wage loss evidence, which under LIRC's reasoning is the only evidence necessary to resolve the bad faith dispute between the parties.

¶14 Finally, for the sake of completeness, we observe that LIRC's decision also pointed to the undisputed fact that Prent raised the offset issue only after LIRC's refusal-to-rehire order was final and after Prent was delinquent in paying the amount awarded. Prent did not raise the offset argument before LIRC in the refusal-to-rehire proceedings, and Prent did not seek judicial review of the \$30,706.52 award. It was only after Leach alleged a bad faith failure to pay that Prent raised its offset argument. It would have been reasonable for LIRC to view this sequence of events as additional evidence of bad faith. Prent does not meaningfully address LIRC's untimeliness discussion.³

³ We note that Prent's premise, even if successful, would justify Prent withholding only \$5,857.22 in disability payments out of the \$30,706.52 total refusal-to-rehire award. This still leaves the fact that Prent paid *nothing* toward the approximately \$25,000 amount that Prent concedes it was obligated to pay by the deadline. Not until well after the deadline did partial payments by Prent reduce the amount owed to \$5,857.22. However, because we reject Prent's appeal for other reasons, we need not dwell on this additional justification for a bad faith award.

B. The Bad Faith Hearing

¶15 Prent also complains that it was denied a right to a “full and fair” hearing on bad faith. Prent refers to the fact that the hearing on bad faith before an ALJ was cut short after the ALJ came to the conclusion that Prent’s representative was not being cooperative. At the end of the hearing, the ALJ told the parties to submit briefs on the bad faith issue, and the parties did so. Prent asserts that, because the hearing was cut short, it was denied its statutory and due process rights to present evidence on the bad faith topic. We disagree.

¶16 Prent merely asserts, in vague terms, that it was denied a right to present evidence, but Prent does not explain what specific evidence it was prevented from presenting, much less explain why that evidence might have been relevant to the bad faith dispute. We find no basis for reversing LIRC’s decision based on Prent’s bald assertion that a longer hearing might have mattered. *See State v. Walker*, 154 Wis. 2d 158, 192, 453 N.W.2d 127 (1990) (quoting the rule that “‘a defendant has no right, constitutional or otherwise, to present irrelevant evidence’” (citation omitted)). Stated differently, Prent gives us no reason to think that a new hearing would serve any purpose.

Conclusion

¶17 For the reasons discussed, we affirm the circuit court.

By the Court.—Order affirmed.

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