

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 22, 2014

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. 2013AP1204

Cir. Ct. No. 2012CV104

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TERRI A. NETHERY,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

SQL, LLC,

DEFENDANT.

APPEAL from a judgment of the circuit court for Lafayette County:
WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Terri Nethery appeals a judgment affirming a decision of the Labor and Industry Review Commission (LIRC). LIRC concluded Nethery concealed work performed and wages earned during specific weeks in which she filed unemployment benefit claims, contrary to WIS. STAT. § 108.04(11)(a) and (b).¹ LIRC therefore ordered Nethery to repay \$5,598 in past benefits and forfeit \$4,324 in future benefits. We conclude LIRC’s factual findings are supported by credible evidence, and its conclusion that Nethery concealed work and wages is reasonable. We also reject Nethery’s argument that LIRC acted in excess of its powers. We therefore affirm.

BACKGROUND

¶2 Nethery applied for unemployment benefits after she was laid off from her job as a dairy milk inspector in January 2010. She began receiving benefits during the first week of February.

¶3 Both before and after she was laid off, Nethery performed services for SQL, LLC, by soliciting customers for “live cam shows” featuring female models. Nethery placed advertisements for the live cam shows on Craigslist.org and Backpage.com. Potential customers wishing to purchase live cam shows then contacted Nethery using instant messaging software. Nethery would chat with a potential customer for about five minutes, attempting to convince the person to purchase a show. If the customer agreed to make a purchase, Nethery provided a link that could be used to complete the transaction. SQL paid Nethery a set amount every time she completed a sale to a new customer. If no one responded

¹ Unless otherwise noted, all references to the Wisconsin Statutes are to the 2009-10 version, which was in effect when Nethery filed the claims at issue.

to an advertisement, or if the response did not lead to a qualifying sale, Nethery was not paid.

¶4 Nethery used her own money to pay for the advertisements she posted. She also paid to upgrade her internet connection speed. It is undisputed that Nethery's out-of-pocket expenses exceeded the total amount SQL paid her.

¶5 Nethery did not inform the Department of Workforce Development (DWD) that she was performing services for SQL. In her weekly filings with DWD regarding her availability for work, Nethery consistently answered "No" to the questions "Did you work?" and "Were you self-employed?"

¶6 In early 2011, Nethery received an Internal Revenue Service Form 1099 from SQL. Nethery gave the form to her tax preparer, who then reported a business loss of \$275 on Nethery's 2010 federal tax return. DWD subsequently commenced an investigation and concluded Nethery had "concealed work performed and wages earned" during certain weeks in which she received unemployment benefits. As a sanction, DWD ordered Nethery to repay \$5,598 in past benefits and forfeit \$4,324 in future benefits.

¶7 Nethery appealed DWD's determination. In two related decisions issued October 10, 2011, Administrative Law Judge (ALJ) Raymond Bradley set aside DWD's finding of concealment. In each decision, ALJ Bradley noted that Nethery contended her services for SQL were performed as an independent contractor, not an employee, so her earnings did not qualify as wages, and she could not have concealed wages. ALJ Bradley stated, "The evidence presented suggests that the claimant's argument is not without merit." However, ALJ Bradley concluded DWD had never made any finding as to whether Nethery was an employee of SQL. ALJ Bradley stated he did not have jurisdiction to decide

that issue as a matter of first impression. He therefore remanded the case to DWD for a determination of whether Nethery was an employee of SQL.

¶8 On remand, DWD determined Nethery was an employee of SQL, and her earnings therefore constituted wages. Nethery appealed that decision, which was affirmed by ALJ Gretchen Mrozinski on December 9, 2011. Nethery petitioned LIRC for review of ALJ Mrozinski's decision, which LIRC affirmed with minor modifications on May 30, 2012. Nethery did not appeal LIRC's May 30 decision.

¶9 While Nethery's appeal of ALJ Mrozinski's December 9 decision was pending before LIRC, DWD reinstated its prior decision that Nethery had concealed work and wages and was therefore required to repay past benefits and forfeit future benefits. Nethery subsequently appealed that decision, and ALJ Mrozinski affirmed it on March 26, 2012. LIRC affirmed ALJ Mrozinski's March 26 decision on September 10, 2012. The circuit court later affirmed LIRC's September 10 decision. This appeal follows.

DISCUSSION

¶10 On appeal, we review LIRC's decision, not the circuit court's. *General Cas. Co. v. LIRC*, 165 Wis. 2d 174, 177 n.2, 477 N.W.2d 322 (Ct. App. 1991). LIRC's decision may be reversed only upon the following grounds: (1) LIRC acted without or in excess of its power; (2) LIRC's order or award was procured by fraud; or (3) LIRC's findings of fact do not support the order or award. WIS. STAT. § 102.23(1)(e); see also *Patrick Cudahy Inc. v. LIRC*, 2006 WI App 211, ¶5, 296 Wis. 2d 751, 723 N.W.2d 756.

¶11 Here, LIRC found that Nethery violated WIS. STAT. § 108.04(11)(a) and (b), which prohibit a person filing an unemployment claim in a given week from “conceal[ing] any material fact relating to his or her eligibility for benefits” and “conceal[ing] any of his or her wages earned in ... that week[.]” The statute further provides that the term “conceal” means “to intentionally mislead or defraud [DWD] by withholding or hiding information or making a false statement or misrepresentation.” WIS. STAT. § 108.04(11)(g).

¶12 We begin by addressing Nethery’s challenge to LIRC’s factual findings. Next, we consider whether the facts found by LIRC fulfill the legal standard for concealment. Finally, we address Nethery’s argument that LIRC acted in excess of its power.

I. LIRC’s factual findings

¶13 In the absence of fraud, findings of fact made by LIRC acting within its powers are “conclusive.” WIS. STAT. § 102.23(1)(a). We will uphold LIRC’s factual findings as long as there is “credible and substantial evidence in the record on which reasonable persons could rely to make the same findings.” *Xcel Energy Servs., Inc. v. LIRC*, 2013 WI 64, ¶25, 349 Wis. 2d 234, 833 N.W.2d 665 (quoting *deBoer Transp., Inc. v. Swenson*, 2011 WI 64, ¶30, 335 Wis. 2d 599, 804 N.W.2d 658). Substantial evidence “does not constitute the preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion [LIRC] reached.” *Holy Name Sch. v. DILHR*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982). We may not substitute our own judgment for LIRC’s in evaluating the weight or credibility of the evidence. WIS. STAT. § 102.23(6).

¶14 ALJ Mrozinski made the following factual findings, which LIRC adopted in its decision:

- Nethery agreed to provide sales services for SQL.
- Nethery understood she would be paid per sale and would be responsible for various expenses.
- Nethery worked and earned wages from SQL during the weeks ending February 6 through April 17, 2010; July 31 through August 14, 2010; September 4 through September 11, 2010; October 30, 2010; and November 27, 2010.
- During the weeks she worked for SQL, Nethery failed to report that work to DWD.

These findings are amply supported by the record, including Nethery’s testimony, her bank records, and her weekly filings with DWD. Moreover, Nethery does not dispute these findings on appeal.²

¶15 ALJ Mrozinski further found that Nethery “knew that she was required to report all work and wages and chose not to.”³ In support of this finding, ALJ Mrozinski reasoned:

[Nethery’s] testimony was self-serving. [Nethery’s] contention that she did not conceal work and wages from the department for the weekly claims at issue is not credible. [Nethery] agreed to perform sales services for [SQL] in return for monetary compensation. [Her] assertion that she did not understand that such

² At various points in her brief-in-chief, Nethery seems to suggest she was not an employee of SQL, and, as a result, her earnings did not constitute wages. However, LIRC previously determined Nethery was an employee of SQL, and Nethery did not appeal that decision. Moreover, in her reply brief, Nethery concedes she was an employee of SQL.

³ As LIRC points out, an employee’s intent is a question of fact. See *Gouger v. Hardtke*, 167 Wis. 2d 504, 516-17, 482 N.W.2d 84 (1992); *Holy Name Sch. v. DILHR*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982).

circumstances qualified as work and wages is not credible. [Nethery] was provided with multiple instructional handbooks from [DWD] which contained clear instructions on what was considered work and wages. [Nethery] was not new to unemployment insurance.

¶16 Credible and substantial evidence supports ALJ Mrozinski's finding that Nethery knew she was required to report her work for SQL and chose not to. Each week she submitted an unemployment claim, Nethery was asked, "Did you work?" Nethery repeatedly responded, "No." However, Nethery knew she was performing sales services for SQL, and SQL was paying her for those services. Based on this evidence, a reasonable person could conclude Nethery knew she was working, knew she was required to report her work to DWD, and chose not to do so. Further, although Nethery testified she did not understand at the time she filed her benefits claims that she was working for SQL, ALJ Mrozinski explicitly concluded Nethery's testimony on that point was not credible, and LIRC adopted that finding. We must defer to LIRC's credibility determinations. WIS. STAT. § 102.23(6).

¶17 Moreover, substantial and credible evidence supports LIRC's finding that Nethery's testimony was not credible. At a March 13, 2012 hearing before ALJ Mrozinski, Nethery testified she did not report working for SQL because she believed she was "in training" for the first three to four months. Similarly, in a July 1, 2011 telephone interview with a DWD investigator, Nethery claimed she "did not believe [she] was working" for SQL because she was "being trained by them." However, on a "Worker Status Questionnaire" Nethery submitted to DWD on October 13, 2011, Nethery asserted she was not "given instructions, training or orientation by [SQL]." Nethery subsequently testified the information she provided in that "Worker Status Questionnaire" was true and accurate. Nethery's inconsistent statements about whether she received training

from SQL would give a reasonable person cause to doubt her assertion that she believed she was not working for SQL because she was “in training.”

¶18 Nethery also testified at the March 13, 2012 hearing that she did not think she needed to report working for SQL because her expenses exceeded her income. However, LIRC specifically rejected that assertion in its decision, reasoning, “Had the weekly claims questions only asked [Nethery] if she earned wages, [her] argument would have more support. However, [Nethery] repeatedly answered the basic question of, ‘Did you work?’ incorrectly. Obviously, [Nethery] was being paid for services she was performing. She was working.” Again, credible and substantial evidence supports LIRC’s conclusion that Nethery’s explanation for failing to report her work was not credible. Nethery does not explain why the fact that she was not making a profit caused her to believe the services she performed for SQL were not “work.”

¶19 Nethery has not demonstrated that any of LIRC’s factual findings are unsupported by credible and substantial evidence. We therefore proceed to consider whether the facts found by LIRC fulfill the legal standard for concealment set forth in WIS. STAT. § 108.04(11).

II. LIRC’s conclusion that Nethery concealed work and wages

¶20 Whether the facts found by LIRC fulfill a particular legal standard is a question of law. *Nottelson v. DILHR*, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980). When reviewing an agency’s legal conclusions, we apply either great weight deference, due weight deference, or no deference. *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477. Our supreme court has summarized the three levels of deference as follows:

An agency's interpretation of a statute is entitled to great weight deference when: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in the application of the statute.

We grant an intermediate level of deference, due weight, "where an agency has some experience in the area, but has not developed any particular expertise in interpreting and applying the statute at hand" that would put the agency in a better position to interpret the statute than a reviewing court.

....

We apply de novo review when "there is no evidence that the agency has any special expertise or experience interpreting the statute[,] ... the issue before the agency is clearly one of first impression, or ... the agency's position on an issue has been so inconsistent so as to provide no real guidance."

Id., ¶¶27-29 (citations omitted).

¶21 Where great weight deference is appropriate, the agency's legal conclusion will be sustained as long as it is reasonable, even if another conclusion is more reasonable. *Barron Elec. Co-op. v. PSC*, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997). Under due weight deference, we will sustain the agency's conclusion if it is reasonable, unless another interpretation is more reasonable. *Id.* at 762-63. Finally, where no deference is warranted, "the weight to be afforded [the agency's] interpretation is no weight at all." *Id.* at 763 (quoting *Local No. 695 v. LIRC*, 154 Wis. 2d 75, 84, 452 N.W.2d 368 (1990)).

¶22 Here, we conclude great weight deference is appropriate. LIRC is charged with administering WIS. STAT. § 108.04(11) by virtue of its broad authority to review unemployment benefits decisions. See WIS. STAT.

§ 108.09(6). Further, LIRC’s interpretation of § 108.04(11) is one of long standing—LIRC has been interpreting the statutory term “conceal” for decades.⁴ In deciding the present case, LIRC necessarily employed the expertise, specialized knowledge, and technical competence it has developed over the years. In addition, deferring to LIRC’s interpretation of § 108.04(11) provides uniformity in the application of the statute.

¶23 Nethery asserts great weight deference is inappropriate because LIRC has “decided only a handful of cases” that are factually similar to this case. However, LIRC “need not have decided a case with identical or similar facts in order for its decision to be given great weight deference.” *Honthaners Rests., Inc. v. LIRC*, 2000 WI App 273, ¶12, 240 Wis. 2d 234, 621 N.W.2d 660. The correct test is whether LIRC has experience in interpreting a particular statutory scheme, not whether it has previously ruled on the same, or even substantially similar, facts. *Id.*

¶24 Nethery also argues great weight deference is inappropriate because LIRC’s decision in this case conflicts with its determinations in three prior cases. However, as we explain in greater detail below, the cases Nethery cites are factually distinguishable. *See infra*, ¶¶34-39. We agree with LIRC that these cases “do not reflect inconsistency in interpretation of a statutory standard[] but rather the expected variation in the results of cases in which factual circumstances

⁴ Searching for the term “concealment” in LIRC’s online database of unemployment insurance decisions returns decisions dating back to the early 1990s. *See, e.g., Kevin T. Willingham*, UI Hearing No. 91609604MW (LIRC June 5, 1992), *available at* <http://dwd.wisconsin.gov/lirc/ucdecsns/3922.htm>.

vary and the ultimate issue [concerns] the subjective motives and intent of an individual.”

¶25 Applying great weight deference, we will uphold LIRC’s conclusion that Nethery concealed work and wages as long as it is reasonable. See *Barron Elec. Co-op.*, 212 Wis. 2d at 761. A claimant “conceals” work and wages by “intentionally mislead[ing] or defraud[ing] [DWD] by withholding or hiding information or making a false statement or misrepresentation.” WIS. STAT. § 108.04(11)(g). Given its findings of fact, LIRC’s conclusion that Nethery’s conduct met this standard is reasonable. LIRC found that Nethery worked and earned wages from SQL during specific weeks in which she received unemployment benefits, but she did not report that work to DWD, despite being asked each week, “Did you work?” LIRC also found that Nethery knew she was required to report all work and wages to DWD, but she chose not to. Although Nethery testified she did not understand she was working for SQL and earning wages, LIRC concluded her testimony was not credible. On these facts, LIRC could reasonably conclude Nethery intentionally misled DWD by withholding information and making false statements about her work and wages.

III. Nethery’s argument that LIRC exceeded its power

¶26 Nethery next asserts, for several reasons, that LIRC exceeded its power by concluding she concealed work and wages. We address and reject Nethery’s arguments in turn.

¶27 First, Nethery argues LIRC must “prove” concealment by clear and convincing evidence, and LIRC has “failed to meet” its burden of proof. This argument misses the mark. When a concealment case is *before* LIRC, LIRC must determine whether DWD has proven concealment by clear and convincing

evidence. See *Joseph W. Hein, Jr.*, UI Hearing No. 00605374MW (LIRC Dec. 13, 2001), available at <http://dwd.wisconsin.gov/lirc/ucdecns/1260.htm> (“In order to impose a forfeiture on a UI claimant, the burden of proof is on the department to present clear, satisfactory and convincing evidence of fraud.”). However, on appeal, LIRC does not have the burden to establish that clear and convincing evidence supports its decision. Instead, LIRC’s factual findings are “conclusive” as long as they are supported by “credible and substantial evidence.” WIS. STAT. § 102.23(1)(a), (6). Further, under great weight deference, LIRC’s legal conclusions will be affirmed as long as they are reasonable. See *Barron Elec. Co-op.*, 212 Wis. 2d at 761. “The burden of proof to show that the agency’s interpretation is unreasonable is on the party seeking to overturn the agency action; it is not on the agency to justify its interpretation.” *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995). Here, credible and substantial evidence supports LIRC’s factual findings, and LIRC’s conclusion that Nethery concealed work and wages is reasonable.

¶28 Nethery next argues LIRC acted in excess of its power by “arbitrarily ignor[ing] the judicial determination of ALJ Bradley.” (Capitalization omitted.) In the proceedings before ALJ Bradley, Nethery argued she could not have concealed work or wages because she was not an employee of SQL. In his decision, ALJ Bradley stated that “[t]he evidence presented” suggested Nethery’s argument was “not without merit.” According to Nethery, because ALJ Bradley concluded her actions were “not unreasonable,” LIRC had no basis to find that her actions were “not merely incorrect, but fraudulent[.]”

¶29 Nethery’s argument fails for three reasons. First, she does not cite any authority for the proposition that LIRC, in an appeal from AJL Mrozinski’s decision, was bound by a statement ALJ Bradley made in an earlier proceeding.

We need not address arguments unsupported by legal authority. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶30 Second, Nethery's argument is inconsistent with the law regarding the weight LIRC must give to ALJs' decisions. LIRC is not required to consider or give weight to a decision rendered by an ALJ that was never appealed to or reviewed by LIRC. *See, e.g., Theuer v. LIRC*, 2001 WI 26, ¶13, 242 Wis. 2d 29, 624 N.W.2d 110 ("Unreviewed administrative law judge decisions regarding Chapter 102 are not binding on [LIRC] and do not constitute [LIRC's] authoritative interpretation of a statute.").

¶31 Third, Nethery ignores the fact that ALJ Bradley's decision was based on a different hearing record than the record before ALJ Mrozinski. The record of the proceedings before ALJ Bradley is not before this court on appeal, and it was not before either ALJ Mrozinski or LIRC. We have no way of knowing whether the evidence on which ALJ Bradley relied was the same as the evidence presented to ALJ Mrozinski. ALJ Mrozinski and LIRC were bound to decide the concealment issue on the record before them.

¶32 Nethery next argues LIRC could not reasonably find that she intentionally concealed work and wages because the information about reporting work and wages in DWD's "Handbook for Claimants" is ambiguous. Nethery essentially argues the instructions in the handbook are so confusing that she could have reasonably concluded her services for SQL did not qualify as work. However, LIRC considered Nethery's assertion that she did not understand her services for SQL were work, and it concluded that assertion was not credible. Nethery's argument implicitly invites this court to substitute its judgment for

LIRC's regarding the weight and credibility of evidence, which we may not do. *See* WIS. STAT. § 102.23(6).

¶33 Moreover, there is nothing in the record to support a claim that Nethery failed to report working for SQL because she was confused by the instructions in the handbook. Nethery testified she did not report working for SQL because: (1) she was in training; and (2) her expenses exceeded her income. At no point did Nethery assert she failed to report working for SQL because she was confused by the handbook's instructions. Consequently, we are not persuaded that any alleged ambiguities in the handbook require reversal of LIRC's decision.

¶34 Finally, Nethery argues LIRC exceeded its authority because its decision in this case conflicts with three of its prior decisions. She relies primarily on *Hein*, UI Hearing No. 00605374MW. There, Joseph Hein filed unemployment claims during certain weeks in 1997 and 1998. Although he was attempting to start his own business, he repeatedly answered "no" to the question "Are you self-employed?" Hein testified that, before he filed his first unemployment claim, he contacted DWD and asked a claims specialist whether starting his own business would affect his eligibility for benefits. According to Hein, the claims specialist told him he would not be considered "self-employed" under the circumstances. Hein testified he "tried to follow the rules and did not intentionally lie to [DWD]."

¶35 LIRC found that Hein did not intentionally conceal self-employment. It noted the DWD handbook did not contain a definition of self-employment, and "a layperson who is not earning any income might reasonably form the opinion that he is not self-employed." LIRC further found it was "possible" Hein received erroneous advice from DWD, and it was "even more plausible" that he was given the correct information but misunderstood it. Under

these circumstances, LIRC was “willing to give [Hein] the benefit of a doubt” that he did not intend to conceal self-employment from DWD.

¶36 *Hein* differs from this case in two important respects. First, the DWD found that Hein engaged in concealment because he answered “no” to the question “Are you self-employed?” Although Nethery also answered “no” to that question, in her case, DWD’s determination of concealment was premised on the fact that she answered “no” to the question “Did you work?” Thus, contrary to Nethery’s assertion, *Hein*’s discussion about the handbook’s failure to define the term self-employment is irrelevant.

¶37 Second, Hein recognized that starting a business might affect his eligibility for benefits, so he sought advice from DWD before filing his first claim. LIRC found that Hein either received incorrect information from DWD or was given correct information that he misunderstood. In contrast, Nethery never contacted DWD to ask how her services for SQL would affect her eligibility for benefits. She did not testify that she failed to report working for SQL based on advice received from DWD. Moreover, in *Hein*, LIRC implicitly found credible Hein’s testimony that he attempted to comply with the rules and did not intentionally lie to DWD. Conversely, LIRC determined Nethery’s assertion that she did not intentionally conceal work and wages was not credible. *Hein* is therefore inapposite.

¶38 Another case cited by Nethery is distinguishable for similar reasons. See *Scott G. Lynch*, UI Hearing No. 10404406AP (LIRC March 11, 2011), available at <http://dwd.wisconsin.gov/lirc/ucdecsns/3589.htm>. While receiving unemployment benefits, Lynch performed work for an employer on commission. Instead of reporting the gross amount of his commissions to DWD, Lynch

erroneously deducted his expenses and reported his net earnings. DWD found that Lynch concealed wages. However, Lynch testified he had called DWD to ask for advice about reporting his earnings, and he was instructed to report the net amount. Relying on *Hein*, LIRC found Lynch did not intentionally conceal his wages. LIRC also noted that, if Lynch had intended to conceal his wages, it was unlikely he would have reported a portion of those wages to DWD. Unlike Lynch, Nethery's failure to report her work and wages was not the result of advice obtained from DWD, and Nethery did not report any portion of her work and wages.

¶39 Nethery also argues LIRC's decision in this case conflicts with *Gerald L. Chepil*, Trade Act Hearing No. 97201062RL (LIRC Nov. 19, 1997), available at <http://dwd.wisconsin.gov/lirc/ucdecsns/172.htm>, in which LIRC found the claimant had concealed work and wages. Nethery asserts that "none of the indicia that led to a finding of fraudulent concealment of wages in *Chepil* are present in ... this case." In *Chepil*, LIRC noted that certain aspects of the claimant's background gave it reason to doubt his assertion that he believed he was performing services as a self-employed contractor, rather than an employee. However, *Chepil* did not hold that those particular circumstances were required for LIRC to make a finding of concealment. Nethery has not convinced us that LIRC's decision in her case conflicts with *Chepil*.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

