COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1024 **Cir. Ct. No. 2012CV2112**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MICHAEL B. DERMODY,

PETITIONER-APPELLANT,

V.

COMMISSIONER OF INSURANCE,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed.*

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

¶1 KLOPPENBURG, J. Michael Dermody[1] appeals an order affirming the decision of the Office of the Commissioner of Insurance (OCI). The Commissioner found that Michael violated various subsections of WIS. STAT. ch. 628 (2011-12),[2] which govern the conduct of insurance intermediaries.[3] As pertinent to this appeal, the Commissioner found that Michael violated ch. 628 by selling insurance policies to Lyle and Elayne Bolender after his insurance license had been revoked; by making false representations to Cynthia Marino; and by selling insurance policies to Stephen and Susan Tinus after his insurance license had been revoked. As a result, the Commissioner prohibited Michael from reapplying for his insurance license for five years, and ordered Michael to pay restitution and a forfeiture. Michael appealed to the circuit court, and the circuit court affirmed the Commissioner's decision.

¶2 On appeal to this court, Michael argues that the Commissioner erred in basing the decision on credibility determinations and factual findings that were not supported by substantial evidence, and that a remand to OCI was required by WIS. STAT. § 227.57(4), because there were various "material errors of procedure" that compromised the fairness of the proceedings. For the reasons set forth below, we affirm.

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[1] In this opinion, we will refer to both Michael Dermody and his wife, Kathleen Dermody. Because the Dermodys share the same last name, we refer to them individually by their first names throughout the remainder of this opinion.

[2] All references to the Wisconsin statutes are to the 2011-12 version unless otherwise noted.

[3] An "insurance intermediary," commonly referred to as an agent, is a person who engages or assists another in "[s]olicit[ing], negotiat[ing] or plac[ing] insurance or annuities on behalf of an insurer or a person seeking insurance or annuities" or who "[a]dvises other persons about insurance needs and coverages." WIS. STAT. § 628.02(1)(a). Because ch. 628 uses the specific term "intermediary," we do the same.

BACKGROUND

¶3 Michael was a licensed insurance intermediary until December 2009. On November 3, 2009, OCI sent Michael an Order of Revocation advising Michael that his insurance license would be revoked in thirty-one days for failure to pay taxes if he did not take certain actions. OCI revoked Michael's insurance license by letter dated December 4, 2009.

¶4 In April 2010, OCI issued a notice of hearing against Michael alleging a number of violations of WIS. STAT. ch. 628. Pertinent to this appeal, the notice of hearing alleged that Michael: (1) violated WIS. STAT. § 628.03(1)[4] by selling insurance policies to Lyle and Elayne Bolender after his insurance license had been revoked; (2) violated § 628.34(1)(a)[5] by misleading Cynthia Marino as to the accessibility of funds in her annuities;[6] and (3) violated § 628.03(1) by selling insurance policies to Stephen and Susan Tinus after his insurance license had been revoked.

¶5 An evidentiary hearing was held in January and February 2011. In January 2012, the administrative law judge (ALJ) who presided at the hearing

[4] WISCONSIN STAT. § 628.03(1) provides in relevant part: "No natural person may perform, offer to perform, or advertise any service as an intermediary in this state, unless the natural person obtains a license under s. 628.04 or 628.09 ...."

[5] WISCONSIN STAT. § 628.34(1)(a) provides in relevant part: "No person who is or should be licensed under chs. 600 to 646 … may make or cause to be made any communication relating to an insurance contract, the insurance business, any insurer, or any intermediary that contains false or misleading information, including information that is misleading because of incompleteness."

[6] As the case progressed, this allegation specifically concerned Michael's processing of withdrawals from Marino's annuities without advising Marino about penalties that were associated with the withdrawals.

issued a proposed decision that included findings of fact and conclusions of law. The ALJ made the following pertinent findings of fact: (1) Michael sold insurance policies to Lyle and Elayne Bolender on January 28, 2010, after his insurance license had been revoked; (2) Michael told Cynthia Marino that she "would incur no penalties on withdrawals that she needed to make" and then processed withdrawals that resulted in penalties of $1,776.39 and $1,940.53; and (3) Michael sold insurance policies to Stephen and Susan Tinus on December 30, 2009, after his insurance license had been revoked.

¶6 In April 2012, the Commissioner issued a final decision that adopted, with minor revisions not pertinent to this appeal, the ALJ's proposed decision. The Commissioner's decision prohibited Michael from reapplying for an insurance license for five years, ordered Michael to pay restitution to Marino, and imposed a $15,000 forfeiture. We reference additional facts as necessary below.

DISCUSSION

¶7 Michael raises multiple arguments that fall into two main categories. First, Michael argues that the Commissioner's decision is defective because it rests in part on the following two findings that he submits were not supported by substantial evidence: that Michael and Kathleen were not credible witnesses, and that Michael processed withdrawals that resulted in penalties assessed to Marino. Second, Michael argues that there were four "material errors of procedure" contrary to WIS. STAT. § 227.57(4) that compromised the fairness of the proceedings. As we will explain, we reject each of Michael's arguments. Because Michael's arguments invoke different standards of review, we set forth the applicable standards of review in the sections relating to each argument.

Sufficiency of the Evidence

¶8 We first address Michael's arguments regarding the findings related to the allegations involving the Bolender sales and the Marino transactions, which Michael contends were not supported by substantial evidence.

¶9 Upon review of a circuit court's order affirming an administrative agency's decision, we review the decision of the agency, not that of the circuit court. ***Doepke-Kline v. LIRC***, 2005 WI App 209, ¶10, 287 Wis. 2d 337, 704 N.W.2d 605. When we are called upon to review an agency's findings of fact, we apply the "substantial evidence" standard. ***Milwaukee Symphony Orchestra, Inc. v. DOR***, 2010 WI 33, ¶31, 324 Wis. 2d 68, 781 N.W.2d 674. The supreme court has summarized the substantial evidence standard as follows:

> Substantial evidence does not mean a preponderance of evidence. It means whether, after considering all the evidence of record, reasonable minds could arrive at the conclusion reached by the trier of fact. "[T]he weight and credibility of the evidence are for the agency, not the reviewing court, to determine." An agency's findings of fact may be set aside only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.

Id. (quoted source and footnotes omitted). We set forth the relevant testimony relating to Michael's arguments and then address the merits of his arguments.

¶10 Regarding the Bolender sales, the testimony was as follows. Lyle Bolender testified that he signed an insurance contract on January 28, 2010, that Michael was at the Bolenders' home on that day, and that Kathleen was not there. Elayne Bolender testified that Michael came to her home to discuss insurance products on January 28, 2010, and that Kathleen was not present. Kathleen testified that she was present on January 28, 2010, when the Bolenders signed the

insurance policies. Michael testified that he was also at the Bolenders' home on that day, but that he was there "[a]s a caregiver for Kath[leen]," who uses a wheelchair, and that he did not discuss the insurance policies.

¶11 Additionally, the Bolenders were questioned about affidavits that they signed on July 1, 2010, in which they averred that Kathleen sold them insurance policies on January 28, 2010. Elayne Bolender testified that the information in the affidavits was not accurate. She explained that she received the affidavits from Michael, and that Michael told her "that Kath[leen's] career was on the line." Elayne testified that she signed the affidavit because she thought that she "was helping Kath[leen] by signing these." Lyle Bolender testified that he signed the affidavit because he thought that he was helping Kathleen.

¶12 The ALJ recorded her observations regarding the witnesses in her proposed decision. The ALJ noted that the Bolenders "both looked understandably embarrassed when questioned about having signed [the false] affidavits," but that they "frankly admitted the statements made in the affidavits (signed on July 1, 2010) were not true." The ALJ noted that the "Bolenders clearly remembered details about that day [January 28, 2010]." Finally, the ALJ, who was uniquely positioned to weigh the credibility of the testimony of the witnesses, determined that "the Bolenders … were telling the truth in their testimony in this case, and the Dermodys were not."

¶13 Michael cites no authority in support of his argument that credibility determinations, like findings of fact, must be supported by substantial evidence. We could reject his argument on this basis. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("Arguments unsupported by references to legal authority will not be considered."). More fundamentally, we reject

Michael's argument on the basis that in an appeal following an administrative agency decision, we do not pass upon the credibility of witnesses. ***Beecher v. LIRC***, 2003 WI App 100, ¶9, 264 Wis. 2d 394, 663 N.W.2d 316. In light of the Commissioner's findings that the Bolenders' testimony was credible, Michael does not argue that their testimony, if accepted, does not establish the violations alleged. Accordingly, we reject Michael's challenge based on the Commissioner's credibility findings.

¶14 Regarding the Marino transactions, the testimony was as follows. Marino testified that when she needed to withdraw money from her annuities, she would call Michael and tell him the amount to withdraw, Michael would tell her which accounts she could withdraw money from, and Michael would then process the withdrawal. Marino testified that Michael did not talk to her about penalties associated with the withdrawals.

¶15 Michael testified that Marino told him that she needed access to money to pay for college tuition and her daughters' weddings, and that he withdrew money for her for those purposes. Michael testified that he explained to Marino that she could only withdraw a certain percentage per year from each annuity, and that she could incur a penalty if she withdrew more than that percentage. Michael testified that Marino had never paid a penalty for the withdrawals.

¶16 Based on Marino's testimony, the ALJ found that Michael "repeatedly falsely stated to and continually assured [Marino] that … she had plenty of access, and penalty-free access, to her funds." The ALJ noted that, while Michael "continued to claim [Marino] had no liquidity problems, and never paid a penalty on any withdrawal[s] … he made for her," the "record establishe[d] [that]

Marino did pay penalties totaling $3,717.36 to obtain these … funds." We conclude that the findings as to the Marino transactions were supported by substantial evidence in the record.

Material Errors of Procedure

¶17 Michael argues that the fairness of the proceedings against him were impaired by four material errors of procedure within the meaning of WIS. STAT. § 227.57(4).[7] First, Michael argues that a material error of procedure occurred when the OCI attorney who prosecuted his case allegedly made "disturbing" calls to a number of his clients who were potential witnesses in the case, and that these calls created "the potential for false memory on the part of the witnesses." Michael has submitted no proof that the OCI attorney's contacts with potential witnesses in fact caused the witnesses to testify falsely. His argument is therefore undeveloped, and we do not address it for that reason. ***Pettit***, 171 Wis. 2d at 646.

¶18 Second, Michael argues that the Commissioner's application of the "minimum burden of proof" instead of the "'middle' burden of proof" in his case constituted a material error of procedure that compromised the fairness of the proceedings. The Commissioner applied the burden of proof set forth in WIS. ADMIN. CODE § Ins 5.39(3), which requires OCI to prove the case by a preponderance of the evidence; Michael refers to this as the "minimum burden of proof." Michael argues that OCI should have proved the case by "clear, satisfactory, and convincing" evidence, which he refers to as the "'middle' burden

[7] WISCONSIN STAT. § 227.57(4) states: "The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure."

of proof," because, as Michael states, "conduct involving moral turpitude was alleged."

¶19 Underlying Michael's argument on appeal that the Commissioner applied the incorrect burden of proof is his challenge to WIS. ADMIN. CODE § Ins 5.39(3), the administrative rule that sets forth the preponderance of the evidence burden of proof in this administrative proceeding. However, Michael did not directly challenge § Ins 5.39(3) before the ALJ or the Commissioner. This is fatal to his burden-of-proof argument. To challenge an administrative rule, a party must follow the procedures set forth in WIS. STAT. § 227.40(1) and (2), as these sections "prescribe the exclusive procedures for challenging an administrative rule." ***State ex rel. Clifton v. Young***, 133 Wis. 2d 193, 198, 394 N.W.2d 769 (Ct. App. 1986). Because Michael did not challenge § Ins 5.39(3) in accordance with § 227.40(1) and (2), his burden-of-proof argument fails.

¶20 Third, Michael argues that OCI failed to provide him with notice of the allegation that he sold insurance policies to Stephen and Susan Tinus on December 30, 2009, and that this constituted a material error of procedure.[8] Michael contends that the original April 2010 notice of hearing alleged that Michael sold policies to the Tinuses on February 15, 2010, and did not mention the alleged December 30, 2009 sales. As we now explain, the pleadings were

[8] In his reply brief, Michael raises for the first time the argument that the Commissioner's finding that Michael sold insurance policies to the Tinuses on December 30, 2009, "was not supported by the evidence in the record." Michael did not raise this argument in his brief-in-chief, and we therefore do not address it. *See* ***Turner v. Sanoski***, 2010 WI App 92, ¶12 n.6, 327 Wis. 2d 503, 787 N.W.2d 429 (explaining that we generally do not consider arguments made for the first time in a reply brief).

properly amended in accordance with WIS. STAT. § 227.44(4) to provide notice of the December 30, 2009 Tinus sales.

¶21 In July 2010, the OCI attorney moved to amend the notice of hearing to reflect that the Tinus sales occurred on December 30, 2009. Michael submitted a response to the OCI attorney's motion. The ALJ held a hearing on the motion on August 4, 2010, and Michael appeared by phone.[9] The following day, the ALJ issued a written decision stating: "[F]or the reasons stated verbally at the hearing, it is hereby ordered [that] OCI's motion to Amend the Notice of Hearing to allege additional sales made to Stephen and Susan Tinus on 12-30-09 and to correct the dates of currently alleged sales to Mr. and Mrs. Tinus … is granted."

¶22 We conclude that Michael received notice of the allegations regarding the December 30, 2009 Tinus sales. Michael appeared by phone at the hearing on the OCI attorney's motion to amend the notice of hearing. The ALJ's written decision issued after the hearing indicates that the amendment to the date of the Tinus sales was discussed and permitted at the hearing at which Michael appeared. Accordingly, we find no material error of procedure on this basis.

¶23 Fourth, Michael argues that the denials of his motions to reopen the record to present additional evidence, primarily comprising additional evidence

[9] Under WIS. STAT. § 227.44(4)(a), the ALJ was authorized to hold a hearing to consider "[t]he necessity or desirability of amendments to the pleadings." Subsequent to the hearing, the ALJ was required to "make a memorandum for the record which summarizes the action taken at the conference, [and] the amendments allowed to the pleadings," which thereafter "control[led] the subsequent course of the action." WIS. STAT. § 227.44(4)(b).

regarding snowfall on January 28, 2010, the date of the Bolender sales, constituted a material error of procedure.[10]

¶24 The standard for reopening the record is set forth in WIS. ADMIN. CODE § Ins 5.39(8), which provides in part:

> After the record is closed, no further evidence shall be added to the record except by order of the administrative law judge. The administrative law judge *may* reopen the record to take further evidence if a party moves for reopening and shows to the administrative law judge's satisfaction that there is evidence that *could not reasonably have been discovered before the record was closed* and that it should be admitted in the interest of justice, or that documentary evidence used at the hearing was inadvertently omitted.[11]

(Emphasis added.) The use of the word "may" in § Ins 5.39(8) signals that whether to reopen the record is within the ALJ's discretion. *See* ***Pries v. McMillon***, 2010 WI 63, ¶34, 326 Wis. 2d 37, 784 N.W.2d 648 (explaining that "may" is ordinarily viewed as a "discretionary word[]").

¶25 When we review an administrative agency's exercise of discretion, we examine "whether the exercise of discretion was made based upon the relevant

[10] Michael also asked the Commissioner to take official notice of the weather conditions on January 28, 2010, the date of the Bolender sales. In his reply brief, Michael appears to argue that the Commissioner's denial of this request constituted error. However, he did not raise this argument in his brief-in-chief. As we have explained, we generally will not consider arguments made for the first time in a reply brief. *See* ***Turner***, 327 Wis. 2d 503, ¶12 n.6.

[11] WISCONSIN ADMIN. CODE § Ins 5.39(8) sets forth the standards that govern an ALJ's decision whether to reopen the record, and does not refer to the standards that govern the Commissioner's decision to reopen the record. However, the Commissioner applied the standards set forth in § Ins 5.39(8) when deciding Michael's motion to reopen the record, and Michael does not argue that another rule controlled the Commissioner's review of Michael's motion to reopen the record. We therefore assume without deciding that the standards set forth in § Ins 5.39(8) also apply to the Commissioner's decision whether to reopen the record.

facts by applying a proper standard of law." ***Verhaagh v. LIRC***, 204 Wis. 2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996). We defer to an agency's exercise of its discretion. ***Stern v. WERC***, 2006 WI App 193, ¶38, 296 Wis. 2d 306, 722 N.W.2d 594. "The burden to demonstrate an erroneous exercise of discretion rests on the party claiming the exercise of discretion was improper." ***Verhaagh***, 204 Wis. 2d at 160-61.

¶26 The record in Michael's case was closed at the conclusion of the hearing on February 24, 2011. Nearly seven months later, Michael moved to reopen the record to admit additional evidence regarding the January 28, 2010 Bolender sales. The ALJ denied Michael's motion, concluding that the standard for reopening the record had not been met because the evidence was not "newly discovered evidence" and "was known to [Michael and Kathleen] and/or in their possession since January or March 2010." Michael renewed his motion to reopen the record before the Commissioner. The Commissioner concurred with the ALJ's decision and denied Michael's motion.

¶27 Michael has not demonstrated that the ALJ and the Commissioner erroneously exercised their discretion by denying his motions to reopen the record. To the contrary, the ALJ's decision specifically states that the ALJ reviewed the record in the case, reviewed the additional affidavits and exhibits that Michael sought to add to the record, and found that the standards for reopening the record set forth in WIS. ADMIN. CODE § Ins 5.39(8) had not been met. The Commissioner agreed with the ALJ's decision. Accordingly, we conclude that the ALJ's and the Commissioner's exercise of discretion was based upon the relevant facts and the proper standard of law, and we defer to their discretionary decisions to deny Michael's motion to reopen the record.

CONCLUSION

¶28 For the reasons set forth above, we affirm the circuit court's order affirming the Commissioner's final decision.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.