COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2031

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

JOHN MANIACI,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, UNEMPLOYMENT COMPENSATION DIVISION,

DEFENDANTS-RESPONDENTS,

WISCONSIN GAS COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: PATRICK J. MADDEN, Reserve Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. John Maniaci appeals from an order of the circuit court affirming a decision by the Labor and Industry Review Commission that denied unemployment compensation benefits to Maniaci. We affirm.

Maniaci worked for the Wisconsin Gas Company for over 20 years as an industrial pipefitter. His job was "safety sensitive," which subjected him to random drug testing requirements mandated by federal regulations. His employer implemented these requirements through its written Substance Abuse Policy. Maniaci tested positive for cocaine metabolites on November 8, 1993, during a random drug screen. Thereafter, he signed a "Rehabilitation and Last Chance Agreement," which required him to enroll in a drug abuse rehabilitation program and submit to random drug testing for up to two years. The agreement provided that Maniaci would be terminated if he tested positive for drug use during this two-year period. On June 7, 1994, Maniaci submitted a urine specimen to the Metpath Laboratory that tested positive for cocaine metabolites. On June 13, 1994, the Gas Company's medical review officer spoke with Maniaci about the positive result. During the conversation, Maniaci requested a retest of the urine specimen, but did not request that a different laboratory perform the test. On June 15, 1994, the retest was performed at Metpath; it was again positive.[1] Maniaci was suspended and ultimately discharged, effective June 15, 1994.

On August 12, 1994, Maniaci mailed a letter to the medical review officer requesting another retest of his urine sample, this time by another laboratory. The retest was performed by Metpath on August 31, 1994, and once again was positive.

[1] Maniaci wrote a letter to the medical review officer requesting a retest on June 15, 1994. The letter did not request that a different laboratory do the retest.

On July 6, 1994, the Department of Industry, Labor and Human Relations (now the Department of Workforce Development) determined that Maniaci was discharged for work-related misconduct within the meaning of § 108.04(5), STATS., and, therefore, he was denied unemployment compensation benefits. Maniaci appealed the determination, and hearings were held before an administrative law judge. The administrative law judge affirmed the initial determination. Maniaci then appealed to the Commission which affirmed the administrative law judge's decision. Maniaci then appealed to the circuit court which affirmed the decision of the Commission.

On appeal, this court reviews the decision of the commission not that of the circuit court. ***Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n***, 156 Wis.2d 611, 616, 457 N.W.2d 502, 504 (Ct. App. 1990). We must uphold the commission's findings of fact if they are supported by credible and substantial evidence. Section 102.23(6), STATS.; *see* ***L&H Wrecking Co. v. LIRC***, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. ***Madison Gas & Elec. Co. v. Pub. Serv. Comm'n***, 109 Wis.2d 127, 133, 325 N.W.2d 339, 342 (1982).

The Commission's determination of whether an employee engaged in misconduct under § 108.04(5), STATS., is a legal conclusion, which we review *de novo* but give appropriate deference. *See* ***Charette v. LIRC***, 196 Wis.2d 956, 959, 540 N.W.2d 239, 241 (Ct. App. 1995).

Maniaci first claims that his employer's Substance Abuse Policy misled him with regard to his right to a retest of his urine sample by a different laboratory. He claims that although Section A of the Substance Abuse Policy

provides that the sample must be retested if the employee makes a written request for a retest within 72 hours of receipt of the first test result, Appendix H, through its adoption of 49 CFR § 199, gives employees the right for a retest within 60 days of receipt of the first test result. He states that Section A misled him into ignoring the provision found in Appendix H, which gives employees the right to a longer period of time to request a retest. The relevant portions of the Gas Company's Substance Abuse Policy are as follows:

> VII. RE-ANALYSIS
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> A. If the Medical Review Officer determines, as provided in Appendix F, there is no legitimate medical explanation for a confirmed positive test result other than the unauthorized use of a prohibited drug, the original sample must be retested if the employee makes a written request for a retesting within 72 hours of receipt of the final test result from the MRO. Only the MRO is authorized to order a reanalysis of the original sample and such tests are authorized only at laboratories certified by the Department of Health and Human Services. The employee will pay in advance the cost of shipment (if any) and reanalysis of the sample, but the employee will be reimbursed for such expense if the retest is negative.
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> B. If the employee specifies retesting by a second laboratory, the original laboratory must follow approved chain-of-custody procedures in transferring a portion of the sample.
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> APPENDIX H
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> I. SCOPE
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> Wisconsin Gas Company is committed to maintaining a safe and healthy work place free from the influence of alcohol and drugs and therefore has a substance abuse policy. In addition, Wisconsin Gas Company will comply with the requirements of the Department of Transportation as specified in 49 CFR Part 199.

49 CFR § 199.17(b) states:

> If the medical review officer (MRO) determines there is no legitimate medical explanation for a confirmed positive test

> result other than the unauthorized use of a prohibited drug, the original sample must be retested if the employee makes a written request for retesting within 60 days of receipt of the final test result from the MRO. The employee may specify retesting by the original laboratory or by a second laboratory that is certified by the Department of Health and Human Services.

The Commission determined that the Gas Company complied with Maniaci's retest request pursuant to its Substance Abuse Policy and that Maniaci's June, 1994, request for the retest did not seek to have the retest done at a second laboratory. This determination is supported by credible and substantial evidence.

The Substance Abuse Policy clearly provides that an employee may request that his or her retest be done at a second laboratory. However, Maniaci's request for the retest, made verbally and in writing, did not include a request that the retest be done at a second laboratory. Maniaci's June 13, 1994, verbal request for a retest was honored, as was his June 15, 1994, written request. His request for a second laboratory was made on August 11, 1994. The plain language of both the Substance Abuse Policy and 49 CFR § 199.17(b) provides for one retest, not two.

Maniaci also claims that there is no credible and substantial evidence that his urine sample tested positive for cocaine metabolites on June 7, 1994. He bases his argument on a statement printed at the bottom of each of his laboratory test reports:

> THIS IS NOT AN OFFICIAL REPORT. IN ACCORDANCE WITH FEDERAL GUIDELINES, NO ADMINISTRATIVE ACTION IS PERMITTED ON THE BASIS OF THESE TEST RESULTS. AN OFFICIAL CERTIFIED COPY OF THE TEST RESULTS WILL BE SENT TO THE DESIGNATED MEDICAL REVIEW OFFICER.

The Commission contends that the disclaimer merely reflects the necessity of having the medical review officer review the test results before administrative

action can be taken. Maniaci does not dispute this contention (he did not submit a reply brief), and it is thus conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (propositions of the opposing side are taken as confessed when not refuted).

Finally, Maniaci claims that he was denied procedural due process when the Gas Company did not comply with 49 CFR § 199.17(b). This argument is essentially a rehash of his argument under his first issue and does not require additional discussion.

By the Court.—Order affirmed.

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