

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 17, 2014

Diane M. Fremgen
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. 2013AP1941

Cir. Ct. No. 2012CV8128

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

LINDA STEWART,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION,
CHARTER MFG. CO., MILWAUKEE WIRE PRODUCTS
AND TRAVELERS PROPERTY CASUALTY OF AMERICA,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
PAUL R. VAN GRUNSVEN, Judge. *Reversed and cause remanded with
directions.*

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

¶1 CURLEY, P.J. Linda Stewart appeals a decision of the Labor and Industry Review Commission that: (1) sets aside part of an earlier order of the

Commission regarding worker's compensation, and (2) remands the matter back to the Department of Workforce Development for an additional evidentiary hearing. Stewart contends that the Commission acted outside its authority in ordering the remand because the trial court already ordered the Commission's earlier order to be reversed—not remanded for further proceedings. Neither party appealed the trial court's decision; rather, the Commission, acting in response to a letter from counsel for Stewart's employer, decided that what the trial court meant to do, despite clear language to the contrary, was remand the case for further proceedings. We agree with Stewart that the Commission acted outside its authority and reverse.

BACKGROUND

¶2 We glean much of the background information from the trial court's July 15, 2011 decision. While the parties appear to have disputed at one point whether the court's decision was a reversal or a remand for further fact-finding, the facts within the decision are not in dispute.

¶3 In 2006, Stewart began working at Charter Manufacturing Company. Her job involved operating machines to make dipsticks, a position that required continuous, repetitive movements.

¶4 In 2007, Stewart began experiencing pain in her hands and wrists, which worsened over time, radiating to her elbow, shoulder, and neck. Between February 2008 and October 2009, numerous doctors examined Stewart and made various diagnoses regarding the nature, cause, and severity of her pain. At least two doctors concluded that there was a causal connection between the nature of her work and her injuries. For her injuries, Stewart received over \$14,000 in disability payments from Charter, including over \$10,000 from a fund providing

short-term disability insurance and close to \$4000 in long-term disability payments.

¶5 In June 2008, Stewart filed a worker's compensation hearing application, seeking compensation for her injuries. An administrative law judge, finding that Stewart's injuries were work-related, awarded Stewart over \$19,000 in temporary disability benefits and gave Charter a credit of approximately \$14,000 for sick pay allowance and long-term disability. Both parties appealed to the Commission.

¶6 Upon review, the Commission, on November 11, 2010, agreed with the ALJ that Stewart's injuries were work related. The Commission also determined that part of the funds that would be awarded under worker's compensation should be used to reimburse Charter. The Commission made its determination by applying WIS. STAT. § 102.30(7)(a) (2009-10), which allows the Department of Workforce Development to reimburse an employer "for payments made under a nonindustrial insurance policy covering the same disability and expenses compensable under s. 102.42 ... when it is established that the payments under the nonindustrial insurance policy were improper."¹

¹ WISCONSIN STAT. § 102.30(7)(a) (2009-10) provides: "The department may order direct reimbursement out of the proceeds payable under this chapter for payments made under a nonindustrial insurance policy covering the same disability and expenses compensable under s. 102.42 when the claimant consents or when it is established that the payments under the nonindustrial insurance policy were improper. No attorney fee is due with respect to that reimbursement."

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 Specifically, the Commission concluded that that testimony of Charter’s human resources manager was sufficient to establish that Charter was entitled to reimbursement. The Commission ultimately found that of the total amount of worker’s compensation ordered, approximately \$7000 would be awarded to Charter’s “self-funded non-industrial disability plan.”

¶8 Stewart appealed the Commission’s November 11, 2010 decision to the trial court, arguing that the Charter insurance policy was not a “nonindustrial insurance policy” for purposes of WIS. STAT. § 102.30(7)(a) and that the Charter plan was not entered into evidence at the administrative hearing to prove a subrogation right.

¶9 The case was assigned to Judge Thomas Cooper, who, on July 15, 2011, agreed with Stewart and reversed the Commission’s decision.² Judge Cooper explained that the evidence was insufficient to establish that Charter’s plan was in fact a “nonindustrial insurance policy.” Judge Cooper’s decision stated that while the human resources manager’s testimony “describes Charter’s employment practice when an employee receives worker’s compensation, it does not describe the relevant terms and conditions of the Charter plan.” Judge Cooper further explained that “[a]fter reviewing all of the evidence in the record, this court cannot find evidence demonstrating the existence of an express subrogation clause in the plan.”

² As we will see, the case was later transferred to Judge Jeffrey Conen after Judge Cooper retired. While we generally do not refer to the trial court by name, we do so in this opinion for ease of reference in what we deem to be unusual circumstances.

¶10 At no point in the decision did Judge Cooper refer to his decision as a remand for further proceedings. Rather, he repeatedly stated that the Commission’s decision—insofar as it ordered reimbursement to Charter Manufacturing—was reversed.

¶11 Unfortunately, Judge Cooper’s decision was not mailed to the parties before the time to appeal expired. The reasons for this oversight are unknown. Judge Cooper retired, and the case was assigned to Judge Jeffrey Conen.

¶12 Upon being assigned the case, Judge Conen allowed the parties additional time to appeal Judge Cooper’s decision; however, neither party did so. Rather, Stewart, believing that Judge Cooper’s decision was favorable to her, filed a petition for judgment.

¶13 Meanwhile, Charter’s attorney—who, we repeat, did *not* appeal Judge Cooper’s decision on his client’s behalf—wrote a letter to the Commission seeking the Commission’s guidance on Judge Cooper’s decision, claiming that Judge Conen was having trouble interpreting Judge Cooper’s decision. That letter stated, as pertinent here:

The parties are at a procedural standstill in the circuit court case for a couple [of] different reasons. First, the initial circuit court’s Decision was never mailed to the parties and the time to appeal in that case has run. Second, both parties indicated at the most recent circuit court hearing that neither one intended to appeal that Decision because both parties felt that the Decision was favorable to their position.

The fact is the parties do not agree on the [e]ffect of the circuit court’s Decision and Order. Thirdly, the circuit court judge who issued the Decision and Order at issue is no longer on the bench and the judge that has inherited this case is having difficulty interpreting the prior judge’s Decision (similar to the attorneys in this case).

It has been suggested that the parties write to the Commission to see if the Commission would interpret the circuit court judge's Decision and Order and issue a new Order with the Commission's interpretation, which would also allow the parties to have a fresh appeal of the Commission's new Decision in the event one of the parties chooses to take it back up to the circuit court.

¶14 In response to counsel's letter, the Commission did not ask counsel for a response from Stewart, nor did it request that both parties set forth their positions so it could consider Charter's request. At no time was Stewart's attorney aware "that the Commission was even considering remanding this matter for the taking of additional evidence." Moreover, as an affidavit from Stewart's attorney indicates, "Judge Conen never stated nor indicated that he was having trouble interpreting Judge Cooper's decision."

¶15 The Commission, on June 28, 2012, issued an order remanding the case for a further hearing "so that [Charter] may introduce its written policy or plan into evidence and to provide testimony from someone competent to provide foundation for the admission of the policy or plan into the record." The Commission cited no authority for its decision, but explained that it had the power to do this given the unusual circumstances outlined in counsel's letter:

The commission appreciates that [Stewart] does not believe the commission has jurisdiction to issue any further orders. However, in light of [Charter's attorney's] representation that the case is at a procedural standstill and that "the judge who has inherited this case is having difficulty interpreting the prior judge's Decision," ... the commission is satisfied that it has jurisdiction.

The commission reads the court's decision to conclude that the commission's order that reimbursement should be made under WIS. STAT. § 102.30(7) depended on material and controverted findings of fact not supported by substantial credible evidence. The commission therefore concludes that a remand was intended under WIS. STAT. § 102.23(6) and 102.24(1) rather than judgment on the findings of the commission.

¶16 Thereafter, Stewart appealed the Commission's June 28, 2012 order to the circuit court. The case was assigned to Judge Paul Van Grunsven. The Commission responded by filing a motion to dismiss, which Judge Van Grunsven granted on the basis that the trial court was without competency to decide the case.

¶17 Stewart now appeals. Additional facts will be developed as necessary below.

ANALYSIS

¶18 On appeal, Stewart argues that the Commission acted outside its authority when it decided to construe Judge Cooper's decision as a remand instead of a reversal, as the decision clearly indicates. We review the Commission's decision, not the decision of the trial court. *Stoughton Trailers, Inc. v. LIRC*, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477.

¶19 On review, we will set aside the Commission's decision only on the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

See WIS. STAT. § 102.23(1)(e). Whether the Commission acted in excess of its statutory powers is a question of law we review without deference to the agency. *Wright v. LIRC*, 210 Wis. 2d 289, 293, 565 N.W.2d 221 (Ct. App. 1997).

¶20 WISCONSIN STAT. § 102.23 governs judicial review of worker's compensation decisions, and allows a trial court reviewing a decision of the

Commission to confirm, set side, and/or remand the case to the Commission. It provides, as relevant here:

(1)(a) The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02....

....

(e) ... *the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon*; but the same shall be set aside only upon the following grounds:

1. That the commission acted without or in excess of its powers.
2. That the order or award was procured by fraud.
3. That the findings of fact by the commission do not support the order or award.

....

(6) If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. *The court may, however, set aside the commission's order or award and remand the case to the commission* if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

(Emphasis added.)

¶21 Likewise, WIS. STAT. § 102.24(1), which concerns the handling of administrative records during judicial review of the Commission's decision, allows the trial court to remand the case back to the agency for further hearings *or* to simply enter judgment on the Commission's decision. Section 102.24(1) provides, as relevant here:

Upon the setting aside of any order or award, the court may recommit the controversy and remand the record in the case to the commission for further hearing or proceedings, or it may enter the proper judgment upon the findings of the commission, as the nature of the case shall demand.

¶22 Reading WIS. STAT. §§ 102.23-102.24 together, it is clear that the trial court reviewing the Commission’s November 11, 2010 decision—in this case, Judge Cooper—had the option either to remand the case back to the Commission for further proceedings or to simply set aside the judgment.

¶23 It is equally clear, upon review of Judge Cooper’s July 15, 2011 order, that Judge Cooper meant to set aside the agency’s order to the extent that it ordered reimbursement of Stewart’s employer. The last sentence of the first paragraph clearly states: “Accordingly, this court *reverses* the LIRC’s decision to the extent that it orders reimbursement.” (Emphasis added.) The first sentence of the first paragraph on page five of the decision reads:

For the reasons that follow, this court reverses the LIRC’s decision to order reimbursement. The record does not establish that the insurance policy was a “nonindustrial insurance policy covering the same disability and expenses compensable under [WIS. STAT. §] 102.42” or that the policy contained an express subrogation clause.

The penultimate paragraph of the decision reads: “Because this court cannot conclude that the Charter plan is a nonindustrial insurance policy that contains an express subrogation clause, it must *reverse the LIRC’s decision to the extent that it orders reimbursement.*” (Emphasis added.) Additionally, the final paragraph of the decision states, in pertinent part, “it is hereby ordered[] that the LIRC’s decision, to the extent that it orders reimbursement, [is] *reversed.*” (Emphasis added; some capitalization omitted.) Nowhere in this decision does Judge Cooper state that he is remanding the case to the Commission for further proceedings.

¶24 Not only does Judge Cooper’s order make perfectly clear that he ordered a simple reversal rather than a remand for further proceedings, but there is also no evidence in the record showing that the parties asked Judge Conen to clarify the order after Judge Cooper retired. Moreover, as the affidavit from Stewart’s attorney indicates, “Judge Conen never stated nor indicated that he was having trouble interpreting Judge Cooper’s decision.” The Commission does not dispute this fact. Therefore, when Judge Cooper issued his decision, his order constituted a clear, final order that fell under the province of WIS. STAT. § 102.25(1), which provides that a “party aggrieved by a judgment entered upon the review of any order or award may appeal therefrom within the time period specified in s. 808.04(1).” Again, we note that it is undisputed that the parties did not appeal—even after Judge Conen allowed them additional time to do so.

¶25 The parties point to no authority allowing a party to petition the Commission if the party takes issue with the trial court’s decision. *See State v. DILHR*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977) (“It is the general rule that an administrative agency has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates.”). As we have seen, the correct procedure would have been to appeal the trial court’s order to this court. *See* WIS. STAT. § 102.25(1).

¶26 More importantly, the parties point to no authority allowing the Commission to: (1) settle disputes about the meaning of the trial court’s order, and/or (2) unilaterally remand a case for further proceedings in circumstances where, as here, the trial court simply ordered “judgment upon the findings of the commission.” *See* WIS. STAT. § 102.24(1); *see also DILHR*, 77 Wis. 2d at 136 (“the existence of an implied power of an administrative agency should be resolved *against* the exercise of such authority”) (emphasis added).

¶27 Therefore, we conclude that the Commission did not have the authority to settle the alleged dispute regarding the meaning of Judge Cooper’s order, and it did not have the authority to remand the matter—as it did in its June 28, 2012 order—for further proceedings when Judge Cooper’s order was so clearly void of language that would have allowed such an interpretation.

¶28 Moreover, we are unconvinced by the Commission’s argument that this court does not have competency to decide this case because the Commission’s June 28, 2012 order was not an “order or award granting or denying compensation” as required by WIS. STAT. § 102.23(1)(a). In support of its argument, the Commission cites *Vidal v. LIRC*, 2002 WI 72, 253 Wis. 2d 426, 645 N.W.2d 870, a case in which the supreme court held that certain orders of the Commission were not reviewable because they did not grant or deny compensation. See *id.*, ¶¶1-2. The Commission also cites *Cranston v. Industrial Commission*, 246 Wis. 287, 16 N.W.2d 865 (1944), which stated the same rule. See *id.* at 291. Both cases cited by the Commission are inapposite.

¶29 In *Vidal*, the case upon which the Commission primarily relies, the decision of the Commission at issue was the decision to set aside an earlier order based on newly-discovered evidence—a power which is clearly conferred upon the Commission by WIS. STAT. § 102.18(4).³ See *Vidal*, 253 Wis. 2d 426, ¶¶7-9.

³ WISCONSIN STAT. § 102.18(4)(c) provides:

On its own motion, for reasons it deems sufficient, the commission may set aside any final order or award of the commission or examiner within one year after the date of the order or award, upon grounds of mistake or newly discovered evidence, and, after further consideration, do any of the following:

(continued)

The Commission, on March 5, 1999, affirmed and adopted the findings of the Department of Workforce Development regarding an employee's worker's compensation claim. *Id.*, ¶¶3, 5. Nearly a year later, the employee petitioned the Commission to set aside this decision based on new medical evidence. *See id.*, ¶6. The Commission responded by setting aside its March 1999 decision on a provisional basis, *id.*, ¶7, and later on April 28, 2000, remanded the March 1999 decision to the Department for further hearings, *see id.*, ¶9. In response, the employer filed a complaint at the trial court level on the basis that the Commission had acted outside the one-year time limit set by WIS. STAT. § 102.18(4)(c), *see Vidal*, 253 Wis. 2d 426, ¶10, which the Commission moved to dismiss on the basis that its order did not grant or deny compensation as required by WIS. STAT. § 102.23(1)(a), *see Vidal*, 253 Wis. 2d 426, ¶11. The trial court agreed with the Commission and dismissed the employer's claim, and the supreme court affirmed. *See id.*, ¶¶12, 28.

¶30 Not only did *Vidal* involve a decision that would have been clearly conferred to the Commission but for the exigencies of time, but it also had a very different procedural posture than the circumstances before us. In *Vidal*, the parties did not appeal the Commission's initial order—its March 1999 order—to the trial court. Rather, the appeal was for the setting aside of the Commission's own decision that came more than one year later. *See id.*, ¶10. In contrast, in the

1. Affirm, reverse or modify, in whole or in part, the order or award.

2. Reinstate the previous order or award.

3. Remand the case to the department for further proceedings.

situation before us, there is simply is no authority for the Commission to make determinations regarding the legal effect of the trial court's decision. In other words, it is one thing for the Commission to set aside its own order when that decision has not yet been subject to judicial review, but it is quite another for it to unilaterally declare, after being subject to judicial review, that the trial court's decision does not mean what it says and that a remand is surely what the trial court must have meant. We consequently conclude that *Vidal* does not apply here because the circumstances are far too different.

¶31 Similarly, we find *Cranston* inapposite. *Cranston* involved the Commission's decision to award attorneys' fees. See *id.*, 246 Wis. at 288. Unlike the situation before us, the Commission in *Cranston* did not unilaterally act to interpret a trial court order that already ruled on the Commission's decision. See *id.* at 288-91.

¶32 In sum, what we have before us is a unique situation in which the Commission acted, without any authority, to make a determination about the legal effect of the trial court's order of its (the Commission's) award granting compensation. This is a very peculiar situation that we conclude does not implicate the rule of WIS. STAT. § 102.23(1) and its progeny, and it is a situation that we hope will not become commonplace in the realm of administrative law.

¶33 Consequently, we conclude that the Commission acted in excess of its statutory powers when it ordered a remand for further proceedings in a case where the trial court's order made clear that it was not ordering a remand. If either of the parties were in fact aggrieved by Judge Cooper's order, the proper vehicle for them to address their grievances was an appeal to this court—not a letter to the Commission asking the Commission to interpret the trial court's order.

¶34 The Commission's June 28, 2012 order is therefore reversed, and the cause is remanded with directions for the Commission to comply with Judge Cooper's July 15, 2011 order.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

