

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 14, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 96-3550

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

THURNER HEAT TREATING CORPORATION,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
WILLIE PHILLIPS, II,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN F. FOLEY, Judge. *Affirmed.*

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

PER CURIAM. Thurner Heat Treating Corporation appeals from a circuit court order affirming the Labor, Industry and Review Commission's decision finding that Thurner wrongfully refused to rehire its employee, Willie Phillips II, contrary to § 102.35(3), STATS. Thurner asserts two claims: (1) LIRC

exceeded its authority in holding Thurner responsible because Phillips was employed by a temporary help agency, Thuro Services, Inc., rather than Thurner; and (2) LIRC's findings are not supported by credible and substantial evidence. Because LIRC did not exceed its authority and the record demonstrates that LIRC's findings are supported by credible and substantial evidence, we affirm.

I. BACKGROUND

In January 1994, Phillips began working for Thurner. He was tardy on a number of occasions and various supervisors discussed this subject with Phillips. On March 21, 1994, Phillips was injured during work when a furnace exploded, causing first-degree burns to his face. Phillips sought medical treatment for the injury and did not work for the next several days.

On March 25, he returned to work with a limited, light-duty work-restriction and was advised by a physician that he could return to work without restrictions on March 28. Phillips returned to work on March 29 and was discharged by Thurner for his repeated tardiness.

Phillips applied for worker's compensation benefits. He named Thurner as his employer. Thurner did not file a response to the application, but Thuro did. However, at the hearing before the administrative law judge, Thurner appeared to defend the case. Prior to the start of the hearing, both sides conceded jurisdictional facts.

The ALJ issued an opinion on March 10, 1995, holding that Thurner had "unreasonably refused to rehire the applicant under sec. 102.35(3)," and that Thurner was liable for up to one year's lost wages due to the injury. Thurner filed a petition for review by LIRC. LIRC agreed with the ALJ's decision, and adopted

its findings and order as its own. LIRC determined that the “tardiness” excuse was merely a “pretense.”

Turner sought judicial review of LIRC’s decision from the circuit court. The circuit court affirmed LIRC’s decision. Turner now appeals.

II. DISCUSSION

Turner first asserts that LIRC exceeded its authority by finding that Turner, rather than Thuro, was Phillips’s employer. Turner argues that there is evidence in the record to show that Phillips was actually employed by the temporary employment agency, Thuro, and placed by Thuro to work *at* Turner. Even if the record contains evidence supporting Turner’s contention that Phillips’s employer was Thuro, reversal is not mandated. We are bound by the following standard of review.

Judicial review of Worker’s Compensation decisions is confined to questions of law and there are only three grounds upon which a reviewing court may overturn a LIRC decision: “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.” Section 102.23(1)(e), STATS. LIRC’s findings of fact are conclusive if supported by substantial and credible evidence and in the absence of fraud. Section § 102.23; *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis.2d 118, 124, 519 N.W.2d 713, 716 (Ct. App. 1994). Section 102.23(6), provides that:

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.

Our review of the record reveals that LIRC's finding that Thurner was Phillips's employer is supported by credible and substantial evidence. There was testimony from Scott Thurner, President of Thurner, that Phillips was hired by Thuro, but that he actually worked for Thurner. There was also testimony from Mr. Thurner that he had the authority to discharge Phillips. There was also evidence that during the course of his employment, Thurner gave Phillips a raise, additional responsibility and training. Thurner paid Phillips a weekly wage based on Phillips's time card that was kept at Thurner. Phillips "punched in and out" at Thurner. He was fired by Thurner. This evidence in total constitutes credible and substantial evidence sufficient to uphold LIRC's finding that Thurner was Phillips's employer.¹

Thurner's second claim on appeal is that LIRC's and the circuit court's decisions are dependent upon material and controverted findings of fact not supported by credible and substantial evidence. More specifically, Thurner claims that the failure to rehire determination was based on Thurner's failure to follow its own work rules with respect to tardy employees when, in fact, the work rules relied upon were the work rules of Thuro, not Thurner. In its decision, LIRC stated: "The employer's disciplinary steps provide for progressive discipline in terms of a warning and then a layoff or suspension, and then discharge for

¹ As a part of this argument, Thurner contends that LIRC and the circuit court erred in concluding that: (1) its concession of jurisdictional facts included an admission that it was Phillips's employer; (2) Thurner may have been in default for failing to answer the application; (3) the physical proximity of Thurner and Thuro was evidence that Thurner was Phillips's employer; and in not concluding that Phillips was presumptively a Thuro employee. Because we have determined that substantial and credible evidence exists in the record to sustain LIRC's finding, it is not necessary for us to address these additional arguments.

tardiness. However, it was not established that the employer ever suspended or gave the applicant a written warning for tardiness.” Although there is some dispute whether these work rules were solely Thuro’s or actually implemented by Thurner as well, the distinction is irrelevant. We adopt the circuit court’s analysis in rejecting Thurner’s claim on this issue. The circuit court stated, in pertinent part:

Plaintiff Thurner argues that it was improper for the LIRC to rely on the failure to comply with the progressive discipline policies of Thuro Services if Phillips was an employee of Thurner Heat Treating. However, the failure to practice progressive discipline was not the sole basis for the LIRC’s decision.

In addition to evidence supporting these findings of the LIRC, the record also contained evidence that Phillips testified that he had been excused on an occasion when he had to babysit until his wife came home from work. Phillips was not “docked” for his tardiness, nor was his raise rescinded. Scott Thurner’s allegations of insubordination and absenteeism against Phillips arise from Phillips’[s] leaving to seek medical treatment from his own doctor. Phillips testified and Thurner did not rebut that Bill Bauer [Phillips’s supervisor at Thurner] gave Phillips permission to see his own doctor who said that Phillips should not return to work until March 29, rather than March 28 as had been recommended by the doctor Thurner had referred Phillips to.

The LIRC’s ultimate decision that Thurner Heat Treating’s justification for discharging Phillips was a pretext for discrimination is a question of fact which this reviewing court must confirm if there is substantial evidence to support it. This court confirms the LIRC’s finding that Thurner Heat Treating’s justification for the discharge of Phillips (tardiness, absenteeism, insubordination) was a pretext.

(Citations omitted). We agree with the circuit court that there is additional evidence in the record, aside from LIRC’s reference to the work rules, to support LIRC’s finding that Thurner’s claim that Phillips was discharged for tardiness was

simply a pretext. Such evidence includes testimony that Phillips's tardiness was repeatedly excused due to his child care situation, that he was not "docked" for tardiness, and that he, in fact, was given a raise.

By the Court.—Order affirmed.

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

