

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 11, 2011

A. John Voelker
Acting 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. 2010AP1225

Cir. Ct. No. 2009CV4819

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

OPEN HEARTH HOMES, LLC,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

RANDALL CERNY,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 ANDERSON, J. The Labor and Industry Review Commission (LIRC) and Randall Cerny appeal from a circuit court order reversing and vacating a LIRC order which held that Open Hearth Homes, LLC, had violated the Wisconsin Worker's Compensation Act, WIS. STAT. § 102.35(3) (2009-10),¹ by unreasonably refusing to rehire Cerny after he was injured in the course of his employment. The circuit court held that LIRC lacked substantial and credible evidence to support its decision to overturn and substitute the administrative law judge's (ALJ) order with its own credibility determination. The issue on appeal is whether LIRC reasonably determined that Open Hearth refused to rehire Cerny without reasonable cause after Cerny was injured in the course of his employment. Because LIRC's memorandum order is inadequate to sustain its ruling, we reverse the circuit court order, set aside LIRC's order and remand with instructions to send the matter back to LIRC for further proceedings.

FACTS

¶2 Open Hearth is a carpentry and construction company owned by Richard Mueller. Mueller hired Cerny to work as a rough carpenter around January 2004. While working for Open Hearth, on August 17, 2004, Cerny suffered an ankle injury, which caused him to miss nearly two months of work. As a result of the injury, Cerny filed a worker's compensation claim, which was heard by an ALJ. The ALJ found in favor of Cerny and Mueller chose not to appeal. Cerny returned to work for light duty and was soon back to full duty. According to Cerny, however, he continued to experience pain from his original

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

injury. On January 24, 2005, Cerny missed work to see a doctor about his work-related ankle injury.

¶3 Prior to missing work for his doctor's appointment, Cerny had not informed Mueller that he would be absent from work, but alleges that he phoned Mueller later that same day. Although both parties acknowledge that the phone conversation occurred and ended with Mueller firing Cerny without explanation, the exact date and nature of their conversation is disputed and is part of the underlying credibility issue of this case.

¶4 Cerny alleges that the phone conversation occurred on January 24, 2005, during which he informed Mueller that he had been advised by his doctor to undergo ankle surgery and, as a result, would need a few weeks off of work. According to Cerny, Mueller then told Cerny to "[g]o ahead. Get the operation. Just don't come back to work."

¶5 Mueller, on the other hand, claims that it was not until the next day, January 25, 2005, that he learned Cerny had a doctor's appointment and that he needed surgery. Mueller alleges that he first learned about the doctor's appointment when Cerny called him on January 25, 2005, a day after Cerny had failed to show up for work. Mueller further alleges that he only learned about Cerny's scheduled surgery when Cerny's girlfriend phoned Mueller on January 25, 2005, after Cerny was terminated. Mueller claims that Cerny's firing—which he acknowledges occurred during the phone conversation—was unrelated to his injury or surgery, but instead occurred as a result of Cerny's poor job performance.

¶6 Additionally, Mueller admits that although Cerny worked for him for a total of eight months, within a month of his hiring, Mueller knew or should

have known that Cerny was not as skilled as he initially held himself out to be. Moreover, Mueller admits that he neither gave Cerny any written warnings nor made record of any instances when he had disciplined Cerny. During Mueller's testimony before the ALJ, he did, however, cite Cerny's poor job performance as the reason for his firing.

¶7 As a result of the firing, Cerny filed an application for hearing with the Department of Workforce Development, Worker's Compensation Division, alleging that Open Hearth and Mueller had violated Wisconsin's Worker's Compensation Act, WIS. STAT. § 102.35(3), for refusing to rehire him without reasonable cause. The matter went before an ALJ. The sole issue in dispute was whether Open Hearth unreasonably refused to rehire Cerny in violation of § 102.35(3). The ALJ ultimately dismissed Cerny's application for hearing, holding that neither Cerny's work-related injury nor his plans to undergo surgery were the basis for his termination. Instead, the ALJ concluded that Cerny was terminated due to his unsatisfactory job performance.

¶8 Cerny petitioned LIRC for review of the ALJ's order. Upon analyzing the evidence, LIRC reversed the ALJ, determining that Cerny was the credible party and that Mueller had, in fact, refused to rehire Cerny because of Cerny's work-related injury in violation of WIS. STAT. § 102.35(3).

¶9 In its order, LIRC cited to this court's holding in *Ray Hutson Chevrolet, Inc. v. LIRC*, 186 Wis. 2d 118, 123, 519 N.W.2d 713 (Ct. App. 1994), to state the principle that reasonable cause to refuse to rehire an employee exists if the employer can demonstrate he or she refused to rehire the employee because the employee's position was eliminated as a means to reduce costs and increase efficiency. However, LIRC also cited to this court's holding in *Great Northern*

Corp. v. LIRC, 189 Wis. 2d 313, 319, 525 N.W.2d 361 (Ct. App. 1994), where we held that an employer lacks reasonable cause to refuse to rehire even if he or she discharges the employee due only in part to a work-related injury. LIRC concluded that Mueller had impermissibly discharged and refused to rehire Cerny in part because of Cerny’s work-related injury, not solely because of his poor job performance.

¶10 LIRC’s order ultimately turned on the matter of credibility. To support its order, LIRC reasoned that “[t]here were no written warnings concerning [Cerny’s] job performance” and a lack of verbal warnings as “Mueller yelled at other workers on his worksites [in addition to Cerny].” Further, LIRC issued a memorandum opinion, which detailed its conference with the ALJ regarding witness credibility and demeanor. LIRC noted that the ALJ had regarded Mueller as the credible witness because, “as a small employer[,] he was unlikely to document job performance concerns in writing,” and he brought Cerny “back to work on light duty for a period after the injury.” LIRC disagreed with the ALJ’s credibility determinations. Instead, LIRC noted the timing surrounding Cerny’s termination—during a discussion about Cerny’s lost work time, which was caused by a work-related injury—to conclude that Mueller had, in fact, terminated Cerny and unreasonably refused to rehire him due to his work-related injury.

¶11 Open Hearth appealed LIRC’s order to the Waukesha county circuit court for an administrative agency review. The circuit court concluded that LIRC’s order was not supported by credible and substantial evidence and reversed the order. The circuit court acknowledged Mueller’s lack of written warnings and recorded discipline; however, the court held that the ALJ—not LIRC—was in the best position to make a credibility determination and that nothing in the record

indicated that the ALJ's determination was erroneous. The court concluded that there was "nothing to support by substantial and credible evidence ... that Mueller was not truthful" or that Cerny was terminated "in response to or related to the injury that ... Cerny had suffered." The circuit court "revers[ed] and vacat[ed] the finding of [LIRC] and reinstate[ed] the decision in essence of the [ALJ]."

¶12 LIRC and Cerny appeal from the circuit court's final order, arguing that LIRC's findings of fact that Open Hearth unreasonably refused to rehire Cerny are supported by credible and substantial evidence in the record.

Standard of Review

¶13 When this court reviews a circuit court's ruling regarding a LIRC order, "[w]e do not deal with the question of whether the circuit court made the right decision. Our task is merely to determine whether [LIRC's] decision was correct." *Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). We therefore owe no special deference to the circuit court. *Id.*

Discussion and Law

¶14 Cerny filed an unreasonable refusal to rehire claim under Wisconsin's Worker's Compensation Statute, WIS. STAT. § 102.35(3), which provides in relevant part:

Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, where suitable employment is available within the employee's physical and mental limitations, upon order of the department and in addition to other benefits, has exclusive liability to pay to the employee the wages lost during the period of such refusal, not exceeding one year's wages....

Id.

¶15 For an employee to demonstrate an employer’s prima facie violation of WIS. STAT. § 102.35, the employee has the initial burden to demonstrate that (1) the employee sustained a workplace injury and (2) that the employer refused to rehire the employee as a result of that injury. *Ray Hutson Chevrolet*, 186 Wis. 2d at 122. If the employee meets his or her burden, the burden then shifts to the employer to demonstrate that it had reasonable cause to refuse to rehire the employee. *Id.* A reasonable cause determination presents a mixed question of fact and law. *Id.*

¶16 For worker’s compensation claims, LIRC has the authority to make determinations on the weight and credibility of witness testimony—a finding of fact. *See* WIS. STAT. § 102.23(6). LIRC’s order to reverse the ALJ was based primarily upon LIRC’s perception of witness credibility, thus we discuss the standard of review for LIRC’s findings of fact. However, because LIRC’s order ultimately concluded that Mueller lacked reasonable cause—a question of law—we also give consideration to the standard of review for LIRC’s questions of law.²

¶17 When LIRC makes findings of fact—including findings as to witness credibility—those findings are conclusive. *See* WIS. STAT. § 102.23(1)(a), (6). On review, LIRC’s findings of fact shall be upheld, even when against the great weight and clear preponderance of the evidence. *See Goranson v. DILHR*, 94 Wis. 2d 537, 554, 289 N.W.2d 270 (1980). When a court reviews a LIRC

² When it comes to questions of law and LIRC’s legal conclusions, we give LIRC great weight deference, having previously held that LIRC’s interpretation of WIS. STAT. § 102.35(3) is entitled to great weight deference. *See Hill v. LIRC*, 184 Wis. 2d 101, 109-10, 516 N.W.2d 441 (Ct. App. 1994).

decision, if LIRC’s “order or award depends on any [finding of] fact,” the court shall not “substitute its judgment ... as to the weight or credibility of the evidence on any [such] finding of fact.” Sec. 102.23(6).

¶18 Although LIRC’s findings of fact are conclusive, a reviewing court does have the authority to “set aside [LIRC’s] order or award and remand the case to [LIRC] if the ... order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.” *Id.*

¶19 Evidence is credible if it is sufficient to exclude speculation or conjecture. *Bumpas v. DILHR*, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). “[S]ubstantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Hamilton v. DILHR*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980) (citations omitted). However, substantial evidence does not require the existence of only one reasonable or plausible interpretation. *Id.*

¶20 Thus, under this standard, we may set aside an order by LIRC “only when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.” *Id.* at 618.

¶21 Additionally, the Wisconsin Supreme Court has held that for issues of credibility, “special deference is to be paid (by the agency setting aside an examiner’s findings) to the face-to-face examiner or fact-finder.” *Transamerica Ins. Co. v. DILHR*, 54 Wis. 2d 272, 282-83, 195 N.W.2d 656 (1972) (quoting *Briggs & Stratton Corp. v. DILHR*, 43 Wis. 2d 398, 410, 168 N.W.2d 817 (1969)). When an administrative agency reverses the examiner’s credibility,

concerns of due process and “[f]undamental fairness require[] that administrative agencies, as well as courts, [(1)] set forth the reasons why a fact finder’s findings are being set aside or reversed and [(2)] spell out the basis for independent findings substituted.” *Transamerica Ins. Co.*, 54 Wis. 2d at 284. This reasoning is typically set forth in a memorandum opinion, which accompanies a LIRC decision. *See id.* at 283.

¶22 Here, the inadequacy of LIRC’s accompanying memorandum opinion is the basis for our decision to set aside its order. “Fundamental fairness” requires that LIRC set forth the reasons why the ALJ’s findings are being reversed and LIRC must “spell out the basis for [its] independent findings.” *See id.* at 284.

¶23 LIRC argues it reasonably determined that Open Hearth violated WIS. STAT. § 102.35(3) by unreasonably refusing to rehire Cerny after he suffered an injury in the course of his employment. Specifically, LIRC argues that because its findings were supported by credible and substantial evidence within the record, those findings are conclusive. Open Hearth argues to the contrary that LIRC’s findings are not supported by credible and substantial evidence and that LIRC’s determination was an error as a matter of law.

¶24 Although LIRC’s legal conclusions are entitled great deference, LIRC’s inadequate memorandum opinion leaves us to speculate as to whether its findings were supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6). Again, LIRC was required to “[(1)] set forth the reasons why [the ALJ’s] findings are being set aside or reversed and [(2)] spell out the basis for independent findings substituted.” *Transamerica Ins. Co.*, 54 Wis. 2d at 284.

¶25 While LIRC properly issued an accompanying memorandum opinion to its order, the memorandum opinion is inadequate because we are

nonetheless left to wonder the reasoning behind LIRC's decision to reject the ALJ's credibility determination and make its own independent findings of fact. Because this court may not substitute its judgment for LIRC's findings of fact, we reverse and remand the circuit court's order with direction to send the matter back to LIRC for further reasoning as to its findings of facts and rejection of the ALJ's findings regarding the credibility of the testifying witnesses.

¶26 We reach this conclusion because without further support, LIRC's findings of fact regarding witness credibility—namely, that Mueller's reasoning for terminating Cerny was insufficient and equates to an unreasonable refusal to rehire—seem based on conjecture and speculation.

¶27 Here, LIRC had before it the ALJ's conclusion that after Cerny's initial work-related injury, Mueller rehired Cerny in good faith and not on a pro forma basis and ultimately discharged Cerny with good cause for unsatisfactory job performance. Specifically, the ALJ reached its conclusion based on the following facts: Mueller believed that Cerny was slow in his work; did not exhibit the level of experience he claimed he had when he was hired; and exhibited a consistently poor work performance, which prompted Mueller to yell at Cerny on multiple occasions.

¶28 In its order, LIRC provides these reasons for overturning the ALJ and finding Mueller in violation of WIS. STAT. § 102.35: the lack of written warnings or discipline relative to Cerny's job performance; Mueller's aggressive conduct towards all employees, not just Cerny; Mueller should have been aware of Cerny's poor job performance prior to his injury and discharge; the timing of the firing; and the lack of restrictions or medical evidence to demonstrate Mueller was unable to provide Cerny suitable work.

¶29 In LIRC’s memorandum opinion, it stated that it disagreed with the ALJ’s credibility determination and it gave significant importance to the timing of Cerny’s termination. Specifically, LIRC stated that the timing of Cerny’s discharge “in a phone conversation involving lost work time due to the work injury[,]” was significant because “Mueller acknowledged he would have been aware of [Cerny’s] poor performance months earlier, well before the work injury.” LIRC then reasoned that although “Mueller re-employed [Cerny] for a while after his injury ... it is reasonable to infer that [Mueller] changed his mind” when he was faced with the possibility of Cerny losing more work time and undergoing additional treatment. Although LIRC “appreciate[d] that ... Mueller re-employed [Cerny] for a while after his injury,” it concluded Mueller’s gesture was a short-term pro forma rehire, which does not circumvent an employer’s unreasonable refusal to rehire.

¶30 LIRC’s memorandum opinion does not provide adequate findings or reasoning as to why it reversed the ALJ’s credibility findings and substituted its own independent findings. See *Transamerica Ins. Co.*, 54 Wis. 2d at 284.

CONCLUSION

¶31 We reverse and remand the circuit court order for further findings from LIRC on its rejection of the ALJ’s credibility determination about Mueller’s reasoning for firing Cerny.

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

Not recommended for publication in the official reports.

