COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP986 **Cir. Ct. No. 2010CV1859**

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

SCOT FORGE COMPANY,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

BRADLEY P. BRANDT,

DEFENDANT.

APPEAL from an order of the circuit court for Rock County: JAMES WELKER, Judge. *Reversed and cause remanded with directions*.

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 VERGERONT, J. The Labor and Industry Review Commission (LIRC) appeals the circuit court's order reversing LIRC's decision that Bradley

Brandt's discharge from his employment was not for misconduct connected with his employment. Brandt was discharged after a hair sample test conducted by his employer concluded that Brandt had used cocaine in violation of a "second chance" agreement that Brandt entered with his employer. LIRC declined to accept the hair sample test as evidence that Brandt violated the agreement. For reasons we explain below, we reverse the order of the circuit court and remand to the circuit court with directions to vacate LIRC's decision and remand to LIRC for further proceedings consistent with this opinion.

BACKGROUND

¶2 Brandt began his employment as a saw operator with Scot Forge Company in September 2006. At that time, the company had a policy that allowed testing for use of unauthorized drugs in these situations: before hiring an applicant, upon reasonable suspicion of an employee's unauthorized drug use, and when an incident resulted in injury to an employee.

¶3 In January 2009 Scot Forge announced an amended drug testing policy that added a practice of random drug testing using hair samples. The amended policy also contained a "second chance" program that had been first implemented under the original policy, whereby an employee who had used unauthorized drugs could disclose this information to Scot Forge and the employee would not be given a drug test for at least ninety days. Any employee who tested positive for unauthorized drugs without first disclosing that he or she had used unauthorized drugs was subject to immediate termination. Brandt notified Scot Forge in January 2009 that he had used cocaine, and he was permitted to enter the "second chance" program.

¶4 In June 2009 Brandt was tested for cocaine using a hair sample. The lab test was performed by Psychemedics, the lab Scot Forge used for all the drug tests it administered. The test result was positive. Scot Forge permitted Brandt to take a second test and that result was negative. Brandt was permitted to continue his employment. In September 2009 he was tested again and the result was positive. Scot Forge terminated Brandt's employment.

¶5 Brandt applied for unemployment compensation benefits and the Department of Workforce Development (DWD) made an initial determination of eligibility. The determination stated that "[t]he method of testing [using hair samples] is considered unreliable. Since it cannot be established the employee actually violated the policy based on the type of test used, a willful and substantial disregard of the employer's interests cannot be established."

¶6 Scot Forge appealed the initial determination, and a hearing was held before an administrative law judge (ALJ). Besides presenting evidence of the Psychemedics test results, Scot Forge presented evidence that the hair sample testing procedure the lab used in this case had been approved by the U.S. Food and Drug Administration (FDA), and that Psychemedics' lab had been certified by the FDA to offer this test.

¶7 Brandt testified at the hearing that he had not used cocaine since at least January 2009, when he disclosed his prior cocaine use to Scot Forge. He also testified that, after receiving the positive test result in September 2009, he contacted a different testing facility, Omega Laboratories, where he had a drug test conducted using a hair sample, and this test result was negative. Brandt, representing himself at the hearing, submitted the lab report from Omega

Laboratories, but the ALJ did not accept it into evidence because it was not on the proper form and not certified as required.[1]

¶8 The ALJ concluded that Scot Forge had not established misconduct as defined in the case law. The ALJ stated that "[n]either [DWD] nor [LIRC] recognize[s] the validity of a positive test based solely [upon] a hair sample" and that Brandt "had denied that [he] had used any cocaine since the employer had implemented the testing policy in January 2009."

¶9 Scot Forge appealed the ALJ's decision to LIRC. Scot Forge argued that the hair testing procedure it used in this case was reliable. LIRC adopted the ALJ's findings of fact and conclusions of law. In its memorandum opinion, LIRC stated:

> For twenty years, the commission and [DWD] have limited acceptable drug testing methods to urinalysis. The employer asks the commission to expand permissible drug testing methods to include radioimmunoassay hair analysis. The commission will not do so. While the employer argues that hair testing is a superior technology for ensuring a drug free workplace because evidence of drug use can be detected for a significantly longer period, the commission believes that the shorter timeframe provided by urinalysis insures a closer connection to actual conduct in the workplace. Therefore the commission affirms the appeal tribunal decision finding that the employee's discharge was not for misconduct connected with his employment.

¶10 Scot Forge appealed LIRC's decision to the circuit court, which reversed LIRC's decision. The circuit court concluded on its de novo review that

[1] The ALJ informed Brandt of these deficiencies in the Omega Laboratories report and allowed Brandt time to have the proper form completed and certified. As we understand the record, that did not occur.

Scot Forge terminated the employment of Brandt for misconduct under WIS. STAT. § 108.04(5) (2009-10).[2]

DISCUSSION

¶11 LIRC contends on appeal that the circuit court erred when it reversed LIRC's decision that Brandt was not discharged for misconduct connected with his employment. LIRC presents three grounds on which its decision should be affirmed. First, LIRC contends that it has a long-standing, reasonable policy of rejecting hair sample drug test results in all cases. Second, LIRC contends that it made a specific factual finding that Brandt did not use cocaine in violation of the workplace policy. Third, LIRC contends that it properly exercised its discretion in this case to reject Scot Forge's hair sample test results because this type of test could not accurately identify the time during which Brandt used cocaine. LIRC acknowledges that this court has the authority to order a remand to LIRC for further proceedings under WIS. STAT. § 102.24(1) if this court concludes "that a more thorough administrative review of [LIRC's hair sample] policy … is appropriate." However, LIRC asserts that this is not warranted and that the correct result is for this court to reverse the circuit court and direct it to affirm LIRC's decision.

¶12 Scot Forge responds that LIRC's policy against accepting hair sample test results is arbitrary and that the undisputed facts show that Brandt violated its drug policy. Scot Forge asserts that the correct result is to affirm the

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. Pursuant to WIS. STAT. § 108.09(7)(b), the judicial review provisions in ch. 102 apply to judicial review of LIRC's decision in unemployment compensation cases.

circuit court. If we do not do so, Scot Forge asks for a remand to the administrative agency for another hearing. According to Scot Forge, because LIRC's "blanket" policy is arbitrary, there must be a case-by-case determination of the reliability of the drug test results and that did not occur here.

¶13 WISCONSIN STAT. § 108.04(5) provides that "an employee whose work is terminated by an employing unit for misconduct connected with the employee's work is ineligible to receive benefits" until a specified period of time has passed since the discharge and the employee earns a statutorily specified amount of wages. "Misconduct" is not defined by the statute. However, in ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 259-60, 296 N.W. 636 (1941), the supreme court adopted the following definition:

> [T]he intended meaning of the term "misconduct," as used in sec. [108.04(5)], Stats., is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

There is no dispute between LIRC and Scot Forge that Brandt's use of an illegal drug in violation of the second chance agreement would have constituted misconduct under this definition.[3]

¶14 In conducting our review, we review LIRC's decision and not the decision of the circuit court. ***Madison Gas & Elec. v. LIRC***, 2011 WI App 110, ¶7, 336 Wis. 2d 197, 802 N.W.2d 502 (citation omitted). We may set aside, or

[3] Brandt has not filed a brief on appeal and did not file a brief in the circuit court.

vacate, LIRC's order or award only upon the following grounds: (1) LIRC acted without or in excess of its powers; (2) the award was procured by fraud; or (3) the findings of fact by LIRC do not support the order or award. WIS. STAT. § 102.23(1)(e). If we do vacate LIRC's order, we may "recommit the controversy and remand … to [LIRC] for further hearing or proceedings …." § 102.24(1).

¶15 As we explain in the following paragraphs, we are unable to affirm LIRC on any of the three grounds it advances. We conclude that all three proposed grounds for affirmance have the same deficiency: LIRC's findings of fact do not support its order. It is therefore necessary to vacate LIRC's decision and remand to the agency for further proceedings.

¶16 We first examine the issue of LIRC's policy against accepting hair sample test results to prove violations of an employer's drug policy for purposes of establishing misconduct.[4] The question whether particular conduct constitutes "misconduct" under WIS. STAT. § 108.04(5) presents a question of law, and we generally review questions of law de novo. ***Bunker v. LIRC***, 2002 WI App 216, ¶25, 257 Wis. 2d 255, 650 N.W.2d 864 (citation omitted). However, when we review an agency's interpretation or application of a statute that the agency is charged with enforcing, we may decide that deference to the agency's legal conclusion—either great weight or due weight deference—is more appropriate than de novo review. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996).

[4] We do not address whether any such policy LIRC may have is a "rule" within the meaning of WIS. STAT. § 227.01(13) because neither party raises this issue.

¶17 LIRC contends that great weight deference is appropriate for court review of its policy against accepting hair sample test results. When we accord this level of deference, we uphold an agency's interpretation or application of a statute if it is reasonable and not contrary to the clear meaning of the statute, even if we conclude there is a more reasonable alternative. *See* ***id.*** at 287.[5] Scot Forge contends that de novo review is appropriate because of various deficiencies and inconsistencies in LIRC's policy. We conclude we need not address the proper standard of review of LIRC's policy because we cannot determine from LIRC's decision the factual basis for the policy LIRC asserts it applied in its decision.

¶18 In its memorandum opinion, LIRC states that, "[f]or twenty years, the commission and [DWD] have limited acceptable drug testing methods to urinalysis," but it does not cite to any document or case articulating this policy or showing its previous application. In its brief on appeal, LIRC attempts to fill this gap by citing to the DWD Disputed Claims Manual and to prior LIRC decisions. However, these citations in LIRC's brief are insufficient to show that LIRC has previously employed such a policy.

¶19 The DWD Disputed Claims Manual was not referred to or admitted at the hearing before the ALJ and was not referred to in LIRC's decision. On appeal LIRC has attached two pages to its brief that, LIRC explains, are from the manual and set forth its policy. The two pages do not provide any identifying information and do not contain dates. In its brief LIRC provides an internet website address for access to the entire manual online, but this court is unable to

[5] When we accord due weight deference, we uphold the agency's interpretation or application if it is reasonable and if we conclude an alternative is not more reasonable. ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996).

gain access to any website at the address given.[6] Because we do not have access to the entire manual, it is not appropriate to take judicial notice that the information it contains is LIRC's current policy. *See* WIS. STAT. § 902.01(2)(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is … [a] fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); ***Medlock v. Schmidt***, 29 Wis. 2d 114, 121, 138 N.W.2d 248 (1965) (explaining that judicial notice may be inappropriate when a document is not "in the usual course of government business published or otherwise made available to the general public").[7]

¶20 With respect to its prior decisions employing this policy, LIRC refers us to ***Tabaska v. John Deere Shared Services, Inc.***, Hearing No. 06600803MW (LIRC Jan. 26, 2007). However, it is difficult to draw from this decision a general policy of rejecting hair sample tests in all unemployment compensation cases. In its brief LIRC relies on this portion of the ***Tabaska*** decision:

> The evidence adduced at the hearing failed to establish that the hair test results submitted by the employee were reliable. There are no federally accepted standards for hair testing methodology, and the procedures used to test the employee's hair sample have not been approved by the FDA. The employee's own expert testified that he does not know of a certification process for the collection of hair samples for testing and that there is not an agreed upon cut-off for any drug and its metabolites in hair. Further,

[6] The address LIRC provides in its brief is http://dwd.workweb.

[7] In its brief on appeal, LIRC requests that we take judicial notice of an excerpt from the Federal Register, as well as a publication created by the Substance Abuse and Mental Health Services Administration (SAMHSA). We decline to do so because LIRC's decision does not provide any basis for an inference that these or similar publications were considered by LIRC in developing its policy.

> although the employer's expert explained that the length of the hair sampled is relevant to the test and that hair dyes and color treatments will affect the outcome of the hair test, there is nothing to indicate the length of the hair sampled, nor was any information collected with regard to possible chemical alteration of the hair sample.

Id. at 2. This reasoning appears to be an analysis of the reliability of the hair test results in that case rather than the adoption of a policy or the application of policy.

¶21 The only other LIRC decision addressing hair sample testing that LIRC brings to our attention is ***Graveen v. Lac du Flambeau***, Hearing No. 08202198RH (LIRC Jan. 30, 2009). This decision simply cites to ***Tabaska*** to support its statement that "neither [DWD] nor [LIRC] accepts such hair testing." ***Id.*** at 2.

¶22 Even if LIRC's statement in its decision that it has a policy against accepting hair sample test results is sufficient to show that LIRC has previously employed such a policy, a reviewing court must be able to evaluate the reasonableness of the policy. LIRC in its brief asserts that ***Tabaska*** sets forth the reasons for the policy. However, it is not clear from LIRC's decision that the reasons identified in ***Tabaska,*** which all relate to a perceived lack of reliability of hair sample testing, were the basis for its decision here. In its memorandum opinion, LIRC noted Scot Forge's assertion that the hair sample test procedure it uses has been approved by the FDA and the lab it uses has been certified by the FDA to offer this test. As we read LIRC's decision, it accepted these assertions as true statements of fact and gave another reason for its decision. In rejecting Scot Forge's argument that the hair sample testing procedure "is superior technology for ensuring a drug free work place because evidence of drug use can be detected for a significantly longer period," LIRC stated: "The commission believes the

shorter timeframe provided by urinalysis insures a closer connection to actual conduct in the workplace."

¶23 Thus, it appears the rationale in this case for rejecting the hair sample test results rests on facts relating to the time period during which that procedure detects cocaine use as compared to a urine test. The reasonableness of LIRC's conclusion on the "closer connection to actual conduct in the workplace" of urinalysis cannot be evaluated without that factual basis. However, LIRC's decision contains no factual findings on these points and refers to no evidence that supports the factual premise of this rationale. Nor does LIRC's brief on appeal point to any such evidence. We therefore conclude that LIRC's factual findings do not support the reasonableness of LIRC's policy based on this rationale. This is a basis for vacating LIRC's decision under WIS. STAT. § 102.23(1)(e)3.

¶24 We next address LIRC's contention that it based its decision upon evidence that Brandt did not use cocaine in violation of the "second chance" agreement. In reviewing LIRC's decision on this ground, we defer to its findings of fact if they are supported by credible and substantial evidence. ***Bunker***, 257 Wis. 2d 255, ¶30. We also bear in mind that, in certain situations, "[a] finding not explicitly made may be inferred from other properly made findings and from findings which [LIRC] failed to make, if there is evidence (or inferences which can be drawn from the evidence) which would support such findings." ***Valadzic v. Briggs & Stratton Corp.***, 92 Wis. 2d 583, 591, 286 N.W.2d 540 (1979) (citations omitted).

¶25 LIRC asserts on appeal that in its decision it "relied upon credible and substantial evidence of record to determine that in this case misconduct had not been demonstrated," including "not only Brandt's credible testimony, but also

the negative result from the Omega Laboratory test analysis, and the questionable history of Psychemedics' hair sample test results in this particular case." The problem with this argument is that the ALJ declined to allow into evidence the test result from Omega Laboratory, and LIRC's decision does not indicate that it reversed that determination and considered the Omega report.

¶26 In addition, nothing in the ALJ's findings or conclusions, which LIRC adopted, or in LIRC's memorandum opinion suggests a weighing of the evidence resulting in a determination that Psychemedics' hair sample result in this case was "questionable" or that Brandt's testimony was credible. Thus, this is not a case where we are able to infer these findings "from other properly made findings and from findings which [LIRC] failed to make." ***Valadzic***, 92 Wis. 2d at 591. We would simply be speculating that LIRC even engaged in fact finding on these points.

¶27 We conclude that, if the basis for LIRC's decision is a finding that Brandt did not use cocaine in violation of the "second chance" agreement, LIRC must make factual findings based on evidence of record that demonstrate this is the basis for its decision, and it has failed to do so.

¶28 Finally, we address LIRC's contention that in its decision it properly exercised its discretion to reject Psychemedics' hair sample test results in this particular case because the procedure used could not reliably identify whether Brandt used cocaine before or after he disclosed his cocaine use to Scot Forge and entered the "second chance" agreement. Admission of evidence is a matter of discretion exercised by the administrative agency. ***Board of Regents v. State Personnel Comm'n***, 2002 WI 79, ¶26, 254 Wis. 2d 148, 646 N.W.2d 759. Our review of a discretionary decision by an administrative agency is the same as that

for a circuit court: the inquiry is whether the agency made a reasonable determination based on the relevant facts and the proper legal standard. ***Verhaagh v. LIRC***, 204 Wis. 2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996).

¶29 As with LIRC's argument that it found Brandt did not use cocaine in violation of the "second chance" agreement, we do not see a basis in LIRC's decision for concluding that it exercised its discretion in excluding the Psychemedics' hair sample test results. As we have already noted, LIRC did not make findings or discuss evidence relating to the time period during which the hair sample test could detect cocaine use as compared with a urine test. Nor did LIRC make findings or discuss evidence on other points that bear on the reliability of the Psychemedics' hair sample test results. Indeed, LIRC's reference in its decision to its policy against accepting hair sample test results suggests that LIRC was not basing its decision on the exercise of its discretion with respect to the evidence in this particular case. If LIRC's discretionary power with respect to the admission of evidence is the basis for its decision, on remand LIRC needs to make findings of fact and explain its rationale for concluding that the Psychemedics' hair sample test results are unreliable.

¶30 In addition to the inadequacy of LIRC's factual findings to support its conclusion of no misconduct, *see* WIS. STAT. § 102.23(1)(e)3., we think it important to note that LIRC's decision does not identify the findings of fact and conclusions of law with sufficient detail and explanation so that we may understand the agency's reasoning. WIS. STAT. § 227.47(1) provides that "every proposed or final decision of an agency … shall be in writing accompanied by findings of fact and conclusions of law." While recognizing that ch. 227 does not

apply to unemployment compensation cases,[8] case law has established that "even in [unemployment compensation cases] the agency has the obligation to state the reasons for its conclusions." ***Transport Oil Inc. v. Cummings***, 54 Wis. 2d 256, 263, 195 N.W.2d 649 (1972). Specifically, the decision does not enable us to understand LIRC's reasoning for concluding Brandt was not terminated for misconduct connected with his employment. Whether this is an independent basis for setting aside LIRC's decision is not an issue we need address in this case.

¶31 In summary, we conclude that LIRC's decision must be vacated and the matter must be remanded to LIRC so that LIRC may further articulate the basis for its decision and make additional factual findings as necessary. On remand LIRC may conduct such further proceedings as it considers appropriate, including taking, or having an ALJ take, additional evidence. *See* WIS. STAT. § 102.24(1).

CONCLUSION

¶32 We reverse the order of the circuit court and remand with directions to vacate LIRC's decision and remand to LIRC for further proceedings consistent with this opinion.

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

Not recommended for publication in the official reports.

[8] WIS. STAT. § 227.03(2) (Except as provided in [a section not applicable to this case], only the provisions of this chapter relating to rules are applicable to matters arising out of … ch. … 108 ….").