COURT OF APPEALS DECISION DATED AND FILED

January 8, 2009

David R. Schanker
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. 2008AP1638

Cir. Ct. No. 2007CV477

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

TODD A. GONNERING,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

PAUL DAVIS RESTORATION OF FOX VALLEY,

DEFENDANT.

APPEAL from an order of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Curry,[1] JJ.

¶1 PER CURIAM. Todd Gonnering appeals a circuit court order confirming a decision of the Labor and Industry Review Commission (the Commission) that denied him unemployment insurance benefits and required him to repay benefits already paid. We affirm for the reasons discussed below.

BACKGROUND

¶2 Gonnering worked as a project superintendant for Paul Davis Restoration of Fox Valley, a company which repaired damaged buildings following insured losses. Sometime around August or September of 2006, Gonnering supervised a project involving the replacement of wood laminate flooring that had been water damaged by a leaking dishwasher. Because the original flooring pattern could not be matched, the insurer had agreed to replace contiguous flooring that had not been directly damaged. Gonnering determined at the job site that some of the removed flooring was in good enough condition to be salvaged for possible future use. He therefore rescued the flooring from a dumpster and sent it back to be stored at the company warehouse.

¶3 Project superintendants had discretion to determine on site whether removed building materials, which had already been deemed a loss by the insurer, should be discarded or saved for possible use on future projects or possible resale at discounted prices to employees or others. Project superintendants had a history of allowing other workers to take from a project site for free removed building

[1] Circuit Judge George S. Curry is sitting by special assignment pursuant to the Judicial Exchange Program.

materials which were otherwise going to be discarded. However, after some problems with employees taking damaged personal items before getting authorization from the owners or insurers, the employer issued an employee handbook in the fall of 2006 which stated in relevant part that "[r]ejected items, scrap material, or waste items taken off company property must be checked out by the general manager."

¶4 Gonnering did not read the handbook in its entirety, but did attend a meeting on January 10, 2007, at which employees were reminded that "taking any type of customer property without permission is considered stealing and you will be terminated." On January 19, 2007, Gonnering gave the flooring materials that he had previously salvaged to a friend without asking anyone's permission. When asked what had happened to the flooring materials, Gonnering readily admitted what he had done. He explained that he did not think he had done anything wrong since he could have allowed the flooring materials to be discarded in the first place; the planks had been sitting around the warehouse for months; the resources manager was not happy about storing them in the first place; and Gonnering did not believe he needed to ask permission of the general manager since he himself was a supervisor.

¶5 The general manager acknowledged that he would likely have given permission had he been asked. The employer nonetheless discharged Gonnering for failing to ask permission, citing the precedent of another worker who had been terminated for taking personal items that had been removed from a project without permission, and the need to consistently enforce company policy.

¶6 Gonnering sought unemployment benefits. A deputy of the Department of Workforce Development denied his claim on the grounds that he

had been fired for misconduct. An administrative law judge (ALJ) reversed that decision and directed that benefits be paid. The Commission, in turn, reversed the ALJ and ordered that Gonnering repay $2,305 in benefits he had already received under the ALJ's ruling. The circuit court upheld the Commission's decision, and Gonnering appeals.

STANDARD OF REVIEW

¶7 In certiorari actions, we review the decision of the administrative agency rather than that of the circuit court. ***Currie v. DILHR***, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997). Certiorari review is limited to considering: (1) whether the agency kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will rather than its judgment; and (4) whether it could reasonably make the determination in question based upon the evidence before it. ***State v. Waushara County Bd. of Adjustment***, 2004 WI 56, ¶12, 271 Wis. 2d 547, 679 N.W.2d 514.

¶8 The Commission's findings of fact on worker's compensation issues are conclusive in the absence of fraud or action outside of its authority. WIS. STAT. § 102.23(1)(a) (2005-06).[2] Therefore, we may not substitute our judgment for that of the Commission as to the weight or credibility of the evidence on a

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

finding of fact.[3] Section 102.23(6); ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). Rather, we must examine the record for any credible and substantial evidence that supports the agency's factual determinations. ***Currie***, 210 Wis. 2d at 387.

¶9 Questions about an employee's conduct and intent are issues of fact. ***Holy Name Sch. v. DILHR***, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982). The determination whether an employee's conduct constitutes disqualifying "misconduct" sufficient to render the employee ineligible for unemployment benefits is a question of law, however. ***Bernhardt v. LIRC***, 207 Wis. 2d 292, 302-03, 558 N.W.2d 874 (Ct. App. 1996).

¶10 Although we are not bound by an agency's conclusions of law in the same manner as we are by its factual findings we may nonetheless defer to its legal determinations. *See* ***Begel v. LIRC***, 2001 WI App 134, ¶6, 246 Wis. 2d 345, 631 N.W.2d 220. In particular, because the Commission has been administering WIS. STAT. § 108.04(5) pursuant to WIS. STAT. § 108.09(6) for years, and because the legal question of misconduct is intertwined with factual and policy determinations, we give great weight to the Commission's interpretation and application of the misconduct provision. *See* ***Charette v. LIRC***, 196 Wis. 2d 956, 960, 540 N.W.2d 239 (Ct. App. 1995). When we accord great weight deference, we will affirm any reasonable decision of the agency, even if an alternate decision

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[3] The Commission, in turn, is required to consult with the ALJ regarding any witness credibility determinations before making materially different findings of fact. ***Pieper Elec., Inc. v. LIRC***, 118 Wis. 2d 92, 97-98, 346 N.W.2d 464 (Ct. App. 1984). Its decision states that it did so, but that the ALJ had no recall of the parties. In any event, here the Commission made substantially similar findings of fact to those of the ALJ, but drew a different legal conclusion from them.

might have been more reasonable. ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 287, 548 N.W.2d 57 (1996).

DISCUSSION

¶11 There is no dispute between the parties that the restoration company discharged Gonnering for giving away salvaged flooring materials that were being stored in the company warehouse, without first seeking permission from the general manager. The questions before the Commission were whether Gonnering's removal of the materials constituted "misconduct" within the meaning of WIS. STAT. § 108.04(5), such that he was ineligible for unemployment insurance benefits, and if so, whether he needed to repay the benefits he had already received. The issue before this court is whether the Commission could reasonably and in a nonarbitrary manner answer both those questions in the affirmative, in accordance with law and based upon the evidence before it. We are satisfied that it could.

¶12 First, there is no doubt that the Commission acted in accordance with law by applying the longstanding definition of misconduct set forth in ***Boyton Cab Co. v. Neubeck***, 237 Wis. 249, 259-60, 296 N.W. 636 (1941). That is:

> 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.

¶13 Next, the Commission reasonably applied the relevant law to the facts of record. The Commission noted that Gonnering was responsible for

knowing the contents of the employee handbook. It was not arbitrary for the Commission to conclude that the employer had a right to expect an employee, and particularly a supervisor, to be familiar with company policies.

¶14 Moreover, the Commission reasoned that Gonnering's action met the definition of misconduct because he himself acknowledged that the salvaged flooring materials he gave away were in good condition and could have been used on another project, and because the materials were taken from the employer's place of business, not the job site from which they were removed. Gonnering could not credibly claim that he thought he was taking nothing of value from his employer — as might have been the case if he had given the removed flooring materials away at the job site — when he himself had previously deemed the materials to have value and had stopped them from being discarded.

¶15 Gonnering's arguments that he did not knowingly violate the rule amount to little more than a request for this court to draw different inferences from the evidence than those drawn by the Commission, or to give more weight to other testimony than that the Commission deemed most relevant. For instance, Gonnering points to his own testimony that he had taken cabinets out of the warehouse in front of the owner without comment as a reasonable basis for him to believe such conduct was okay. The owner testified, however, that he thought Gonnering was simply examining the cabinets for possible purchase, and did not realize that he had taken them without payment. It was for the Commission to resolve any conflicts in those statements, and to determine what, if any significance the cabinet incident had regarding Gonnering's later conduct.

¶16 The bottom line is that reweighing the evidence is outside of the limited scope of our certiorari review. There was testimony in the record from

which the Commission could infer that—even without actual knowledge of the policy language in the handbook—Gonnering knew that salvaged materials from projects could be resold or reused in other projects. Therefore, it was not arbitrary for the Commission to conclude that taking materials of some acknowledged value from the employer's premises without permission evinced a substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

¶17 Finally, the Commission also reasonably acted in accordance with law and based upon the evidence when it determined that Gonnering must repay those benefits he had already received. WISCONSIN STAT. § 108.22(8) provides that the department shall waive recovery of overpaid benefits when the overpayment was the result of a "departmental error" due to a mathematical mistake, miscalculation, misapplication or misinterpretation of the law or mistake of evidentiary fact, by commission or omission, or from misinformation provided to a claimant by the department on which the claimant relied. *See also* WIS. STAT. § 108.02(10e). Here, the overpayment was the result of the reversal of the tribunal's decision on appeal. That does not fit the definition of a "departmental error."

By the Court.—Order affirmed.

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