COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP150 **Cir. Ct. No. 2008CV8448**

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

STANLEY L. TERRY,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 FINE, J. Stanley L. Terry appeals a circuit-court order affirming the Labor and Industry Review Commission's determination that he falsely represented that he was able to work during the weeks for which claims were filed under his name even though he was incarcerated, and directing the forfeiture of almost three-thousand dollars in unemployment benefits. Terry argues that the

Commission exceeded its authority when it applied WIS. STAT. § 108.04(11)(a), ("If a claimant, in filing his or her application for benefits or claim for any week, conceals any material fact relating to his or her eligibility for benefits, the claimant shall forfeit benefits …."), to him. He also contends that the Commission's decision was not supported by substantial and credible evidence. We affirm.

I.

¶2 Terry worked as a journeyman roofer for twelve years. In January of 2005, a claim for unemployment benefits was filed under his name, using his social security number and personal identification number. He testified at the hearing before the administrative law judge that he did not file the January 2005 claim. Unemployment claims for Terry were made every week thereafter through March 19, 2005, representing that Terry was available to work during that time. On February 25, 2005, however, Terry was incarcerated on a drug charge.

¶3 In March of 2005, Terry's employer notified the Department of Workforce Development that Terry was incarcerated. The Department issued an initial determination that Terry concealed a material fact—that, contrary to the benefits-claim representations, he was unavailable to work because of his incarceration. Terry testified at the hearing that his wife and stepson lived in his residence during 2005. When asked "Did you ever learn if either of them filed a claim in your name?" he answered "No, I did not." Terry said he had talked to his wife and stepson about the claims, but "They didn't have no [*sic*] idea what happened." When asked if his wife and stepson knew his social security number, Terry answered: "Not that I know of. Once before--when … I … was incarcerated my wife claimed that somebody stole her purse and all of that was in her purse." He testified that his wife kept his social security card, driver's license,

and birth certificate in her purse "[c]ause [*sic*] she needed it" and "[i]f I keep it I lose it." Terry also said that while he was locked up, he could only make collect phone calls, and the only person he called was his wife. The administrative law judge, finding that a person needed a personal identification number in addition to his or her social security number in order to file a claim, determined that although Terry "may have lacked the ability to personally call in his weekly claims while incarcerated, he had the means to arrange for another individual to do this for him." The administrative law judge concluded "that there exists sufficient circumstantial evidence to support a conclusion that concealment occurred."

¶4 Terry appealed the administrative law judge's decision to the Commission, which "agree[d] with the ALJ that [Terry's] explanations are not credible," and "adopt[ed] the findings and conclusion in that decision as its own." Terry sought certiorari review of the Commission's decision. The circuit court affirmed, as do we.

II.

¶5 On appeal, we review the opinion of the Commission, not the circuit court. ***General Cas. Co. of Wis. v. Labor & Indus. Review Comm'n***, 165 Wis. 2d 174, 177 n.2, 477 N.W.2d 322, 323 n.2 (Ct. App. 1991). The Commission's factual findings are invulnerable when they are "supported by credible and substantial evidence." ***Id.***, 165 Wis. 2d at 178, 477 N.W.2d at 324. Substantial evidence is relevant, credible, and probative evidence on "which reasonable persons could rely to reach a [conclusion]." ***Sills v. Walworth County Land Management Committee***, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 549, 648 N.W.2d 878, 883. Further, circumstantial evidence may be as probative as direct evidence. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752,

758 (1990). Our review and level of deference owed to the Commission on legal issues depends upon its experience and expertise in the area. *See* ***UFE Inc. v. Labor & Indus. Review Comm'n***, 201 Wis. 2d 274, 284–287, 548 N.W.2d 57, 61–63 (1996) (discussing the three levels of deference: "great weight deference, due weight deference and de novo review").

¶6 As a preliminary matter, Terry and the Commission disagree on what level of deference applies. The Commission argues we should give "great weight" deference to the Commission's determination. Terry argues we must give "due weight" or "no weight" deference because this is the first time the Commission has applied WIS. STAT. § 108.04(11)(a) to a claimant who was found to have given information to a third party in order to make fraudulent claims on the claimant's behalf, contending that "great weight" deference cannot be used where the Commission has never previously decided a case with similar facts.

¶7 We give "great weight" deference to the Commission's legal conclusion if "the following four elements are met: (1) the [Commission] is responsible for administering the statute, (2) the [Commission's] conclusion or interpretation is long standing, (3) the [Commission] employed its specialized knowledge or expertise in forming the conclusion or interpretation, and (4) the [Commission's] interpretation provides consistency and uniformity in the application of the statute." *See* ***Knight v. Labor & Indus. Review Comm'n***, 220 Wis. 2d 137, 148, 582 N.W.2d 448, 453 (Ct. App. 1998). "Due weight" is applied when "the agency interpretation is 'very nearly' one of first impression," ***ibid.*** (quoted source omitted), and *de novo* review ("no weight") applies when the Commission's legal conclusions are matters of first impression, *see* ***id.***, 220 Wis. 2d at 149, 582 N.W.2d at 453. Here, two levels of deference are supported by Wisconsin case law: (1) "great weight" deference even though the

Commission has never dealt specifically with the precise issue in this case, *see* ***Honthaners Restaurants, Inc. v. Labor & Indus. Review Comm'n***, 2000 WI App 273, ¶12, 240 Wis. 2d 234, 243, 621 N.W.2d 660, 664 ("[T]he Commission need not have decided a case with identical or similar facts in order for its decision to be given great weight deference."), and (2) "due weight" deference, *see* ***UFE Inc.***, 201 Wis. 2d at 286–287, 287 n.3, 548 N.W.2d at 62–63, 63 n.3.

¶8 Regardless of which deference level applies, we reach the same result: the Commission's interpretation of the statute is reasonable. Thus, "[u]nder the due weight standard, we will uphold the agency's interpretation and application of a statute if it is reasonable and comports with the purpose of the statute, and no other interpretation is more reasonable." ***Xerox Corp. v. Wisconsin Dep't. of Revenue***, 2009 WI App 113, ¶48, ___Wis. 2d ___, ___, ___ N.W.2d ___, ___.

¶9 Terry contends that, under WIS. STAT. § 108.04(11)(a), he cannot be the unemployment-benefits "claimant" because it was impossible for him to phone-in the claims while incarcerated because he could only make collect phone calls; thus, he asserts it is undisputed that he did not personally file the claims. He argues it is more reasonable to interpret the statute to require that the "claimant" actually be the person who physically files the claim. This, however, ignores the long-recognized reality that persons frequently act through agents, *see* ***Kasson v. Noltner***, 43 Wis. 646, 650–651 (1878), and this is what the administrative law judge found that Terry did. Thus, the Commission's decision upholding the administrative law judge's determination was both reasonable and, indeed, required, because otherwise, persons could circumvent the enforcement-mechanism applied here by the simple expedient of having someone else file the

necessary documents to get benefits. In short, Terry's procrustean reading of the word "claimant" in § 108.04(11)(a) is unreasonable.[1]

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

[1] Although Terry also argues that there was no evidence that the benefit checks, mailed to his house, were ever cashed or returned, the absence of that evidence in the Record is not material to whether he, through an agent, violated WIS. STAT. § 108.04(11)(a) by making a fraudulent claim. As the administrative law judge found, there is ample circumstantial evidence that he did because the claim could not have been filed without Terry's personal identification number, and it was reasonable for the administrative law judge to conclude that Terry gave that number to the person who filed the claim.