COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2358 **Cir. Ct. No. 2011CV374**

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

MENARD, INC. AND RELIANCE INSURANCE CO. - WISF,

PETITIONERS-APPELLANTS,

V.

SUSAN J. KEENE AND LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Menard, Inc. and Reliance Insurance Co.–WISF (Menards) appeal a judgment affirming a decision of the Labor and Industry Review Commission. The Commission reopened a permanent partial disability award previously made to Susan Keene, who suffered a workplace injury while

employed by Menards. Because Keene returned to work at Menards following her injury, the original award was based solely on her physical limitations and did not take into account her loss of earning capacity. *See* WIS. STAT. § 102.44(6)(a).[1] However, the Commission determined that Menards subsequently terminated Keene without reasonable cause. It therefore reopened her claim and awarded her additional benefits based on her loss of earning capacity. *See* WIS. STAT. § 102.44(6)(b). Menards argues the Commission erred by determining that Menards lacked reasonable cause to terminate Keene and by refusing to admit certain evidence. We disagree and affirm.

BACKGROUND

¶2 On April 5, 1999, Keene was working in the building materials department of the Menards store in Wausau when a forklift pinned her against a counter. Keene suffered a low-back injury. She was placed on permanent work restrictions, but she continued to work for Menards. She received a worker's compensation award based on a finding of two-percent permanent partial disability to the body as a whole.

¶3 On April 4, 2005, James Maki, the general manager of the Wausau store, terminated Keene's employment. Keene subsequently petitioned to reopen her worker's compensation claim, seeking benefits for loss of earning capacity. Two hearings were held before an administrative law judge (ALJ). Keene and Maki were the only witnesses to testify.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Keene testified that she normally worked in Menards' building materials department, but she was sometimes moved to other departments in the winter. In the winter of 2004-2005, she was working as a cashier. In March 2005, she heard a rumor that she would not be transferred back to the building materials department. She approached Maki to ask him about the rumor, and he asked her to come back the next day. When Keene met with Maki the next day, she brought along a list of questions concerning her employment situation and Maki's management practices. Keene testified she was taking advantage of Menards' "open-door policy," under which employees were encouraged to discuss issues, problems, or questions with the store manager. She testified she was not argumentative or disrespectful during the meeting. However, Maki refused to answer many of her questions, and at the end of the meeting he suspended her for three days.

¶5 When Keene returned to work on April 4, 2005, she reported to Maki's office. According to Keene, Maki said that to keep her job she must agree to "do what he said when he said it without question and without argument[.]" Keene responded that she could not agree to such an "open-ended statement," and she asked Maki to rephrase it. Maki refused to rephrase his statement and terminated Keene's employment. Keene testified she would not agree to Maki's statement because doing so would have prevented her from refusing to do work barred by her work restrictions.

¶6 Maki testified that, when Keene approached him in March 2005 with her list of questions, she was argumentative, combative, and loud. He admitted that he refused to answer many of Keene's questions because "they had nothing to do with her." Maki felt that Keene was "attempting to get [him] frustrated" and

"trying to get [him] to terminate her[.]" At the end of the meeting, he suspended Keene to give her time to calm down.

¶7 Maki further testified that he could not remember exactly what he said to Keene at the April 4, 2005 meeting during which her employment was terminated. On the termination form Maki completed, he wrote that he "sat down with [Keene] to discuss her attitude toward myself and Menards. I asked her if she would change her attitude and not be insubordinate of my decisions." Maki wrote that Keene responded she "would not go against her beliefs and would not change her attitudes."

¶8 Maki testified he terminated Keene for insubordination. As evidence of her insubordination, he pointed to: (1) her failure to follow Menards' vacation policy; (2) her failure to follow Menards' forty-hours-per-week policy for full-time employees; and (3) her inappropriate discussions with coworkers about store events.

¶9 Regarding Menards' vacation policy, Maki testified Menards has a policy that employees may not take more than seven days of vacation at one time. He stated Keene violated this policy by taking a nine-day vacation in November 2004. However, he admitted Keene's nine-day vacation had been approved by his assistant ahead of time. Additionally, when asked to identify the portion of Menards' vacation policy that prohibits an employee from taking more than seven days of vacation at one time, Maki pointed to the sentence, "A vacation of 1 week, forty (40) hours, must consist of seven (7) consecutive days off." Under cross-examination, Maki conceded the policy "doesn't [explicitly] say … you must not take anything longer than seven consecutive days." Maki also admitted that he

discussed the vacation policy with Keene, and "once that policy was clarified [to Keene] that seemed to be the end of the discussion."

¶10 Maki also testified Keene violated Menards' policy that full-time employees must work at least forty hours per week on a regular basis. Keene's payroll records reflected that she averaged 36.92 hours per week from 1998 to 1999 and 38.95 hours per week from 1999 to 2005. Maki himself recalled three occasions when Keene worked fewer than forty hours per week. He noted that, on August 23, 2004 and November 2, 2004, Keene received verbal warnings for failing to work forty hours in a week. However, Maki conceded Keene was not terminated at the time of those violations, nor was she threatened with termination. Instead, Keene was informed that the penalty for further violations would be demotion to part-time status.

¶11 During Maki's testimony about Menards' forty-hours-per-week policy, Menards attempted to introduce Exhibit 13, which was an e-mail Maki purportedly received from a scheduling analyst at Menards' central office. In the e-mail, the analyst informed Maki that four full-time employees at the Wausau store, including Keene, failed to work forty hours during the week of September 4, 2004. The analyst asked Maki to explain why each employee worked fewer than forty hours that week. Maki did not recall receiving the e-mail, and, consequently, Keene objected to its admission on foundation grounds. The ALJ agreed that Menard had not demonstrated a proper foundation for the e-mail and therefore refused to admit it.

¶12 Finally, Maki testified that Keene engaged in inappropriate discussions with other employees about store events. He stated Keene "essentially incit[ed] team members to have either negative responses, negative

feelings, or not carry on their normal daily routines." Keene objected to Maki's testimony on relevance grounds, and the ALJ sustained her objection.

¶13 The ALJ ultimately determined Menards did not have reasonable cause to terminate Keene. The ALJ's decision stated, "From Mr. Maki's testimony I gleaned that any time [Keene] questioned him or any member of the managerial team about policies, procedures or staffing decisions, Mr. Maki took this as a personal affront to his ability to manage." The ALJ therefore determined Keene was terminated "due to a personality/attitude conflict with Mr. Maki," and not due to insubordination based on her violations of Menards' policies. Accordingly, the ALJ concluded Keene was entitled to reopen her worker's compensation claim to receive additional benefits for loss of earning capacity.[2]

¶14 The Commission affirmed the ALJ's decision, concluding the ALJ properly determined that Menards discharged Keene without reasonable cause. The Commission found that the evidence "[did] not indicate that [Keene] was discharged for insubordination or misconduct" and instead "indicate[d] [that Keene's] employment was terminated due to a personality/attitude conflict" with Maki. The Commission rejected Menards' argument that the ALJ should have admitted Exhibit 13 and noted that, even if the exhibit had been admitted, it "would not have established that [Keene] was terminated for misconduct or that the termination was reasonably justified." The circuit court subsequently affirmed the Commission's decision.

[2] Specifically, the ALJ determined Keene had suffered a forty-percent loss of earning capacity and awarded her $73,600, plus attorney fees and costs. Menards does not challenge the amount of damages awarded or the ALJ's conclusion that Keene's loss of earning capacity was forty percent.

DISCUSSION

¶15 On appeal, we review the Commission's decision, not the circuit court's. ***Hill v. Labor & Indus. Review Comm'n***, 184 Wis. 2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994). Menards argues the Commission erred by: (1) finding that Menards discharged Keene without reasonable cause; and (2) concluding the ALJ properly excluded Exhibit 13. We address each argument in turn.

I. Reasonable cause

¶16 Under WIS. STAT. § 102.44(6)(a), if an injured employee claiming compensation for permanent disability returns to work for the same employer following his or her injury, "the permanent disability award shall be based upon the physical limitations resulting from the injury without regard to loss of earning capacity[.]" However, if the employer discharges the employee within a twelve-year period following the injury, "the department may reopen [the] award and make a redetermination taking into account loss of earning capacity." WIS. STAT. § 102.44(6)(b); *see also* WIS. STAT. § 102.17(4). Historically, the Commission has held that it will exercise its discretion to reopen an award under § 102.44(6)(b) if the employer terminated the employee without "reasonable cause." *See* ***Biddle v. Dana Corp.***, WC Claim No. 2000-019424 (LIRC June 18, 2003).

¶17 The parties appear to agree that insubordination, based on a failure to follow company policies, is reasonable cause for termination. However, the Commission found that Keene was terminated because of a personality conflict with Maki, not because of insubordination. Menards does not argue that an employee's personality conflict with his or her manager can amount to reasonable cause for termination. Thus, if the Commission properly determined that Keene

was fired because of a personality conflict with Maki, then Menards lacked reasonable cause to terminate her.

¶18 The Commission's determination of the reason for Keene's termination is a finding of fact. Our review of the Commission's findings of fact is significantly limited. ***Heritage Mut. Ins. Co. v. Larsen***, 2001 WI 30, ¶24, 242 Wis. 2d 47, 624 N.W.2d 129. We must accept the Commission's factual findings if they are supported by credible and substantial evidence. *See* WIS. STAT. § 102.23(6). Under this standard, we may set aside the Commission's findings only when "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." ***Hamilton v. Department of Indus., Labor & Human Relations***, 94 Wis. 2d 611, 618, 288 N.W.2d 857 (1980). Consequently, the Commission's findings of fact must be upheld if they are supported by any credible and substantial evidence in the record, even if they are contrary to the great weight and clear preponderance of the evidence. ***Heritage Mut.***, 242 Wis. 2d 47, ¶24. Furthermore, "[i]t is the function of the [C]ommission, not the reviewing courts, to determine the credibility of witnesses, and it is for the [C]ommission to weigh conflicting testimony and decide who should be believed." ***Link Indus., Inc. v. Labor & Indus. Review Comm'n***, 141 Wis. 2d 551, 558, 415 N.W.2d 574 (Ct. App. 1987).

¶19 Credible and substantial evidence supports the Commission's finding that Keene was terminated because of a personality conflict with Maki. The Commission found that Keene was terminated as a direct result of her March 2005 meeting with Maki. At that meeting, Keene presented Maki with a list of questions concerning her own employment and Maki's management practices. Keene testified she was not disrespectful or argumentative during the meeting, and

she was merely taking advantage of Menards' open-door policy. In contrast, Maki testified Keene was loud, argumentative, and combative and was trying to frustrate him and goad him into firing her.

¶20 Keene's and Maki's conflicting accounts of the March 2005 meeting support the Commission's determination that a personality conflict between them led to Keene's termination. They obviously saw the same meeting in very different lights, with Keene believing that she was asking relevant questions in a respectful manner, and Maki believing Keene was being argumentative and trying to provoke him to fire her. As noted by the Commission, "the [ALJ], who could observe the demeanor of the witnesses and therefore was in [a] good position to make a determination as to credibility[,] credited [Keene's] version" of the meeting. Accepting Keene's testimony that she behaved respectfully and appropriately during the meeting, the ALJ could reasonably infer that Maki viewed the meeting differently because he took Keene's questions as "a personal affront to his ability to manage." This inference supports the Commission's conclusion that Maki terminated Keene because of a personality conflict.

¶21 Furthermore, credible and substantial evidence supports the Commission's finding that Keene was not terminated because of insubordination. Menards first contends Keene was insubordinate by violating its vacation policy. However, the termination form Maki filled out did not list Keene's violation of the vacation policy as a reason for her termination. Additionally, Keene was not terminated at the time the purported violation occurred, nor was she threatened with termination. Instead, Maki discussed the vacation policy with her and "once that policy was clarified [to Keene] that seemed to be the end of the discussion."

¶22 Moreover, it is far from clear that Keene actually violated Menards' vacation policy. As the Commission noted, Maki admitted on cross-examination that his assistant approved Keene's nine-day vacation. In addition, while Maki interpreted the vacation policy to mean that employees may not take vacations longer than seven days, he conceded that the policy does not explicitly ban vacations of that length. All of this evidence supports the Commission's determination that Keene was not fired because she violated the vacation policy.

¶23 Credible and substantial evidence also supports the Commission's finding that Keene was not fired for violating Menards' forty-hours-per-week policy. Menards cites multiple instances when Keene failed to work forty hours in a week and notes that, in August and November 2004, Keene received verbal warnings for violating the forty-hours policy. However, Keene was not terminated at the time of those violations, nor was she threatened with termination. Instead, Keene was informed that she would be demoted to part-time status if further violations occurred. Keene was never demoted to part-time status, and there is no evidence that she was disciplined for violating the forty-hours policy during the four-month period preceding her discharge. Moreover, Keene's termination form did not list any violation of the forty-hours policy as a reason for her termination. Accordingly, the Commission reasonably concluded Keene's violations of the forty-hours policy were not "a continuing problem" at the time she was terminated and, therefore, did not cause her termination. Credible and substantial evidence supports the Commission's conclusion.

¶24 Menards also argues Keene was insubordinate by inciting negative attitudes among her coworkers. However, the ALJ prevented Menards from introducing evidence about Keene's discussions with her coworkers. On appeal, Menards does not contend the ALJ improperly excluded this evidence.

Consequently, there is no evidence in the record to support Menards' argument that Keene was insubordinate by inciting her coworkers' negative attitudes. This lack of evidence supports the Commission's finding that Keene was not fired for insubordination. Additionally, the termination form Maki filled out does not list Keene's discussions with her coworkers as a reason for her termination.

¶25 Thus, there is credible and substantial evidence in the record to support the Commission's finding that Keene was terminated because of a personality conflict with Maki, not because she was insubordinate. Menards cites other evidence that supports its argument that Keene was fired for insubordination. However, when we review the Commission's findings of fact, we do not ask "whether there is evidence to support a finding that was not made, but whether there was evidence to support a finding that was, in fact, made by the [C]ommission." ***Brickson v. Department of Indus., Labor & Human Relations***, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968). Consequently, we need not consider whether there is evidence that would have supported a finding that Keene was fired for insubordination. *See* ***id.*** Instead, because credible and substantial evidence supports the Commission's finding that Keene was fired due to a personality conflict, that finding must be upheld. Accordingly, the Commission properly determined Menards lacked reasonable cause to fire Keene.

II. Exhibit 13

¶26 Menards also contends that the ALJ should have admitted Exhibit 13 into evidence and that her refusal to do so violated the Wisconsin Rules of Evidence. However, the rules of evidence govern proceedings in Wisconsin courts, and the Commission is not a court. *See* ***Goranson v. Department of Indus., Labor & Human Relations***, 94 Wis. 2d 537, 551, 289 N.W.2d 270 (1980).

Thus, "[p]roceedings before the [Commission] in worker's compensation cases do not require strict adherence to the statutory rules of evidence." ***Id.***

¶27 Furthermore, we agree with the Commission that, even if the ALJ had allowed Exhibit 13 into evidence, it would not have established that Keene was terminated for insubordination. Exhibit 13 purported to be an e-mail Maki received from a scheduling analyst at Menards' central office. The analyst noted that Keene and three other full-time employees at the Wausau store had worked fewer than forty hours during the week of September 4, 2004. The analyst asked Maki to explain why each employee failed to work forty hours during that week.

¶28 Exhibit 13 does not change the fact that, based on the evidence discussed above, the Commission could reasonably conclude Keene was not terminated for violating Menards' forty-hours policy. Again, the Commission's finding was supported by credible and substantial evidence, and we will not disregard the Commission's finding simply because there is evidence supporting a contrary conclusion. *See* ***Brickson***, 40 Wis. 2d at 699.

¶29 Moreover, Exhibit 13 merely demonstrates that Menards' central office was aware that Keene violated the forty-hours policy in September 2004. It does not demonstrate that central office felt that Keene should be disciplined or terminated because of that violation. There is no evidence that Keene was disciplined because of the September 2004 violation. Additionally, neither the September 2004 violation nor any other violation of the forty-hours policy was listed on Keene's termination form as a reason for her termination. Exhibit 13 simply does not bolster Menards' argument that Keene's violation of the forty-hours policy led to her termination. Thus, even assuming that the exclusion of Exhibit 13 was error, it was harmless error. ***Schwigel v. Kohlmann***, 2005 WI App

44, ¶11, 280 Wis. 2d 193, 694 N.W.2d 467 (error is harmless if there is no reasonable possibility it contributed to the outcome of the action).

By the Court.—Judgment affirmed.

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