COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2171

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

THE COPPS CORPORATION,

PLAINTIFF-RESPONDENT,

v.

LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

LAVERNE KERTIS,

DEFENDANT-CO-APPELLANT.

APPEAL from an order of the circuit court for Portage County: FREDERIC W. FLEISHAUER, Judge. *Reversed and cause remanded with directions*.

Before Dykman, P.J., Eich, and Deininger, JJ.

¶1 DEININGER, J. The Labor and Industry Review Commission and Laverne Kertis appeal a circuit court order which reversed the commission's determination that Kertis was entitled to unemployment compensation benefits.[1] The commission argues that the circuit court erred in reversing its factual findings. The Copps Corporation, Kertis's employer, responds that there was no credible and substantial evidence to support the commission's finding that Kertis had not engaged in misconduct, and further that the commission erred in rejecting the administrative law judge's (ALJ) credibility assessment. Because the commission's findings are supported by credible and substantial evidence, and because it adequately explained its departure from the ALJ's factual findings, we reverse the order of the circuit court. On remand, the commission's determination shall be ordered reinstated.

BACKGROUND

¶2 Kertis worked as an assistant manager at a Copps retail store. After receiving information that Kertis was leaving the store before the end of his shift on Sundays, a Copps loss prevention specialist investigated the matter. Copps obtained videotapes of Kertis's entry and exit from the store on Sundays and on a holiday during a period of approximately two months, and it compared this information with the hours recorded on Kertis's time sheets. The loss prevention specialist then confronted Kertis regarding the discrepancies.[2] Kertis did not deny

[1] Although both Kertis and the commission appeal the circuit court's order, Kertis joined in the commission's brief and did not file a separate brief. We will refer to the appellants collectively as "the commission."

[2] Kertis allegedly falsified his time sheets on five Sundays and one holiday, for a total of 13.75 hours or $412.23 in wages. Specifically, the discrepancies were as follows:

Date	Hours in store	Hours reported	Difference
12/07/97	7.50	9.0	1.50

(continued)

that he left the store early, but claimed that he was doing work at home or visiting competitors' stores. Kertis also explained that he recently had experienced a "turning point" with Copps, which caused him to become upset with his employer, and he decided that he should be paid for "all the extra work outside of the store." At the loss prevention specialist's request, Kertis prepared a written statement regarding the matter. After determining that Kertis falsified his pay records to collect wages for hours he did not actually work, Copps discharged him.

¶3 After his discharge, Kertis filed a claim for unemployment compensation. The Department of Workforce Development determined that Kertis was discharged for misconduct, and thus was not eligible for benefits pursuant to WIS. STAT. § 108.04(5) (1997-98).[3] Kertis appealed the determination. He testified at the appeal hearing that he spent the disputed time on permitted off-premises work activities. Copps presented no direct evidence of what Kertis was doing during the hours at issue. There was circumstantial evidence, however, suggesting that Kertis did not perform work for Copps during all of the disputed hours. The ALJ affirmed the department's determination denying unemployment benefits based on misconduct.

¶4 Kertis appealed to the commission. The commission, with one member dissenting, reversed the ALJ's decision, concluding that Copps did not

Date	Hours in store	Hours reported	Difference
12/21/97	5.25	8.0	2.75
12/28/97	5.75	8.0	2.25
01/01/98	4.75	8.0	3.25
01/04/98	5.75	8.0	2.25
01/25/98	2.25	4.0	1.75

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

prove that Kertis had engaged in misconduct connected with his employment. Copps sought review of the commission's decision in the circuit court. The court concluded that the commission's decision was not supported by credible and substantial evidence and reversed it. The commission appeals the reversal of its determination.

ANALYSIS

¶5 We review the commission's decision, not that of the circuit court. *See* ***Stafford Trucking, Inc. v. DILHR***, 102 Wis. 2d 256, 260, 306 N.W.2d 79 (Ct. App. 1981). The specific matter under review is the commission's determination that Kertis did not engage in misconduct because he performed work for his employer during the hours he was away from his employer's place of business for which he claimed pay. This is a question of fact. *See* ***Holy Name Sch. v. DILHR***, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982) (holding that questions concerning an employee's conduct and intent are questions of fact for the administrative agency to determine).[4]

¶6 This court cannot find facts, and our review of factual findings is always deferential, albeit in several differing degrees. When we review the factual findings of a trial court, we will only overturn a finding if it is clearly erroneous—that is, if it is against the great weight and clear preponderance of the evidence. *See* WIS. STAT. § 805.17(2); *see also* ***Siker v. Siker***, 225 Wis. 2d 522, 527-28, 593

[4] We emphasize that the issue is *not* whether claiming pay for hours not worked is misconduct within the meaning of WIS. STAT. § 108.04(5), but whether Kertis in fact engaged in that form of misconduct. Misconduct includes "deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee …." *See* ***Boynton Cab Co. v. Neubeck***, 237 Wis. 249, 259, 296 N.W. 636 (1941). It is undisputed that Copps had a policy stating that falsification of time cards or company records was cause for discharge. Kertis testified that he knew of and understood the policy.

N.W.2d 830 (Ct. App. 1999). We grant greater deference to a jury's factual determination. We will uphold a jury's verdict even if it *is* against the great weight and clear preponderance of the evidence, so long as we can locate in the record "any credible evidence" to support the jury's finding. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995). The deference with which we review an administrative agency's finding of fact lies somewhere between these two standards, but we conclude that the standard for our present review more closely resembles that applicable to a jury's findings.

¶7 We are not to set aside an agency's finding of fact if it is supported by "credible and substantial evidence." *See* WIS. STAT. § 102.23(6).[5] We are not to weigh the evidence or pass upon the credibility of the witnesses. *See* ***Applied Plastics, Inc. v. LIRC***, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984). "Substantial" evidence is that which is "relevant, probative, and credible, and which is in a quantum that will permit a reasonable factfinder to base a conclusion upon it." *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983). We must search the record to locate substantial evidence which supports the commission's decision. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975). And, as in the case of a jury's verdict, we will affirm a finding by the commission even if it is contrary to the great weight

[5] "[T]he provisions of ch. 102 [which governs worker's compensation claims] with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under" WIS. STAT. § 108.09, relating to unemployment compensation claims. *See* § 108.09(7)(b). Although WIS. STAT. § 102.23(6), which sets forth the credible and substantial evidence standard, is a relatively recent addition to unemployment compensation practice, the supreme court has held that the statute did not make a substantive alteration to the standards of review expressed in earlier judicial opinions. *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 53-55, 330 N.W.2d 169 (1983).

and clear preponderance of the evidence. *See* ***Eastex Packaging Co. v. DILHR***, 89 Wis. 2d 739, 745, 279 N.W.2d 248 (1979).

¶8 The burden to prove misconduct in unemployment compensation determinations lies squarely on the employer. *See* ***Boynton Cab Co. v. Giese***, 237 Wis. 237, 243, 296 N.W. 630 (1941). The commission's finding that Kertis did not falsify his time records is supported by his own testimony that he performed work for Copps during the hours he submitted for the dates at issue. He is the only person who testified regarding what he did during those hours. Kertis's testimony is direct evidence of these facts, even if his testimony was self-serving, and even if the record provides grounds to question its veracity. We conclude that Kertis's testimony constitutes substantial evidence to support the commission's factual findings.

¶9 Copps argues that we should reject the commission's findings because Kertis's testimony was incredible as a matter of law. Testimony is not inherently incredible, however, unless it is in conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Mere conflicts in testimony do not render the testimony inherently incredible. Rather, such conflicts are to be resolved by the commission. While other evidence presented at the hearing was arguably quite damaging to Kertis's credibility, it did not render his testimony incredible as a matter of law.

¶10 Copps points to several matters in the evidentiary record which, it argues, render Kertis's testimony incredible:

(1) The key evidence on which Copps relies is Kertis's alleged "admission" to the loss prevention specialist. Kertis stated as follows:

"Yes I did leave some Sundays early sometimes, I just would go home and other times I would go to other stores or work on things at home." However, at the hearing, Kertis testified that he was "very upset" when he wrote the statement, and he meant that at times he would continue with work at home later in the evening.

(2) Another piece of evidence Copps cites is Kertis's explanation of his "turning point" in his relationship with his employer that occurred shortly before the investigation began. One day while Kertis was at work, someone took approximately $400 from his checkbook on the store premises. This caused Kertis to become upset with his employer, at least in part because he was not kept advised of any investigation into the matter. At that point, he "made up [his] mind" that he should be paid for "all the extra work outside of the store."

(3) Copps also points to Kertis's pay structure and his job duties, which allegedly provided him both a motive and the opportunity to falsify his time records. As a manager, Kertis was a salaried employee except for Sundays and holidays, when he earned overtime pay for his work hours. Kertis was in charge of the store on the dates at issue. Also, he was responsible for employee time submissions to Copps's headquarters.

(4) The fact that Kertis failed to give notice to or obtain permission from Copps to leave work early on Sundays, according to Copps, also renders his testimony incredible. Kertis never told his employer that he was leaving the store before the end of his shift on Sundays to do work

other than at the store. He also never completed an off-premises work form.[6]

(5) Kertis's alleged work activities during the hours in dispute, in Copps's view, also demonstrate his lack of credibility. One of the tasks Kertis claimed to be working on at home was a United Way campaign, but he admitted at the hearing that he had completed the pledge work before the dates at issue. Also, Kertis claimed to have visited competitors' stores. Although Kertis usually reported the results of his visits to competitors' stores to the store manager, the store manager did not recall Kertis doing so following the dates at issue. The store manager testified that he preferred employees to conduct these visits on weekdays, but there was no established rule in that regard. In addition, although Kertis admittedly could have performed this task at the store, he claimed to have proofread thousands of Key Club applications at home. Copps asserts that the sheer volume of these documents renders this testimony incredible.

(6) Finally, Copps points to Kertis's evasiveness in answering questions regarding the work he allegedly performed at home. For example, Kertis asserted that he washed former employees' smocks at home during some of the disputed hours. When informed that the videotape did not show him taking home any smocks on the days in question, Kertis responded as follows: "[B]ut that doesn't mean that I did

[6] There was conflicting testimony as to whether Kertis was required to complete this form. Kertis, who was in charge of collecting the forms, said that employees were not required to complete the form. The store manager testified that the form should be completed whenever an employee performed work other than on the store premises, unless the employee returned to the store before the end of the shift. However, neither Kertis nor any other assistant manager had ever completed such a form.

not cart them home earlier in the week and do them on Sunday." That is, instead of directly responding to the impeaching evidence, Kertis implied that it was theoretically possible that he had performed that task during the hours in question.

¶11 Having independently reviewed the record, we agree with Copps that reasonable persons could quite easily interpret the evidence in this case differently than did the commission, as the department, the ALJ, one commissioner, and the trial judge all have done. The question before us, however, is not whether reasonable persons could reach the opposite conclusion on the evidence before the commission, but whether there was "relevant, probative, and credible" evidence "in a quantum that will permit a reasonable fact finder" to reach the conclusion the commission reached. *See* ***Princess House, Inc.***, 111 Wis. 2d at 54. We conclude that there was. The items Copps has pointed to all tend to support its view that Kertis falsified his time records, but they do not, individually or cumulatively, render Kertis's testimony incredible as a matter of law. It is not this court's task to assess Kertis's credibility; in fact, we are precluded from doing so. *See* WIS. STAT. § 102.23(6). That responsibility is delegated to the commission, it has discharged it, and we must uphold its findings.

¶12 Copps makes an additional argument as to why we should conclude that the commission erred in making its present determination. Under WIS. STAT. § 227.46(2), "[i]f an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance." Copps acknowledges that the commission, and not the ALJ, bears the ultimate responsibility for finding facts. *See* ***Falke v. Industrial Comm'n***, 17 Wis. 2d 289, 294-95, 116 N.W.2d 125 (1962); *see also* WIS. STAT.

§ 102.18(3). However, Copps argues that the commission did not fulfill its duty to explain why it reversed the ALJ's credibility assessment. We disagree.

¶13 Whether the commission failed to comply with required procedures, or otherwise violated Kertis's due process rights, is a question of law subject to our de novo review. *See* ***Tateoka v. City of Waukesha Bd. of Zoning Appeals***, 220 Wis. 2d 656, 669, 583 N.W.2d 871 (Ct. App. 1998). "[D]ue process requires only that the [administrative agency] consult with the hearing examiner and submit a memorandum opinion explaining its basis for rejecting the hearing examiner's findings." ***Hakes v. LIRC***, 187 Wis. 2d 582, 588, 523 N.W.2d 155 (Ct. App. 1994).

¶14 The requirement for a "credibility conference" has evolved from decisions of the supreme court. The court held in ***Falke v. Industrial Comm'n***, 17 Wis. 2d 289, 116 N.W.2d 125 (1962), that there is a constitutional right, in cases involving the credibility of a witness as a substantial element, to have the benefit of the demeanor evidence which is lost when the agency decides the controversy without the participation of the hearing examiner who heard the testimony. *See also* ***Shawley v. Industrial Comm'n***, 16 Wis. 2d 535, 541-42, 114 N.W.2d 872 (1962). Subsequently, the court held that due process required that the record affirmatively show that the commission had the benefit of the examiner's personal impressions of the material witnesses. *See* ***Braun v. Industrial Comm'n***, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967).

¶15 The court soon realized, however, that a simple statement in the record that the commission had consulted with the hearing examiner, was not an adequate safeguard of the parties' rights. Thus, in ***Burton v. DILHR***, 43 Wis. 2d 218, 225, 168 N.W.2d 196, *modified*, 43 Wis. 2d 218, 170 N.W.2d 695 (1969), the

court stated that it would be "proper, prudent and helpful" if the agency, in situations where the recommended findings of the examiner are rejected or reversed, would submit a statement or memorandum opinion giving the reasons for such rejection or reversal. Then, in ***Transamerica Ins. Co. v. DILHR***, 54 Wis. 2d 272, 283-84, 195 N.W.2d 656 (1972), the procedure the court suggested in ***Burton*** was made mandatory. In doing so, the court relied on not only the right to due process and meaningful judicial review, but also on notions of fundamental fairness:

> The parties ... are entitled to know, not only that the department set aside the findings of an examiner but why it did so – not only what independent findings the department found proper, but on what basis and evidence it made such findings. Particularly is this true where credibility of witnesses is involved. Fundamental fairness requires that administrative agencies, as well as courts, set forth the reasons why a fact-finder's findings are being set aside or reversed, and spell out the basis for independent findings substituted.

Id. at 284.

¶16 In the present case, the commission provided the following explanation for its reversal of the ALJ's determination:

> The commission consulted with the administrative law judge regarding the credibility and demeanor of the witnesses. The administrative law judge indicated that he did not feel the employe was absolutely credible when he stated he was making up the time. This credibility assessment was not based upon any negative impression of the employe's demeanor, but was grounded in the administrative law judge's belief that the employe was attempting to get even with the employer after money was stolen from his office. However, while the evidence does demonstrate that the employe was upset about the employer's response to the missing money and determined that from that point on any work done at home would be done on the clock, the employe's unwillingness to put in extra time for the employer does not necessarily indicate

> that he falsified records with respect to the work which he did perform. The commission sees nothing inherently incredible about the employe's explanation for his actions, and in the absence of any other evidence to suggest that he was not actually performing work for the employer during the hours reported, it does not conclude that intentional falsification of records occurred.

¶17 Thus, there can be no dispute that the commission conducted the required credibility conference with the ALJ in this case. The remaining issue is whether the commission provided an adequate explanation of its variance from the ALJ's credibility determination. Copps contends that the commission's "limited explanation" is inadequate and that we should remand this case to the commission with instructions to review the entire record. According to Copps, there *is* other evidence to suggest that Kertis falsified his time records, which we have summarized above. Although we agree with this assertion, we disagree that the commission failed to fulfill its duty to explain its findings.

¶18 We must rely on the commission's description of the credibility conference because there is no other record of it. The commission states that the ALJ did not rely on demeanor evidence, but made an inference from Kertis's testimony that his "turning point" with Copps motivated him to falsify his time records. The commission made a different inference from this same testimony. The commission was aware of the contrary evidence in the record, inasmuch as it formed the basis for the ALJ's and the dissenting commissioner's conclusions, and the commission itself addressed some of the opposing evidence in a footnote. Assuming, as we must, that the commission accurately stated the basis of the ALJ's credibility determination, it was arguably in as good a position as the ALJ to pass on the credibility of Kertis's testimony and to find the facts in this case.

¶19 In short, we conclude that there is no basis in the present record for setting aside the commission's determination on due process grounds, or because of any failure on the commission's part to comply with the requirements that it consult with the ALJ on matters of credibility and explain the basis of its variance from the ALJ's findings.

CONCLUSION

¶20 For the reasons discussed above, we reverse the appealed order and direct the circuit court to enter an order affirming the commission's decision.

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

Not recommended for publication in the official reports.

¶21 DEININGER, J. *(concurring).* I join in the court's opinion and disposition, but write separately to note that the standard by which we review the commission's determination in this appeal is not without its detractors. *See* ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 585, ¶39, 579 N.W.2d 668 (1998) (Crooks, J., concurring) ("Such limited judicial review works to insulate from close scrutiny those decisions of the LIRC that are arguably unjust as well as those that are just."). Were this court's review permitted to be less deferential to the factual finding of the two commissioners who constituted the commission's majority, I may well have joined the circuit court, the dissenting commissioner, the ALJ, and the department in concluding that Copps had established that Kertis had engaged in misconduct.

I am authorized to state that Judge Eich joins in this concurrence.