

FILED

OCT 9 1979

CLERK OF SUPREME COURT  
MADISON, WISCONSIN

**NOTICE**

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

No. 77-047

STATE OF WISCONSIN

IN SUPREME COURT

---

APPLETON ELECTRIC COMPANY,

Plaintiff-Appellant,

v.

JOHN E. MINOR and the DEPARTMENT  
OF INDUSTRY, LABOR & HUMAN RELATIONS,

Defendants-Respondents.

---

APPEAL from a judgment of the circuit court for Dane county:

MICHAEL B. TORPHY, JR., Circuit Judge. Affirmed.

PER CURIAM. The Appleton Electric Company, plaintiff-appellant, appeals from a judgment affirming the decision of the Department of Industry, Labor and Human Relations which modified and affirmed the decision of an appeal tribunal holding that John E. Minor, defendant-respondent, was not discharged for misconduct connected with his employment within the meaning of sec. 108.04 (5), Stats., and was therefore eligible for unemployment compensation based on his employment with the Appleton Electric Company.

to the department deputy and it was not introduced into evidence.

Sec. Ind-UC 140.05 (6) of the Wisconsin Administrative Code permits signed statements from the investigation to be used in evidence at a hearing: "signed statements of parties can be used if received in evidence at a hearing."

At the hearing the personnel officer of the employer testified. She testified that the company knew Minor had a dermatology problem although there was nothing in the record to indicate that contact with the die lubricant would aggravate it. Also in an attempt to bring the discharge within the rule of Checker Cab Co. v. Industrial Comm., 242 Wis. 429, 8 N.W. 2d 286 (1943), she testified as to prior employment problems with Minor, thereby asserting that his disobedience of the order of his supervisor on his last day of employment was not the sole cause of his discharge.

The appeal tribunal reversed the initial determination and allowed benefits. After making its findings of fact the tribunal concluded the conduct of Minor did not evince such willful, intentional or substantial disregard for the employer's interests as would constitute misconduct connected with his employment. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (1941).

The appellant then petitioned the commission for review of the appeal tribunal decision. In doing so the appellant transmitted a letter to the department stating that the employee had contradicted his own statement regarding the circumstances of his discharge. This apparently refers to the statement Minor gave to the department deputy which had not been offered in evidence. No request was made to reopen the case.

The commission reviewed the evidence, modified the findings of the appeal tribunal and affirmed the decision as so modified, and in doing so found that the findings of the tribunal were supported by the evidence.

The employer then brought an action to review the decision of the department in the circuit court. The circuit court affirmed the decision of the department, and this appeal follows.

The final contention of the appellant is that the commission exceeded its power and denied appellant due process of law by failing to consider respondent's statement dated March 31, 1976, in which he stated, among other things, that he had sprayed die lubricant on his face. Appellant contends that when the commission became aware of the discrepancy between that statement and the respondent's testimony before the appeal tribunal in which he stated that he sprayed die lube all over himself, it was required to investigate the matter further.

Sec. 108.09 (6)(b), Stats., states:

" (b) Any party may petition the commission for review of an appeal tribunal decision, pursuant to general department rules, if such petition is received by the department within 14 days after the appeal tribunal decision was mailed to the party's last-known address. Promptly after the receipt of a petition, the commission shall dismiss it if not timely at any level or, if timely, may affirm, reverse, change, or set aside the appeal tribunal decision, on the basis of the evidence previously submitted in such case or it may order the taking of additional evidence as to such matters as it may direct and thereafter make its findings and decision."

Clearly, the commission may affirm, reverse, change, or set aside the decision of an appeal tribunal "on the basis of the evidence previously submitted in such case." As previously stated, the statement of Minor could have been offered and received in evidence. This was never done and therefore the commission was without authority to consider that statement in making its decision, and obviously did not exceed its powers in failing to consider it.

Sec. 108.09 (6)(b), Stats., also provides that the commission may order the taking of additional evidence.

This court has stated that:

". . . The taking of additional testimony on a petition for a review of an examiner's findings and order is a matter for the sole discretion of the commission. . . ." Christnovich v. Industrial Comm. 257 Wis. 235, 237, 238, 43 N.W. 2d 21 (1950). See also: Kenneth F. Sullivan Co. v. Industrial Comm. 25 Wis. 2d 84, 90, 91, 130 N.W. 2d 194 (1964).

And it would need to be a flagrant abuse of discretion by the commission, in denying an application to reopen a case, in order to permit a reviewing court to determine that the commission acted in excess of its powers. Moore v. Industrial Comm. 4 Wis. 2d 208, 218, 89 N.W. 2d 788 (1958); Theodore Fleisner, Inc. v. ILHR Department,

process right.

The judgment of the circuit court is affirmed.

Judgment affirmed.