

Michael T. Ciszewski,

Petitioner,

vs.

DECISION AND FINAL ORDER

Case No. 94-CV-000239

Bruner Corporation

and

State of Wisconsin

Labor and Industry Review Commission,

Respondent.

NOV 29 1994

Statement of the Facts and History of the Case

Petitioner Michael Ciszewski began working for Bruner Corporation, a business engaged in designing and manufacturing commercial and industrial water treatment equipment, on August 1, 1990. Ciszewski worked for Bruner until February 18, 1993, when he was suspended without pay. Ciszewski was terminated on March 30, 1993.

Ciszewski was terminated in connection with activities surrounding John Balough. Balough had worked for Bruner until January, 1993, as Director of Original Equipment Manufacturing Sales.

Bruner markets its products through authorized manufacturer representatives, usually at a 40% discount, with a commission of 10% to its representatives. Bruner came to realize that over a period of time, hundreds of thousands of dollars of merchandise had been stolen from Bruner and sold at hefty discounts through Roger Balough, John Balough's brother. The merchandise was sold to Bruner manufacturer representatives, including Stickler & Associates

of Milwaukee.

While working for Bruner, Ciszewski signed a conflict of interest agreement, which provided in part that a "conflict of interest" would arise from any direct or indirect business, management or financial interest or activity, whether for remuneration or not, in any business or entity that is a present or prospective customer of Bruner.

On January 19, 1993, the President and CEO of Bruner, John Prochot, met with Ciszewski to ask him if he knew anything about the situation because Ciszewski had worked for Stickler before working for Bruner. At this meeting, Ciszewski admitted to knowing John Balough, but denied knowing Roger Balough. Ciszewski also denied knowing anything about Bruner merchandise being sold at substantial discounts. Bruner's attorney told Ciszewski at this meeting that Roger and John Balough are brothers. Ciszewski also stated that he did some service work for friends.

Another meeting was held on January 29, 1993, wherein Ciszewski was asked about invoices he initialed at Stickler for purchases of Bruner products bought directly from John Balough. When asked why he did not provide this information at the first meeting, Ciszewski said that he did not want to get involved.

After the January 29th meeting, Bruner discovered that Ciszewski purchased a number of items directly from John Balough. Bruner found invoices showing these purchases along with canceled checks.

A third meeting was held on February 18, 1993. At this point, Ciszewski was confronted with evidence that he had purchased materials directly from John Balough. Finally, Ciszewski admitted to purchasing a salt shelf from John Balough. Ciszewski was then suspended without

pay. More checks to John Balough from Ciszewski were discovered by Bruner. Finally Ciszewski was terminated on March 30, 1993.

After his termination, Ciszewski filed a claim for unemployment compensation benefits, which were denied by an Administrative Law Judge (ALJ) who found that Ciszewski was suspended for good cause connected with his work and was terminated for misconduct connected to his work. Ciszewski appealed this decision to the Labor and Industry Review Commission (LIRC), which affirmed the ALJ's decision. Ciszewski then commenced this action for judicial review of LIRC's decision.

Ciszewski Argument

Ciszewski argues that his conduct did not amount to misconduct, and therefore, he is entitled to his unemployment compensation benefits.

Ciszewski argues that unemployment compensation benefits cannot be denied on the ground of misconduct unless the employee's conduct is an intentional and substantial disregard of, or an intentional or unreasonable interference with, the employers interests. Holy Name School of Congregation v. DIHLR, 109 Wis. 2d 381 (1982); McGraw-Edison Co. v. DIHLR, 64 Wis. 2d 703 (1974). Ciszewski asserts that he did not engage in any intentional or substantial disregard of Bruner's interest.

As to the misconduct, Ciszewski first points out that the discussions at the January 19, 1993, meeting centered around Roger Balough rather than John Balough. Ciszewski claims that he had no reason to believe John Balough was dishonest in dealing with Ciszewski. In fact,

John Balough had held many positions while working for Bruner, including corporate vice-president. Ciszewski was under the impression that John Balough had a special deal worked out with Bruner, and that if Bruner wanted to know if John Balough had been selling Bruner equipment, Bruner should have specifically asked Ciszewski.

At the second meeting, Ciszewski acknowledged that he bought a salt shelf, but contends that Bruner did not question Ciszewski about any further purchases.

Ciszewski states that it was only at the third meeting on February 18, 1993, that he was confronted with checks in payment to John Balough. "Ciszewski was confronted with these and testifies that he answered every question asked of him at that time honestly." Ciszewski Brief, p. 20. However, Ciszewski himself has admitted in his brief that at the January 19, 1993, meeting, ". . . [c]learly, Ciszewski was not being entirely candid by not disclosing that Stickler had made purchases from John Balough." Ciszewski Brief, p. 21. Ciszewski maintains that this does not amount to misconduct, however. Neither does it amount to an intentional and substantial disregard of Bruner's interests.

As to the conflict of interest claim, Ciszewski asserts that he did not solicit any business from Bruner's customer base. Moreover, Bruner was in the business of designing and manufacturing commercial and industrial water treatment equipment, while Ciszewski was merely repairing and servicing water treatment equipment for his relatives, friends, or acquaintances, and did not solicit business from Bruner's client base.

LIRC Argument

LIRC asserts that the facts found by the ALJ and the Commission, including the findings as to Ciszewski's intent, should be upheld. Initially, this case turns on findings of fact concerning Ciszewski's state of mind and intent, which Ciszewski has never really disputed, at least in terms as to what he did and what he knew. His defense is that he did not know that there was anything improper in what he did.

LIRC points out that Ciszewski's complaint for judicial review did not claim that the findings of fact were erroneous. Under sec. 102.23, Stats., the only grounds for challenge to a decision of the commission concerning entitlement to unemployment compensation are:

1. That the commission acted without or in excess of its powers;
2. That the order or award was procured by fraud; and
3. That the findings of fact by the commission do not support the order or award.

Sec. 102.23(1)(e), Wis. Stats. The complaint for judicial review makes only one allegation of error: "[t]he facts as found do not constitute misconduct within either Sec. 108.04(6), Wis. Stats. or Sec. 108.04(5), Wis. Stats." Thus, this court should uphold the prior decisions. Furthermore, the decisions should be affirmed because the findings of fact are based on assessment of witness credibility, and they are supported by credible and substantial evidence in the record.

Therefore, LIRC argues that on the facts found, the commission properly concluded that Ciszewski was suspended for good cause connected with his employment and terminated for misconduct connected with his employment. LIRC contends that Ciszewski's "protestations of

innocence, coming from one who was benefitting by the arrangement, are not credible." LIRC's Brief, p. 29.

Scope of Review

Judicial review of decision by LIRC is limited and narrowly defined by statute. Sec. 102.23(1)(e) provides that the court may set aside a decision of the Commission only upon the following grounds:

- 1) That the Commission acted without or in excess of its powers;
- 2) That the order or award was procured by fraud; or
- 3) That the findings of fact by the Commission do not support the order or award.

The statute also provides that the findings of fact made by the Commission acting within its powers shall, in the absence of fraud, be conclusive. Certain well-established rules have evolved through court decisions interpreting this statute. They are set forth in L & H Wrecking Co. v. LIRC, 114 Wis. 2d 504, 508-509 (Ct. App. 1983):

Judicial review of findings of fact by the Department is governed by statute and is limited in scope. R.T. Madden, Inc. v. Department of Industry, Labor & Human Relations, 43 Wis. 2d 528, 536, 169 N.W. 2d 73, 76 (1969). Section 102.23(1), Stats., sets out the limitations on the scope of this review. The purpose of these limitations is to ensure speedy justice under the Workman's Compensation Act by limiting appeals and extensive litigation. Id. ... This court is to affirm the findings of the Commission if there is any credible evidence in the record to support those findings. Madden, 43 Wis. 2d at 547, 169 N.W. 2d at 82. In reviewing the sufficiency of credible evidence, we need to find only that the evidence is sufficient to exclude speculation

or conjecture. Bumpas v. Department of Industry, Labor & Human Relations, 95 Wis. 2d 334, 343, 290 N.W.2d 504, 508 (1980). The Commission's findings must be upheld even if against the great weight and clear preponderance of the evidence. Goranson v. Department of Industry, Labor & Human Relations, 94 Wis. 2d 537, 554, 289 N.W.2d 270, 278 (1980). The credibility of a witness or the persuasiveness of the testimony rendered are for the Department to determine. Sec. 102.23(6), Stats.; Goranson, 94 Wis. 2d at 556, 289 N.W.2d at 179. In applying the credible evidence test to findings of the Department, a reviewing court does not weigh conflicting evidence to determine which should be believed. If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to the opposite conclusion, a court must affirm. Valadzie v. Briggs & Stratton Corp., 92 Wis. 2d 583, 592-94, 286 N.W.2d 540, 544-45 (1979).

Furthermore, in Holy Name School, supra, at 385-386, the court held:

[j]udicial review under ch. 108 is primarily confined to questions of law. See sec. 108.09(7), Stats. Section 102.23(6), Stats., which sec. 108.09(7) incorporates by reference, sets forth the following limited standard of review of the commission's findings of fact:

If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

Substantial evidence for purposes of this statute does not constitute the preponderance of the evidence. The test is whether reasonable minds could arrive at the same conclusion the commission reached. In reviewing administrative agencies' factual findings under similar provisions containing the "substantial evidence" standard, our supreme court has stated that "there may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the

evidence it wishes to accept."

[A reviewing court is] not bound by the commission's determination of a question of law. The commission's legal conclusion will be given weight, however, when its expertise is significant to a value judgment involved in a question of law.

(Citations omitted).


Conclusion and Final Order

This court concludes that there is credible and substantial evidence to support the Commission's findings of fact and conclusions of law. Ciszewski was less than candid and truthful about his involvement in this situation. As such, Ciszewski has intentionally interfered with Bruner's interests. This alone constitutes "good cause" for a disciplinary suspension and constitutes "misconduct" for discharge.

Accordingly, the decision of the Labor and Industry Review Commission is **AFFIRMED**.

Dated at Milwaukee this 29th day of November, 1994.

BY THE COURT:



Hon. John J. DiMotto
Milwaukee County Circuit Court, Branch 41