

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0427

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF CLARK,

PETITIONER-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT,

ARTHUR RICHARD EDWARDS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Clark County:
JOHN V. FINN, Judge. *Reversed and cause remanded with directions.*

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

DYKMAN, P.J. Arthur Richard Edwards appeals from the circuit court's order reversing a Labor and Industry Review Commission's order granting

him unemployment compensation benefits. He contends that there is credible and substantial evidence supporting the Commission's finding that his behavior did not amount to misconduct. We agree. We therefore reverse and remand with directions to reinstate benefits.

BACKGROUND

Arthur Edwards was a sheriff's deputy for Clark County until he was discharged on May 29, 1996, for violating department regulations. The violation occurred on November 1, 1993, when Edwards responded to a call from his adult daughter concerning a problem that she was having with her boyfriend. Before he left to meet his daughter, Edwards contacted Officer Flewellen, a municipal police officer, and requested that he meet him near his daughter's apartment. Upon arriving at the apartment, Edwards asked Flewellen to wait while he went inside to talk to his daughter. After talking with his daughter, Edwards radioed Flewellen to come into the apartment. After Flewellen entered the apartment, he noticed that Edwards's daughter had a fresh bruise on her face. Edwards informed him that there was no problem and no further investigation was required. He told Flewellen that the bruise was because she was accidentally hit in the face with a briefcase. Edwards then introduced Flewellen to his daughter and told her that Flewellen was a friend with whom she could talk. Flewellen later reported these events to his chief and an investigation ensued. A criminal complaint was filed against Edwards on November 30, 1994, for obstructing an officer in the performance of his duties.

On April 25, 1996, a jury found Edwards guilty of obstruction, contrary to § 946.41, STATS.¹ On May 29, 1996, he was discharged following a disciplinary hearing before the Clark County Grievance Committee for violating department regulations, which prohibit an employee from violating the laws of the state. Upon being discharged, Edwards applied for unemployment compensation benefits. The Department of Workforce Development issued an initial determination that Edwards had been discharged for misconduct connected with his employment. Edwards requested a hearing before an appeal tribunal to review the denial of benefits. On September 25, 1996, the appeal tribunal affirmed the initial determination that Edwards was discharged for misconduct. The appeal tribunal's decision was based primarily on the fact that Edwards was convicted of the crime for which he was subsequently discharged.

Edwards then appealed to the Labor and Industry Review Commission. In a two-to-one decision, the Commission reversed the appeal tribunal's decision, finding as a matter of law that Edwards did not engage in misconduct. The majority concluded that a criminal conviction does not necessarily warrant a finding of misconduct for unemployment compensation purposes. The majority cited § 108.101(4), STATS., which states:

No finding of fact or law, determination, decision or judgment in any action or administrative or judicial proceeding in law or equity not arising under this chapter made with respect to the rights or liabilities of a party to an action or proceeding under this chapter is binding in an action or proceeding under this chapter.

¹ This conviction was later reversed on appeal.

The majority held that without the conviction there was insufficient evidence in the record to establish that Edwards engaged in misconduct. It noted that because Edwards's daughter informed Edwards that the bruise on her face was the result of an accident, it was not culpable behavior on his part to then relay this statement to Flewellen. Based on the context of the events, the majority stated that it could not conclude that Edwards intentionally misled Flewellen. It further stated that if Edwards "intended to so mislead the municipal officer, he would not have introduced him to his daughter as someone the daughter would be able to contact if she needed someone to talk to."

Clark County appealed the Commission's determination to the trial court. The trial court reversed. Edwards now appeals.

DISCUSSION

On appeal, we review the Commission's decision, not that of the trial court. *Wisconsin Pub. Serv. Corp. v. Public Serv. Comm'n*, 156 Wis.2d 611, 616, 457 N.W.2d 502, 504 (Ct. App. 1990). We must uphold the Commission's factual findings if there is credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. Section 102.23(6), STATS. Credible evidence is that which excludes speculation and conjecture. See *Bumpas v. DILHR*, 95 Wis.2d 334, 343, 290 N.W.2d 504, 508 (1980). Substantial evidence is not a preponderance of evidence, but relevant evidence that a reasonable mind might accept as adequate to support a conclusion. See *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979). Where inferences may be drawn for the evidence, the drawing of one such permissible inference by the Commission is an act of fact finding, and the

inference so derived is conclusive on the reviewing court. *Bernhardt v. LIRC*, 207 Wis.2d 292, 299, 558 N.W.2d 874, 876 (Ct. App. 1996).

The Commission's determination of whether an employee engaged in misconduct under § 108.04(5), STATS., is a legal conclusion, which we review *de novo*. *Bernhardt*, 207 Wis.2d at 303, 558 N.W.2d at 878. However, in conducting our review, we give appropriate deference to the Commission's decision. *Id.* We afford "great weight" to the Commission's determination because the Commission has experience, technical competence and specialized knowledge in interpreting and applying the unemployment compensation statute. *Id.* Under this great weight standard, we will uphold the Commission's legal conclusion if the conclusion is reasonable and not contrary to the clear meaning of the statute. *UFE, Inc. v. LIRC*, 201 Wis.2d 274, 287, 548 N.W.2d 57, 62 (1996).

Edwards contends that great weight should be given to the Commission's decision because the Commission routinely determines whether certain behavior constitutes misconduct. Clark County disagrees. Clark County asserts that great weight should not be given in this case because the Commission's findings were not reasonable. It contends that the Commission's findings were not supported by substantial and credible evidence in the record. It points to evidence in the record that contradicts Edwards's statement to Flewellen that his daughter's bruise was an accident. For example, there is a statement by a woman who picked up Edwards's daughter after the daughter had an altercation with her boyfriend and took her to a phone where she could call her father. In addition, Edwards's daughter was on probation, and as a condition of her probation, she was not to have any contact with her boyfriend. Finally, Edwards admitted at the appeal tribunal hearing that his daughter does not always tell the truth about everything.

Based on these facts, the County contends that Deputy Edwards engaged in misconduct by failing to investigate the matter further and in instructing Officer Flewellen that further investigation was not required. It asserts that the Commission acted without or in excess of its authority when it reached a contrary finding because their decision was not based on substantial and credible evidence.

The County, however, misinterprets the substantial and credible evidence standard. We will not disregard the Commission's finding simply because there is evidence that runs contrary to their findings. We simply look to see if there is substantial, credible evidence that supports the Commission's findings. If reasonable minds could arrive at the same conclusion reached by the Commission, the credible evidence test is met. *See Framers Mill of Athens, Inc. v. DILHR*, 97 Wis.2d 576, 579, 294 N.W.2d 39, 41 (Ct. App. 1980). If those same reasonable minds consider the evidence used by the Commission to reach its decision to be adequate, then the substantial evidence test is met. *Bucyrus-Erie Co.*, 90 Wis.2d at 418, 280 N.W.2d at 147. We conclude that the evidence relied upon by the Commission—the fact that Edwards called another officer to come along, the fact that he had the officer come into the apartment, and the fact that he told his daughter that she could talk to the other officer if she need to—is both credible and substantial.

The County further contends that great weight should not be given to the Commission's decision because it reversed the appeal tribunal's decision, and made its own credibility determinations, without first contacting the appeal tribunal to discuss the basis of the appeal tribunal's findings. We disagree. The appeal tribunal did not make credibility determinations in reaching its decision. The Commission pointed this fact out in its decision. The appeal tribunal, instead,

based its decision on the fact that Edwards was convicted of the crime for which he was later terminated.²

The Commission is required to confer with the appeal tribunal only when it differs with the appeal tribunal regarding "material findings of facts based on an appraisal of the credibility of witnesses" See *Carley Ford, Lincoln, Mercury, Inc. v. Bosquette*, 72 Wis.2d 569, 575, 241 N.W.2d 596, 599 (1976). While we agree that the Commission must confer with the appeal tribunal when it is going to disregard the appeal tribunal's credibility determinations, such conferring is not required when the appeal tribunal never made an initial credibility determination. We conclude that the Commission did not act without or in excess of its authority in reversing the appeal tribunal's decision.³ Giving great weight to its decision, we reverse the trial court and remand with directions to reinstate Edwards's unemployment compensation benefits.

² The appeal tribunal stated in his decision:

The employe contended that his actions did not constitute an obstruction of a police officer from the performance of his duties and therefore, his actions did not amount to misconduct connected with his employment. His contention cannot be sustained. The circuit court [in the criminal proceedings] has adjudged otherwise. His conviction on that charge was a violation of the employer's regulations which resulted in the discharge from the employment. *Based solely on the conviction*, it is established that his actions evinced such a wil[]ful, intentional, and so substantial a disregard for the employer's interests as to constitute misconduct connected with the employment with the employer.

(Emphasis added.)

³ There also is some dispute between the parties regarding whether the reversal of Edwards's criminal conviction should be included in the record. As we discussed, section 108.101(4), STATS., states that the criminal conviction was not binding on the appeal tribunal or the Commission in the first place. Therefore, the reversal of his conviction was also non-binding.

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

Not recommended for publication in the official reports.