STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Petitioner,

vs.

WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION, et al.,

Respondents.

DECISION AND ORDER
Case No. 14CV008679

This case comes before me on the petition of the Department of Workforce Development to review a decision of the Labor and Industry Review Commission. The Commission ruled that Bridgette Terry did not intend to mislead the Department when she falsely stated information about her eligibility for benefits and therefore she should not be penalized for concealing information. The Department disagrees, and asks me to reverse the Commission's finding.

The briefs submitted by the Commission and the Department are lengthy, detailed and well-researched. But the case is a bit simpler than the briefing might suggest. The question whether Ms. Terry intended to conceal information from the Department comes down to a factual finding, to which I must defer if it finds support in the record. The Commission found that Ms. Terry didn't understand the question put to her about her work and wages, and therefore could not have formed an intent to conceal. This finding is supported by substantial evidence. Accordingly, I must affirm.

Factual background

Ms. Terry began claiming unemployment benefits on March 13, 2013. She

continued to file claims in the weeks that followed.

Every week she was required to certify her eligibility for benefits. She completed a weekly certification by calling the Department of Workforce Development and answering questions over the telephone about her eligibility. The questions were put to her by an automated telephone system and her answers were recorded. One question (to which the parties and the record refer as Question 4), asked:

> During the week, did you work or did you receive or will you receive sick pay, bonus pay, or commission?

For eight consecutive weeks, and then once more three weeks later, Ms. Terry answered "no," but this answer was false. There is no dispute that in each of these weeks she was working and receiving pay. This streak of false answers was interrupted by two weeks of truthful answers. During those two intervening weeks, she also was working and receiving pay, and when asked Question 4, she answered "yes."

At a hearing conducted before an administrative law judge, Ms. Terry was confronted with her answers and with proof that she had been working while she was claiming benefits:

> Q: And uh, why did you answer no?
>
> A: Because I didn't understand the question. Because it was accident [*sic*] --- um, you know, like you said, multiple questions in one. And I didn't understand, you know, what they wanted.

Transcript of Hearing, March 24, 2014 at 36.

Ms. Terry went on to explain that even when she answered the question, "no," she was asked to identify her employers and report how many hours she worked, and she testified that she answered those questions truthfully. Tr. 37-38, 41, 43.

Procedural background

There is no dispute in the case that Ms. Terry was not eligible for the benefits she received. The dispute concerns whether in addition to forfeiting benefits Ms. Terry is liable for certain penalties for making a fraudulent claim. She is liable for a penalty if she "in filing . . . her application for benefits or claim for any week, conceals any material fact relating to . . . her eligibility." WIS. STAT. § 108.04(11).

In August, 2013, the Department determined that Ms. Terry had concealed information about her work and wages and penalized her. Ms. Terry requested a hearing. A hearing was conducted on March 24, 2014, at which she gave the testimony summarized above. The ALJ also heard the testimony of a Department disputed claims analyst. After hearing the testimony, the ALJ reversed the Department's determination. The ALJ ruled that Ms. Terry was required to repay the benefits she collected that were not owed to her (about $2,700.00), but was not required to forfeit future benefits (about $6,500.00) and was not required to pay a $490.00 penalty.

The Department asked the Commission to review the matter. The Commission upheld the ALJ's decision. The Department then sought review in this court.

Analysis

1. Standard of Review

The Department asks me to reverse the Commission, but acknowledges, as it must, that my authority to do so is limited, and in particular I am not permitted to start from scratch in reviewing the evidence. WIS. STAT. § 102.23(6) directs that the court "not substitute its judgment for that of the commission as to the weight of the evidence" but

instead reverse only "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."

Thus, WIS. STAT. § 102.23(6) incorporates the substantial evidence standard. "Substantial evidence does not mean a preponderance of the evidence. Rather, the test is whether, taking into account all the evidence in the record, 'reasonable minds could arrive at the same conclusion as the agency.'" *RURAL v. PSC*, 2000 WI 129, ¶ 20, 239 Wis. 2d 660, 676 (quotations omitted). *See also Madison Gas & Elec. Co. v. Public Serv. Commission*, 109 Wis. 2d 127, 133 (1982), *citing Sanitary Transfer & Landfill, Inc. v. DNR*, 85 Wis. 2d 1, 15 (1978); *Painter v. Dentistry Examining Bd.*, 2003 WI App 123, ¶ 17, 265 Wis. 2d 248.

Indeed, in a *certiorari* proceeding such as this, the deck is stacked heavily in favor of preserving the Commission's findings of fact. If there is substantial evidence to support the Commissions findings, I must uphold them even if I believe them to be "contrary to the great weight and clear preponderance of the evidence." *Amsoil, Inc. v. Labor and Industry Review Commission,* 173 Wis. 2d 154, 167-168 (Ct. App. 1992). What's more, I am required to search the record to locate credible evidence that supports the Commission's findings. *See Ide v. Labor and Industry Review Commission,* 224 Wis. 2d 159, 165 (1999).

Finally, the evidentiary hurdle the Department was required to clear before the appeal tribunal or the Commission could uphold its determination against Ms. Terry is higher than normal. "In order to impose a forfeiture on a UI claimant, the burden of proof is on the department to present clear, satisfactory and convincing evidence of fraud." *Joseph W. Hein, Jr.*, UI Hearing No. 00605374MW (LIRC Dec. 13, 2001), available at

http://dwd.wisconsin.gov/lirc/ucdecsns/1260.htm, *cited in Nethery v. Labor and Industry Review Commission*, 2014 WI App 24, ¶ 27, 352 Wis. 2d 756 (*per curiam*).

2. *Is there substantial evidence in the record supporting the Commission's finding that Ms. Terry did not intend to conceal?*

The Commission found that Ms. Terry did not intend to mislead or defraud the Department and instead concluded that her inaccurate reporting was the result of misunderstanding Question 4. R. 15 While the Commission does not come right out and say as much, this finding is evident from the discussion in the Commission's decision:

- Question 4 was "susceptible to misinterpretation." R. 15.
- "Besides the incorrect answer to the compound Question 4, there is very little evidence in the record to create a reasonable inference [of intentional concealment]." *Id.*
- That a handbook explaining the process was sent to Ms. Terry does not give rise to a sufficient inference. *Id.*
- Neither does Ms. Terry's testimony that she reported her hours even though she answered "no" to Question 4. *Id.*
- "Under these circumstances, the department has not met its burden to present evidence sufficient to reasonably infer an intent to mislead or defraud . . . " *Id.*

In short, if Ms. Terry didn't understand the question she was answering, she could not have intended to conceal.

The parties spill a good deal of ink over how WIS. STAT. § 108.04(11) should be interpreted,[1] but the lynchpin of the Commission's decision isn't a legal conclusion, it's the factual finding I have just outlined, a factual dispute that centers on credibility: is it believable, as Ms. Terry testified, that she did not understand Question 4? While the Commission did not expressly answer this question, it seems to have concluded that, yes, Ms. Terry was confused by Question 4, or at least that the Department failed to demonstrate clearly and convincingly that she did understand Question 4 and gave false answers and that her false answers imply an intent to conceal her work and wages.

I have searched the record for credible evidence to support the Commission's finding. I found several bits of evidence which substantiate it:

First, Ms. Terry said she was confused and that she didn't understand the question. She repeated that point several times. The ALJ believed her, R. 206-207, and the Commission appears to have believed her, too. When a factual issue involves a question of intent, the Commission's finding is conclusive. *Pick 'n Save Roundy's*, 2010 WI App 130, ¶ 8, 329 Wis. 2d 674, *citing Fitzgerald v. Globe Union, Inc.*, 35 Wis. 2d 332, 337 (1967). Thus, Ms. Terry's testimony, which was accepted by the factfinder, is itself substantial evidence to support the Commission's conclusion.

[1] The parties dispute the elements of a fraudulent claim under WIS. STAT. § 108.04(11). The Department contends that all it must prove is that a claimant intended to conceal a material fact of any sort. The Commission contends that the Department must prove that the claimant intended to receive benefits to which the claimant knows he or she is not entitled. The Department contends that the latter is a gloss that finds no support in the language of the statute. Because I agree with the Commission that the record supports a finding that no any intent of any kind was proven, I need not resolve the subordinate question about what particular species of intent the Department was required to prove.

The Department contends that Ms. Terry's testimony is implausible, because she answered the question correctly some of the time, which implies (to the Department at least) that Ms. Terry understood the question. But there are three other bits of evidence that suggest the contrary.

First, Question 4 is confusing. There is no dispute that Question 4 is a compound question. One can quibble over whether it is disjunctive or conjunctive (a distinction the Department considers pertinent), but the more salient fact is that it confronts the listener in one stroke with a complex of separate questions, too many to be digested in a single bite: Did you work during the past week? Did you receive sick pay during the past week? Will you receive sick pay in the future? Did you receive bonus pay during the past week? Will you receive bonus pay in the future? Did you receive a commission during the past week? Will you receive a commission in the future? Cramming that much into a single question is confusing. In my experience presiding over trials, this is an instance of the kind of tangled question that often must be broken down for a witness to understand.

Furthermore, because the question isn't broken down, a "no" answer to the question was plausible in Ms. Terry's circumstances. For some parts of the question, "no" was a correct answer, because Ms. Terry was not expecting to receive sick pay, bonus pay or a commission in the future.

Second, there's the fact that Ms. Terry answered the same question on separate occasions in contrary ways. Although she was working throughout the relevant time period, nine times she answered Question 4 "no," but in the midst of the same streak she twice answered it "yes." The Department would have me

chalk this up to intentional concealment, but inconsistency like this suggests an equal or greater possibility of confusion. It was up to the Commission, not this court, to decide which.

Indeed, third, if Ms. Terry was trying to hide her work and pay from the Department, it is hard to explain why she did not do so consistently. She testified that even when she answered the question, "no," she went on to report the fact that she was working and report how many hours she worked. R. 7; Tr. 37-38, 41, 43. Although it seemed illogical for a computer employing an automated tree of questions to ask a person to report how many hours she worked if she already had said she wasn't working, Ms. Terry told the ALJ that indeed that was what she was asked, and the Department did not have solid evidence to rebut her testimony. The Department's witness was unable to confirm what questions were contained in the script the Department used to certify eligibility with claimants like Ms. Terry. *See* R.8; Tr. 48-49.[2]

In the same vein, twice in a series of the eleven telephone queries Ms. Terry answered Question 4 "yes," and revealed the very facts the Department accuses her of trying to conceal. Thus, if the question is whether Ms. Terry was trying to conceal, what is implausible about her testimony is not that she answered inconsistently, but that she did not consistently answer "no."

[2] The Department asks me to find that it was "impossible" for the automated telephone system to ask Ms. Terry to report her hours if she answered "no" to Question 4, and also to find that "the Commission is well aware of" this fact. Brief of Plaintiff, filed March 13, 2015 at 21. But the Department concedes that the evidence on which this argument depends is not part of the record, *id.* n. 15, and the LIRC precedent the Department offers, *John B. Simonson,* Hearing No. 03401159AP (LIRC, Mar. 26, 2004) is inconclusive because it predates the changes that apparently have been made to the telephone script. Tr. 49.

The Department's remaining arguments are unavailing. The Department argues that Ms. Terry must have been trying to conceal something, because she "*knew* she was supposed to report her work on her claims." Brief of Plaintiff, filed March 13, 2015, at 18, *citing* Tr. 35-36. But the hoped-for inference of fraud that the Department seeks from this testimony dries up when considered alongside Ms. Terry's other testimony, accepted by the Commission, that she did strive to report her hours.

The Department argues that Ms. Terry could not have misunderstood Question 4 because she was asked the same question so many times. Sooner or later, the argument implies, she must have grasped its meaning. The Department's point is not without merit, but it only goes to the weight of Ms. Terry's testimony, which ultimately is within the domain of the Commission to resolve, not the circuit court. WIS. STAT. § 102.23(6).

The Department argues that Ms. Terry could not have been confused because a handbook explaining the question to her had been mailed to her at an address she had maintained for the previous eight years. However, Ms. Terry denied receiving the handbook, Tr. 35, and the only evidence the Department could offer to rebut her testimony was that the envelope containing the handbook was addressed correctly. While this evidence gives rise to an inference that Ms. Terry received the handbook, the inference is rebuttable, not conclusive, as the Department concedes. *See* Brief of Plaintiff at 19, *citing American Family Mutual Insurance Co. v. Golke,* 2009 WI 81, ¶ 36, 319 Wis. 2d 397 ("evidence of mailing a letter raises a rebuttable presumption that the addressee received the letter").

What is conclusive, for purposes of *certiorari* review, is that, in making its findings of fact, the Commission seems pretty clearly to have declined to the inference the Department asked the Commission to draw. R. 6, 15. *See Pick 'n Save Roundy's*, 2010 WI App 130, ¶ 8.

Finally, the Department argues that the Commission's ruling in Ms. Terry's case is inconsistent with its ruling in other cases in which the Commission has found concealment. My review of the many cases cited by the Department leaves me with a firm conclusion that the Commission finds concealment only in cases in which the Department proves that, as in *Suchowski v. Golden County Foods, Inc.*, Hearing Nos. 13202496EC & 13202497EC (LIRC, Jan. 9, 2014), "the employee understood the claims filing process." In Ms. Terry's case, it is pretty clear from the Commission's ruling that it was satisfied that when Ms. Terry was answering Question 4, she did not understand what she was being asked.

Conclusion

For all of the foregoing reasons, IT IS HEREBY ORDERED THAT the decision of the Labor and Industry Review Commission is affirmed.

Richard J. Sankovitz
Circuit Court Judge

Dated: 6.19.2015