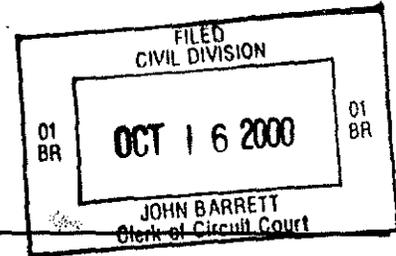


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**WOODROW W. CAIN II, \*****Petitioner,**

v.

Case No. 00-CV-002784

**LABOR & INDUSTRY REVIEW COMMISSION  
and MARQUETTE MEDICAL SYSTEMS n/k/a  
GE MEDICAL SYSTEMS, div. of  
GENERAL ELECTRIC CORPORATION,****Respondent.**

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**DECISION**

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**INTRODUCTION*****Procedural History***

Petitioner, Woodrow W. Cain II, appeals from a decision of the Labor and Industry Review Commission ("LIRC") determining that respondent GE Medical Systems properly terminated Cain for misconduct. LIRC's decision reversed the determination of Administrative Law Judge Paul Gordon ("ALJ"), who found that petitioner's actions did not rise to the level of misconduct.

Petitioner contends that a finding of fact necessary to support LIRC's conclusion is not based on credible and substantial evidence. Petitioner further contends that LIRC erred as a matter of law in determining that he committed misconduct and did not make required findings of fact needed to support this conclusion. This court finds LIRC's factual determinations to be supported by credible and substantial evidence in the record and its conclusions of law to be reasonable, and therefore LIRC's decision is affirmed.

## ***Background***

Respondent GE Marquette Medical Systems, Inc., (GE) employed petitioner for thirteen years as a technician. Respondent discharged Petitioner for failure to complete assigned tasks. Respondent GE manufactures medical monitoring devices. Petitioner was an inspector responsible for a final inspection of medical devices before Respondent GE delivered them. In February 1999, Petitioner and several others were assigned the task of correcting programming flaws in several hundred devices. Petitioner was required to record the corrections into a device history log as part of government regulations. One hundred and two devices were shipped out around the world without any entry of the corrections into the log. The Respondent GE discovered the mistakes in June, and immediately decertified Petitioner as a final inspector and asked to sign retraining paperwork. He refused. On August 3, 2000, Petitioner again failed to properly document his work on two machines. He was terminated soon after that discovery.

## **STANDARD OF REVIEW**

Section 102.23, Stats., controls the judicial review of Labor and Industry Review Commission decisions. *See* § 108.09(7) Stats. This court reviews LIRC's decision and not the decision of the ALJ. *See Stafford Trucking, Inc. v. DILHR*, 102 Wis. 2d 256, 260 (Ct. App. 1981). The burden of proving misconduct remains with the employer. *See Holy Name School v. DILHR*, 109 Wis. 2d 381, 387 (Ct. App. 1982). Petitioner disputes both findings of fact and conclusions of law and this court applies different standards of review to these issues.

## ***Findings of Fact***

“The findings of fact made by the commission within its powers shall, in the absence of fraud, be conclusive.” Wis.Stat. § 102.23. Furthermore,

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.

§ 102.23(6) Stats. The court shall consider evidence substantial if it is "relevant, probative, and credible and . . . in a quantum that will permit a reasonable factfinder to base a conclusion upon it." See *Princess House, Inc. v. DIHLR*, 111 Wis. 2d 46, 51 (1983).

The Commission's finding of fact must be upheld even if the court finds that they are contrary to the great weight of the evidence. See *General Cas. Co. of Wisconsin v. LIRC*, 165 Wis.2d 174, 178 (Ct. App. 1991). Finally, it is the function of the commission, not of a reviewing court, to determine the credibility of the evidence on any finding of fact. See *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249 (1989).

### *Conclusions of Law*

Once the facts are established, the determination of whether certain conduct is "misconduct" under § 108.04(5) Stats. is a question of law. See *Charette v. LIRC*, 196 Wis. 2d 956, 959 (Ct. App. 1995). On judicial review, there are three levels of deference that may be given to an administrative agency's conclusions of law and statutory interpretations, depending on the agency's experience, technical competence, and knowledge with regard to the question presented. See *Kelley v. Marquardt*, 172 Wis.2d 234 (1992). Those levels of deference are great weight, due weight, and de novo. See *Jicha v. DILHR*, 169 Wis.2d 284 (1992). Four elements are required in order to afford great weight deference to an agency decision on a question of law. See *UFE Inc. and Pacific Indemnity Co. v. LIRC and Huebner*, 201 Wis.2d 274, 284 (1996).

The elements are:

- (1) the agency must be legislatively charged with the duty of administering the statute;
- (2) the interpretation of the agency is one of long standing;
- (3) the agency employed its expertise and knowledge in forming the interpretation; and,
- (4) the agency's interpretation will provide uniformity and consistency in the application of the statute.

*See id.*, at 287. Under the great weight standard, a court will uphold the commission's interpretation, if it is reasonable and consistent with the statute, even though the court favors an alternative interpretation. *See id.*

Due weight is given an agency's interpretation when the agency has some experience, but has not developed the expertise necessary to put it in a better position than a court to interpret the statute. *See id.*, at 286. Under the due weight standard, a court will not overturn a reasonable interpretation of the statute unless the court determines that a more reasonable interpretation exists. *See id.* De novo review is only applicable when the question presented is clearly one of first impression to the agency, or when an agency's position on an issue is so inconsistent as to provide no guidance to the court. *See id.*, at 285.

## DISCUSSION

### *Challenges to Findings of Fact*

Petitioner argues that LIRC's determination is not based on substantial and credible evidence. He argues that because the inspections were done in an assembly-line process with several technicians working on the machines assigned to his number, the evidence does not support the finding that he was responsible for the errors. However, Ron Weissenburger, Petitioner's supervisor, testified that he never authorized the assembly line approach and that company policy was that each person is responsible for the work recorded under his or her identification number. Respondent argues that Petitioner's identification number appears on the

records of the 102 machines whose work history was not properly documented, and that he is responsible for the records bearing his identification number. Petitioner testified that he gave his identification number to the other employees. He knew the number was recorded in the work history of the machines. Any check of the work history on the machines would reveal his identification number. LIRC's finding that one of the reasons Petitioner was discharged was that he was at least partially responsible for the errors is based on substantial and credible evidence in the record.

Petitioner argues that Respondent knew about the assembly line approach, and ordered him to give his identification number to other employees. Weissenburger denies that assertion, and affirmatively states that each employee is responsible for work done under his or her identification number. This Court cannot judge the credibility of the witnesses. It is the function of the commission, not of a reviewing court, to determine the credibility of the evidence on any finding of fact. *See Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249 (1989). The ALJ discussed the evidence and determined that the identification number on the documents revealed Petitioner's responsibility for the errors. The ALJ heard all the testimony and made the determination that Weissenburger's testimony, that he did not authorize the sharing of Petitioner's identification number, was more credible than Petitioner's assertion that he was told to share the number. Ultimately, the ALJ determined that at the very least, he shared the responsibility. That determination was based on his gauging the credibility of Petitioner and the other witnesses. Because LIRC did not reverse the ALJ's findings with respect to the credibility of the witnesses, this court will not disturb LIRC's determination that the evidence of Petitioner's responsibility for the errors was credible. That evidence is sufficient to satisfy the requirements of section 102.23, Stats. The court shall consider evidence substantial if it is

“relevant, probative, and credible and . . . in a quantum that will permit a reasonable factfinder to base a conclusion upon it.” *See Princess House, Inc. v. DIHLR*, 111 Wis. 2d 46, 51 (1983). This Court is satisfied that the evidence on which LIRC based its decision satisfies the above requirement.

### ***Challenges to Conclusions of Law***

The question of whether certain facts constitute “misconduct” pursuant to section 108.04(5), Stats., is a question of law, although one “intertwined with factual and value determinations.” *See Bernhardt v. LIRC*, 207 Wis.2d 292, 303 (Ct. App. 1996). The Court of Appeals further held that a LIRC finding on this issue is entitled to great weight deference because of LIRC’s experience, technical competence, and specialized knowledge, and also because the matter is so closely related to factual findings. *See id.* Under the great weight standard, a court will uphold the commission’s interpretation, if it is reasonable and consistent with the statute, even though the court favors an alternative interpretation. *See UFE Inc. and Pacific Indemnity Co. v. LIRC and Huebner*, 201 Wis.2d 274, 284 (1996).

Petitioner also argues that LIRC erred in determining that he was discharged for misconduct. Misconduct is defined for unemployment insurance purposes as:

. . . conduct evincing such wilful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or of the employees duties and obligations of his employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed “misconduct” within the meaning of the statute.

*See Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60 (1941). Petitioner asserts that he was not responsible for the errors that led to the recall of the units, and that because he was directed to use the assembly line process to repair the units the Respondent GE assumed the responsibility for the errors that occurred in recording the repairs. He cites several circuit court cases in which employees failed to perform their duties and courts found that they was not guilty of misconduct. None of those cases constitutes authority that must be followed by this Court.

LIRC found that Petitioner was responsible for the 102 record-keeping errors that were recorded under his identification number. It found that his refusal to sign re-certification papers was unreasonable, and that his argument that he was not allowed to read the papers was unreasonable. Common sense reveals that he could have read the papers when handed to him to sign. He had signed re-certification papers in the past. LIRC found that the employer's decision to de-certify him was reasonable given the magnitude of the errors. Finally, LIRC found that while Petitioner's discharge was somewhat remote from the February errors, the discovery of the problems in June and subsequent investigation time are not too remote from the errors to warrant a termination for misconduct.

This Court follows the ruling in *Bernhardt v. LIRC*, 207 Wis.2d 292, 303 (Ct. App. 1996), granting great weight deference to LIRC's decisions regarding employee misconduct. LIRC has a longstanding legislative charge to decide matters of unemployment benefits, and this Court will not disturb its ruling in this case. This Court holds that LIRC's decision was based on substantial and credible evidence. The evidence that Petitioner was at least partially responsible for over one-hundred errors that cost the Respondent GE over ten-thousand dollars was sufficient to allow LIRC to make the reasonable determination that Petitioner was discharged for misconduct under section 108.04(5), Stats.

**CONCLUSION AND ORDER**

Based on the foregoing and the reasons stated, **IT IS HEREBY ORDERED** that the decision of the Labor and Industry Review Commission is **AFFIRMED**.

Dated this 16 day of October, 2000 at Milwaukee, Wisconsin.

BY THE COURT:

A handwritten signature in cursive script that reads "Maxine A. White". The signature is written in black ink and is positioned above the printed name and title.

Judge Maxine A. White  
Circuit Court - Branch 01  
Case No. 00-CV-002784