STATE OF WISCONSIN * CIRCUIT COURT BRANCH 13 DANE COUNTY *

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Plaintiff,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and JENNIFER PANZIGRAU,

Defendants.

MEMORANDUM DECISION AND ORDER

Case No. 88CV4739

The Department of Industry, Labor and Human Relations (The Department), as the employer of Jennifer Panzigrau, brings a petition for review of a decision of the Labor and Industry Review Commission (Commission) affirming a decision of the Unemployment Compensation Appeal Tribunal. The Appeal Tribunal held that the Department was collaterally estopped from relitigating whether the claimant, Panzigrau, concealed a material fact relating to her eligibility for unemployment compensation and was therefore properly suspended for misconduct. I conclude that LIRC properly applied the Collateral estoppel doctrine and affirm.

Panzigrau was employed as a claimstaker in the unemployment compensation division of DILHR. In July, 1987, she sought unemployment compensation benefits, believing she had been "partially laid-off." When completing the required claim card pertaining to a particular benefit week, she indicated that she had not received vacation pay during that

week when, in fact, she had. The Department made an initial determination that Panzigrau "concealed a material fact relating to her eligibility" and ordered a forfeiture of that week's benefit. Sec. 108.04(11), Wis. Stats. She appealed the determination and a hearing followed.

Following the hearing, the administrative law judge found that Panzigrau "had no intention of concealing a material fact relating to her eligibility" and that she, therefore, "did not conceal ... a material fact ... within the meaning of Section 108.04(11)(a) of the statutes..." (ALJ Rehbein Decision of 9-25-87, p. 3). The Department did not appeal this decision and it became final.

On August 30, 1987, the Department had suspended Panzigrau, alleging that when she filed the unemployment claim in question, she withheld a material fact. When Panzigrau applied for unemployment benefits during the suspension period, her application was denied based upon the initial determination that her suspension was for misconduct, thus making her ineligible to receive benefits. Sec. 108.04(6)(a), Wis. Stats. She timely requested a hearing on her claim and on February 10, 1988, a second administrative law judge conducted a telephonic prehearing on the matter.

During the prehearing, the administrative law judge suggested the possibility that the Department was collaterally estopped from relitigating the misconduct issue because it had already been decided in the September 25, 1987 decision. The administrative law judge did not take

testimony but asked the parties to brief the collateral estoppel issue. They did so, and he rendered a decision.

He concluded that the Department was collaterally estopped from relitigating the concealment issue and stated: "When that issue is resolved in the employe's favor, there can be no finding of misconduct or other good cause connected with her employment." The administrative law judge went on to conclude that Panzigrau was eligible to receive benefits. The division appealed and the Commission affirmed.

Review of administrative actions is confirmed to the record, and a court may not disturb the agency's findings of fact so long as substantial evidence supports them. Kewaunee County v. WERC, 141 Wis.2d 347, 356 (Ct. App. 1987). A reviewing court, however, addresses questions of law ab initio and need not give any deference to the agency's determination when the agency's action does not implicate its expertise and the court is as competent as the agency to decide it. Dielectric Corp. v. LIRC, 111 Wis.2d 270, 272 (Ct. App. 1983). Whether collateral estoppel applies is a question of law about which this court owes no deference to the Commission's conclusion. Kichefski v. American Fam. Mut. Ins., 132 Wis.2d 74, 78 (Ct. App. 1986).

Collateral estoppel "'precludes relitigation of an issue of ultimate fact previously determined by a valid final judgment in an action between the same parties." Crawall v. Heritage Mutual Insurance Co., 118 Wis.2d 120, 123 (Ct. App. 1984), quoting State ex rel. Flowers v. Department of Health

& Social Services, 81 Wis.2d 376, 387 (1978). Here there is not dispute that the parties are the same as those involved in the prior proceeding and that the findings made in that proceeding were part of a valid final judgement.[1] The threshold issue is whether the previous finding was an "ultimate fact" in that prior proceeding.

As noted above, the prior proceeding rested on the application of Sec. 108.04(11)(c), Wis. Stats., which provides:

> If a claimant, in filing his or her claim for any week, conceals any part of his or her wages earned in or paid or payable for that week ... or any other material fact relating to ... eligibility for benefits, so much of any benefit payment as was paid because of such concealment shall be recovered by the department as an overpayment.

The key language is the word "conceals". The Department argues that there is no ambiguity in this statutory language and that any failure to disclose "wages ... or any other material fact" is concealment. The Commission urges the imposition of a scienter element as a part of the statute's meaning. Neither of these constructions is wholly unreasonable and thus ambiguity is present, and resort to extrinsic aids to ascertain the legislative's intent is permitted.

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[1] The Department also does not argue that a finding of "no intent" is not dispositive of the misconduct issue.

The title of this subsection is "Fraudulent Claims". Such titles may be used to resolve doubts as to a statute's meaning. In the Interest of C.D.M., 125 Wis.2d 170, 172 (Ct. App. 1985). The use of the word "fraudulent" clearly suggests that the legislature was addressing culpable conduct by applicants and was not creating a system of strict liability where even honest mistakes would lead to forfeitures. This is confirmed by the use of the word "conceals". While it is not modified by any words such as "intentionally" or "knowingly", the dictionary definition for conceal itself is "[t]o hide or keep from observation, discovery, or understanding; keep secret." The American Heritage Dictionary of the English Language at 275 (1981). The element of conscious, affirmative action in the act of concealing is undeniable.[2] If the legislature intended there to be strict liability for any missing information, alternative wording was readily available.

Furthermore, this statutory section describes the circumstances under which a claimant may have a forfeiture imposed. Such laws, if their meaning is at all uncertain, should be strictly construed to narrow the range of acts that will lead to the harsh result of a forfeiture. Liberty Loan Corp. & Affiliates v. Eis, 69 Wis.2d 642, 649 (1975). To

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[2] Use of a standard dictionary to ascertain the usual meaning of a word does not necessarily render the word ambiguous. Figgs v. City of Miwlaukee, 121 Wis.2d 44, 51 (1984). Here the use of the dictionary definition of "conceals" might well have led to the conclusion that there was no ambiguity, but the result would have been the same in any case.

construe "conceals" to include the necessity for a knowing or intentional failure to disclose material information is consistent with this directive. It is also consistent with the public policy concerns expressed by the legislature in the preamble to the Unemployment Compensation law. sec. 180.01, Wis. Stats.

Thus I conclude that the finding that Panzigrau did not intentionally conceal a material fact on her claim card was an "ultimate fact" in the sec. 108.04(11) proceeding for collateral estoppel purposes. This does not, however, fully resolve the collateral estoppel issue; for Kichefski, supra at 81 seems to suggest that even if the technical requirements for its application are present, public policy concerns may dictate that a court decline to do so. The central focus is on considerations of fairness, that is, that the party against whom the doctrine is sought to be applied have had a "fair chance procedurally, substantively, or evidentially to pursue the claim." Id at 79-80. These concerns are measured against the doctrine's purposes of conserving judicial resources and encouraging reliance on adjudications by preventing inconsistent decisions.

The Commission concluded that collateral estoppel was properly applied because:

> "the employer has conceded that it appeared as a party at [the initial] hearing .... Second, the employer had a full and fair opportunity to present its case at the concealment hearing. It was represented by an attorney and had the opportunity to present and cross-examine witnesses. Third, the employer had the ultimate burden of proof at the concealment hearing and has the ultimate burden of

> proof on the disciplinary suspension issues. Fourth, the concealment decision was issued after a full hearing and said decision is now final. Fifth, all issues arose from the same set of facts because the prior hearing involved the same allegation of the employe's failure to disclose vacation pay as is alleged in the disciplinary-suspension issues...." (Commission Decision, 7/29/88, p. 3.).

The Department argues from 2 prior Commission decisions that because "intent" had not previously been considered a component of concealment, it did not litigate the issue as fully as it would have had if known that "intent" was necessary to determine the issue. However, its cross-examination at the hearing belies its current position. Its attorney's detailed cross-examination included inquires about who in the Panzigrau household had access to stamps (Tr 39), why Panzigrau filled out the benefits card "if [she] didn't intend to mail it" (Id.), whether she had an opportunity to clear up her confusion regarding vacation pay, and whether she understood the unemployment compensation process generally. In closing statements the Department's counsel stated:

> I think my ... points are fairly clear from the questions I asked that I do not believe it's credible that you could have an employe working right in the U.C. Office. You know we're not even talking about a private employer here, we're talking about someone who's in the office who has a variety of adjudicators and supervisors to talk to who had a number of days on which these points could have been checked and could easily have resolved this essentially very simple question without making that statement. It's clear that Ms. Panzigrau did learn at some point that this was a very bad thing to do and tried to withdraw it but I think it's also clear that she had ample opportunity ahead of time to inform herself as to the law and to not make the statement. All

> employes ... anyone filing claims of course is held to the standard of honesty. „Therefore, I think there is sufficient evidence to show that ... despite the statements of Ms. Panzigrau as to intent, I think the facts are sufficient to show that there was concealment with intent. (Emphasis added.) (Tr 53-54).

At the telephonic prehearing some five months later regarding the misconduct issue, The Department's counsel stated:

> Even though we've had a finding that states that she did not intentionally do it, I would like to show that the employe had ample knowledge and instructions that she should have known what to do and that therefore her failure to do so given the history of careful instructions, review by her supervisor, et cetera reasonably amounted to misconduct because of the background that she had received in this area. (Tr 59)

And finally in the Department's brief before the administrative law judge on the matter of collateral estoppel, counsel argued:

> Although the ALJ in the first hearing found that the claimant had no intention of concealing a material fact relating to the eligibility for benefits, that finding was not necessary to determine the issue in question, which was whether the claimant had actually concealed a material fact relating to eligibility for benefits. The ALJ's statement as to the employe's intentions in the first hearing is classic dicta in that it is entirely extraneous to the actual issue before the ALJ. (R 112)

These lengthy passages have been quoted for one reason -- to illustrate that the prior cases[3] the Department now claims to have relied upon in choosing not to fully litigate the necessity of a finding on intent were not cited to either

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[3] In the matter of Darryl R. Kusz, Hearing No. 87-L-600988 MW (LIRC, March 26, 1987); In the matter of Carmon Darracott, Jr., Hearing No. 87-601254 (LIRC, May 12, 1987).

of the administrative law judges charged with the responsibility for determining the matters or to the Commission. It is disingenuous to argue that it was the Commission that changed the legal rules in the middle of the game. (Reply Brief, p. 7). The Department asked the law judge to find that Panzigrau's actions were intentional and the law judge responded directly. The Department cannot now find law it was unaware of then or uninclined to cite and say "we take it back." There is nothing unfair about giving the Department its day in court under rules it perceives to be operative (and which this court now concludes was a correct perception) and to deny it a second day in court to litigate over the same facts using the same rule.[4]

The Department also maintains it would be unfair to apply collateral estoppel here because it had other evidence to present on the misconduct issue that it did not present at the hearing on concealment. In reviewing its Offer of Proof in this regard, this court agrees with the Commission's conclusion that "it appears that the employer is attempting to obtain a second chance to resolve findings already made, rather than a chance to resolve new and necessary matters." (7/29/88 Decision, p. 4). The "fair chance" to pursue a claim referred to in Kichefski does not require that the party presented their best evidence or legal arguments in the

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[4] The Department apparently concedes that unintentional conduct cannot be misconduct under sec. 108.04(5), Wis. Stats.

prior proceeding but only that they had the chance to do so. All of the items on the Department's Offer of Proof were in existence at the time of the first hearing. All of them that were relevant to whether Panzigrau knowingly or intentionally failed to disclose a material fact could have been introduced then. It is also of interest that Panzigrau had already been suspended before that first hearing, and the Department had cited as their reasons in its Notice of Disciplinary Suspension her "withholding a material fact," her "knowledge" of the rules, and that she was "aware" of the requirements. They had every reason to anticipate a further application for benefits in which misconduct would be at issue and thus every incentive to litigate the "intentional concealment" issue which, as noted above, they did. Their recourse if they did not agree with the administrative law judge's finding on this issue was to seek review by the Commission, which they did not pursue; not to have another hearing on the same incident.

For the foregoing reasons, as well as those cited by the Commission, I conclude that the Department had a fair chance to pursue its claim and that the public policy of preserving judicial resources and encouraging reliance on adjudications is the more important policy to be served.

Therefore,

IT IS ORDERED that the Decision of the Commission dated July 19, 1988, is hereby affirmed and this action is dismissed.

Dated this 27th day of July, 1989.

BY THE COURT

/s/

MICHAEL NOWAKOWSKI
CIRCUIT COURT JUDGE

cc: AAG Bruce Olsen
Attorney Glenn Kelley