

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL WAYNE STEARNS,
Petitioner-Appellant,

UNPUBLISHED
June 19, 2008

v

PRO-TECH ENVIRONMENTAL &
CONSTRUCTION SERVICES, INC., and
DEPARTMENT OF LABOR AND ECONOMIC
GROWTH,

No. 270315
Montcalm Circuit Court
LC No. 05-006806-AA

Respondents-Appellees.

Before: Whitbeck, C.J., and Talbot and Fort Hood, JJ

PER CURIAM.

Petitioner appeals by leave granted from the circuit court's order reversing a decision by the Department of Labor and Economic Growth (DLEG) that respondent, Pro-Tech Environmental & Construction Services, Inc.,¹ had violated the anti-retaliation provision of the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1065, when it discharged petitioner. We reverse.

I. Basic Facts and Procedural History

Petitioner alleged that he was discharged from his employment with respondent in retaliation for reporting deficiencies in the safety equipment provided during an asbestos removal project at a local university, Calvin College. It was alleged that the respirators used during asbestos removal, known as the powered air purifying respirators (PAPR), did not comply with MIOSHA standards according to the university supervisor of the project. Petitioner reported the complaints to respondent at the insistence of the university supervisor. He alleged that he was terminated from his employment as a result of his complaint report. Specifically, petitioner alleged a violation of MCL 408.1065(1), which provides:

¹ Although the DLEG is also delineated as a respondent in the caption, the dispute involves the actions of the employer only. Accordingly, the singular "respondent" refers solely to Pro-Tech Environmental & Construction Services, Inc.

A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under or regulated by this act or has testified or is about to testify in such a proceeding or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

On the contrary, respondent asserted that petitioner was lawfully discharged for his use of vulgar language and insubordination in the presence of co-workers and superiors at his place of employment and in the presence of supervising personnel at the university. The DLEG investigated petitioner's claim and concluded that respondent violated MCL 408.1065(1) by terminating petitioner after he reported MIOSHA violations. Respondent contested the findings by the DLEG, and a hearing was held before an administrative law judge (ALJ).

At the commencement of the administrative proceeding, counsel for the DLEG indicated that the department selects a position in a retaliatory discharge situation. Consequently, the DLEG was aligned with the position of petitioner. Therefore, counsels for petitioner and the DLEG questioned witnesses first followed by cross-examination by respondent. The testimony presented during the three-day hearing supported the respective positions of each party. Ultimately, the ALJ ruled in favor of petitioner. In an extremely detailed decision, the ALJ found that the witnesses presented by the petitioner were credible, in particular relying on the testimony of the supervising employee from the university, Art Lillibridge, who refused to allow the asbestos respirators to be used by respondent's employees and instructed petitioner to call his superiors regarding the condition of the equipment.

Respondent filed a petition for review in circuit court alleging: (1) the administrative decision was arbitrary and capricious; (2) the decision was not supported by competent, material, and substantial evidence on the whole record; and (3) the decision was based on material and substantial errors of law. Following oral argument on the petition, the circuit court ruled in favor of respondent, holding:

Well, the Court has listened to arguments of Counsel, read the briefs more than once and looked at some of the cases that were cited. Based on the information that was provided to me, I think that looking at the whole record of the ALJ's fact finding, as to fact 64, that was not supported by the whole record. Based on the whole record, I do not find that normal equipment – well, I don't think this new equipment was brought to the job on the 29th. I couldn't find any evidence of that. This decision by him, I think goes through all of his other conclusions and had that been a different finding, I think the result would have been different.

The testimony appears to me, based on the briefs and what has been supplied, that the equipment was either fixed by Mr. Stearns, per his own testimony on the 27th or it was fixed by Mr. Hansen on the 29th. In either case, that's what would have been done, should have been done, or could have been done on the 27th without all the commotion that was raised by Mr. Stearns.

Also, based on the whole record, I find that Mr. Stearns' behavior was unreasonable and not in good faith. I think it was clear to me when he told Steve

Kemco (phonetic), I guess, that watch this and he walked into the office and talked in front of Mr. Davis. What Mr. Kemco watched was a confrontation in the office in front of everybody else. Mr. Stearns would not go into the office and talk just with Mr. Davis, privately.

I think, therefore, based on that, Pro-Tech did have a proper reason and was properly motivated to terminate Mr. Stearns' employment and I think the ALJ finding otherwise was in error because it was based on his finding of fact 64, which I think was not correct.

I'll also adopt for the record, Pro-Tech's brief and arguments here today and I'll indicate that the decision of the ALJ should be reversed.

The circuit court also issued a written decision specifying its reasons for reversal the ALJ decision. Although neither briefed nor argued by respondent, the circuit court also held that additional findings of fact rendered by the ALJ were erroneous. Consequently, the circuit court reversed the decision of the ALJ and dismissed the MIOSHA retaliation complaint against respondent. We granted petitioner's application for leave to appeal.

II. Standard of Review

Mich Const 1963, art 6, § 28 addresses review of administrative actions and provides in relevant part:

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

The Court of Appeals reviews for clear error the circuit court holding when reviewing an administrative decision. *Cole's Home & Land Co, LLC v Grand Rapids*, 271 Mich App 84, 89; 720 NW2d 324 (2006). The decision will be overturned only when the appellate court is left with a definite and firm conviction that a mistake has been made. *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003). "Evidence is competent, material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion." *Romulus v Dep't of Environmental Quality*, 260 Mich App 54, 63; 678 NW2d 444 (2003).

"When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). The administrative decision is supported by substantial evidence when the inferences made were legitimate and supportable. *Id.* at 690 n 8. Appellate review of the agency

decision does not determine if the evidence preponderates one way or the other but determines if the evidence justifies the findings as a legitimate inference from the facts proved. *Id.* at 690. The reviewing court should not invade administrative fact finding by replacing an agency's selection between two reasonably differing views. *Romulus, supra* at 63. An agency's decision is arbitrary if it is without adequate determining principle. *Id.* Although deference is generally given to an agency's construction of a statute or administrative rule with which it is charged with administering, this deference does not permit the reviewing court to abandon its responsibility to given meaning to the plain language of statutes and administrative rules. *Id.* at 65. An agency's interpretation will not be given deference where the language of the rule is unambiguous or the agency's interpretation is clearly wrong. *Id.* at 65-66.

“Judicial review of administrative decisions involves a review of the whole record, not just those portions which support the agency's findings. Although review is not *de novo*, it entails a degree of qualitative and quantitative evaluation of the evidence considered by the agency.” *West Ottawa Education Ass'n v West Ottawa Public Schools Bd of Ed*, 126 Mich App 306, 313; 337 NW2d 533 (1983) (emphasis in original). Because the individual presiding over the hearing has the opportunity to hear the testimony and view the witnesses, “we give great deference to the hearing officer's factual findings and credibility determinations.” *Lewis v Dep't of Corrections*, 232 Mich App 575, 578; 591 NW2d 379 (1998). When a decision is supported by competent, material, and substantial evidence on the entire record, it must be affirmed. *Arnold v State Employees' Retirement Bd*, 193 Mich App 137, 138; 483 NW2d 622 (1992).

III. Analysis

Review of the circuit court's ruling reveals that it exceeded the scope of review allowed for an agency decision. Because a hearing was held, the circuit court was to determine whether the ALJ's decision was supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. The ALJ's factual finding met the substantial evidence requirement because a reasonable mind would have accepted the evidence and credibility assessments as sufficient to support the conclusion. *Romulus, supra*. Furthermore, the substantial evidence requirement was satisfied by inferences that were reasonable and supportable. *Payne, supra*. In the present case, the circuit court's decision invaded the ALJ's fact finding by replacing the ALJ's selection between two reasonably different views. *Romulus, supra*.

Review of the record reveals that the ALJ was presented with two diametrically opposed versions of events. Specifically, petitioner testified that he objected to the use of inadequate safety equipment at the behest of university staff overseeing the project. That is, Art Lillibridge of Calvin College observed the respirators as they came out of the containers and noted that the respirators were dirty and did not comply with MIOSHA standards. On the contrary, respondent contended that petitioner's insubordination and improper conduct caused his termination. Consequently, the ALJ resolved the petition by conducting an analysis of the demeanor, testimony, and overall circumstances, including discrediting the testimony of respondent's witnesses.

The circuit court concluded that the ALJ's factual finding number 64 was not supported by the whole record. Factual finding number 64 provides:

Of the 9 or 10 PAPRs used December 29, 2003, two PAPRs (or only the batteries) were supplied by Lillibridge. Pro-Tech arranged for additional PAPR equipment (e.g. batteries, fuses) to be delivered to Calvin on December 29, 2003, so there were 9 or 10 functioning PAPRs. The additional equipment did not come directly from the Pro-Tech warehouse. Pro-Tech ordered some “new” equipment from its supplier; so apparently, the equipment came from the supplier. (Testimony of Lillibridge credited over testimony of Davis and Vlaming. The worker, Steven Sherwood, testified he did not know if other respirators were brought to the job site.[])

Review of the record reveals that there was a dispute regarding the nature of the equipment. Lillibridge testified that he observed the equipment when it was pulled from the storage containers. He rejected the safety equipment because of the condition and advised petitioner to call respondent and obtain new equipment.² Later, in the project, Lillibridge allowed other respirators to be used by respondent’s employees. Lillibridge testified that this equipment was satisfactory, and therefore, he *inferred* that the equipment was new or different. He acknowledged during cross-examination that he did not specifically observe the “new” respirators being brought to the worksite. An inference that is legitimate and supportable satisfies the substantial evidence requirement. *Payne, supra*.

Based on the testimony, Lillibridge did not have personal knowledge regarding the source of the different equipment or if it was “new.” Despite factual finding number 64, the ALJ specifically acknowledged that Lillibridge’s testimony did not resolve the source of the equipment that was ultimately deemed satisfactory for use on the jobsite. Later in the detailed opinion, the ALJ acknowledged that “[w]hile [Lillibridge’s] testimony does not fully clarify how adequate equipment was obtained, he does clarify that Respondent arranged for additional equipment to be delivered to Calvin on December 29, 2003.”³ Thus, the circuit court’s conclusion that factual finding number 64 was not supported by the whole record and permeated the entire ALJ opinion is incorrect.

Review of the ALJ opinion as a whole reveals that the ALJ rejected the credibility of the testimony presented by the employees and supervisors of respondent that the same equipment was adequate at the jobsite and the deficiency was the lack of charged batteries. “[I]f the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence.” *Dep’t of Community Health v Risch*, 274 Mich App 365, 372-373; 733 NW2d 403 (2007). The circuit

² At the administrative proceeding, counsel for respondent opined while questioning Lillibridge that the equipment was merely dirty. Lillibridge testified that he had preserved a sample from the equipment. Therefore, the sample could be tested to determine if the equipment was merely dirty or if it was asbestos. There is no indication in the lower court record that the sample was ever tested.

³ See ALJ opinion, page 28.

court clearly erred in rejecting the assessment of credibility by the ALJ in favor of its own. *Cole's Home, supra*. In fact, the ALJ noted that the testimony of the jobsite supervisor who replaced petitioner and the employees on site would have provided the most beneficial testimony regarding the distinction between the equipment rejected by Lillibridge and the equipment later accepted by Lillibridge.⁴ However, respondent chose not to present the testimony of witnesses with firsthand knowledge. Consequently, the ALJ accepted the testimony of Lillibridge, although it was based on his personal inspection and reasonable inferences. It was error for the circuit court to substitute its assessment of credibility when deference must be given to the hearing officer in the position to observe the testimony and demeanor of the witnesses. When the evidence is conflicting, the reviewing court must defer to the factfinder. *Smith v MESC*, 410 Mich 231, 260; 301 NW2d 285 (1981).⁵

After the circuit court rendered its oral decision concluding that factual finding number 64 was not supported by the record, the circuit court issued a written decision, concluding that factual finding number 64 was speculative and that the testimony of respondent's agents, Sherwood and Vlaming should have been adopted. However, once again, this exceeds the scope of review allowed. Lillibridge testified that the equipment did not meet MIOSHA standards because the respirators were not assigned to individuals, were not individually sanitized, and were not packed and ready for use. Lillibridge was slowing the project because of his demand for adequate safety equipment for the workers; therefore, he took digital photographs of the equipment in the event he was questioned by his superiors. Later, he physically showed the respirators to his superiors who confirmed that the equipment could not be used. Furthermore, Lillibridge logged a sample from the respirators in order to determine if the material present on the respirators was in fact asbestos. He also testified that he approved of the respirators that were later used in the project. Although on cross-examination, Lillibridge admitted that he did not know the source of the equipment used in the project, he expressly testified that the workers did not use the equipment he had earlier rejected. In light of Lillibridge's repeated inspections, his photographed preservation of the condition of the respirators, and his preservation of the sample of the substance on the respirators, Lillibridge judged the adequacy of the respirators first presented at the job site and the respirators later used for the project. Irrespective of Lillibridge's failure to observe the delivery of "new" respirators to the jobsite, the ALJ was entitled to accept his testimony and reject the credibility of respondent's witnesses who testified that the same equipment was used to complete the project. Therefore, the circuit court erred in holding that the

⁴ Respondent contends that this statement by the ALJ shifted the burden of proof. On the contrary, these witnesses actually utilized the equipment and were present on the job site. This statement did not shift the burden of proof, but merely acknowledged the witnesses with actual personal knowledge of how the "new" respirators arrived on site who were never called to testify.

⁵ Review of the circuit court's oral ruling reveals that it exceeded the scope of judicial review. The circuit court stated that petitioner's behavior was "unreasonable and not in good faith." The role of the reviewing court is to determine whether the administrative decision was supported by competent, material, and substantial evidence on the whole record, not to resolve issues anew.

ALJ was required to adopt the testimony of respondent's employees and reject Lillibridge's testimony as speculative. *Cole's Home, supra*.

Also, in the circuit court's written opinion, additional factual findings rendered by the ALJ were rejected. Specifically, the court held:

If the ALJ Decision had not reached this erroneous finding of fact that [respondent] provided new equipment and then lied about it, there would be no basis for the ALJ Decision to discount the other evidence about the reasons for [petitioner's] discharge, to find these reasons to be pretextual, and to find that [respondent's] decision to discharge [petitioner] was in retaliation for complaining about the respirators.

The circuit court went on to conclude that the ALJ had no basis to "discredit" the testimony of respondent's witnesses, specifically regarding the nature of the equipment ultimately used on the jobsite. Again, the circuit court's holding does not identify a deficiency in the proofs to support the ALJ decision. Rather, the circuit court evaluates the same evidence considered by the ALJ and reaches the opposite conclusion by rejecting the deference given to ALJ's ability to see and hear the witnesses testify. Moreover, the ALJ expressly noted that key witnesses who used the equipment on the site or may have brought additional equipment to the site were simply not called to the witness stand. Thus, the ALJ was left with two diametrically opposed versions of events and opined, under all the facts and circumstances, that the testimony of Lillibridge, an impartial witness, was credible while the testimony of respondent's witnesses was not credible. Review of the detailed ALJ opinion reveals that there was competent, material, and substantial evidence to support the decision, and therefore, the circuit court erred in reversing the ALJ's decision.⁶

Reversed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood

⁶ In the brief on appeal, respondent also alleges that the circuit court did not clearly err in concluding that a MIOSHA violation did not occur because of petitioner's insubordination. Once again, to reach this conclusion, the circuit court disregarded the factual findings by the ALJ and resolved the case anew by concluding that the ALJ should have adopted the testimony of respondent's witnesses. This holding was clearly outside the parameters of judicial review. Const 1963, art 6, § 28; *Payne, supra*.