STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
WORKER'S COMPENSATION DIVISION
P.O. BOX 7901
MADISON, WISCONSIN 53707
(608) 266-1340

2012-015008
2013-006748

JAMES R STAHL
1094 N PINE ST
SUN PRAIRIE WI 53590

Applicant,

vs. PLEASE SEE ENCLOSURE

LIGHT HAUS OF MADISON
1921 FREEPORT RD
MADISON WI 53711

Respondent.

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A bifurcated hearing was held in Madison, Wisconsin on July 31, 2013 and October 28, 2013.

APPEARANCES: Applicant, in person, and by Attorney Aaron N. Halstead; Respondent by Attorney Nilesh P. Patel at the first hearing and by Steve Melahn (president and owner) at the second hearing.

Conceded are compensable work-related right knee injuries on February 13, 2012 and on May 3, 2012, a weekly wage of $1,098.00, and the following primary compensation: temporary partial disability benefits of $2,710.59 between May 6, 2012 and June 10, 2012, $5,246.00 in TTD benefits between June 9, 2012 and July 30, 2012, and $12,835.00 in permanent partial disability

benefits for a PPD rating of 10% permanent partial disability as compared to amputation of, or loss of use of, the right lower extremity at the knee.

In dispute is whether the respondent/employer is liable to pay the applicant for lost wages under sec. 102.35(3), Wis. Stats., for an alleged "unreasonable refusal to rehire" him when the respondent/employer discharged him on August 1, 2012, effective August 4, 2012.

Upon the disputed issue, the administrative law judge makes the following:

FINDINGS OF FACT

James R. Stahl, the applicant, had worked as a glazier for 18 years before going to work on August 13, 2001 for the Light Haus of Madison, the respondent/employer. According to Wikipedia, "a glazier is a construction tradesperson who selects, cuts, installs, replaces, and removes residential, commercial, and artistic glass." During his almost 11 year career with the respondent until his last day of work on June 6, 2012, he primarily worked on residential jobs, some commercial jobs and no artistic glass jobs. While working for this employer, he injured his right knee on February 13, 2012 when he stepped on a log; and he injured the same knee again on May 3, 2012 when it gave out while he and a co-worker were carrying a mirror down some stairs. He underwent surgery on June 7, 2012, the day after his last day of work for the Light Haus of Madison. He then experienced a fairly routine 7.5 week period of recovery after the surgery. .

Mr. Stahl's surgeon released him to return to work on July 30, 2012 without any permanent work restrictions. He could perform all of the glazier job duties in Exhibit E. Mr. Stahl timely informed the respondent's general manager (Bonnie Shaw) a few days before July 30, 2012 that he was ready to return to work on July 30, 2012 without any restrictions. They had a nondescript conversation except that she asked him to come in to the office on August 1, 2012 and suggested that he file for unemployment insurance benefits in the interim. He complied with the request and the suggestion. When he met with Ms. Shaw and Mr. Melahn on August 1, 2012, she discharged him, effective August 4, 2012, while offering him "2 weeks compensation" in exchange for his signing off on a "severance agreement and release of claims". (Exhibit D) After consulting with his

wife, Mr. Stahl declined to sign it. Therefore, the employment relationship was terminated by the respondent effective on August 4, 2012.

Section 102.35(3), Wis. Stats., is Wisconsin's "wrongful discharge" statute. Universal Foods Corporation v. LIRC, 161 Wis. 2d 1, 6-7 (1991), provides the following:

> To establish employer liability under sec. 102.35(3), Stats., the employee has the burden of showing: (1) that she was an employee; (2) that she sustained a compensable injury; (3) that she applied for rehire; and, (4) that the employer refused to rehire her because of the injury.... The burden then shifts to the employer to show a reasonable refusal to rehire.... In order to meet this burden, the employer must show: (1) that the employee could not do the work she applied for; and (2) that no other suitable work was available. (Citations omitted.)

Regarding these two employer burdens, the respondent could not show that Mr. Stahl could not do the work as a glazier because, among other reasons, he has been released by his surgeon to work as a glazier and without any restrictions. Moreover, Light Haus of Madison offered no evidence that no other suitable work was available on August 1 and 4, 2012.

Accordingly, the analysis moves back to the above four employee burdens, all of which have been proved by the concessions and the evidence ostensibly with one exception: was there a causal linkage between the applicant's right knee injuries and the employer's refusal to rehire him? However, Universal Foods is a Court of Appeals decision. The problem is that there are non-Supreme Court decisions which are inconsistent on the issue of whether or not an injured worker must prove up such a linkeage. Tiffany Cunningham v. Ernie's Riverdale Inn and Society Insurance A Mutual Company, WC Claim No. 2008-022784 (LIRC Nov. 30, 2011), instructs us that clarification on this issue by the Wisconsin Supreme Court is necessary.

At the outset, two public policies must be kept in mind in connection with the manner in which this state agency must evaluate the evidence in this case. First, 102.35(3) "must be liberally construed to effectuate its beneficent purpose of preventing discrimination against employees who have sustained compensable work-related injuries." Great Northern Corporation v. LIRC, 189 Wis. 2d 313, 317 (1994). Second, the Wisconsin Supreme Court has declared that the Wisconsin Legislature has given injured workers like Mr. Stahl a "special status" under 102.35(3), namely, that

he has a "protected employee status". West Bend Company v. LIRC, 149 Wis. 2d 110, 120 (1989). It is within two these guidelines that the Wisconsin Worker's Compensation Division of the Department of Workforce Development (DWD) is required to assess the facts and circumstances in this case vis-à-vis the serious allegation that the Light Haus of Madison has violated the law.

That said, the evidence in this case demonstrates that while the employer ostensibly had a cost saving "reasonable cause" to not rehire the applicant, it was actually pretextual in nature. Furthermore, DWD infers that the employer did refuse to take Mr. Stahl back to work because of his two right knee injuries. For example, we infer that a number of the other 12 employees on the payroll on August 1, 2012 were less senior than the applicant whose faithful career with the respondent went unbroken all the way back to 2001. True, the applicant earned an excellent wage, $1,098.00 a week, but no explanation has been given by the respondent showing why it did not discharge one or two of these other less senior employees in order to combat its claim that it needed to cut costs to stay afloat.

Stated another way, Light Haus of Madison contends that it had a reasonable cause to discharge Mr. Stahl because it had experienced a significant financial downturn due to the 2009 housing crash. This contention cannot be sustained. First, the respondent produced no evidence regarding new housing starts or real estate sales in Dane County between 2009 and 2012. Madison typically has been a business and economic stalwart when other communities in Wisconsin have businesses experiencing slow economic times. Second, Exhibit 3 is a detailed graph showing yearly sales from 2007 through July 27, 2013. The sales from 2010 through 2012 remained fairly constant.

The respondent argues that Mr. Stahl refused to perform jobs other than working as a glazier. However, we believe his testimony that except for not doing "art glass" work, he was open to perform, and did perform, the majority of the other jobs listed in the lower right hand corner of each of the pages in Exhibit 3. The applicant spent a fair amount of time working with Brian Schuler. While Mr. Schuler no longer works for the respondent, Light Haus of Madison has not

explained why it failed to bring either him or some other coworker to the hearing to corroborate the allegation that Mr. Stahl refused to work at jobs other than as a glazier.

Contrary to the employer's assertion that the applicant was not a cooperative employee, the respondent failed to submit an iota of evidence that the respondent had counseled him or had disciplined him at any time during 2011 or 2012 nor did they ever tell him that his job was in jeopardy. Before the start of testimony on October 28, 2013, Mr. Melahn stated that he had decided in October to go with just one employee to function as a glazier. He did not indicate which October that he was referring to, but we infer that it must have been in October of 2011. However, the applicant continued working from then until the day before his right knee surgery on June 7, 2012. During these eight months, Mr. Melahn did not exercise his claimed decision to go with just one glazier. Once again, the assertions and contentions by the respondent are pretextual in nature without any credible basis in fact. Thus, while on the surface it might appear that the respondent has met its reasonable cause "burden, the applicant has the opportunity to show (and has shown) that the respondent's asserted reasons are pretextual." (Parenthetical phrase added.) Mark Gutkowski v. Bell Laboratories and Home Indemnity Company, WC Claim No. 1985-001922 (LIRC October 30, 1987).

The parties do not dispute that over the years when business truly was slow, the respondent simply laid the applicant off work, and he collected unemployment insurance benefits until business picked up once again. However, in the July-August 2012 timeline in this case when the employer has argued that business was slow, they did not merely lay Mr. Stahl off on August 1, 2012, but instead they discharged him! The only distinguishing factor regarding the many earlier layoffs and the subject discharge is that regarding the earlier layoffs, the applicant had sustained no work injury while regarding the employer's decision on August 1, 2012, he was trying to come back to work after recovering from two work injuries, all of which does lend credence to our inference that there was a causal connection between these work injuries and the discharge.

When Mr. Stahl told Ms. Shaw that he was ready to return to work without restrictions on July 30, 2012, she suggested that he go on unemployment insurance for a week, and that during

the interim she told him that "we will then see what we can do legally." I believe she said that. Exhibits D and 6 clearly demonstrate that this particular business entity does obtain legal assistance while carrying out its business. After seeing what they could do legally, the employer brought the applicant in on August 1, 2012, offered him the grossly one-sided severance agreement and told him "you are fired." The severance agreement (Exhibit D) is an exhaustive highly legalistic document revealing the fruits of the employer's effort to see what they could do legally about the applicant's offer to return to work on July 30, 2012. (Exhibit D is not an "arms length agreement." Had the parties signed it, one questions whether it would have been voidable as contrary to public policy.) This represents another distinguishing factor. During his various earlier periods of being laid off when business was slow, the employer never once told him that they were going to see what they could do legally nor did they have (we infer) an attorney draft a severance agreement. Once again, the employer's treatment of the applicant's offer to return to work on July 30, 2012 demonstrates that their proffered "reasonable cause" was really pretextual in nature.

In a legitimate attempt to fight the claimed economic downturn during the summer of 2012, the employer did not offer the applicant some other job that he was capable of performing nor did they offer him a part time job.

Here we have a faithful employee for almost 11 years, there being no evidence to the contrary; yet the employer never once, in good faith or in a demonstration of friendliness, contacted Mr. Stahl while he was recovering from his surgery to tell him that they thought that business had slowed down and that they might not be able to bring him back. In street language, it appears that the discharge came as a bolt out of the blue!

As Mr. Schuler was leaving the business in July of 2013, apparently the respondent offered the applicant a glazier job at $19.00 an hour which was something less than either $27.45 an hour (when the applicant worked 40 hours a week) or $31.37 (when the applicant worked 35 hours a week). Attorney Halstead advised Attorney Patel that Mr. Stahl "is not interested in returning to the company given all that has happened in the year that has passed since his initial attempt to return

to work following his injury." (Exhibit 2) First, we are not convinced that this job offer was in good faith. Second, the job offer was not timely under all of the circumstances herein. Third, the applicant's rejection of the job offer was reasonable at least in part because he was working in a stable work relationship with another employer at the time.

The employer argued that it had been experiencing mismeasurements and "call backs" regarding Mr. Stahl's alleged inferior work product. However, they produced no documentary evidence supporting the same nor were any alleged mismeasurements and "call backs" given to the applicant on August 1, 2012 as a reason for his discharge. DWD rejects this argument.

My assessment of the witnesses' credibility is interesting and somewhat surprising. Ms. Shaw presented herself as an honest and truthful person, a woman of integrity. During some of Mr. Stahl's testimony, anger or other negative emotions that he was experiencing came through his demeanor. There were times when I believe that he slightly misrepresented the facts. However, on the vast majority of crucial issues in this litigation, Mr. Stahl was sufficiently credible. Moreover, the documentary evidence has greatly buttressed his case.

In the end, therefore, Light Haus of Madison has wrongfully discharged James R. Stahl and has violated sec. 102.35(3), Wis. Stats.

Mr. Melahn argued that the housing market crash caused his business to suffer economically and that he was not required to take the applicant back to work under the Ray Hutson decision. Ray Hutson Chevrolet, Inc. v. LIRC, 186 Wis. 2d 118, 123 (1994), states:

> A business decision to reduce costs can, by itself, establish the reasonableness of the decision. Reducing costs is a form of efficiency. Inefficient businesses risk their very survival and the jobs of all their employees. Nothing in §102.35(3), STATS., reflects a legislative intent that an employer must perpetuate an unnecessary expense by rehiring an injured employee to fill a position that the employer eliminated to save costs.

First, Mr. Melahn did not eliminate the applicant's position, allegedly to save costs, before Mr. Stahl had reached an end of healing and was allowed by his surgeon to return to work. Second, Mr. Melahn himself stated that he had decided "in October" to eliminate one of the two glazier positions, yet he failed to do so during the balance of 2011 and half way into 2012. Instead, he

discharged Mr. Stahl after he had sustained two work-related right knee injuries. Third, as seen above, his evidence fails to demonstrate that the business was in such dire financial straits that not bringing back Mr. Stahl would have constituted a reasonable basis for the discharge. Thus, DWD concludes that Ray Hutson does not assist Mr. Melahn under the facts and circumstances herein.

Accordingly, Light Haus of Madison "has exclusive liability" under 102.35(3) "to pay to the employee the wages lost during the period of such refusal not exceeding one year's wages." Consequently, the respondent shall pay James R. Stahl $57,096.00, $1,098.00 a week times 52 weeks, as outlined herein. The applicant experienced total lost wages from August 1, 2012 to February 14, 2013 when he went to work for Canteen Vending at $600.00 a week for six weeks. August 1, 2012 to February 14, 2013 constitutes 28.2 weeks which, when multiplied by $1,098.00, equals $30,963.60, the first amount due the applicant minus 20% attorney's fees.

The six week tenure at Canteen Vending went from February 14, 2013 to March 27, 2013. Since he earned $600.00 each week, the applicant's lost wages due to the wrongful discharge was $498.00 each week so he is entitled to receive from the respondent $2,988.00, 6 weeks times $498.00, minus 20% attorney's fees to Attorney Halstead.

Mr. Stahl was unemployed between March 27, 2013 and April 26, 2013, 4.4 weeks so at a 100% loss of wages during this period of time, the employer owes him $4,831.20, 4.4 weeks times $1,098.00, minus 20% attorney's fees.

Mr. Stahl worked at Fiduciary Real Estate from April 26, 2013 to September 13, 2013, some 20 weeks, where he earned $7,199.10 or $359.96 a week. Therefore, his lost wages each week due the wrongful discharge was $738.04, $1,098.00 minus $359.96. Thus, for these 20 weeks, his lost wages equals $14,760.80, owed by the respondent to him, minus attorney's fees. .

Skipping the weekend (when workers typically do not work) of September 14-15, 2013, the applicant went to work on Monday, September 16, 2013, with Mr. Handyman where he has been earning $814.00 a week, $22.00 an hour times an average of 37 hours a week. His lost wages equals $284.00 a week, $1,098.00 minus $814.00. Consequently, during the 6 weeks between

September 16, 2013 and October 28, 2013, the date of the hearing, the applicant has lost $1,704.00, 6 weeks times $284.00, due to the wrongful discharge.

Accordingly, the earned or accrued "up front" award due Mr. Stahl up to the date of the hearing is a grand total of $55,247.60 minus 20% attorney's fees.

The remaining unaccrued balance of the award due Mr. Stahl is $1,848.40 minus 20% in attorney's fees, $57,096.00 minus $55,247.60. The $1,848.40 shall be paid to him, minus 20% attorney's fees, at the rate of $284.00 a week for the next 6.5 weeks as those weeks unfold after October 28, 2013 when the hearing was held

The applicant may lose his job and income with Mr. Handyman so the remaining payout of $1,848.40 may change. Therefore, DWD retains jurisdiction over this matter which involves only Mr. Stahl and the Light Haus of Madison, not the carrier. Let it be clear that this decision does not affect any possible future claim that he might have against Continental Western Insurance Company regarding his right knee injuries.

NOW, THEREFORE, this:

ORDER

Within 21, days, Light Haus of Madison, the respondent, shall pay to James R. Stahl, the applicant, the sum of Forty-four thousand one hundred ninety-eight dollars and eight cents ($44,198.08); and to his attorney, Aaron N. Halstead, the sum of Eleven thousand forty-nine dollars and fifty-two cents ($11,049.52) in attorney's fees. (He has waived his costs.)

As outlined in the decision, the respondent shall thereafter pay the applicant the sum of Two hundred twenty-seven dollars and two cents ($227.02) a week and Attorney Halstead the sum of Fifty-six dollars and eight cents ($56.08) a week until the respondent has paid them the remaining One thousand eight hundred forty-eight dollars and forty cents ($1,848.40).

Dated and mailed at Madison, Wisconsin
this 5th day of November, 2013.

Joseph P. Schaeve, Administrative Law Judge

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