COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2024AP133 **Cir. Ct. No. 2023CV1222**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

BARTELT CUSTOM AUTOMOTIVE, INC.,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND KEVIN D. WARLOW,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: KRISTY KASHOUA YANG, Judge. *Affirmed*.

Before Donald, C.J., Geenen, and Petrashek, JJ.

¶1 GEENEN, J. Bartelt Custom Automotive, Inc. ("Bartelt") appeals from the circuit court's order affirming a decision of the Labor and Industry Review Commission ("LIRC") awarding Kevin Warlow worker's compensation benefits for Bartelt's unreasonable refusal to rehire him following his compensable workplace

injury under Wisconsin's worker's compensation laws. *See* WIS. STAT. § 102.35(3) (2023-24).[1] The primary dispute concerns what showing an employee must make to establish a prima facie case of an unreasonable refusal to rehire claim under § 102.35(3). Bartelt argues that an employee's prima facie case includes showing that the employee was not rehired because of the workplace injury and that the employee applied for rehire.

¶2 There is a conflict in published court of appeals cases with respect to what an employee must show to make a prima facie case under WIS. STAT. § 102.35(3). Following the first-in-time rule to resolve conflicts between published court of appeals opinions, *see* ***State v. Swiams***, 2004 WI App 217, ¶23, 277 Wis. 2d 400, 690 N.W.2d 452 (concluding that, to the extent a later published court of appeals case conflicted with an earlier case, the later case "must give way" to the earlier case); ***State v. Bolden***, 2003 WI App 155, ¶¶9-11, 265 Wis. 2d 853, 667 N.W.2d 364 (holding that if two court of appeals decisions conflict, the first governs), we agree with LIRC that § 102.35(3) does not require an employee to prove that they were denied rehire because of the workplace injury, nor are they required to demonstrate that they applied for rehire. To establish a prima facie case for unreasonable failure to rehire under § 102.35(3), a claimant must show that they: (1) were an employee; (2) sustained an injury in the course of their employment; and (3) were subsequently denied rehire. ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 123, 438 N.W.2d 823 (1989); ***Dielectric Corp. v. LIRC***, 111 Wis. 2d 270, 277-78, 330 N.W.2d 606 (Ct. App. 1983).

¶3 We further affirm LIRC's findings that Bartelt did not show reasonable cause for failing to rehire Warlow, that suitable work existed within

[1] All references to the Wisconsin Statutes are to the 2023-24 version.

Warlow's physical and mental limitations, and that Warlow acted in good faith to try to mitigate his losses because these findings are supported by substantial and credible evidence. Accordingly, we affirm the circuit court's order.

BACKGROUND

¶4 The following facts are taken from the administrative record and LIRC's decision awarding Warlow wage-loss benefits.

¶5 Bartelt is a metal fabrication and machine shop located in Milwaukee. Warlow worked for Bartelt as a welder. Warlow was originally offered a press brake[2] operator position, but he turned it down because, at the time, he had no interest in operating a press brake and wanted to utilize other skills. Warlow had prior experience as a press brake operator and was always comfortable running the press brake, but he was wary of the machine because it could be dangerous.

¶6 On January 9, 2017, Warlow sustained an injury to his left hand while at work. The injury was determined to be compensable under Wisconsin's worker's compensation law. Warlow recovered from the injury and was released to return to work without restrictions on February 28, 2017.

¶7 When Warlow returned to Bartelt's facility following his release to work, he was informed that work had slowed down while he was recovering from his injury, and he was being laid off. However, Bartelt had actually filled Warlow's welding position with someone else. Although a press brake operator position was available at that time, Bartelt did not offer Warlow that position. Warlow testified

[2] A press brake is a piece of manufacturing equipment used to bend metal.

that, for financial reasons, he would have accepted any job at Bartelt, including the press brake operator position.

¶8 After he was laid off, Warlow briefly received unemployment compensation before obtaining employment at Resource Management, earning slightly less than he had earned at Bartelt. However, Warlow left this job after one week when he learned the job was not temporary-to-permanent as had been advertised. Warlow later obtained other employment operating a press brake but at a wage lower than what he earned at Resource Management.

¶9 Warlow filed a complaint with LIRC alleging that Bartelt unreasonably refused to rehire him when he was able to return to work after a worker's compensation injury, and he sought lost wages and benefits pursuant to the worker's compensation wage-loss statute, WIS. STAT. § 102.35(3). Following administrative and judicial proceedings, including a prior remand from this court, LIRC ultimately affirmed an administrative law judge's ("ALJ") determination that Bartelt had unreasonably refused to rehire Warlow and awarded wage-loss benefits under § 102.35(3).

¶10 LIRC agreed with the ALJ that the press brake operator position was suitable for Warlow because the evidence demonstrated that both before and after his employment with Bartelt, Warlow worked as a press brake operator. LIRC rejected Bartelt's argument that it was Warlow's burden to inquire about other available positions, concluding instead that Bartelt should have informed him about the open press brake operator position and offered it to him. LIRC also rejected Bartelt's argument that Warlow's wage-loss award should be reduced because Warlow left Resource Management, resulting in a period of unemployment before

Warlow obtained employment that paid him less than what he received at Resource Management. The circuit court affirmed LIRC's decision.

¶11 Bartelt appeals.

STANDARD OF REVIEW

¶12 We review LIRC's decision, not the decision of the circuit court. ***Pick n' Save Roundy's v. LIRC***, 2010 WI App 130, ¶8, 329 Wis. 2d 674, 791 N.W.2d 216. LIRC's decision must be affirmed unless LIRC acted without or in excess of its powers, its decision was procured by fraud, or its findings of fact do not support its order or award. WIS. STAT. § 102.23(1)(e).

¶13 Whether an employer unreasonably refused to rehire an individual is a mixed question of fact and law. ***deBoer Transp., Inc. v. Swenson***, 2011 WI 64, ¶29, 335 Wis. 2d 599, 804 N.W.2d 658. LIRC's findings of fact are conclusive if supported by substantial and credible evidence. ***Operton v. LIRC***, 2017 WI 46, ¶18, 375 Wis. 2d 1, 894 N.W.2d 426. When there is no dispute as to the relevant facts, our review is limited to LIRC's application of the worker's compensation statutes to those facts. ***Epic Staff Mgmt., Inc. v. LIRC***, 2003 WI App 143, ¶13, 266 Wis. 2d 369, 667 N.W.2d 765. An agency's determination as to the meaning and application of a statute is a legal conclusion, which we review de novo. ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21. In reviewing LIRC's legal conclusions, we give due weight, but not deference, to its experience and specialized knowledge implementing Wisconsin's worker's compensation laws. *See* ***id.***, ¶¶77-79.

DISCUSSION

I. Prima Facie Framework under WIS. STAT. § 102.35(3)

¶14 We begin with a threshold issue that forms the majority of the parties' dispute: what an employee is required to prove under WIS. STAT. § 102.35(3) before the burden shifts to the employer to defend not rehiring the employee. Section 102.35(3) provides that an employer who, without reasonable cause, refuses to rehire an employee injured in the course of employment is liable for lost wages. It states:

> Any employer who without reasonable cause refuses to rehire an employee who is injured in the course of employment, when suitable employment is available within the employee's physical and mental limitations ... has exclusive liability to pay the employee, in addition to other benefits, the wages lost during the period of such refusal, not exceeding one year's wages.

Id.

¶15 An employee making a wrongful refusal to rehire claim must make an initial showing, sometimes called a prima facie case, by proving certain elements of their claim, and after making this showing, the burden shifts to the employer to defend its decision not to rehire the employee. ***West Bend***, 149 Wis. 2d at 124-125. Here, LIRC found that Warlow made a prima facie case that Bartelt wrongfully refused to rehire him following a worker's compensation injury, thus shifting the burden of proof to Bartelt to establish that it had reasonable cause for its refusal to rehire Warlow.

¶16 On appeal, Bartelt argues that LIRC applied the wrong legal standard. The parties agree that the statute requires the claimant to show that they were an employee injured in the course of employment and that the employer refused to

rehire them. There is no dispute that Warlow was an employee injured in the course of employment, that he was released to return to work, that his prior job was within his restrictions, that he was permanently replaced while recovering from his work-related injuries, and that Bartelt refused to rehire Warlow.

¶17 This appeal arises from the parties' disagreement over what the statute and case law require an employee to prove before the burden shifts to the employer to defend not rehiring the employee. LIRC contends that WIS. STAT. § 102.35(3) and our supreme court's decision in ***West Bend*** establish a three-element test to satisfy the employee's initial burden of proving a prima facie case, and Warlow was required to prove only that: (1) he was an employee of Bartelt; (2) he was injured in the course of his employment; and (3) Bartelt refused to rehire him. *See* ***West Bend***, 149 Wis. 2d at 123. Bartelt, on the other hand, argues that LIRC should have applied a different, four-element prima facie case test which contains a different third element and an additional fourth element. According to Bartelt, Warlow was required to show that: (1) he was an employee of Bartelt; (2) he was injured in the course of his employment; (3) he applied for rehire; and (4) he was denied rehire because of his work injury. This formulation of the test was first articulated by this court in ***Universal Foods Corp. v. LIRC***, 161 Wis. 2d 1, 6, 467 N.W.2d 793 (Ct. App. 1991), reiterated in ***Hill v. LIRC***, 184 Wis. 2d 101, 107, 516 N.W.2d 441 (Ct. App. 1994), and finally adopted post-***Tetra Tech*** in ***Anderson v. LIRC***, 2021 WI App 44, ¶21, 398 Wis. 2d 668, 963 N.W.2d 89.[3]

[3] In ***Tetra Tech EC, Inc. v. DOR***, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21, our supreme court ended the practice of courts deferring to agency interpretations of statutes and clarified that all agency conclusions of law are reviewed de novo. Our decision in ***Hill v. LIRC***, 184 Wis. 2d 101, 109-11, 516 N.W.2d 441 (Ct. App. 1994) applied the pre-***Tetra Tech*** deferential framework when determining the elements of a prima facie case for a WIS. STAT. § 102.35(3) claim, so ***Anderson v. LIRC***, 2021 WI App 44, ¶21, 398 Wis. 2d 668, 963 N.W.2d 89 made clear that it was adopting ***Hill***'s interpretation of § 102.35(3) under a de novo standard of review.

¶18 The confusion over the employee's burden in making the prima facie showing is not unwarranted. In ***deBoer***, 335 Wis. 2d 599, ¶41, our supreme court identified a "potential inconsistency" stemming from the ***West Bend*** decision, because the elements of a WIS. STAT. § 102.35(3) were set forth twice. In ***West Bend***, our supreme court first stated that "the employee's prima facie case is met after an employee shows that [he or] she has been injured in the course of employment and subsequently is denied rehire." ***deBoer***, 335 Wis. 2d 599, ¶41 (citation modified). The ***West Bend*** court "did not specify that the employee must show that [he or] she was denied rehire because of the injury." ***deBoer***, 335 Wis. 2d 599, ¶41. However, the court also stated in ***West Bend*** that "the last element of the prima facie case is that the employee has been denied rehiring because of the injury sustained in [his or] her work." ***deBoer***, 335 Wis. 2d 599, ¶41 (citation modified). ***deBoer*** recognized that, in the wake of ***West Bend***, some courts resolving claims under § 102.35(3) were applying the three-factor test while other courts applied a framework that included an additional element: the requirement that the employee show that the failure to rehire was "because of the injury." ***deBoer***, 335 Wis. 2d 599, ¶40.

¶19 Adding an additional wrinkle, the ***deBoer*** court noted that the court of appeals in ***Hill***, 184 Wis. 2d 101, offered yet another formulation of the statutory standard and burden shifting framework. ***deBoer***, 335 Wis. 2d 599, ¶39 n.16. ***Hill*** followed the four-factor test, requiring that the employee show that the failure to rehire was "because of the injury," but it also listed an additional element that the employee was required to prove, namely, that the employee applied for rehire. ***Hill***, 184 Wis. 2d at 111-12. The ***Hill*** standard was recently adopted in ***Anderson***, 2021

WI App 44, ¶21, stating that "we adopt ***Hill***'s interpretation of [WIS. STAT.] § 102.35(3) as our own."[4]

¶20 Bartelt argues that we must follow the ***Anderson/Hill*** formulation of the test because ***Anderson***, a published opinion from this court, is the most recent binding expression of what WIS. STAT. § 102.35(3) requires. LIRC argues that the three-factor formulation from ***West Bend*** should control because the ***Anderson/Hill*** formulation of the test conflicts with earlier decisions from this court that applied the three-factor ***West Bend*** formulation.

¶21 LIRC is correct. We have, on several occasions, resolved a conflict between published court of appeals opinions by following the earliest, not the latest case. *See* ***Swiams***, 277 Wis. 2d 400, ¶23 (concluding that, to the extent a later published court of appeals case conflicted with an earlier case, the later case "must

[4] The concurrence suggests that ***Anderson***'s adoption of ***Hill*** was more limited and did not include the "because of injury" prima facie case requirement. Concurrence, ¶¶58-59. We see two potential problems with this interpretation of ***Anderson***.

First, while the ***Anderson*** court's last reference to ***Hill*** appears to be limited in the way the concurrence suggests, it did not use limiting language when it discussed ***Hill*** in light of ***Tetra Tech***. Earlier in the opinion, the ***Anderson*** court appears to adopt the entirety of ***Hill***'s interpretation of WIS. STAT. § 102.35(3) for the specific purpose of reaffirming ***Hill***'s statutory analysis to prevent ***Hill***'s interpretation from being attacked based on its reliance on pre-***Tetra Tech*** deference to administrative agency interpretations of statutes. ***Anderson v. LIRC***, 2021 WI App 44, ¶21 & n.8, 398 Wis. 2d 668.

Second, the ***Anderson*** court recognized that it might not have been necessary to reaffirm ***Hill*** in light of ***Tetra Tech*** because the lead opinion in ***Tetra Tech*** sought to rebut the notion that the precedential value of prior cases was imperiled by its decision to end the practice of court deference to agency interpretations of statutes. ***Anderson***, 398 Wis. 2d 668, ¶21 n.8. If ***Hill*** is viewed as retaining all of its precedential value post-***Tetra Tech***, the ***Anderson*** court could not have limited its adoption of ***Hill*** in the way the concurrence suggests that it did. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

Ultimately, whether ***Anderson*** adopted ***Hill***'s "because of injury" prima facie case requirement does not affect the conflict in our published case law. As we explain later in this opinion, the conflict remains regardless of the extent to which ***Anderson*** adopted ***Hill***, and we resolve that conflict by applying the first-in-time rule.

give way" to the earlier case); ***State v. Bolden***, 2003 WI App 155, ¶¶9-11, 265 Wis. 2d 853, 667 N.W.2d 364 (holding that if two court of appeals decisions conflict, the first governs). The idea behind this rule is that the first published court of appeals opinion deciding a particular issue is binding such that no subsequent court of appeals case can overrule, modify, or otherwise contradict it. If a later court of appeals opinion contradicts an earlier opinion, the later opinion constitutes a violation of ***Cook v. Cook***, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), and cannot be followed, even if the later opinion is published. *See* ***Bolden***, 265 Wis. 2d 853, ¶¶9-11.

¶22 While our supreme court has never endorsed the first-in-time rule to resolve conflicts in published court of appeals cases, it also has not repudiated the rule despite having the opportunity to do so.[5] ***Marks v. Houston Cas. Co.***, 2016 WI

[5] In ***Marks v. Houston Casualty Co.***, 2016 WI 53, ¶¶78-80, 369 Wis. 2d 547, 881 N.W.2d 309, our supreme court acknowledged but expressed no opinion on the first-in-time rule and refused to either endorse or repudiate it, although it instructed the court of appeals to certify cases presenting similar types of conflicts. Unfortunately, these equivocal statements cause a conflict within ***Marks*** itself. While this uncertainty was highlighted by one justice in a concurring opinion, *see* ***id.***, ¶¶89-94 (R.G. Bradley, J., concurring), the majority opted not to pass judgment on the first-in-time rule because the issue was inadequately briefed and raised "weighty" concerns regarding the constitutional authority of the court of appeals, ***id.***, ¶79 n.34.

As the law currently stands, the first-in-time rule is established in our published case law, and its validity has not been contradicted by our supreme court, so we are bound to follow the rule. Indeed, were we to repudiate the rule ourselves, that in itself would constitute a violation of the supreme court's directive that "the court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals." ***Cook***, 208 Wis. 2d at 190. If the supreme court wishes to direct us to certify cases presenting similar types of conflicts in the future, it must repudiate the first-in-time rule because we are not empowered to do so ourselves. *See* ***id.***; *see also* ***Marks***, 369 Wis. 2d 547, ¶89 (R.G. Bradley, J., concurring); *but see* ***Wisconsin Voter Alliance v. Secord***, 2025 WI 2, ¶¶41, 51-59, 414 Wis. 2d 348, 15 N.W.3d 872 (Hagedorn, J., concurring) (questioning the rules announced in ***Cook***).

(continued)

53, ¶¶78-79, 369 Wis. 2d 547, 881 N.W.2d 309. Considering that we lack the power to overrule, modify, or withdraw language from our previously published decisions, ***Cook***, 208 Wis. 2d at 190, we are bound by the first-in-time rule, and we follow both ***West Bend*** and our first articulation of the prima facie case elements for a claim under WIS. STAT. § 102.35(3).

¶23 Prior to ***Anderson***, ***Hill***, and ***Universal Foods***, we decided ***Dielectric***. In ***Dielectric***, we set forth the burden shifting framework of WIS. STAT. § 102.35(3), explaining that after an employee shows that he or she has been injured in the course of employment and was subsequently denied rehire, it becomes the burden of the employer to show reasonable cause for not rehiring the employee. ***Dielectric***, 111 Wis. 2d at 277-78. In ***West Bend***, our supreme court explicitly adopted this formulation of the framework, and it cited our decision in ***Dielectric*** in support of the formulation. Following the first-in-time rule to resolve conflicts between published court of appeals opinions, we agree with LIRC that the binding formulation of the test does not require an employee to prove that they were denied rehire because of the work-related injury, nor are they required to demonstrate that they applied for rehire. To establish a prima facie case for unreasonable failure to rehire under § 102.35(3), a claimant must show that they: (1) were an employee; (2) sustained an injury in the course of their employment; and (3) were subsequently denied rehire. ***West Bend***, 149 Wis. 2d at 123; ***Dielectric***, 111 Wis. 2d at 277-78;

To be clear, we are not expressing an opinion in this case about what the majority of this panel believes the correct elements of a WIS. STAT. § 102.35(3) claim are or whether prior court of appeals decisions misinterpreted the law. Rather, we are acknowledging a conflict in our published case law with respect to this issue and following the first-in-time rule that our case law currently requires us to follow.

In our view, this case presents an attractive vehicle to clarify both whether the first-in-time rule is compatible with ***Cook*** and the proper elements of a prima facie case for a WIS. STAT. § 102.35(3) claim.

see also ***deBoer***, 335 Wis. 2d 599, ¶¶39-42 (discussing but not applying the ***Hill*** formulation of the test and instead applying the three-factor formulation from ***West Bend***).

¶24 The parties agree that these elements were met, and we agree with the parties. We conclude that Warlow satisfied his burden of showing a prima facie case for an unreasonable refusal to rehire claim under WIS. STAT. § 102.35(3).

II. Reasonable Cause

¶25 Bartelt next argues that it had reasonable cause not to rehire Warlow. Specifically, Bartelt offers three reasons: (1) the press brake operator position was not suitable for Warlow; (2) it would be futile to offer Warlow a position he had previously rejected; and (3) Warlow did not communicate that he changed his mind and was interested in the press brake operator position. We conclude that LIRC's rejection of these reasons is supported by substantial and credible evidence.

¶26 As to the first reason, we conclude that substantial and credible evidence supports LIRC's finding that the press brake operator position was suitable for Warlow. As LIRC explained in its decision, the record shows that Warlow had significant press brake experience on machines similar to the one in Bartelt's plant both before and after his employment with Bartelt. Indeed, Bartelt's president first reached out to Warlow about the press brake operator position because he saw press brake experience on Warlow's resume. Warlow testified that when Bartelt initially offered him the press brake job, he discussed his previous work operating a press brake. He told Bartelt that he was always comfortable operating a press brake, although he was aware that operating the machine could be dangerous. While Bartelt points to some evidence in the record suggesting that Warlow believed he was too small to operate a press brake, LIRC's contrary finding is supported by

substantial and credible evidence, and we do not reweigh the evidence or reassess witness credibility on appeal. ***Operton***, 375 Wis. 2d 1, ¶18.

¶27 As to the second reason, LIRC determined that it did not matter that Warlow had previously turned down the press brake operator position. LIRC explained that, when declining the press brake operator position, Warlow told Bartelt that he was fully capable of operating the press brake but preferred welding. LIRC also relied on Warlow's testimony that he would have accepted the press brake position because he had no other job and had expenses to pay, and it observed that Warlow accepted a press brake operator position at a different facility after he lost his job at Bartelt. LIRC reasonably determined that it would not have been futile to offer Warlow the press brake operator position simply because Warlow had previously turned down the position, and this determination is supported by substantial and credible evidence.

¶28 As to the third reason, LIRC concluded that it was not Warlow's burden to inquire about positions that he was not aware were available. Warlow testified that he did not know that there was an open press brake operator position because, at the time he was injured, Bartelt already had a full-time press brake operator. Bartelt does not point to any evidence that Warlow was aware of the opening but failed to communicate his interest in it, and Bartelt cites no authority for the proposition that an employee must affirmatively inform his employer that he is open to other work without any awareness of what positions may be available.

¶29 On this issue, ***Anderson*** is instructive. In ***Anderson***, we observed that "there is no requirement under WIS. STAT. § 102.35(3) that a terminated employee express a willingness to return to work in the same position that he or she occupied before being fired." ***Anderson***, 398 Wis. 2d 668, ¶23. We continued, however,

noting that the rule is different when an employee's claim is grounded in the employer's refusal to rehire the employee for a different position than the one the employee previously occupied. ***Id.*** "In those instances, the employee must demonstrate, as part of his or her prima facie case,[6] that he or she indicated to the employer a willingness to accept other work." ***Id.*** The employee in ***Anderson*** was expressly told to reach out to his employer about a sales position when he "felt better," ***id.***, ¶5, but he did not make any required "overtures" that would put his employer on notice that he was interested in a sales position or any other position, ***id.***, ¶¶19, 24.

¶30 Accordingly, the key focus is on whether the employer had notice that the employee was seeking to return to work; it is enough for the employee to contact the employer and indicate they want and are able to return to work. That is what happened in this case. Warlow returned to work without restrictions and sought to be reinstated. On this record and unlike the employer in ***Anderson***, Bartelt was on notice that Warlow was seeking and able to perform work at Bartelt after he was released to return to work without restrictions.

¶31 In sum, LIRC found Bartelt's proffered reasons for not rehiring Warlow to be unreasonable, and that finding is supported by substantial and credible evidence.

[6] For the reasons stated in section I of this opinion, we are bound by ***Dielectric*** and ***West Bend***'s three-factor formulation of a prima facie case for a WIS. STAT. § 102.35(3) claim. However, we view ***Anderson***'s discussion as relevant to the question of whether an employer has reasonable cause not to rehire an employee (e.g., the employer is never put on notice that the claimant is seeking and capable of performing other work), and we therefore discuss ***Anderson*** in this context.

III. Mitigation of Damages and Wage-Loss Award

¶32 Finally, Bartelt contends that LIRC should not have awarded Warlow full wage-loss benefits as the result of its refusal to rehire Warlow because Warlow failed to mitigate his losses. Specifically, Bartelt argues that Warlow failed to mitigate his losses because he quit his subsequent employment at Resource Management after approximately one week.

¶33 While WIS. STAT. § 102.35(3) makes no reference to an employee's duty to mitigate damages, LIRC routinely interprets the statute to include a duty to mitigate lost wages, which it addresses on a case-by-case basis, guided by a standard of reasonableness. We agree with LIRC that its interpretation of the statute is consistent with the statute's purpose and our supreme court's declaration that § 102.35(3) should not be viewed as a penalty imposed on an employer. *See* ***West Allis Sch. Dist. v. DILHR***, 116 Wis. 2d 410, 421, 342 N.W.2d 415 (1984) (providing that § 102.35(3) "should be viewed as a compensation payment inuring to the benefit of a worker and not as a penalty imposed upon an employer"); *see also* ***State v. Dinkins***, 2012 WI 24, ¶29, 339 Wis. 2d 78, 810 N.W.2d 787 (holding that statutes must be interpreted consistently with the statute's manifest purpose).

¶34 Here, LIRC reasonably declined to reduce Warlow's wage-loss award for leaving Resource Management because the position was falsely advertised as temporary-to-permanent. LIRC found that, when Warlow accepted employment with Resource Management, the position was advertised as a temporary-to-permanent position, but after discovering that the position was not as advertised, Warlow quit in order to seek and obtain other, permanent employment. LIRC reasonably concluded that Warlow had a valid reason for leaving Resource

Management, and that he demonstrated good faith in mitigating his lost wages because he subsequently took another job.

¶35 Bartelt's arguments to the contrary are not persuasive. Bartelt provides a quote from ***West Allis*** where our supreme court said that WIS. STAT. § 102.35(3) "should be viewed as a compensation payment inuring to the benefit of a worker and not as a penalty imposed on an employer," but Bartelt does not connect this quote to an actual argument with respect to why Warlow should have his benefits reduced for leaving Resource Management.

¶36 Bartelt also cites ***Gutkowski v. Bell Laboratories, Inc.***, LIRC October 30, 1987, WC Claim 85-01922, but in addition to not being binding on this court, ***Gutkowski*** is distinguishable from the present case. In ***Gutkowski***, the claimant held several part-time jobs after he was refused rehire. ***Id.*** The claimant received a raise and decided that he could afford to stay home with his children during the week, at which point he stopped looking for full-time work to replace his previous job. ***Id.*** LIRC stated that "[t]he wages lost after that point in time were caused by the applicant's decision not to look for work and not by respondent's refusal to rehire the applicant." ***Id.***

¶37 Here, Warlow did not decide to stop looking for work after he left Resource Management. After he resigned because the job was not accurately advertised, he began his job search again.[7] Nothing in the record suggests that Warlow stopped looking for work at any point in time while he was unemployed.

[7] We note that unemployment law permits a claimant to retain unemployment eligibility even if they reject what would otherwise be offers of "suitable work" for a period of at least six weeks after becoming unemployed if the job offer involves lower skill work, lower pay, or less favorable working conditions than the employee's previous employment, particularly where the employee is diligent in seeking alternative employment. *See*, e.g., ***DILHR v. LIRC***, 193 Wis. 2d 391, 535 N.W.2d 6 (Ct. App. 1995); WIS. STAT. § 108.04(8)(d).

LIRC's decision and its benefits award correctly applied the law and were firmly grounded in substantial and credible evidence in the record.

CONCLUSION

¶38 For the foregoing reasons, we agree with LIRC's recitation of the prima facie case test for claims brought under WIS. STAT. § 102.35(3), and under that recitation of the test, Warlow satisfied his burden. We further conclude that LIRC's findings that Bartelt did not show reasonable cause for failing to rehire Warlow and that Warlow acted in good faith to try to mitigate his losses are supported by substantial and credible evidence.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

¶39 PETRASHEK, J. (*concurring*). I agree that application of the first-in-time rule determines which of this court's prior case law must be applied when addressing the elements of an employee's prima facie showing under WIS. STAT. § 102.35(3), and I join the majority opinion's analysis of that issue and the other issues Bartelt raises. I write separately to explain how, in my view, the waters have been muddied by case law misconstruing ***West Bend***'s clear adoption of the three-element test for an employee to demonstrate a prima facie case of an unreasonable refusal to rehire. *See* ***West Bend Co. v. LIRC***, 149 Wis. 2d 110, 123, 438 N.W.2d 823 (1989). To be clear, I conclude the most accurate interpretation of ***West Bend***—and the only interpretation that is consistent with the statutory text, purpose, and policy—is that, to establish a prima facie violation of § 102.35(3), the employee need only show that they were (1) an employee, (2) injured in the course of their employment, and (3) subsequently denied rehire. ***West Bend***, 149 Wis. 2d at 123.[1]

[1] I recognize that some cases have added an additional requirement that the employee signal an openness to other work when the employee is alleging an unreasonable refusal to rehire for a position other than the one they occupied before the injury. *See* ***Hill v. LIRC***, 184 Wis. 2d 101, 112, 516 N.W.2d 441 (Ct. App. 1994); ***Anderson v. LIRC***, 2021 WI App 44, ¶23, 398 Wis. 2d 668, 963 N.W.2d 89. Both decisions seem to exist in tension with ***L & H Wrecking Co.***, 114 Wis. 2d 504, 506-07 & n.3, 339 N.W.2d 344 (Ct. App. 1983), which held the employee does not have a prima facie burden to show that other suitable work was available, although ***Anderson*** at least attempted to reconcile those inconsistencies.

For purposes of this concurrence, I do not address whether ***Hill*** and ***Anderson*** improperly place the burden on the employee to demonstrate that they have signaled an openness to other work. Assuming that such a requirement exists, I conclude it was satisfied under the facts of this case, mostly for the reasons set forth in LIRC's decision and the majority opinion. Importantly, LIRC's specific factual finding was that when Warlow initially rejected the press brake operator position with Bartelt, "he told Bartelt that he was more interested in a welding position." Even assuming ***Hill*** and ***Anderson*** are good law, this was sufficient to put Bartelt on notice that Warlow might accept press brake work if a welding job was unavailable when he returned to work.

¶40 The majority opinion ably explains some of this history. ***Dielectric Corp. v. LIRC***, 111 Wis. 2d 270, 330 N.W.2d 606 (Ct. App. 1983), appears to be one of the first appellate court decisions interpreting the meaning of WIS. STAT. § 102.35(3) following the enactment of that subsection.[2] The court observed the statute was "relatively new and has little, if any, helpful legislative history or case law." ***Dielectric***, 111 Wis. 2d at 276. Interpreting the statute—in part by applying the longstanding "general rule" that courts are guided not only by the exact words used in a statute, but also a statute's "apparent general purpose"—the court crafted the burden-shifting framework later endorsed by our supreme court in ***West Bend***. ***Dielectric Corp.***, 111 Wis. 2d at 277-78 (citing ***Davis v. State***, 134 Wis. 632, 115 N.W. 150 (1908)); *see also* ***West Bend***, 149 Wis. 2d at 123.

¶41 Notably, the ***Dielectric*** statement of the statutory requirements did not in any way suggest the employee bore a burden of showing, as part of their prima facie case, that they were denied rehire because of the work injury they had suffered. Instead, the court wrote that "[u]nder this new statute, once the employee has suffered a worker's compensation injury, the question initially becomes: does the employer have good cause not to rehire." ***Dielectric***, 111 Wis. 2d at 278. The legislature "mandated rehire unless an *employer* could demonstrate that reemployment would create a substantial likelihood of reinjury to an employee or injury to co-workers due to the nature of the employee's physical or mental condition." ***Id.*** at 277 (emphasis added).

¶42 Because ***West Bend*** relied on ***Dielectric*** for its articulation of the employee's prima facie burden, it is no surprise that ***West Bend***'s framing did not

[2] For a discussion of the amendment history of WIS. STAT. § 102.35, *see* ***County of La Crosse v. WERC***, 182 Wis. 2d 15, 38 & n.5, 513 N.W.2d 579 (1994).

include any reference to the employer's reason for refusing rehire. *See* ***West Bend***, 149 Wis. 2d at 123. Rather, all that is required of the employee is to show "that [he or] she has been injured in the course of employment and subsequently … denied rehire." ***Id.*** Upon making that showing, "it becomes the burden of the employer to show reasonable cause for not rehiring the applicant." ***Id.*** The employer's reason for refusing to rehire an injured employee was no part of either ***Dielectric***'s or ***West Bend***'s black-letter statement of the employee's prima facie burden under WIS. STAT. § 102.35(3).

¶43 There is good reason for the absence of any such requirement. Some employers might speak plainly in telling an employee that they are not being rehired because of their work injury. In ***West Bend***, for example, the employer told the employee, who had a history of work-related hand and arm injuries, that she would not be rehired because she was physically unfit for factory work. ***West Bend***, 149 Wis. 2d at 114-15. The employer in ***L & H Wrecking Co. v. LIRC***, 114 Wis. 2d 504, 507 n.3, 509, 339 N.W.2d 344 (Ct. App. 1983), was even more candid; after initially offering no explanation to the employee for his termination, one of the company's partners later told him that the philosophy amongst ownership was "once a back injury, always a back injury."

¶44 One can easily imagine that some employers may be less forthright with injured employees they would rather not rehire. Employers who are used to the at-will aspects of Wisconsin employment law likely know that they need not even have a reason for terminating an employee—and there is no requirement that an employer tell an employee of the reason for their termination. *See* ***Hausman v. St. Croix Care Ctr.***, 214 Wis. 2d 655, 663, 571 N.W.2d 393 (1997). Employers may be reluctant to provide an injured employee with any reason for their termination, or an employer might provide reasons that appear neutral to the

employee's injury status but mask a desire not to bring back an injured employee. It is not the employee's burden to show that the employer's proffered reason for a refusal to rehire is pretextual; rather, pretextual refusals are addressed as part of the employer's burden to demonstrate reasonable cause. *See* ***deBoer Transp., Inc. v. Swenson***, 2011 WI 64, ¶54 n.19, 335 Wis. 2d 599, 804 N.W.2d 658.

¶45 Unless an employer explicitly tells an employee that they are being terminated or refused rehire because of their work injury, as in ***West Bend***, how could the employee prove, as part of a prima facie case, that the injury is the reason for the adverse employment action? No case has explored what evidence would suffice when the employer gives no reason for the refusal to rehire, or how an employee would demonstrate that an injury-neutral reason for the refusal was pretextual to make a prima facie showing. Bartelt's briefing also does not attempt to answer this question.

¶46 The facts of this case illustrate the information asymmetry that exists between an employee and his or her employer regarding the employer's motivation refusing rehire. During a short conversation with Bartelt's president, Warlow was told that work had slowed down while he was recovering from his injury and that he was being laid off because of the slow down. That may or may not have been true—only Bartelt could know. Warlow was not in a position to understand whether he was being denied rehire because of his injury.[3]

[3] Bartelt's president testified things were "very slow at the time" that Warlow returned to work, but he also acknowledged that he had hired a welder about one week before Warlow came back.

¶47 Given this information asymmetry, proof of employer motivation is properly assigned to the employer under WIS. STAT. § 102.35(3)'s burden-shifting framework:

> The burden-shifting model recognizes the realities of the employment relationship and disparate access to information. The employee generally has limited means to prove the "real" reason for his discharge. The employer has the knowledge and information access to assert the reasoning behind employment decisions. Accordingly, a low *prima facie* burden is on the employee, allowing the employer to establish good cause when the burden shifts.

THOMAS M. DOMER & CHARLES F. DOMER, 17 WISCONSIN PRACTICE SERIES, WORKERS' COMPENSATION LAW § 25.23 (2025). Placing the burden on the employer to prove the reason for the refusal is consistent with ***deBoer***'s directive that any claims of pretext are resolved after the burden shifts to the employer. ***deBoer***, 335 Wis. 2d 599, ¶54 n.19.

¶48 As ***West Bend*** recognized, this approach is also in line with the text and meaning of WIS. STAT. § 102.35(3). The statute looks to whether the employer had "reasonable cause" for the refusal to rehire, which can include that there was no suitable work available within the employee's physical and mental limitations.[4] *See* ***id.*** The statute does not condition liability on—and in fact says nothing about—the employer's subjective mindset in refusing to rehire, instead mandating an objective assessment of "reasonable cause." Even when the employer relies on the employee's injury to justify its refusal to rehire, the employer must present medical proof to demonstrate that the employee is unable to perform the work. ***Universal Foods Corp. v. LIRC***, 161 Wis. 2d 1, 7, 467 N.W.2d 793 (Ct. App. 1991). There is

[4] "Reasonable cause" under the statute has been defined as "a cause or reason that is fair, just, or fit under the circumstances." ***West Allis Sch. Dist. v. DILHR***, 116 Wis. 2d 410, 426, 342 N.W.2d 415 (1984).

no basis in the statutory text or public policy to support a requirement that the employee demonstrate they were denied rehire because of their injury.

¶49 Wisconsin courts have already applied the foregoing principles to reject the argument that an employee must prove that suitable work with the employer is available to recover under WIS. STAT. § 102.35(3). ***L & H Wrecking Co.*** called it an "unreasonable construction of the statute" to require an employee, rather than the employer, to demonstrate the availability of suitable jobs, observing that information about suitable positions is easily accessible to the employer. ***L & H Wrecking Co.***, 114 Wis. 2d at 510-11. "To impose such a duty would place an unreasonable roadblock in the employee's path to recovery and, thus, would undermine the beneficent purposes of the statute." ***Id.*** at 511. The same is true of a requirement that an employee demonstrate that the employer has terminated or refused to rehire them because of their work injury. *See* ***id.*** at 510 ("A statute should be construed so as to avoid unreasonableness or absurdity.").

¶50 The purpose and policy of WIS. STAT. § 102.35(3) also support a conclusion that the employee does not have to show they were denied rehire because of their injury. Generally speaking, worker's compensation statutes—including § 102.35(3)—are to be "liberally construed in favor of securing the basic objectives of the law to protect injured workers." ***West Allis Sch. Dist. v. DILHR***, 116 Wis. 2d 410, 421-22, 342 N.W.2d 415 (1984). The fundamental purpose of § 102.35(3) specifically, "is to prevent discrimination against employees who have previously sustained injuries and to see to it, if there are positions available and the injured employee can do the work, that the injured person goes back to work with his [or her] former employer." ***West Allis***, 116 Wis. 2d at 422.

¶51 As LIRC recognized here, because of unfortunate language later in ***West Bend***, some court of appeals decisions have, with no explanation or analysis, interpreted the employee's prima facie burden to include a demonstration that the refusal to rehire was because of their injury. These recitations of a four-element test stem, in part, from a few paragraphs in ***West Bend***—all in the context of a discussion of what the *employer* must show to demonstrate reasonable cause to not rehire "when it is clear from the evidence that the employer is asserting that the claimant will be unable to do the work because of the injury sustained at work and is additionally asserting that there will be a substantial risk of reinjury if she is rehired." ***West Bend***, 149 Wis. 2d at 124-25.

¶52 During that discussion—a deliberation on whether medical evidence was required for the employer to sustain its burden of proof to show "reasonable cause"—the ***West Bend*** court remarked upon the state of the evidence at the time the employer commenced its evidentiary presentation before the hearing examiner. It was important to the court that at the beginning of the employer's case, the employee "had proved her prima facie case—that she had been an employe[e], had sustained an injury on the job, had applied for rehire, and had been denied rehiring because of the injury sustained in her work at West Bend." ***Id.*** at 126.

¶53 For two reasons, this lone sentence cannot establish a "because of the injury" qualification on the refusal to rehire. First, the sentence is a recitation of the particular evidence and theory of defense in that case, as it was undisputed in ***West Bend*** that the employer was justifying its refusal to rehire based on the work injury. Second, the court's point was an entirely procedural one: that the employee had, during her evidentiary presentation, provided sufficient evidence to establish everything necessary for a prima facie showing of a violation of WIS. STAT.

§ 102.35(3), thereby shifting the burden to the employer to substantiate its rationale that the employee was unfit for duty *because of the work injury*.

¶54 It also seems highly unlikely the ***West Bend*** court would have intentionally required an employee to show a "because of the injury" refusal, because one of its core holdings was an explicit rejection of a similar qualification. The employee in ***West Bend*** had been laid off as part of a general company workforce reduction. ***West Bend***, 149 Wis. 2d at 114. The employer argued this absolved it of liability under WIS. STAT. § 102.35(3), because the employee could not show that they were laid off because of their work injury. Our supreme court easily dispensed with that argument, pointing out that nothing in § 102.35(3) or prior case law required that the employee be out of work because of their injury. For the reasons set forth in this concurrence, it seems incongruous that the supreme court would have, in a single sentence in the very same opinion and without any statutory justification, mandated that the employee show the refusal to rehire was because of the injury.

¶55 Unfortunately, in ***Universal Foods***, the court of appeals lifted that single sentence from its context and apparently used it to graft a fourth "because of the injury" element onto the employee's prima facie burden. *See* ***Universal Foods***, 161 Wis. 2d at 6. This misinterpretation persisted in a pair of 1994 decisions, ***Hill v. LIRC***, 184 Wis. 2d 101, 107, 516 N.W.2d 441 (Ct. App. 1994), and ***Ray Hutson Chevrolet, Inc. v. LIRC***, 186 Wis. 2d 118, 122, 519 N.W.2d 713 (Ct. App. 1994).[5] ***Universal Foods***, ***Hill***, and ***Ray Hutson Chevrolet*** offered no rationale for requiring

[5] The Seventh Circuit Court of Appeals has also relied on the articulation of the employee's prima facie burden in ***Universal Foods Corp. v. LIRC***, 161 Wis. 2d 1, 7, 467 N.W.2d 793 (Ct. App. 1991). *See* ***Kohl's Food Stores, Inc. v. Hyland***, 32 F.3d 1075, 1077-78 (7th Cir. 1994).

an employee to show they were denied rehire because of the injury, did not discuss procedural aspects of the ***West Bend*** discussion they cited, and made no mention of ***West Bend***'s earlier discussion of the employee's prima facie burden, which omitted any such requirement. Nor did the court of appeals decisions purport to interpret or apply the "because of the injury" qualification they inserted as part of the employee's prima facie burden. While our supreme court has previously "take[n] the opportunity to underscore [the] potential inconsistency in the case law" regarding those decisions and ***West Bend***, it has so far declined to resolve that inconsistency. *See* ***deBoer***, 335 Wis. 2d 599, ¶¶41-42.

¶56 Faced with these inconsistent articulations of the employee's prima facie burden, LIRC in this case correctly surveyed the case law and rejected Bartelt's position. Although Bartelt faults LIRC for "completely ignor[ing] Wisconsin Supreme Court and Wisconsin Court of Appeals precedent," that appears to have been inevitable no matter which articulation of the employee's prima facie burden LIRC adopted.

¶57 At this juncture, a variety of appellate doctrines render this court unable to resolve the inconsistencies in the case law, although as set forth above I believe the answer is straightforward. Only the supreme court can overrule, modify or withdraw language from a previous supreme court case, ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), and, as a corollary, we cannot treat a statement in a supreme court opinion as dictum, ***Zarder v. Humana Insurance Co.***, 2010 WI 35, ¶57, 324 Wis. 2d 325, 782 N.W.2d 682. Nor can we undo what ***Universal Foods***, ***Hill*** and ***Ray Hutson Chevrolet*** have done; only the supreme court has the power to "overrule, modify or withdraw language from a published opinion of the court of appeals." ***Cook***, 208 Wis. 2d at 190. Under the circumstances, application of the first-in-time rule, as set forth in the majority

opinion, is seemingly the only mechanism we have to reach a workable resolution to this appeal.

¶58 Bartelt also appears to argue for a last-in-time rule, repeatedly asserting that ***Anderson v. LIRC***, 2021 WI App 44, 398 Wis. 2d 668, 963 N.W.2d 89, also endorsed the four-element test for the employee's prima facie burden. That is plainly incorrect. ***Anderson*** was explicit that the burden shifts to the employer "[a]fter an employee shows that he or she has been injured in the course of employment and subsequently denied rehire[.]" ***Id.***, ¶12. ***Anderson*** never identified a because-of-the-injury refusal as something that the employee must demonstrate.

¶59 Bartelt's argument to the contrary stems from a partially quoted sentence in ***Anderson*** that, once again, demonstrates the risk of removing words from their context. As the majority explains, ***Anderson*** had to determine, as a matter of de novo review in a post-***Tetra Tech*** world, whether ***Hill***'s holding was still good law; that is, whether an employee had to in some way express to the employer that they were interested in other positions when there was reasonable cause for the employer's refusal to rehire them for their old position. *See* ***Anderson***, 398 Wis. 2d 668, ¶¶20-21; *see also* Majority, ¶17 & n.3. When ***Anderson*** said that it was "adopt[ing] ***Hill***'s interpretation of [WIS. STAT.] § 102.35(3) as our own," *that* holding is what it was referring to—not ***Hill***'s articulation of the four-element test that ***Anderson*** had impliedly repudiated earlier in the opinion. Any doubt about the limited nature of ***Anderson***'s adoption is resolved in the last paragraph of the opinion: "*As to Northridge's refusal to rehire Anderson for a different position*, we affirmatively adopt ***Hill*** as our own interpretation of WIS. STAT. § 102.35(3), including in instances where the employee has been terminated from his or her prior

position prior to his or her medical recovery being complete." ***Anderson***, 398 Wis. 2d 668, ¶25 (emphasis added).[6]

¶60 In short, a holding that the employee must demonstrate they were refused rehire because of their work injury "imposes a condition for relief not found in the statute." *See* ***West Bend***, 149 Wis. 2d at 121. The various court of appeals decisions articulating such a requirement misinterpret ***West Bend*** and ignore necessary context from that decision. Although application of the first-in-time rule adequately resolves—at least for purposes of the present case—which test governs the employee's prima facie burden, I accept our supreme court's invitation to explain why ***Universal Foods*** and its progeny incorrectly state the test under WIS. STAT. § 102.35(3). *See* ***Cook***, 208 Wis. 2d at 190 (observing that the court of appeals, when confronted with case law it believes is incorrect, "may decide the appeal, adhering to a prior case but stating its belief that the prior case was wrongly decided.").

¶61 For those reasons, I respectfully concur.

[6] Given the foregoing, I disagree with the suggestion in the majority opinion that ***Anderson*** in any way adopted from ***Hill*** a "because of the injury" qualification as part of the employee's prima facie burden. *See Majority*, ¶¶17, 19-20.