

STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

MICHAEL H OWENS, Employee

UNEMPLOYMENT INSURANCE
DECISION

Hearing No. 10604869MW

K & J TRANSPORTING INC, Employer

**SEE ENCLOSURE AS TO
TIME LIMIT AND
PROCEDURES ON
FURTHER APPEAL**

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own, except that it makes the following modifications:

1. In the first paragraph of the FINDINGS OF FACT and CONCLUSIONS OF LAW section, the words "less than" are inserted prior to the word "one."
2. The first sentence of the third paragraph of the FINDINGS OF FACT and CONCLUSIONS OF LAW section is deleted.
3. In the quotation of the language of Wis. Stat. § 108.02(12)(a) on page 1 of the decision, the words "in an employment" are deleted.
4. The first sentence of the fifth paragraph of the FINDINGS OF FACT and CONCLUSIONS OF LAW section is deleted.
5. In the quotation of the language of Wis. Stat. § 108.02(12)(c) on the top of page 2 of the decision, the word "satisfied" is changed to "satisfies."

6. The second full paragraph on page 3 of the decision is modified to state as follows:

Subparagraph (a): Whether the contract operator owns the motor vehicle or holds the vehicle under a bona fide lease arrangement with any person other than the carrier. Yes. The claimant holds the subject vehicles under a bona fide lease arrangement with Whitaker Trucking, a business entity separate from the employing unit.

7. In the third full paragraph on page 3 of the decision, analyzing subparagraph (b), the sentence after the word "No." is deleted and the following substituted:

The claimant shared responsibility for maintaining the leased vehicles with the employing unit.

8. In the fourth full paragraph on page 3 of the decision, analyzing subparagraph (c), the sentence after the word "No." is deleted and the following substituted:

The claimant shared responsibility for these costs with the employing unit.

9. The final sentence of the last paragraph on page 3 of the decision is modified to state as follows:

The routes and stops were determined by the employing unit.

10. In the final sentence of the first paragraph on page 4 of the decision, the words beginning with "but" and continuing through the end of the sentence are deleted.

11. The following paragraph is added after the first paragraph on page 4 of the decision:

Subsection (g): Yes. The claimant could terminate the lease agreement with the employing unit at any time.

12. The final sentence of the original second paragraph on page 4 of the decision, analyzing subparagraph (h), is deleted.

13. The final paragraph on page 4 of the decision is deleted and the following substituted:

The evidence of record does not establish that any of the factors set forth in Wis. Adm. Code § DWD 105.03(2) are satisfied.

14. The first three sentences of the first paragraph on page 5 of the decision are deleted.
15. In the third paragraph on page 5 of the decision, the words "in employment" are deleted.

DECISION

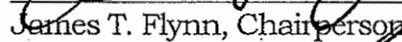
The decision of the administrative law judge, as modified, is affirmed. Accordingly, the amounts earned by the claimant during the relevant time period constitute base period wages.

Dated and mailed

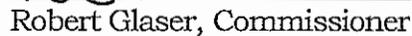
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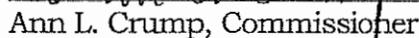
/s/


James T. Flynn, Chairperson

/s/


Robert Glaser, Commissioner

/s/


Ann L. Crump, Commissioner

MEMORANDUM OPINION

The claimant (Owens) performed services as a driver for the putative employer (K & J), a trucking business, from May 2, 2008, through March 13, 2009.

Owens filed a claim for benefits in week 11 of 2010. The base period for this claim consists of the fourth quarter of 2008 and the first three quarters of 2009.

The issue is whether the amounts earned by Owens performing services for K & J during this period constitute base period wages because these services were performed as a statutory employee.

Wisconsin Statutes § 108.02 states as follows, as relevant here:

108.02 Definitions. As used in this chapter:

(4) Base period. "Base period" means the period that is used to compute an employee's benefit rights under s. 108.06...

(4m) Base period wages. "Base period wages" means:

(a) All earnings for wage-earning service which are paid to an employee during his or her base period as a result of employment for an employer;...

(12) Employee.

(a) "Employee" means any individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, except as provided in par. (b), (bm), (c), (d), (dm) or (dn)....

(c) Paragraph (a) does not apply to an individual performing services for a government unit or nonprofit organization, or for any other employing unit in a capacity as a logger or trucker if the employing unit satisfies the department:

1. That such individual has been and will continue to be free from the employing unit's control or direction over the performance of his or her services both under his or her contract and in fact; and

2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged.

(e) This subsection shall be used in determining an employing unit's liability under the contribution provisions of this chapter, and shall likewise be used in determining the status of claimants under the benefit provisions of this chapter....

(14m) Employing unit. "Employing unit" means any person who employs one or more individuals.

(15) Employment.

(a) "Employment", subject to the other provisions of this subsection means any service, including service in interstate commerce, performed by an individual for pay....

(26) Wages. Unless the department otherwise specifies by rule:

(a) "Wages" means every form of remuneration payable, directly or indirectly, for a given period, or payable within a given period if this basis is permitted or prescribed by the department, by an employing unit to an individual for personal services....

Pursuant to Wis. Stat. § 108.02(4m), in order to be considered base period wages, earnings must be "paid to an employee during his or her base period as a result of employment for an employer..."

Since the record shows that Owens performed services for K & J for pay during the relevant base period, Owens would qualify as a statutory employee unless one of the exceptions set forth in Wis. Stat. § 108.02(12)(a) applies.

One of these exceptions, which relates to "truckers," is set forth in Wis. Stat. § 108.02(12)(c).

"Trucker" is defined by Wis. Stat. § 108.02(25e) as "a contract operator with a trucking carrier."

"Carrier" is defined in Wis. Admin. Code § DWD 100.02(8) as:

(8) "Carrier" means a person engaged in the hauling of passengers or freight by motor vehicle and includes a person engaged as a "common motor carrier," under s. 194.01 (1), Stats., as a "contract motor carrier," under s. 194.01 (2), Stats., or as a "private motor carrier," under s. 194.01 (11), Stats.

As the record shows, and as the ALJ found, K & J qualifies as a motor carrier within the meaning of Wis. Stat. § 194.01. Consequently, K & J would qualify as a carrier within the meaning of Wis. Adm. Code § DWD 100.02(8).

The term "contract operator" is defined in Wis. Admin. Code § DWD 100.02(12) as "an individual who contracts to lease a motor vehicle to a carrier for use in the carrier's business."

As the ALJ found, Owens utilized a semi and trailer he leased from a separate business entity [Whitaker Trucking] to perform the subject driving services for K & J.

However, it is not the existence of this lease that would be controlling, since the code requires that, in order to qualify as a contract operator, the individual "contracts to lease a motor vehicle to a carrier..." It is reasonably implicit from the record's reference to both a lease agreement between Owens and Whitaker Trucking, as well as a lease agreement between Owens and K & J, that Owens entered into a separate agreement to lease the semi and trailer back to K & J. Consequently, Owens would qualify as a contract operator within the meaning of Wis. Adm. Code § DWD 100.02(12).

Since K & J qualifies as a carrier, and Owens as a contract operator, Owens satisfies the statutory definition of "trucker."

The next step then is to determine whether, within the meaning of Wis. Stat. § 108.02(12)(c), Owens performed his driving services free from K & J's direction and control, and performed these services in an independently established trade, business or profession in which he was customarily engaged.

This determination is governed by Wis. Adm. Code §§ DWD 105.03 [direction and control], and DWD 105.04 [independently established business].

Wisconsin Administrative Code § DWD 105.03 provides as follows:

DWD 105.03 Contract operators; direction and control.

(1) The department shall examine the factors enumerated in this section to determine, both under contract and in fact, whether the contract operator is free from a carrier's direction or control, while the contract operator performs services for the carrier. The department shall determine whether:

(a) The contract operator owns the motor vehicle or holds the vehicle under a bona fide lease arrangement with any person other than the carrier;

(b) The contract operator is responsible for the maintenance of the motor vehicle;

(c) The contract operator bears the principal burden of the motor vehicle operating costs including such items as fuel, repairs, supplies, insurance and personal expenses while on the road;

(d) The contract operator supplies, or is responsible for supplying, the necessary personal services to operate the motor vehicle;

(e) The contract operator determines the details and means of performance, namely, the type of equipment, assignment of driver, loading, routes and number of stops to be made during the haul, as well as starting, completion and elapsed times;

(f) The contract operator may refuse to make a haul when requested by the carrier;

(g) The contract operator may terminate the lease at any time after reasonable notice; and

(h) The contract operator is compensated on a division of the gross revenue or by a fee based upon the distance of the haul, the weight of the goods, the number of deliveries, or any combination of these factors.

(2) If the department determines that all of the factors under sub. (1) (a) to (h) are present in the relationship between the contract operator and the carrier, the contract operator shall be deemed to be free from the carrier's direction and control in the performance of services under s. 108.02 (12) (b) 1., Stats. If one or more of the factors under sub. (1) (a) to (h) are not present in the relationship between the contract operator and the carrier, the department shall consider additional factors of the relationship, both under contract and in fact, including whether:

- (a) The contract operator may negotiate with the carrier to determine the method, frequency and regularity of payments made to the contract operator;
 - (b) The contract operator has the authority to discharge any driver whom he or she employs;
 - (c) The carrier requires decals, lettering, signs, emblems or other markings on the contract operator's motor vehicle for the purpose of advertising the carrier's name or business;
 - (d) The carrier requires the contract operator to submit reports;
 - (e) The carrier requires the contract operator to obey any work rules or policies; and
 - (f) The carrier requires any deductions from payments owing to the contract operator for federal or state income taxes or taxes under the federal insurance contributions act.
- (3) If the contract operator is found to be under the carrier's direction or control under subs. (1) and (2), the contract operator shall be deemed to be an employee of the carrier under s. 108.02 (12) (b) 1., Stats.

Wisconsin Administrative Code § 105.03(1)(a) requires that "the contract operator owns the motor vehicle under a bona fide lease arrangement with any person other than the carrier." The record shows, as the ALJ found, that Owens leased the semi and trailer he used to drive for K & J from Whitaker Trucking. The record also shows that, although the president of K & J was the vice president of Whitaker Trucking, they were separate business entities, and those driving for K & J were not required to lease their vehicles from Whitaker Trucking, and Whitaker Trucking leased its vehicles to drivers other than those providing services for K & J.

As a result, the record shows that Owens held the vehicles he used to perform driving services for K & J under a bona fide lease arrangement with an entity other than K & J, and 105.03(1)(a) is satisfied.

It is implicit that the lease referenced in 105.03(1)(g) would be that between a contract operator and a carrier since that is the only lease required in the relationship, i.e., a contract operator like Owens could own his own vehicle. The record here shows, as K & J's president testified, that the lease he signed with Owens could be terminated by either party at any time.

As a result, 105.03(1)(g) is satisfied.

The record shows, consistent with the testimony of K & J's president, that the amounts received by Owens for the driving services he performed for K & J were calculated as follows:

- The amount of income generated by the truck for a week was designated as the "gross" amount.
- From this gross amount, the cost of vehicle fuel and maintenance, tolls, workers compensation insurance, and other expenses are deducted, and the remainder is the "settlement" amount.
- Owens received 25% of this settlement amount.

Consequently, Owens and K & J shared these vehicle, travel, and insurance costs. As a result, 105.03(1)(b) and 105.03(1)(c) are not satisfied here because Owens was not principally responsible for the maintenance of the vehicles he used to perform driving services for K & J, and for the costs of operating these vehicles.

Since Owens himself drove the subject vehicles for K & J, 105.03(1)(d) is satisfied.

Consistent with the decision in *DWD v. LIRC and Dunham Express Corp.*, 2010 WI App 123 (Ct. App. 2010), the development of the drop-off/pick-up times and locations by K & J removes from Owens the discretion to "determine...the routes and number of stops to be made during the haul," within the meaning of 105.03(1)(e). As a result, this factor is not satisfied.

The record shows, as the ALJ held, that Owens could refuse to make a haul, within the meaning of Wis. Adm. Code § DWD 105.03(1)(f).

Finally, Owens was effectively compensated on a division of the gross revenue, which satisfies Wis. Adm. Code § DWD 105.03(1)(h).

Since not all of the factors set forth in Wis. Adm. Code § 105.03(1) are satisfied here, the factors set forth in Wis. Adm. Code § 105.03(2) are required to be considered.

The record does not establish that any of the factors in 105.03(2) are satisfied, and, in fact, there is little or no evidence in the record as to any of these factors. The ALJ found that "[t]he claimant could not employ drivers," and [t]he claimant was required to submit reports only as required by state or federal laws of regulations," but, in fact, there is no evidence in the record to support either of these findings.

In its petition, K & J argues that rehearing should be granted to enable it to offer its lease agreement with Owens, and other documents, into the hearing record, and implies in its argument that the provisions of this lease agreement would relate to certain of the factors set forth in 105.03(2).

This was a telephone hearing. Parties are advised prior to telephone hearings to share with the department and with the other party any documents they intend to offer as exhibits. K & J was represented by counsel throughout these proceedings. At hearing, K & J conceded that it had not shared this lease agreement with the department or with Owens prior to hearing. K & J and its counsel had reason to be aware of the manner in which documents are to be shared prior to hearing, so that they would be available to both parties and the ALJ during the course of the hearing. Further hearing to permit K & J the opportunity to offer the lease agreement and other documents into the record is not merited here.

Since Owens does not satisfy all of the conditions set forth in Wis. Adm. Code § DWD 105.03(1), or any of the conditions set forth in Wis. Adm. Code § DWD 105.03(2), the requirement that he be free from K & J's direction and control is not met, and the exception to employee status set forth in Wis. Stat. § 108.02(12)(c) does not apply. As a result, the amounts earned by Owens performing driving services for K & J during the relevant time period constitute base period wages.

cc: Attorney Mark J. Goldstein