

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH V

LA CROSSE COUNTY

CAREER CONNECTIONS STAFFING
SERVICES, INC. D/B/A GO2IT GROUP,

Plaintiff,

vs.

DECISION

LABOR AND INDUSTRY
REVIEW COMMISSION

Case No. 13-CV-179

and

ALBERT ROHLAND,

Defendants.

NATURE OF THE PROCEEDING

This is an action by Career Connections Staffing Services, Inc. d/b/a Go2IT Group (“Go2IT Group”) for judicial review of a determination of the State of Wisconsin Labor and Industry Review Commission (“LIRC” or “the Commission”). This judicial review was sought pursuant to Wis. Stat. § 108.09(7)(a). The provisions of Chapter 102 of the Wisconsin Statutes, and particularly Wis. Stat. § 102.23, govern this judicial review. LIRC’s decision found that Albert Rohland (“Rohland”) met the statutory definition of “employee” under Wis. Stat. § 108.02(12).

STATEMENT OF ISSUE UNDER REVIEW

Did Rohland meet the statutory definition of “employee” within the meaning of Wis. Stat. § 108.02(12)? For the reasons set forth below, the court affirms LIRC’s decision that Rohland was an employee.

PROCEDURAL HISTORY

On August 31, 2012, the Department of Workforce Development (“the Department”) found that Rohland was an employee of Go2IT Group under Wis. Stat. § 108.02(12). Go2IT Group appealed. On October 9, 2012, an Administrative Law Judge (“ALJ”) affirmed the Department’s decision. Go2IT Group petitioned LIRC for a review of the ALJ’s decision. On February 14, 2013, LIRC issued a decision modifying and affirming the ALJ’s decision. On March 14, 2013, Go2IT filed the present action under Wis. Stat. § 108.09(7) seeking judicial review of LIRC’s decision.

STANDARD OF REVIEW

Wis. Stat. § 108.09(7)(b) provides, in part that “[a]ny judicial review under this chapter shall be confined to questions of law, and the provisions of ch. 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section.” (emphasis added).

Wis. Stat. § 102.23 governs judicial review of LIRC decisions. It states that a decision of LIRC can only be set aside on the following grounds: “(1) That the commission acted without or in excess of its powers; (2) That the order or award was procured by fraud; or (3) That the findings of fact by the commission do not support the order or award.” Wis. Stat. § 102.23(1)(e).

Whether an individual is an “employee” entitled to unemployment benefits under Wis. Stat. Ch. 108 presents questions of both fact and law. LIRC argues that its findings of fact were supported by substantial and credible evidence and are therefore conclusive. Go2IT Group

concedes that a reviewing court “must uphold LIRC’s findings of fact if they are supported by relevant, credible, and probative evidence.” (Pl.’s Br. at p. 3). It further concedes that the “historical facts” in this case are not at issue. (Pl.’s Br. at p. 3). Instead, Go2IT Group argues, it is the application of the statute to these facts, a question of law, which is at issue.

Standard of Review: Findings of Fact

This court accepts LIRC’s findings of fact as conclusive. Wis. Stat. § 102.23(6) provides that a reviewing court “shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact.” There is no request that the court remand the case to LIRC on the grounds that any finding of fact was not supported by credible and substantial evidence. There is also no claim that LIRC acted without or in excess of its powers or that the findings of fact were procured by fraud.

Go2IT Group seemingly does not dispute LIRC’s argument that, where more than one reasonable inference may be drawn from the evidence, the drawing of the inference by LIRC is an act of fact-finding and that the inference is conclusive on the reviewing court. *Bernhardt v. LIRC*, 207 Wis. 2d 292, 301-302, 558 N.W.2d 874 (Ct. App. 1996). LIRC further argued, and Go2IT has not disputed, that where differing reasonable views may be sustained by substantial evidence, LIRC may determine which of those views it accepts, *Holy Name School v. DILHR*, 109 Wis. 2d 381, 386, 326 N.W.2d 121 (Ct. App. 1982); and that a reviewing court should not upset LIRC findings of fact if they are supported by credible evidence, regardless of how reasonable the alternative view may be. *Vocational, Technical & Adult Ed. Dist. 13 v. DILHR*,

76 Wis. 2d 230, 242, 251 N.W.2d 41 (1977). This court accepts the LIRC findings of fact as conclusive. The court will apply the facts as found by LIRC in its analysis.

Standard of Review: Conclusions of Law

Go2IT Group argues that the determination that Rohland was an employee is a question of law. (Pl.'s Br., p. 3). LIRC agrees: "The application of a statutory standard to a fact situation is ordinarily a question of law." (Def.'s Br., p. 7).

The parties differ as to the level of deference this court must give to LIRC's decision. In *Brown v. LIRC*, 2003 WI 142, ¶¶ 13-16, 267 Wis. 2d 31, 671 N.W.2d 279, the Wisconsin Supreme Court explained the levels of deference applicable to agency decisions:

¶ 13 Over time, we have developed a three-level approach to an agency's conclusions of law: a court gives an agency's conclusion of law no deference (the court makes a *de novo* determination of the question of law); a court gives an agency's conclusion of law due weight deference; or a court gives an agency's conclusion of law great weight deference. The appropriate level of scrutiny a court should use in reviewing an agency's decision on questions of law depends on the comparative institutional capabilities and qualifications of the court and the agency to make a legal determination on a particular issue.

¶ 14 No deference is due an agency's conclusion of law when an issue before the agency is one of first impression or when an agency's position on an issue provides no real guidance. When no deference is given to an administrative agency, a court engages in its own independent determination of the questions of law presented, benefiting from the analyses of the agency and the courts that have reviewed the agency action.

¶ 15 Due weight deference is appropriate when an agency has some experience in the area but has not developed the expertise that necessarily places it in a better position than a court to interpret and apply a statute. Under the due weight deference standard "a court need not defer to an agency's interpretation which, while reasonable, is not the interpretation which the court considers best and most reasonable."

¶ 16 Great weight deference is appropriate when: (1) an agency is charged with administration of the particular statute at issue; (2) its interpretation is one of

long standing; (3) it employed its expertise or specialized knowledge in arriving at its interpretation; and (4) its interpretation will provide uniformity and consistency in the application of the statute. In other words, when a legal question calls for value and policy judgments that require the expertise and experience of an agency, the agency's decision, although not controlling, is given great weight deference.

(emphasis added).

Applying the language of *Brown* to the case at bar, this court reaches the following conclusions. The issue before LIRC was not one of “first impression” or one where LIRC’s position “provides no real guidance.” Nor is this a case where LIRC “has some experience in the area” but “has not developed the expertise” that puts it in a better position to apply the law than a reviewing court. This is a case where LIRC is charged with administering the statute in question. LIRC’s interpretation is one of long standing, as explained below. LIRC employed its expertise or specialized knowledge in arriving at its interpretation, and LIRC’s interpretation will provide uniformity and consistency in application of the statute. Comparing the “institutional capabilities and qualifications of the court and the agency [LIRC] to make legal determination on a particular issue” leads to the conclusion that this court should give great weight to LIRC’s decision. This decision clearly “calls for value and policy judgments that require the expertise and experience” of LIRC.

Go2IT Group relies on *Larson v. LIRC*, 184 Wis. 2d 378, 516 N.W.2d 456 (Ct. App. 1994), in arguing that this court should give no deference to LIRC’s decision and review it *de novo*. In *Larson* the Court of Appeals stated:

Although great weight is given to the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying it, this

deference is due only if “the administrative practice [of applying the statute] is long continued, substantially uniform and without challenge by governmental authorities and courts.” *Local No. 695 v. LIRC*, 154 Wis. 2d 75, 82–83, 452 N.W.2d 368, 371–72 (1990) (emphasis added; internal quotation omitted). Our independent research shows that LIRC's application of this statute has not gone unchallenged by the courts. See, e.g., *Princess House*, 111 Wis. 2d at 67, 330 N.W.2d at 180 (reversing the commission's holding that employer did not meet its burden of showing that its employees were “free from the employing unit's control or direction”); *Star Line Trucking Corp. v. DILHR*, 109 Wis. 2d 266, 281, 325 N.W.2d 872, 879 (1982) (reversing in part the commission's finding of control or direction); *Grutzner S.C. v. LIRC*, 154 Wis. 2d 648, 654, 453 N.W.2d 920, 922 (Ct.App.1990) (rejecting LIRC's interpretation of “customarily engaged in an independently established business”); *Keeler*, 154 Wis. 2d at 634, 453 N.W.2d at 905 (reversing LIRC's determination on the “independently established business” prong). Thus, there is no clear administrative precedent regarding this issue.

(emphasis added).

Go2IT Group argues that no deference should be granted to LIRC's decision since substantive changes were made to the statutory definition of “employee” in Wisconsin unemployment insurance law by 2009 Wisconsin Act 287, enacted on May 12, 2010, and applicable to services performed after December 31, 2010. Thus, Go2IT Group argues, LIRC's interpretation of the statute is no longer one “long continued” and “substantially uniform.” Go2IT Group asserts that even if a clear administrative precedent regarding the application of the statutory definition of employee had been established in the years since *Larson* was decided, that precedent was negated by the substantive changes to the statute in 2010. Go2IT argues, in essence, that the substantive changes to the statute make the decision of the LIRC in the instant case one of first impression and therefore of no real guidance. It sees the statutory changes as sweeping.

LIRC sees it differently. LIRC notes that it is charged with administering the statute, that its decisions since *Larson* was decided have been reviewed by courts that have recognized LIRC's expertise and given LIRC's legal conclusions great weight deference. LIRC also notes that some of the changes were minor and merely involved renumbering. LIRC also asserts that it has issued 34 decisions applying the revised statute and that those decision coupled with LIRC's familiarity with the general statutory framework and statutes involved require a reviewing court to give its decisions great weight deference.

In reviewing the language of the *Larson* decision and the rationale for the differing levels of deference to be given to an agency's decisions, as laid out in *Brown*, this court concludes that great weight deference should be given to LIRC's decision in this case. First, three of the current subdivisions of the statute are identical in wording to subdivisions of the prior statute: Wis. Stat. §§ 108.02(12)(bm)2.a., g., and h. Second, changes in the other sections were minor or, where they were more substantive, they reflected recommendations made by the Unemployment Insurance Advisory Council. Third, those recommendations, in turn, were based on factors that were already being considered by LIRC and the courts. See, generally, for example, the Report of the Committee to Review the Unemployment Insurance Statutory Definition of "Employee."

The better view of these statutory changes is that LIRC already has the necessary expertise and experience. These statutory changes are a reflection of existing agency and court decisions and not a challenge to them.

REVIEW OF LIRC'S DECISION

Wis. Stat. § 108.02(12) provides, in part:

(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. (bm), (c), (d), (dm) or (dn).

(bm) Paragraph (a) does not apply to an individual performing services for an employing unit other than a government unit or nonprofit organization in a capacity other than as a logger or trucker, if the employing unit satisfies the department that the individual meets the conditions specified in subds. 1. and 2., by contract and in fact:

1. The services of the individual are performed free from control or direction by the employing unit over the performance of his or her services. In determining whether services of an individual are performed free from control or direction, the department may consider the following nonexclusive factors:

- a. Whether the individual is required to comply with instructions concerning how to perform the services.
- b. Whether the individual receives training from the employing unit with respect to the services performed.
- c. Whether the individual is required to personally perform the services.
- d. Whether the services of the individual are required to be performed at times or in a particular order or sequence established by the employing unit.
- e. Whether the individual is required to make oral or written reports to the employing unit on a regular basis.

2. The individual meets 6 or more of the following conditions:

- a. The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
- b. The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.
- c. The individual operates under multiple contracts with one or more employing units to perform specific services.
- d. The individual incurs the main expenses related to the services that he or she performs under contract.

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- e. The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
 - f. The services performed by the individual do not directly relate to the employing unit retaining the services.
 - g. The individual may realize a profit or suffer a loss under contracts to perform such services.
 - h. The individual has recurring business liabilities or obligations.
 - i. The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

It is uncontested that Rohland meets the definition of employee in Wis. Stat. § 108.02(12)(a). It is also uncontested that Rohland meets the conditions set out in the five factors of § 108.02(12)(bm)1. The burden is therefore on Go2IT Group to show that Rohland meets six or more of the nine conditions in § 108.02(12)(bm)2.

The parties do not dispute LIRC's determination that Rohland met the conditions set out in Wis. Stat. §§ 108.02(12)(bm)2.c. and e. Likewise, they do not dispute that Rohland did not meet the conditions laid out in §§ 108.02(12)(bm)2.f. and h. The disputed conditions, therefore, are §§ 108.02(12)(bm)2.a., b., d., g., and i. Accepting LIRC's findings of fact, including its reasonable factual inferences, and giving its legal conclusions great weight, each condition will be addressed in turn.

Wis. Stat. § 108.02(12)(bm)2.a.: The individual advertises or otherwise affirmatively holds himself or herself out as being in business.

LIRC found that Rohland did not advertise or otherwise affirmatively hold himself out as being in business. There is no dispute that Rohland did not advertise in the "traditional" sense, e.g., in print or on television or radio. Rohland did not have business cards or a business name. Go2IT Group focuses its argument that Rohland advertised or otherwise held himself out as

being in business on the fact that he posted his resume online and issued invoices to Go2IT Group for the work that he performed.

LIRC's decision recognized that Rohland posted his resume on "several websites." As Go2IT Group points out, the internet is an increasingly predominant advertising medium. However, Rohland posted his resume under his own name, as opposed to a business name. Furthermore, he stated that his target job title was "customer service associate" and that his desired job type was "employee" and "Temporary/Contract/ProjectTemporary/Contract/Project [sic]." From this LIRC reasonably inferred that Rohland posted his resume online for the purpose of seeking employment, not as an advertisement or otherwise to hold himself out as being in business.

LIRC's decision did not address the fact that Rohland submitted invoices to Go2IT for the work he performed. However, Go2IT's reliance on that fact is not persuasive. It was Go2IT that required Rohland to submit the invoices. Furthermore, the invoices were more of an indication of the number of hours he worked – similar to a timecard, as LIRC points out – than a bill. Therefore, LIRC's conclusion that subsection 108.02(12)(bm)2.a. was not met is reasonable. LIRC's decision as to subsection a. is affirmed.

Wis. Stat. § 108.02(12)(bm)2.b.: The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.

LIRC found that this condition was not met, because Rohland did not maintain his own office or choose where to perform his services. Rohland was instructed where to go and to

whom to report. As to the equipment and materials, LIRC found that Rohland “used his own equipment, including needle nose pliers and zip tie cutters, to perform his services, but the client for whom he performed the vast majority of his services provided the supplies he used in the work.” (LIRC Dec., p. 1/ R.2).

Go2IT does not dispute that Rohland did not maintain his own office. It focuses its argument instead on the location of the work performed. Although the location of the work was dictated by the location of the client, Go2IT argues, essentially, that Rohland constructively had a choice in where to perform his services. Go2IT argues that Rohland chose the location where he performed his services because he was free to refuse work if he did not want to travel to a particular location. LIRC did not find this argument persuasive. LIRC found that Rohland did not choose the location where he performed his services. That finding is a reasonable inference from the testimony at the hearing. Therefore, LIRC’s conclusion that subsection 108.02(12)(bm)2.b. was not met is reasonable. LIRC’s decision as to subsection b. is affirmed.

Wis. Stat. § 108.02(12)(bm)2.d.: The individual incurs the main expenses related to the services that he or she performs under contract.

LIRC found that subsection d. was not met, because Go2IT did not accurately quantify its or Rohland’s expenses and it was not obvious that Rohland’s expenses were the main expenses related to the services he provided. In its decision LIRC pointed out that subsection d. is identical in wording to one of the conditions under the pre-2009 Wisconsin Act 287 standard. Under the old standard, LIRC asserts, it “consistently held that, without a quantification of [both

parties'] expenses or an obvious conclusion as the expenses borne by the respective parties, it must be found that [this condition] has not been met." (LIRC Dec., p. 9/R.10).

LIRC recognized that Rohland had expenses related to travel, some lodging, and maintenance of tools. However, LIRC found that Go2IT Group had expenses related to the work performed, including "administrative costs related to the parties' four agreements, coordination of the specific assignments with its clients, and compensating [Rohland] for his services." (LIRC Dec., p. 9/R.10). The finding that Go2IT Group had expenses relating to the work performed is a reasonable inference from the record. Since the parties' respective expenses are not quantified in the record, it is not possible to determine with certainty which party bore the main expenses related to the performance of Rohland's work. Therefore, LIRC's conclusion that subsection 108.02(12)(bm)2.d. was not met is reasonable. LIRC's decision as to subsection d. is affirmed.

Wis. Stat. § 108.02(12)(bm)2.g.: The individual may realize a profit or suffer a loss under contracts to perform such services.

LIRC found that this condition was not met because it was unlikely that Rohland could suffer a loss under the terms of his agreement with Go2IT. This was based on the fact that he was paid an hourly rate for each assignment, that he could select which assignments he accepted – taking into account his potential expenses, and that his expenses were not substantial. This conclusion is reasonable based on reasonable inferences from the testimony at the hearing. Therefore, LIRC's conclusion that subsection 108.02(12)(bm)2.g. was not met is affirmed.

Wis. Stat. § 108.02(12)(bm)2.i.: The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

LIRC found that this condition was not met, because Rohland was economically dependent upon Go2IT Group with respect to his services as an IT specialist. LIRC found that, although Rohland had worked for multiple entities, it had always been as an employee. It found that the fact that he worked for each entity under contract related only to the duration of his employment and was not an employment status. It concluded that if his relationship with Go2IT Group were to cease, he would have had to find new employment, as opposed to being able to move on to perform his services independently. Essentially, LIRC concluded that Rohland's ability to find work in his field after his relationship with Go2IT ended was more akin to an employee who is let go by one company and is subsequently employed by another company in the same field than to business owner who simply looks for a new client. LIRC's conclusion that subsection 108.02(12)(bm)2.i. was not met is reasonable. LIRC's decision as to subsection i. is affirmed.

CONCLUSION

The decision of LIRC is affirmed in all respects. The decision is supported by substantial and credible evidence. Go2IT Group has not met its burden of showing that LIRC's conclusions were unreasonable or unsupported by the record.

CAREER CONNECTIONS STAFFING
SERVICES, INC., D/B/A GO2IT GROUP
v.
LABOR AND INDUSTRY REVIEW COMMISSION
and
ALBERT ROHLAND

DECISION

ORDER

NOW, THEREFORE IT IS ORDERED:

For the reasons stated above, the Labor and Industry Review Commission's decision is
AFFIRMED.

Dated at La Crosse, Wisconsin, this 23rd day of October, 2013.

BY THE COURT:



DALE T. PASELL
Circuit Court Judge, Branch V

cc: Attorney Daniel S. Leitz
Attorney Jeffrey Shampo
Albert Rohland