

CHRISTINE L. ASKI

Plaintiff,

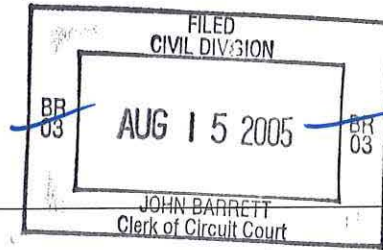
v.

LABOR AND INDUSTRY  
REVIEW COMMISSION, AND  
SUN COUNTRY AIRLINES

Defendants.

**COPY**

Case No. 05-CV-000655

**DECISION**

The plaintiff, Christine L. Aski (“Aski”), seeks judicial review of two Labor and Industry Review Commission’s (“LIRC”) decisions, which determined that she is required to repay Temporary Extended Unemployment Compensation (TEUC) and Temporary Extended Unemployment Compensation for Displaced Airline and Related Workers (TEUC-A) benefits that she erroneously received. LIRC reversed an administrative law judge’s (ALJ) decision that the erroneous payment of benefits was due to departmental error under Wis. Stat. §108.22(8), and therefore, Aski was not required to repay the State. LIRC held that waiver of benefit recovery was not required under §108.22(8)(c) because although the overpayment did not result from the fault of the employee as provided in Wis. Stat. §108.04(13)(f), the overpayment was not the result of a departmental error. For the reasons set forth below, this court affirms the decisions of the Labor and Industry Review Commission.

## STATEMENT OF FACTS

Aski collected regular unemployment insurance (UI) benefits from the State of Wisconsin through week 33 of 2003. On August 23, 2003, the department mailed Aski a Temporary Unemployment Compensation Form TEUC-707 form informing her that she was eligible for TEUC benefits, provided certain conditions were met. The form provided, in part, that TECU is payable to individuals who:

Are not eligible for benefits under the unemployment insurance programs of any other state or the federal government. **IF YOU WORKED IN A STATE OTHER THAN WISCONSIN DURING THE PAST 18 MONTHS, YOU MUST CONTACT THE UI BENEFIT CENTER AT THE NUMBER LISTED ABOVE.**

Aski claims that she never received the TEUC-707 form in the mail. Beginning in week 34 of 2003, until week 37 of 2003, Aski collected TEUC benefits totaling \$1,024.00.

On September 18, 2003, the department sent Aski a letter informing her that she was eligible to receive TEUC-A benefits, again provided certain conditions were met. One of those conditions was that Aski must not be eligible for any benefits from any other state or federal program. Aski did not recall if she received this letter either. From week 38 of 2003 until week 48 of 2003, she received TEUC-A benefits totaling \$2,816.00.

Aski worked in Minnesota during parts of 2002 and 2003, and was eligible for benefits from the State of Minnesota beginning in week 34 of 2003 and during weeks 38 thru 48 of 2003.

## STANDARD OF REVIEW

The weight and credibility of the evidence are for the Commission to evaluate. *Currie v. DILHR*, 210 Wis. 2d 380, 387 (Ct. App. 1997). This court may not substitute

its judgment for the Commission's on issues of fact. *Id.* This court will uphold the Commission's findings of fact if they are supported by credible and substantial evidence in the record. Wis. Stat. §102.23(6); *Langhus v. LIRC*, 206 Wis. 2d 494, 501 (Ct. App. 1996).

Once the facts are established, the determination of whether those facts fulfill the statutory standard is a legal conclusion. *Keeler v. LIRC*, 154 Wis. 2d 626, 632 (Ct. App. 1990). An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference, or *de novo* review, depending on the circumstances. *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 284 (1996). Great deference is given when the following four requirements are met: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is long standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity and consistency on the application of the statute. *Id.* Under the great weight standard, the court will uphold an agency's reasonable interpretation of a statute if it is not contrary to the clear meaning of the statute, even if an alternative interpretation is more reasonable. *Id.* at 287.

The court will use due weight deference "when the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." *Id.* at 286. Additionally, "a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available. *Id.*

The *de novo* standard is only used by the court when the legal conclusion reached by the agency is one of first impression or when the agency's position on the statute has been so inconsistent as to provide no real guidance. *Id.*

With respect to the present case, LIRC is responsible for administering the statute at issue here. *See* Wis. Stat. § 108.09(6). LIRC has also interpreted issues of departmental mistake on numerous occasions, as evidenced by the cases cited in LIRC's brief and digested on the LIRC website. The existence of previous cases decided by LIRC that deal with department error in overpayments can establish that LIRC has expertise in applying the statute to various factual situations. *Lopez v. Labor & Indus. Review Comm'n*, 252 Wis.2d 476, 642 N.W.2d 561 (Ct. App. 2002). The test is whether LIRC has experience interpreting the statutory scheme, not whether LIRC has previously applied the statutory scheme to a particular set of facts. *Id.* Finally, there is no allegation by Aski that LIRC's decisions on department error have been inconsistent or that the statute has not been applied in a uniform manner.

Because all four requirements have been met in this case, application of the greater weight deference standard is appropriate. Therefore, this court must uphold LIRC's reasonable interpretation that is not contrary to the clear meaning of the statute, even if an alternative interpretation is more reasonable. *UFE, Inc. v. LIRC* at 284, 548 N.W.2d 57, 61.

#### ANALYSIS

If benefits are paid to an individual in error, the individual may be forced to repay. *See* Wis. Stats. § 108.22(8)(a). However, the repayment may be waived if

- (a) The overpayment was the result of a departmental error and was not the fault of any employer . . .; and
- (b) The overpayment did not result from the fault of an employee . . . or because of a claimant's false statement or misrepresentation.

§ 108.22(8)(c)1.

“Departmental error” is defined as “an error made by the department in computing or paying benefits which results from:

- (a) A mathematical mistake, miscalculation, misapplication or misinterpretation of the law or mistake of evidentiary fact, whether by commission or omission; or
- (b) Misinformation provided to a claimant by the department on which the claimant relied.

Section 108.02(10e).

Aski believes that LIRC's finding that there was no department error is incorrect. She testified at her hearing before the ALJ that she never received the relevant forms, and argues now that she complied with all department requests and had a good faith belief that she was entitled to the TEUC and TEUC-A benefits.

LIRC noted that although an unemployment insurance representative in Minnesota apparently misinformed Aski as to eligibility for benefits, that did not change the fact that she was not an “exhaustee” as defined by federal law and therefore, not entitled to the benefits. LIRC further found that the department did mail to Aski the form that instructed her to contact the department if she worked in a state other than Wisconsin during the past 18 months. Although Aski denied receiving the notice, the department mailed the notice. Assuming that the overpayment was not due to any fault on Aski's part, LIRC concluded that there was still no department error, as is required for waiver under §108.22(8)(c). Even if Aski did not receive it, and therefore failed to report her Minnesota employment, this was not due to any error by the department. The department

did nothing inappropriate. LIRC concluded that had the department been informed of Aski's Minnesota employment, payments would have never been made.

Employing the great weight standard of review, this court finds that LIRC's interpretation of §108.22(8)(c) is reasonable, and not contrary to the clear meaning of the statute. Therefore, this court must affirm the determinations.

### CONCLUSION AND ORDER

Based upon a review of the entire record, IT IS HEREBY ORDERED that the decisions of the Labor and Industry Review Commission are hereby AFFIRMED.

Dated this 15th day of August, 2005 at Milwaukee, Wisconsin.

BY THE COURT:

CLARE L. FIORENZA  
Clare L. Fiorenza, Circuit Court Judge  
Milwaukee County, Branch 3