No. 87-2433

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT IV

NORMA M. BROCKWAY,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION, and SCHOOL DISTRICT OF SENECA,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Crawford county: MICHAEL KIRCHMAN, Judge. Reversed and cause remanded with directions.

Before Dykman, J., Eich, J., and Sundby, J.

SUNDBY, J. Norma Brockway appeals from a judgment affirming the decisions of the Labor and Industry Review Commission that in benefit weeks 47 and 48 of 1985 she refused suitable work from her former employer, the Seneca School District, without good cause, within the meaning of

sec. 108.04(8)(a), Stats.[1] She claims: (1) LIRC erred in failing to analyze her refusals of work offers under secs. 108.04(1)(e) or 108.04(2)(a). (2) She had good cause within the meaning of sec. 108.04(8)(a) for her refusals of the district's work offers. As a good-cause reason for her refusal, she claims that she cannot be denied benefits because the hours of work offered were substantially less favorable to her than those prevailing for similar work in the locality, sec. 108.04(9)(b).

We conclude: (1) LIRC did not err in refusing to apply secs. 108.04(1)(e) or sec. 108.04(2)(a), Stats., to her refusals. (2) The record is inadequate to support LIRC's finding that when Brockway refused the district's work offer in week 47, she was employed by her husband. We therefore direct that the trial court remand the record to LIRC to redetermine Brockway's eligibility in week 47. (3) LIRC's finding that in week 48 Brockway refused the district's work offer because she no longer wished to do custodial work is not supported by any credible evidence in

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[1] The applicable statutes are those in effect at the time of Brockway's refusals. These are found in the 1985-86 edition of the Wisconsin Statutes.

the record. The district failed to meet its burden of proving that Brockway was disqualified for benefits.

Because of our conclusions, we do not reach Brockway's claims that the work she was offered in weeks 47 and 48 was not suitable. We reverse the judgment and direct the trial court to remand the cause to LIRC to redetermine Brockway's eligibility in week 47.

I.

BACKGROUND

Norma Brockway was employed as a full-time custodian for the Seneca School District for approximately two years. She was laid off after the 1984-85 school year. She thereafter did substitute work for the district on a number of occasions.

In benefit weeks 39, 41, 43, 47 and 48 of 1985 (weeks ending September 28, October 12, October 26, November 23, and November 30, respectively), Brockway refused work offers by the district. Benefits were denied in each of the weeks involved, pursuant to sec. 108.04(1)(a), Stats. Initial determinations of ineligibility were made on February 6, 1986, by the department. On April 4, 1986, the

appeal tribunal affirmed the initial determinations. Brockway timely petitioned LIRC for review.

On August 28, 1986 LIRC remanded the appeals for further proceedings. LIRC concluded that, under Barnett v. LIRC, 131 Wis.2d 416, 388 N.W.2d 652 (Ct. App. 1986), the appeals had been incorrectly analyzed. Thereafter, further hearings were held and LIRC ultimately determined, on Brockway's further appeals, that in weeks 47 and 48 of 1985, Brockway had failed without good cause to accept offers of suitable work, within the meaning of sec. 108.04(8)(a), Stats. Accordingly, Brockway was found ineligible for further benefits until she satisfied the conditions of sec. 108.04(8)(a). LIRC also required her to repay benefits for which she was not eligible.

II.

STATUTES INVOLVED

The department argues that it was foreclosed by Barnett from applying sec. 108.04(1)(a), Stats., to Brockway's refusal of temporary substitute work. Section 108.04(1)(a) provides:

> An employe shall be ineligible for benefits for any week in which he [or she] is with due notice called on by his [or her] current employing unit to report for work actually available within such week and is unavailable for work or physically unable to do his [or her] work.

LIRC concluded that Brockway's work refusals should be analyzed under sec. 108.04(8)(a), Stats., which provides in part:

> An employe who fails ... to accept work when offered shall, if the failure was without good cause as determined by the department, be ineligible for benefits for the week in which the failure occurs and thereafter until the employe [reestablishes eligibility].

Brockway contends that LIRC should have analyzed her work refusals under secs. 108.04(1)(e) or 108.04(2)(a), Stats.

Section 108.04(1)(e), Stats., provides in part:

> An individual who is self-employed shall not be eligible for benefits for any week in which he [or she] has worked at his [or her] self-employment, unless he [or she] establishes to the satisfaction of the department that in view of labor market conditions he [or she] has made an active and bona fide search for employment.

Section 108.04(2)(a), Stats., provides:

> Except as provided in par. (b) and as otherwise expressly provided, a claimant is eligible for benefits as to any given week for which he or she earns no wages only if:
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> 1. The individual is able to work and available for work and is seeking suitable work during that week; and
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> 2. As of that week, the individual has registered for work at a public employment office.

Paragraph (b) provides that the department may by rule prescribe and waive the requirements for work and search for work. These requirements are not involved in this appeal.

III.

APPROPRIATE ANALYSIS

(1)

We do not decide LIRC's claim that Barnett foreclosed it from analyzing Brockway's work refusals under sec. 108.04(1)(a), Stats. Brockway does not argue that LIRC should have applied sec. 108.04(1)(a). She argues that the statutes which LIRC should have applied are secs. 108.04(1)(e) (self-employment) and 108.04(2)(a) (general qualifying requirements).

(a) Self-employment. Section 108.04(1)(e), Stats., applies to persons who are self-employed. Brockway did not show that she was self-employed. The department held three hearings. The first hearing involved weeks 39, 41, 43, and 47 of 1985. The second hearing involved week 49 of 1985. The remand hearing involved weeks 39, 41, 43, 47 and 49.[2] Brockway had only herself as a witness. The only testimony she presented which could conceivably support a claim that she was self-employed was her testimony that she refused the district's work offer in week 47 because of her commitment to strip tobacco in pursuance of the family's part-time farming venture and her testimony that she refused work in week 48 because of her work for Avon. However, Brockway does not argue that these activities establish that she was self-employed. Therefore there is no basis for her claim that LIRC should have applied sec. 108.04(1)(e) to her refusals.

(b) General qualifying requirements. Brockway contends that LIRC should have concluded that in weeks 47

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[2] After the remand hearing LIRC amended the benefit week from week 49 to week 48. Brockway does not object to the amendment.

and 48 she was unavailable for work, sec. 108.04(2)(a), Stats. Brockway would then have been ineligible for benefits only in those weeks and would not have been disqualified for future benefits as provided under sec. 108.04(8)(a).

Brockway's argument fails because sec. 108.04(2), Stats., establishes "general qualifying requirements" which are applicable to all employees. The provision does not supersede specific disqualification provisions.

In Brooks v. LIRC, 138 Wis.2d 106, 109-10, 405 N.W.2d 705, 706 (Ct. App. 1987), we recognized that sec. 108.04(2)(a), Stats., establishes general eligibility requirements for all claimants, while the legislature has established specific eligibility requirements for identifiable classes of claimants, including those who refuse offers of work, id. at 111-12, 405 N.W.2d at 707. Section 108.04(2)(a) does not apply until the eligibility issue under the specific qualifying requirement statute is resolved.

The fallacy in Brockway's argument is her assumption that the general qualifying requirements of sec. 108.04(2), Stats., are alternatives to sec. 108.04(8)(a).

(2)

Brockway makes a number of arguments which must be addressed to the legislature rather than to LIRC or this court. She argues that LIRC's application of sec. 108.04(8)(a), Stats., to her refusals is "both harsh and inconsistent with the purposes of the [Unemployment Compensation] Act." She argues that we have the authority and obligation to interpret statutes to avoid inequitable results, if such interpretation is not precluded by the statutory language. Leissring v. DILHR, 115 Wis.2d 475, 483, 340 N.W.2d 533, 536 (1983). We are precluded by the applicable statutes from adopting Brockway's interpretation. If applying sec. 108.04(8)(a) to substitute part-time work results in inequities, the matter should be called to the attention of the legislature. As Brockway recognizes, we do not have the power to rewrite statutes. In Interest of G. & L.P., 119 Wis.2d 349, 355, 349 N.W.2d 743, 746 (Ct. App. 1984).

IV.

GOOD CAUSE

Brockway is correct that she is presumed to be eligible for benefits for any given week of her unemployment unless she is disqualified by a specific provision of ch. 108, Stats. Section 108.02(11), Stats. The employer has the burden of proving that the employee is disqualified from benefits. Kansas City Star Co. v. ILHR Department, 60 Wis.2d 591, 602, 211 N.W.2d 488, 493 (1973). The presumption of eligibility does not, however, change our standard of review of LIRC's determinations that in benefit weeks 47 and 48 Brockway did not show "good cause" to refuse the work offered her. See id. (where benefit claimant is presumed eligible for benefits, the appellate court in reviewing the department's findings of fact must accept the department's findings if supported by credible evidence on the record as a whole).

The scope of review of findings of fact made by LIRC in unemployment matters is defined by statute as follows: "The findings of facts made by the commission acting within its powers shall, in the absence of fraud, be conclusive." Section 102.23(1), Stats., incorporated by reference into sec. 108.09(7), Stats.

"The test used by the court in reviewing the sufficiency of the evidence to support the findings is whether there is any credible evidence in the record sufficient to support the finding made by the Commission." Eastex Packaging Co. v. DILHR, 89 Wis.2d 739, 745, 279 N.W.2d 248, 250 (1979).

However, we are not bound by LIRC's determination of questions of law. Wehr Steel Co. v. DILHR, 102 Wis.2d 480, 487, 307 N.W.2d 302, 306 (Ct. App. 1981). LIRC concedes that its conclusions that Brockway refused work offers without "good cause" are conclusions of law. Whether facts fulfill a particular legal standard, in this case "good cause," is a question of law and LIRC's determination does not bind us. Milwaukee Transformer Co. v. Industrial Comm., 22 Wis.2d 502, 510, 126 N.W.2d 6, 11 (1964) (quoting Cheese v. Industrial Comm., 21 Wis.2d 8, 15, 123 N.W.2d 553, 557 (1963)). We thus make two inquiries. First, are LIRC's findings of fact supported by credible evidence. If they are, we next inquire whether the facts as found fulfill the "good cause" standard under sec. 108.04(8)(a), Stats. We consider in turn weeks 47 and 48.

(1)

Week 47

LIRC concluded that Brockway's reason for refusal in week 47 -- that she had a prior commitment to help her husband strip tobacco -- was not good cause because employment by a spouse is not covered employment under the Unemployment Compensation Act. Sec. 108.02(15)(k)11, Stats. The record does not support LIRC's implicit factual finding that an employment relationship existed between Brockway and her husband.

At the first hearing, Brockway testified, "We only had two acres and then with everybody pitching in, it don't take that long." At the remand hearing, Brockway testified, variously: "Our tobacco is probably -- approximately 18 miles from where we live;" "We have [the tobacco] in a garage"; "Our tobacco is towards Viroqua;" "[w]e had to get [the tobacco]; it was heating;" "we had more to haul in." (Emphasis added.) Brockway's testimony that she was to be paid for this work does not, as a matter of law, establish an employment relationship. LIRC's finding that Brockway's compensation arrangement was "so lax as to be non-existent" is irrelevant to the determinative question: was the part-

time farming operation a joint venture of Brockway and her husband or a sole proprietorship owned by Brockway's husband.

We conclude that the record is inadequate for LIRC to have determined that an employment relationship existed between Brockway and her husband. We therefore direct the trial court to remand the record to LIRC for further proceedings to redetermine Brockway's eligibility in week 47. Secs. 108.09(7)(b), 102.24, Stats; see Icke Construction Co. v. Industrial Comm., 30 Wis.2d 63, 69, 139 N.W.2d 841, 844 (1966) (when the record before the agency is inadequate, the court may remand the record to the agency for further hearing or proceedings).

In view of our conclusion, we need not address Brockway's additional arguments as to her good cause for refusing the district's work offer in week 47.

(2)

Week 48

In week 48, on November 25 or 26, 1985, Brockway met with an Avon representative until noon. According to her exhibit showing when she worked for the district and when she refused offers of work, on that day she was offered work by her supervisor[3] sometime after the Avon representative had left. She refused the offer and told her supervisor that she was going to be selling for Avon.[4] LIRC found that the district contacted Brockway again on the same day asking her if she would change her mind. Brockway said she would be willing to do kitchen work but no longer wanted to do custodial work. The district told her she would have to be available for both custodial and kitchen work. Brockway then stated that it looked like she would not be working. LIRC therefore found that Brockway had refused the

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[3] Brockway apparently had two supervisors, one for custodial work and one for kitchen work. Only her supervisor for custodial work testified.

[4] LIRC rejected the district's claim that Brockway quit her job with the district. LIRC concluded that under Barnett, Brockway's employment relationship with the district was severed when she was laid off. Brockway does not dispute LIRC's conclusion.

work offer because she no longer desired to perform custodial work for the district.

There is no testimony to support LIRC's finding. The only evidence to support LIRC's finding is the employee's written statement of January 14, 1986 in which Brockway stated that on November 25 or 26 she talked to "[Caroline] in the payroll dept." and told her that she would work just in the kitchen. Caroline said Brockway had to take all or none, whereupon Brockway said it looked like it would be none because she was getting such a run around. There is no evidence that Caroline intended to speak for the district or had any authority to represent the district. In fact, Brockway's statement recites that Caroline "told me to talk to [the superintendent]." Brockway did talk to her supervisor for custodial work on December 1 and the superintendent on December 2.

Brockway's supervisor testified that "about" December 1 he called Brockway to work and she told him that she was quitting because she was going to sell Avon. Brockway testified that when her supervisor called on or about December 1 she had been with the Avon representative all day and "I wasn't gonna work that night." She testified

she told him that she would work in the kitchen but she did not want to clean anymore. She also testified that she told the superintendent the same thing. The superintendent testified that he had no contact with Brockway between September 4, when he sent her a letter notifying her of her layoff, and December 2 when Brockway called him.

The district had the burden to establish that Caroline "in the payroll dept." had authority to speak for the district. In the absence of such showing, Brockway's conversation with this employee did not constitute a refusal to work. In any event, Caroline did not make Brockway a work offer. It was not until the offer was made by her supervisor on December 1 that it could have been established that Brockway refused to accept offers of work because she no longer wished to do custodial work. December 1 was in benefit week 49.

LIRC's confusion between events and conversations which occurred in week 48 and those which occurred in week 49 is understandable given that Brockway's eligibility for benefits for week 48 was never in issue. Week 49 was the week in issue and the testimony and evidence related to that week. LIRC amended the week in issue after the remand

hearing. Brockway does not object to the amendment and therefore we do not consider the authority of LIRC to try an unemployment compensation dispute with respect to one week and enter an order determining eligibility for a different week.

LIRC's findings of fact upon which it concluded that Brockway was ineligible for benefits in week 48 are not supported by credible evidence. We conclude that the district failed to rebut the presumption of Brockway's eligibility in week 48.

We therefore reverse the judgment and direct the trial court to remand the matter to LIRC for further proceedings to determine Brockway's eligibility in week 47. The judgment is reversed as to week 48.

By the Court.--Judgment reversed and cause remanded to the trial court with directions to remand the matter to LIRC for proceedings consistent with this opinion.

Inclusion in the official reports is not recommended.