

FRANCIS V. GADZIK,

Petitioner,

v.

Case No. 06CV2803

**LABOR AND INDUSTRY REVIEW
COMMISSION and CENTER FOR
COMPREHENSIVE SERVICES, INC.,**

Respondents.

DECISION AND ORDER

Petitioner Francis Gadzik (“Petitioner”) seeks review of the July 20, 2006 Decision (“Decision”) of the Labor and Industry Review Commission (“LIRC”). This Decision modified and affirmed the earlier decision of the administrative law judge and held Petitioner ineligible for unemployment insurance for weeks 7-8, 10-16 and 18 of 2004. However, the Decision also held that Petitioner was eligible for unemployment insurance in weeks 9, 17, 19 and thereafter.

BACKGROUND

The following background is taken from the LIRC’s Decision. Petitioner worked for more than four months as a caregiver for the employer, a community-based rehabilitation facility for individuals with acquired brain injuries. His last day of work was February 5, 2004 and his last day of pay status was February 13, 2004.

On January 28, 2004, Petitioner’s immediate supervisor gave him a written warning for several performance issues, the most important of which concerned errors in dispensing and documenting the medications he was giving to the residents. Petitioner responded by submitting a

two-week notice of resignation on January 30th. The notice stated that his supervisor had asked for his resignation and listed several physical and medical impediments to job performance, including back problems, a vision problem and memory lapses. After receiving the resignation, the employer's human resources manager telephoned Petitioner and asked him if he really wanted to resign, and sought to persuade him to stay. After this conversation, Petitioner rescinded his resignation. However, on February 4, 2004, Petitioner's supervisor issued a final warning for another alleged medication distribution error. Petitioner believed that the warning was unwarranted because he had previously been instructed not to closely monitor this particular resident to see if the resident could learn to take the medication on his own. Through his supervisor, Petitioner then filed a specific rebuttal to the warning and an assertion that the supervisor was threatening to retaliate against him for his earlier statements to the human resources manager. This document concluded with a request to reinstate Petitioner's previous resignation.

On February 6, 2004, the Petitioner consulted his doctor, who ordered cognitive function tests and gave him a slip excusing him from work through February 13th for unspecified medical reasons. Petitioner gave this slip to his employer. Petitioner also had some additional contact with the human resources manager concerning disability and insurance issues, but none concerning his employment status or his complaints about his supervisor.

Petitioner submitted certified medical evidence noting that by February 13, 2004, he would no longer work for the employer. This evidence also documented that on February 6, 2004, the Petitioner's doctor advised him to seek work requiring fewer cognitive responsibilities.

During the time period in question, Petitioner's benefit year (weeks 7 through 37 of 2004), Petitioner had a number of physical and psychological conditions that limited the work Petitioner believed he could perform. Petitioner stated that he had a fragile back that subjected him to lifting

restrictions, was on several medications that affected his sleep patterns, and testified to and submitted a medical report from his doctor regarding several psychological conditions that limited the kinds of work he was able to perform. The medical report submitted indicated that Petitioner suffered from anxiety, depression, and possible memory disorder. The report also indicated that because Petitioner suffered from mental illness, he would not be able to work for the employer, and that he should specifically seek work requiring less cognitive abilities.

The LIRC ultimately found that Petitioner was unable to perform his work and had no reasonable alternative to quitting. Petitioner had previously advised the employer of his medical problems. Petitioner's difficulties were resulting in disciplinary action. The Petitioner followed his doctor's advice and sought other work. However, Petitioner's restrictions made it impossible for him to complete the statutorily required fifteen percent or more of suitable work in his labor market area.¹ Regardless, this disqualification only affected some of the weeks at issue.

Therefore, the LIRC held that, in week 7 of 2004, that Petitioner had voluntarily terminated his work because he was unable to perform that work and had no reasonable alternative to quitting, within the meaning of Wis. Stat. § 108.04(7)(c), 2005-06. Additionally, the LIRC found that Petitioner unable to work, within the meaning of the aforementioned statute and Wis. Admin. Code § DWD 128.01(2)(b),² in weeks 7-8, 10-16, and 18 of 2004. These factors led the LIRC to conclude Petitioner ineligible for unemployment insurance for weeks 7-8, 10-16, and 18 of 2004.

¹ See Wis. Stat. § 108.04(7)(c), 2005-06 which states:

(c) Paragraph (a) does not apply if the department determines that the employee terminated his or her work but had no reasonable alternative because the employee was unable to do his or her work or because of the health of a member of his or her immediate family; but if the department determines that the employee is unable to work or unavailable for work, the employee is ineligible to receive benefits while such inability or unavailability continues. (*emphasis added*).

² Wis. Admin. Code § DWD 128.01(2)(b) states:

(2) A claimant is not considered to be able to work or available for work in any given week if: [...]

(b) The claimant's physical or psychological condition or personal circumstances over which the claimant has no control limit the claimant to less than 15% of the opportunities for suitable work, including all such jobs whether vacant or filled, in the claimant's labor market area.

However, the Decision also held that the Petitioner was eligible for unemployment insurance in weeks 9, 17, 19 and thereafter.

ANALYSIS

I. STANDARD FOR JUDICIAL REVIEW

This court may set aside the LIRC's order denying compensation only upon the following grounds:

- 1) the LIRC acted without or in excess of its powers;
- 2) the order or award was procured by fraud; and/or
- 3) the findings of fact by the LIRC do not support the order or award.

Wis. Stat. § 102.23(1)(e), 2005-06.³

If the LIRC's order or award depends on any fact found by the LIRC, the court shall not substitute its judgment for that of the LIRC as to the weight or credibility of the evidence on any finding of fact. Wis. Stat. § 102.23(6), 2005-06.

A. **THE COMMISSION'S LEGAL DETERMINATIONS ARE ENTITLED TO GREAT WEIGHT DEFERENCE.**

The LIRC's conclusion from its findings of facts regarding Petitioner's ineligibility for unemployment compensation is a question of law reviewable by this court. *Brooks v. LIRC*, 138 Wis. 2d 106, 109, 405 N.W.2d 705 (Ct. App. 1987). Although the Commission's resolution of questions of law is not binding on this court, some deference is appropriate due to the Commission's expertise. *Berns v. WERC*, 99 Wis.2d 252, 261, 299 N.W.2d 248 (1980). Upon review, the court has three options as to the level of deference it may give an agency: great weight deference, due weight deference, or *de novo* review. *UFE Inc. v. LIRC*, 201 Wis.2d 274, 286, 548 N.W.2d 57 (1996). The court generally gives great weight deference to an agency

³ The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review only as provided in Wis. Stat. § 102.23 and not under ch. 227 or s. 801.02.

when: (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 in the application of the statute. *Lopez v. Labor and Indus. Review Comm'n*, 2002 WI App. 63, ¶ 10, 252 Wis.2d 476 (Ct. App. 2002), citing *UFE Inc.*, 201 Wis.2d at 284.

The LIRC has satisfied all of the conditions necessary for this court to give it great deference. The legislature has charged the LIRC with the authority to make determinations regarding an employee's eligibility for benefits. Wis. Stat. § 108.09(6), 2005-06. In addition, great weight deference should be applied where a legal question is intertwined with factual determinations or policy determinations, as it is here. Finally, deference to the LIRC's interpretation and application of Wis. Stat. § 108.04(7)(c) would continue to provide uniformity and consistency in its application. In reviewing this decision, the court will grant great weight deference to the LIRC's determination that Petitioner was not eligible for unemployment insurance. Accordingly, the LIRC's decision will be upheld if it is not contrary to the statute's clear meaning, even if this court finds another interpretation to be more reasonable. *Bunker v. LIRC*, 2002 WI App. 216, ¶ 26, 257 Wis.2d 255 (Ct. App. 2002).

B. THE LIRC'S FINDINGS OF FACT SUPPORT THE CONCLUSION THAT PLAINTIFF WAS JUSTIFIABLY DENIED UNEMPLOYMENT INSURANCE.

In the absence of fraud, findings of fact made by the LIRC (acting within its powers) shall be conclusive. Wis. Stat. § 102.23(1), 2005-06. This court's job is to search the record for credible evidence supporting the findings of the Commission. *Appleton Elec. Co. v. Minor*, 91 Wis.2d 825, 829, 284 N.W.2d 99 (1979), citing *R. T. Madden, Inc. v. ILHR Dept.*, 43 Wis.2d 528, 537, 169 N.W.2d 73 (1969); *Vasquez v. ILHR Department*, 39 Wis.2d 10, 18, 158 N.W.2d

331 (1968); *Unruh v. Industrial Comm.*, 8 Wis.2d 394, 398, 99 N.W.2d 182 (1959). “It is not the function of this court to determine whether the findings that were not made should have been made or could have been sustained by the evidence.” *Appleton*, 91 Wis. 2d at 829, citing *Eastex Packaging Co. v. DILHR*, 89 Wis.2d 739, 745, 279 N.W.2d 248 (1979). Yet, the court may review the entire record to determine whether evidence sought to be relied upon is “so discredited as to be discarded as a matter of law.” *Princess House, Inc. v. Dept. of Indus., Labor, and Human Relations*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983).

Plaintiff argues the facts do not support the LIRC’s conclusion and that he was unfairly denied unemployment compensation. The LIRC held that Petitioner’s eligibility for unemployment insurance required:

- 1) a certain level of attachment to the labor market despite his medical restrictions (Wis. Stat. § 108.04(2)(a), 2005-06,⁴ and Wis. Admin Code § DWD 128.01(2), 2005-06);
and
- 2) Petitioner’s medical conditions rendered him able to perform only eight percent of the suitable work in his labor market area (Wis. Stat. § 108.04(7)(c), 2005-06).

The LIRC found Petitioner’s medical conditions and related work constraints made him ineligible for unemployment insurance under Wis. Stat. § 108.04(7)(c), because Petitioner’s medical conditions limited him to about eight percent of the suitable work in his labor market area. This Court must accept this finding of fact, as well as the related findings of fact inasmuch as they are well-supported by credible evidence in the record as a whole. *Milw. Transformer Co. v. Industrial Comm’n*, 22 Wis. 2d 502, 509-10, 126 N.W.2d 6 (1964).

⁴ Wis. Stat. § 108.04(2) General qualifying requirements;
(a) 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:
1. The individual is able to work and available for work during that week [...]

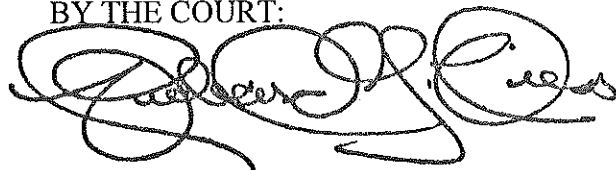
Giving great weight deference to the LIRC's determination as it must, the Court finds the LIRC's conclusions regarding the Petitioner to be reasonable. The Court therefore adopts the legal reasoning sets forth by the LIRC in its March 2, 2007 brief sections II (discussing that the eligibility for unemployment insurance requires a certain level of attachment to the labor market despite one's medical restrictions), III (arguing that Petitioner's medical conditions allowed him to perform only eight percent of the suitable work in his labor market area), IV (arguing that the proceedings before the LIRC were fair, and that no wrongly placed evidentiary burdens were placed on the Petitioner, and V (discussing that there is no basis upon which to award costs, fees, or damages to the Petitioner). The record demonstrates that Petitioner had multiple medical conditions and as a result, his ability to work in his labor market area dipped lower than the required statutory minimum of fifteen percent; this made Petitioner ineligible for unemployment compensation. The LIRC acted within its powers and there is no hint of fraud in the proceedings.

ORDER

For the reasons stated above, the Court hereby affirms the Labor and Industry Review Commission's July 20, 2006 decision.

Dated this 11 day of June 2007 in Madison Wisconsin.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Richard G. Niess", written over a horizontal line.

Richard G. Niess
Circuit Judge

CC: Francis V. Gadzik
Attorney William S. Sample