STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

DAVID JENSEN,

Plaintiff,

vs. Case No. 89 CV 0677

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, LABOR AND INDUSTRY REVIEW COMMISSION and BADGER CAB, INC.

Defendants.

DECISION AND ORDER

This matter is before me on appeal from a decision of the Wisconsin Labor and Industry Review Commission (Commission). The petitioner, David Jensen, asserts that the Commission erroneously decided that he was not eligible for unemployment compensation benefits. After reviewing the record, the parties' submissions and the relevant law, I conclude that the Commission's decision must be affirmed, for reasons which follow.

FACTS

The material facts are undisputed. Mr. Jensen worked under a written lease agreement with Badger Cab, Inc. (Badger) for almost ten years. Under the lease, Jensen was required to pay a fixed lease fee at the end of each workday for use of a taxicab for up to 100 miles. An additional

mileage fee was required for miles in excess of 100 miles. The fee was sometimes reduced by Badger depending on the time of the year, the day of the week, and the time of day when the taxicab was checked out, as well as the total hours the taxicab was checked out.

Badger drivers charge customers for passenger transport based on a zone system established by city ordinance and a shared-ride system established by Badger. Under the zone system, the fare assigned to each zone does not necessarily correspond to mileage. Badger also has contract accounts for passenger transport and a package delivery service. When Badger receives calls for service, its dispatcher reads the calls over the car radio. Drivers in the area of the call may take the call, although they are not required to do so. Drivers who incorrectly take a call must pay the driver who should have handled the call.

Fares for passenger transport and package delivery may be received by drivers in the form of cash or charge although fares for contract passenger transport are always charged. Drivers are not required to report or turn over fares to Badger. Charge slips are used by drivers as credit against the lease fee that must be paid to Badger at the end of the day. Badger then bills charge customers for service and billing costs. Drivers' total compensation therefore is the difference between the amount of fare they receive, cash or charge, and the lease fee. Drivers do not receive any additional compensation from Badger.

The lease agreement with Badger was last signed by Jensen on August 30, 1985. By its terms, the lease was extended for one year and then to be automatically renewed each year absent notice of its termination by either party. Neither party gave notice of terminating the lease agreement at any time.

Jensen's last day of work was in June of 1988. Shortly thereafter, he filed a claim for unemployment compensation benefits based on his employment with Badger. Badger questioned Jensen's eligibility on the ground that Jensen's employment was excluded from coverage under section 108.02(15)(k)18, Stats.

A Department of Labor, Industry and Human Relations (DILHR) deputy issued a computation dated June 16, 1988, indicating that Jensen had no covered employment. Jensen timely objected to the computation and an Initial Determination was issued to the parties on June 22, 1988 denying benefits. A hearing was held on July 26, 1988 before an administrative law judge (ALJ). At the hearing, Jensen represented himself and Badger was represented by its attorney. On August 3, 1988, the ALJ affirmed the Department's Initial Determination and denied benefits. Jensen appealed to the Commission.

On January 6, 1989, the Commission issued its decision affirming the ALJ's findings of fact and conclusions of law. Jensen appeals the attendant order denying him benefits.

STANDARD OF REVIEW

The standard of review for administrative decisions depends on whether the issue presented involves questions of fact or law. The scope of review of findings of fact made by the Commission in unemployment compensation matters is defined by statute as follows: "The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive." Sec. 102.23(1), Stats., incorporated by reference into sec. 108.09(7), Stats. Additionally, the statute provides:

> If the commission's order or award depends on any fact found by the commission, the 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. The court may, however, set aside the commission's order and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

Sec. 102.23(6), Stats., incorporated by reference into sec. 108.09(7), Stats. The test used by a court in reviewing the sufficiency of the evidence to support a finding of fact by the Commission, therefore, is whether there is credible and substantial evidence found on the record as a whole to support the Commission's finding. Wehr Steel Co. v. ILHR, 106 Wis. 2d 111, 117, 315 N.W.2d 357 (1982).

With regard to questions of law, a court is not bound by the Commission's determination of such questions when it is as competent as the agency to interpret the relevant law, or when material facts are undisputed. Department of Revenue v.

Milwaukee Refining Corp., 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). Nonetheless, the Commission's conclusions of law should not be set aside if any rational basis for them exists. Dairy Equipment Co. v. DILHR, 95 Wis. 2d 319, 327, 290 N.W.2d 330 (1980). A court will also sustain a reasonable legal conclusion even if an alternative view may be equally reasonable. United Way v. DILHR, 105 Wis. 2d 447, 453, 313 N.W.2d 858 (Ct. App. 1981). Moreover, where the conclusion of law depends upon the Commission's application of the law to a specific set of facts and such application requires the Commission's expertise, the Commission's interpretation of law will be accorded great weight. Nottelson v. DILHR, 94 Wis. 2d 106, 117, 287 N.W.2d 763 (1980); Samens v. LIRC, 117 Wis. 2d 646, 345 N.W.2d 432 (1984).

DECISION

Section 108.02(15)(k)18 of the statutes provides:

> "(15) EMPLOYMENT (k) "Employment: as applied to work for a given employer other than a government unit or nonprofit organization, except as such employer duly elects otherwise with the department's approval, does not include service...
>
> 18. By an individual who leases a motor vehicle used for taxicab purposes or other taxi equipment attached to and becoming a part of the vehicle under a bona fide lease agreement, if:
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> (a) The individual retains the income earned through the use of the leased motor vehicle or equipment during the lease term;
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> (b) The individual receives no direct compensation

from the lessor during the lease term; and

(c) The amount of the lease payment is not contingent upon the income generated through the use of the motor vehicle or equipment during the lease term."

Petitioner argues that the Commission erred in finding that his employment with Respondent fell within the statutory exclusion under Chapter 108. Specifically, Petitioner disagrees with the following findings of the Commission: first, that the lease agreement with Respondent under which Petitioner worked was a bona fide contract; second, that Petitioner's employment with Respondent was as a taxicab driver; third, that Petitioner retained all the income generated from his use of the taxicab; and finally, that the lease payment was not affected by the income generated by the taxicab.

Whether facts fall within a particular legal standard is a question of law. Milwaukee Transformer v. Industrial Commission, 22 Wis. 2d 502, 510, 126 N.W.2d 6, 11 (1964). Although the Commission's legal determinations do not bind me, its application of the unemployment compensation act to a specific set of facts must be accorded great weight because of the Commission's expertise in this area. My inquiry is, thus, whether there is any rational basis on the record to support the Commission's conclusion that Petitioner's employment was excluded within the terms of Chapter 108.

Petitioner first contends that his working arrangement with Respondent did not fall within the statutory exclusion because the lease agreement was not bona fide. Because the

term "bona fide" is not specifically defined in Chapter 108, its meaning must be interpreted in accordance with its common usage. The term generally signifies, "a thing done really, with a good faith, without fraud or deceit, or collusion... Bona fide means real, actual, genuine...." Kansas City Star Co. v. ILHR Dept., 60 Wis. 2d 591, 601, 211 N.W.2d 488 (1973); Motion for rehearing denied, 62 Wis. 2d 783, 217 N.W.2d 666 (1974).

According to Petitioner, the lease was not bona fide because there was no written contract signed within the last year and the contract last signed did not include all the terms of his working arrangement with Respondent. As an initial point, it is clear that the parties continued to operate under the terms of the lease agreement until Petitioner left his employment with Respondent. The agreement signed by Petitioner in August of 1985 was, by its terms, extended for one year and then automatically renewed as neither party gave notice of termination. Thus, the lease remained in effect until Petitioner's work ended in June of 1981.

Petitioner's additional point that he never signed a lease after he learned that Respondent did not have to pay unemployment compensation is likewise without merit. 1983 Wisconsin Act 477, or section 108.02(15)(k)13, Stats., later renumbered 108.02(15)(k)18, Stats., was published on May 17, 1984, more than a year before Petitioner's last lease agreement was signed. It is well established that ignorance

of the law is no excuse. Corbett v. Physicians Casualty Association, 235 Wis. 2d 505, 516, 115 N.W.2d 365 (1908).

Next, Petitioner argues that the lease was not bona fide because his working arrangement with Respondent included terms outside the scope of the agreement. Petitioner points to the variations on the flat lease fee and the dispatchers' role in helping drivers obtain business in support of this contention. While on occasion variations on the lease agreement were permitted to aid in the smooth operations of the business, such variations did not alter the fact that the fundamental terms of the employment relationship were encompassed in the lease agreement. The terms of the lease agreement were not so systematically altered so as to render the lease a sham. As a result, it was reasonable for the Commission to conclude that these factors did not render the lease less than bona fide.

Petitioner also claims that he was denied a fair opportunity to present evidence relevant to whether or not the lease was bona fide during the hearing before the ALJ. Petitioner's contention is based on two evidentiary rulings excluding evidence regarding terms of Petitioner's employment with Respondent which were allegedly outside of the lease agreement. The transcript of the hearing, however, shows that the ALJ repeatedly invited Petitioner to expand upon his point that the lease was not all-inclusive. As Petitioner was not prevented from presenting material evidence, his contention that he was denied a fair hearing is without

merit. Further, as noted above, the Commission had ample evidence on which to base its finding that the lease was valid.

Petitioner next argues that since a significant portion of the services he provided for customers involved package delivery rather than passenger transport, the lease was not for taxicab purposes under the statute. The Commission found, however, that the majority of work Petitioner performed, in his own estimation, involved passenger transport of some kind. Petitioner testified that, at most, fifty percent of his work was either package delivery or contract passenger transport. Because it is undisputed that drivers provided only three types of service, namely, package delivery, contract passenger transport, and non-contract passenger transport, the remaining fifty percent of Petitioner's work necessarily involved non-contract passenger transport. Therefore, assuming that only one percent of the half of the business that went to package delivery or contract passenger transport went to contract passenger transport, it is clear that at least fifty-one percent of the work Petitioner performed involved passenger transport, contract or otherwise. Thus, even accepting Petitioner's assumption that taxicab work is limited to passenger transport, the evidence rationally supports the Commission's finding that the lease was for the use of a vehicle for taxicab purposes within the meaning of the statute.

Petitioner also asserts that he did not retain all of

the income generated from his use of the taxicab since Respondent, in billing contract and charge customers, added on a fee for billing costs. The Commission's conclusion that these billing charges are independent of the income drivers generated from the operation of the taxicab and necessary to cover Respondent's added expenses associated with billing the customer is a rational interpretation of the statute and, as such, must be sustained.

Petitioner further contends that his working arrangement with Respondent did not fall within the statute because the amount of the lease fee was affected by the income generated through the use of the taxicab. Specifically, Petitioner argues that his payments to Respondent were contingent on the number of miles he drove in a particular day because if he drove more than 100 miles, he had to pay Respondent an additional fee. Thus, because the amount of fares he collected was, in part, dependent upon his mileage, the lease fee was affected by the income generated by the taxicab. In addition, if he drove the taxicab during a slow business period or returned the cab early and, therefore, lost income, his lease fee was reduced by Respondent. Thus he claims that there was a sufficient connection between the income generated by the taxicab and the amount of the lease payment so that the statute was not satisfied.

Although Petitioner makes a good point, the Commission's conclusion that the lease fee was fixed base upon the use of the vehicle rather than upon the income generated from the

use of the taxicab is at least equally plausible. As a general proposition, the more miles a driver travels, the more money he is likely to make; however, the record establishes that this is not always the case. Under the city's zoning system and Respondent's share-ride system, a drivers' income primarily depends on the zones in which he travels and the number of passengers he carries. Moreover, while Petitioner's income might be affected by Respondent's lease fee discounts, the lease payment were fixed based upon the use of the vehicle, regardless of the income generated. Therefore, it is reasonable to conclude that the amount of the lease payment was not contingent on the income generated through the use of the taxicab. As previously stated, this court must sustain the Commission's reasonable legal conclusions even if an alternative position may be equally reasonable. United Way, supra.

For all of the above reasons, the Commission's conclusion that Petitioner's employment was excluded employment under Chapter 108 are affirmed.[1]

Petitioner's constitutional claims need not be addressed because he has failed to send notice of such claims to the Attorney General as required by section 806.04(11), Stats. O'Connell v. Board of Education, Joint District #101, 82

[1]Additionally, it should be noted that this is the second decision by the Commission holding that the relationship between drivers and Respondent falls within the exclusion from coverage contained in section 108.02(15)(k)18, Stats. See In the Matter of the Unemployment Benefit Claim of Charles Deming, August 27, 1987, hearing No. 87-01272 AM.]

Wis. 2d 728, 733-35, 264 N.W.2d 561 (1978). This is a matter of subject matter jurisdiction.

CONCLUSION

The decision of the Labor and Industrial Commission is AFFIRMED. IT IS SO ORDERED.

Dated this 21st day of September, 1989.

BY THE COURT:

Susan Steingass

Susan Steingass, Judge
Circuit Court Branch 8