

STATE OF WISCONSIN MARQUETTE COUNTY CIRCUIT COURT

FILED

LARRY D. NAMES,
Plaintiff

JUL 17 1991

DECISION
Case No. 90CV149

vs.

LABOR AND INDUSTRY REVIEW COMMISSION, MARY LOU SCHMIDT
and CLERK OF CIRCUIT COURT
DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, MARQUETTE CO., WI
Defendants

This is an action by plaintiff Larry D. Names for judicial review under Sections 108.10(4), 108.09(7) and 102.23 Wis Stats., of a decision of defendant Labor and Industry Review Commission (LIRC) dated September 20, 1990. The LIRC decision determined that appellant (NAMES) was personally liable to defendant Department of Industry, Labor and Human Relations (DILHR) for the delinquent unemployment tax obligations of a corporation, LARANMARK, INC.

Defendant DILHR issued an initial determination dated May 16, 1989 to plaintiff. DILHR is the state agency responsible for administering Wisconsin's unemployment compensation law. Plaintiff filed a timely appeal, and a hearing was scheduled for December 22, 1989. After the hearing, the administrative law judge issued a decision on April 25, 1990 which upheld the initial determination. Plaintiff then filed a timely request for a review of the appeal tribunal decision to the LIRC. On September 20, 1990 LIRC issued the decision which is the subject of this review action.

The statute involved in this case is Section 108.22(a) Wis. Stats., and provides:

Any officer or any employe holding at least 20% of the ownership interest of a corporation subject to this chapter, who has control or supervision of or responsibility for filing contribution reports or making payment of contributions, and who wilfully fails to file such reports or to make such payments to the department, may be found personally liable for such amounts, including interest, tardy payment of filing fees, costs and other fees, in the event

RECEIVED
JUL 18 1991
ENFORCEMENTS
SECTION

that after proper proceedings for the collection of such amounts, as provided in this chapter, the corporation is unable to pay such amounts to the department. The personal liability of such officer or employe as provided in this subsection survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the corporation and shall be set forth in a determination or decision issued under section 108.10.

Plaintiff raises two issues:

- (1) Whether the evidence adequately supports LIRC's finding that plaintiff had the requisite ownership interest in LARANMARK, INC for personal liability for LARANMARK's delinquent unemployment tax obligations; and
- (2) Whether plaintiff was afforded a fair hearing in the administrative appeal process.

LARANMARK, INC. was a book publishing and distributing business incorporated in September 1981 by Names and one Mark DREGER. Plaintiff NAMES was president of the corporation until December 1985 when the corporation filed bankruptcy. The business was located in Neshkoro, Wisconsin. During at least part of the time the corporation operated, some 12 to 15 individuals, including plaintiff and MARK DREGER held shares of the stock of this corporation. The initial directors were plaintiff, Mark Dreger, Father Joseph Schlaeffer, and two other individuals who resigned during or after the first year. Dreger who also was the corporation's initial vice president and treasurer, resigned as an officer and director after two years. The last annual report of the corporation was signed by the plaintiff on May 20, 1985 and listed plaintiff, Schlaeffer and Margaret M. Eagan as the directors. Eagan was plaintiff's spouse, and was listed as vice president and secretary, and plaintiff was president and treasurer. No formal vote was recorded designating Eagan as a director of the corporation.

Initially Dreger and plaintiff were the authorized signatories on the corporate checking account, which required two signatures. Later one Rugh Scherbarth, designated shipping clerk and bookkeeper replaced Dreger as authorized co-signer due to Dreger's unavailability and lack of involvement. Scherbarth owned no stock She reported to plaintiff

or at times to Eagan. Scherberth gave mail from government agencies such as IRS or Wisconsin Department of Revenue to plaintiff; any further instructions she received concerning such mail came to her from the plaintiff. Plaintiff decided which bills should be paid and which should not be paid when money was tight. Plaintiff directed the payment of "profit sharing" or "investor's" checks to stockholders, and calculated the amount of the individual payments, which were made while the corporation was delinquent in some of its ordinary obligations, including federal taxes.

There was a conflict in testimony concerning the degree of ownership interest in the corporation. Scherbarth who worked for the corporation from December of 1982 until early May of 1985 recalled some shareholder names but denied any knowledge of share numbers or percent of ownership held by any of them. John Karls, a DILHR auditor who audited LARANMARK's records on September 20, 1985, testified that plaintiff told him that plaintiff and Eagan (his spouse) owned the corporate stock. He also testified that the corporate minute book and stock subscription list were requested but those records were not available.

Plaintiff testified that he and DREGER each owned 400 shares of stock out of a total of 3,000 shares issued. He also testified that the remaining shares were sold to 13 other individuals shortly after incorporation and that no other investor owned as many shares as plaintiff and DREGER. One Gregory K. Scott, a former lawyer who had previously represented both LARANMARK and plaintiff supported plaintiff's testimony that he owned 400 out of 3,000 shares. Except for Mr. Karls, the auditor, all the witnesses had either seen or participated in preparing records, such as stock records or corporate minutes which would have reflected the distribution of the corporation's ownership. The records were last in the possession of the plaintiff, who stated they would support his testimony that he had less than a 20 percent ownership interest. Those records were never produced.

This is an action for a judicial review of a decision of an administrative agency. The statutory provisions are contained in Section 102.23 Wis. Stats., which is part of the worker's compensation chapter, but which is applicable to unemployment cases pursuant to Sections

108.10(4) and 108.09(7). Section 108.23(i)(e) provides that a LIRC decision shall be set aside only upon 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.
3. That the findings of fact by the commission do not support the order or award.

Plaintiff asserts the third ground for review, and his allegation that LIRC made certain errors of law invokes the first ground.

Section 102.23 contains additional provisions re-restricting a court's power to overturn LIRC's resolution of disputed facts.

Section 102.23(1) The findings of fact made by the commission acting within its powers, shall, in the absence of fraud, be conclusive. . .

Section 102.23(6) 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.

A commission decision depending on a material disputed finding of fact may be set aside only if the finding is not supported by credible and substantial evidence. This test was explained in Princess House, Inc v DILHR .||| Wis. 2d46.

The drawing of reasonable inferences from the evidence is an act of fact finding and therefore lies exclusively within the province of the commission. Thus an inference actually drawn by the commission, if supported by any credible evidence, is conclusive. Universal Foundry Co. v. ILHR Dept. 86 Wis. 2d 582

In this case, LIRC was required to resolve conflicting evidence concerning plaintiff's degree of ownership interest in LARANMARK, INC. This required LIRC to assess the credibility of testimony and other evidence and determine its weight.

LIRC's resolution of the disputed fact of plaintiff's ownership interest was one of the reasonable choices available to it, and thus its action as a fact finder acting reasonably must be respected. Princess House, |||Wis 2d 54-55.

The witnesses with respect to ownership interest on behalf of plaintiff were plaintiff himself who has an obvious interest in the

in the outcome of this proceeding, and one Gregory K. Scott who was unable to provide any details as to the source of his claimed knowledge. He did not draft the original subscription list or retain any files or records of legal services provided to the plaintiff or the corporation. He could not indicate what period of time after the corporation's start-up he provided such services. He was not an investor in the corporation so he had no knowledge on that basis.

Witness Scherbarth, as an outsider, had limited knowledge concerning the operation of the corporation and so testified. When asked if she knew who owned how many shares or what percent of the company she answered "No". This answer was not qualified by any of her other testimony.

Witness Karls, the auditor, relied upon notes made shortly after the audit of September, 1985. His testimony was that plaintiff indicated that plaintiff and Eagan owned the corporate stock of LARANMARK, INC.

Plaintiff alleges he was not given a fair hearing. The record does not bear out that allegation. There is no reflection that the administrative law judge displayed any bias or prejudice during the hearing. She explained the hearing procedure prior to commencement, sought questions, and obtained opening statements. She recessed several times at plaintiff's request, and permitted him to confer with Mr. Scott. She conducted a neutral examination of plaintiff. On three occasions she asked plaintiff if he had additional evidence. She also assisted him in recalling a point he had tried to make during another witness testimony. Plaintiff now seeks to raise the question of adequate notice of the evidence. This is the first instance where it is raised; no such claim was made in plaintiff's brief to LIRC. Again the record does not support such a claim. At no point was there a request for a continuance or adjournment, even though the examiner indicated she would entertain such a request.

The Court finds

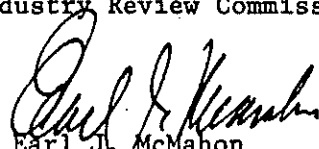
The commission acted within its powers

The award was not procured by fraud

The findings of fact by the commissioner support the order or award

The decision of the Labor and Industry Review Commission dated September 20, 1990 is affirmed.

Dated: July 8, 1991


Earl J. McMahon
Circuit Judge