

MICHAEL J. O'CORDAN,

Plaintiff,

vs

MEMORANDUM OPINION
Case No. 94 CV 408

LABOR AND INDUSTRY REVIEW COMMISSION,
an agency of the Department of Industry,
Labor and Human Relations, State of Wisconsin,
and TRANSPORTATION LEASING/CONTRACT, INC.,
a non-domestic business corporation.

Defendants.

FILED

JUL 31 1995

Clerk of Circuit Court

Plaintiff seeks judicial review of the order of the Labor and Industry Review Commission (hereinafter referred to as the "LIRC") reversing the decision of the Administrative Law Judge dated March 11, 1994. The Administrative Law Judge had affirmed the initial determination of the Department of Industry, Labor and Human Relations which found that the plaintiff employe did not voluntarily terminate his employment within the meaning of section 108.04(7)(a) Wis. Stats. The employer petitioned the LIRC for review and in its decision dated October 31, 1994 the LIRC reversed the decision of the appeal tribunal and found the employe ineligible for benefits beginning in week 48 of 1993. As a result the employe was required to repay \$3,741 in benefits to the Unemployment Reserve Fund. This action was subsequently filed on November 8, 1994 and the parties submitted briefs, the last of which (plaintiff's reply brief) was filed on May 1, 1995

A brief summary of the facts show that plaintiff worked for Transport Leasing/Contract, Inc. (hereinafter referred to as TLC), a truck leasing company, as a truck driver. He was formerly employed as a truck driver with a construction company and during a seasonal lay-off contacted TLC to inquire about the availability of short-term driving jobs. TLC hires out over a thousand truck drivers across the county and leases their services to various trucking companies and other businesses which need drivers for occasional jobs or as fill-ins for drivers on vacation or off the job for other reasons. The record shows that the plaintiff worked for TLC from December 1992 through May 1993 and last worked for them on November 27, 1993.

In November of 1993 he was assigned by employer to work for Arlen Curtis Trucking, one of TLC's lessees, which needed a fill-in driver. The assignment started on November 14, 1993 and ended on November 27, 1993. Plaintiff signed an employment contract with the leasing company (TLC) on November 9, 1993. After driving for Arlen Curtis, plaintiff was informed that their regular driver was ready to go back to work and that they had no further need for his services. He apparently did not contact TLC at the end of his work with Arlen Curtis but returned home and filed for unemployment benefits, which he began receiving for the week ending December 4, 1993 in the amount of \$243 per week. The employer was advised by Arlen Curtis Trucking that the plaintiff's assignment had ended, and TLC sent a letter to the plaintiff on December 20, 1993 advising him to contact the employer if he wished to be reassigned. On the same date plaintiff was informed by the Department (DILHR) that

he had voluntarily terminated his employment and, therefore, was not eligible for unemployment benefits.

The issue presented by this appeal is whether the LIRC erred in concluding that the plaintiff was not eligible for unemployment benefits because he voluntarily terminated his work with TLC.

During the tribunal hearing the TLC maintained that the plaintiff was ineligible for continuing unemployment compensation since he had voluntarily terminated his employment. The employer's position was based upon testimony from its representative that there was a provision in the employment contract which required plaintiff to contact TLC at the completion of an assignment in order to request reassignment to another company or job. TLC maintained that plaintiff's failure to do so could be construed or interpreted as a voluntary quit of the employment relationship between him and the leasing company. The employment contract itself was never presented or introduced into evidence, nor were the significant provisions thereof read into the record. The employer's representative merely testified as to the existence of the agreement and the provision which has been applied to the circumstances in this case. The plaintiff stated that there were some papers he signed when he hired on with the TLC but that he doesn't recall reading them.

Although the Administrative Law Judge had found that plaintiff did not voluntarily terminate his employment, the TLC apparently attached a portion of the employment contract to its petition for review by the LIRC.

The law is clear that decisions of the commission may be set aside only if the commission acted without or in excess of its powers, the order or award was procured by fraud, or the commission's findings of fact do not support the order. (See Sec. 102.23(l)(e) Wis. Stats. Furthermore, findings of fact are conclusive if there is credible, relevant and probative evidence which, if construed most favorably, would justify persons of ordinary reason and fairness to render such findings. (See Princess House, Inc. v. ILHR Dept., 111 Wis.2d 46 (1983)). Additionally, case law sets forth the reviewing court's role as one of locating or finding sufficient evidence which supports the decision instead of weighing the evidence opposing the decision. (See Vande Zande v. DILHR, 70 Wis.2d 1086 (1975)). Finally, the court should not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. (See Advance Die Casting Co. v. LIRC, 154 Wis.2d 239 (1989)).

The plaintiff contends that the record, both before and after it was supplemented by additional documentation by TLC for review before the commission, lacks substantial and credible evidence supporting the LIRC's decision. He also contends that the contract is void under sec. 108.12 Wis. Stats.

With respect to the first contention, plaintiff argues that it was improper for the LIRC to base its decision on evidence which was not introduced at the tribunal hearing, specifically the employment contract. Moreover, plaintiff submits that if the contract had been introduced at the evidentiary hearing before the Administrative Law Judge, the LIRC's conclusion that the contract required the plaintiff to seek reassignment is a

conclusion of law which this court may review based upon the record. In that regard, plaintiff believes that no reasonable interpretation of the language highlighted to the commission supports its ultimate decision.

The pertinent rationale behind the commission's decision was that the relationship between employe and employer in a temporary help business is rather unique insofar as it is between the employe and the temporary help business. In this case it was between plaintiff and TLC and it continues as long as the employment contract between the parties remains in effect.

In support of this proposition, the commission interprets the situation as a voluntary termination based on the conduct of the employe with respect to contacting his employer, the temporary help business, as to when the employe's job with a lessee is ended and the employe is ready and available for another temporary job. The commission buttresses its position by claiming that it has consistently held that the contract in temporary employment may include a requirement that the employe contact the employer immediately after the completion of an assignment, and that such a requirement was part of the contract between the plaintiff and the employer in this case.

Based upon the record in this matter as well as the arguments of counsel, the court is satisfied that the commission's decision that plaintiff voluntarily terminated his employment with TLC based upon his failure to notify them after the completion of his assignment with the lessee should be affirmed. The court believes that there is credible, relevant and probative evidence to support the commission's finding that

plaintiff voluntarily terminated his employment. In that regard, the record is sufficient in order to support the findings of fact with respect to the existence of an employment contract between TLC and the plaintiff and the application of the provision of that contract requiring plaintiff to contact the employer when the temporary assignment with the lessee was completed or terminated. The fact that the contract was not entered into evidence at the tribunal hearing was not necessary and the argument that the contract was based merely on hearsay is not persuasive. Such argument is further vitiated by the fact that the commission had the contract to consider when rendering its findings.

Furthermore, the court is satisfied that it was not unreasonable for the commission to interpret the meaning of the pertinent provision of the contract as it did and to apply the same to the circumstances in this case in reaching its decision. Even if the court felt that there was another reasonable interpretation of the meaning and application of this language, that persuasion alone would not justify reversing the commission if its interpretation were reasonable.

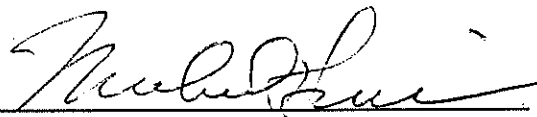
Additionally, the argument that basing some of its findings on a contract not received into evidence violates due process is not convincing since there was sufficient evidence relative to the contract to support the commission's findings in this area.

Finally, the contention that the employment contract in question is contrary to Wisconsin Statutes is not persuasive in light of the facts in this case relating to temporary employment and the nature of temporary help businesses.

Based on all of the foregoing reasons and given the narrow scope of judicial review of these matters, the court affirms the commission's decision in this case.

Dated this 31st day of July, 1995

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Michael T. Lucci", written over a horizontal line.

**Michael T. Lucci
Circuit Court Judge**