

Peterson Produce, Inc., an
Alabama corporation,

Plaintiff,

v.

Case No. 91-CV-0184

Labor and Industry Review Commission,

Defendant.

MEMORANDUM DECISION AND ORDER

BACKGROUND

Plaintiff, Peterson Produce, Inc. seeks review of the decision by the Labor and Industry Review Commission (LIRC) affirming the determination of the Administrative Law Judge (ALJ) that 23 truck drivers are employees under 108.02(12) of the Wisconsin Unemployment Compensation Act.

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ISSUES PRESENTED

The question before the court is whether LIRC's decision that the truck drivers working for Peterson Produce, Inc. were employees under 108.02(12) Stats., ¹ of the

ENFORCEMENT SECTION

¹Section 108.02(12) Wis. Stats., provides:

EMPLOYEE. (a) "Employee" means any individual who is or has been performing services for an employment unit, in an employment whether or not the individual is paid directly by such employment unit; except as provided in par. (b) or (e).

(b) Paragraph (a) shall not apply to an individual performing services for an employment unit if the employing unit satisfies the department as to both of the following conditions:

1. That such individual has been and will continue to be free from the

Wisconsin Unemployment Compensation Act was supported by credible and substantial evidence in the record. Specifically, this court must decide whether there was credible and substantial evidence to support LIRC's finding that, (1) the truck drivers were not free from Peterson Produce's control or direction and, (2) that the truck driver's services were not performed in an independently established trade, business or profession in which they were customarily engaged.

FACTS

Peterson Produce, Inc. is an Alabama corporation in the business of transporting potatoes to potato chip factories throughout the United States. Peterson Produce maintains its corporate office in Summerdale, Alabama, a seasonal office in Antigo, Wisconsin from September through May of each year, and a seasonal truck repair facility in Oxford, Wisconsin from August through March of each year. Peterson Produce uses the services of 175 owner-operator drivers in its business and owns 23 of its own trucks.

The drivers of the Peterson Produce owned trucks were hired through an application and interview process. Plaintiff required that its drivers be experienced truck drivers at least 25 years of age, have a good driving record, and have no pattern of tardiness in their driving history. Plaintiff and the drivers entered into a written agreement which stated that there was a shared understanding that the driver was self-employed and was not under the control of Plaintiff.

employment unit's control or direction over the performance of his services both under his contract and in fact; and
2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged.

The drivers received approximately 50 percent of the gross income from each load but were required to pay for their own fuel, flat tires, speeding tickets or other citations, unloading costs in excess of \$35.00, the first night of lodging on a layover and their own income and employment taxes. Plaintiff provided the truck insurance, driver's accidental injury insurance, tolls, the unloading charges up to \$35.00, truck maintenance and repair, and lodging costs after the first night of a layover. Plaintiff dispatched the truck drivers on the front end of a haul and on the back end of a haul at the option of the drivers (the drivers were permitted, with certain restrictions, to arrange for their own back hauls).²

STANDARD OF REVIEW

Section 102.23(6) Wis. Stats., provides for the scope of judicial review of LIRC decisions,

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 the credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award 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.

Substantial evidence is evidence that is, "relevant, credible, and probative evidence" upon which reasonable persons could rely to reach a conclusion. Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 54. Whether the conditions exist that establish that an individual is free from an employer's control and direction and that his services were performed in an independently established trade, business or profession in which he is customarily engaged

²Focusing on the facts, Mr. Cledis Peterson, himself, presented his own oral argument. Were these decisions to be determined by the charm and affability of the presenter, this decision would read very differently. However, I am bound by the law and can be no more influenced by Mr. Peterson's enchanting personality than to make mention of it.

under 108.02(12)(b) Stats., is a question of fact. Transport Oil, Inc. v. Cummings, 54 Wis. 2d 256, 267. Therefore, this court may only set aside LIRC's order if there was not credible and substantial evidence in the record to support the Commission's findings.

DECISION

The Supreme Court of Wisconsin described the analysis LIRC must perform in determining whether an individual is an employee under Section 108.02(12) Stats., in Graebel Moving and Storage v. LIRC, 131 Wis. 2d 355. The first step is to decide,

whether an individual [...] is or has been performing services in an employment [...] An employment is any service [...] performed for pay. Section 108.02(15)(a) Stats. If the first step is satisfied, the burden shifts to the employer to establish that it is exempt from coverage by demonstrating both that the employee is free from the employer's control or direction [...] under his contract and in fact and that his services

were performed in an independently established trade, business or profession in which he is customarily engaged. Section 108.02(12)(b) 1, 2, Stats.

The Plaintiff does not dispute that the truck drivers were performing services in an employment. The Plaintiff argues that it met its burden of establishing that it is exempt from coverage by satisfying both prongs of Section 108.02(12)(b) and that LIRC's decision to the contrary was not supported by credible and substantial evidence.

A. Section 108.02(12)(b) 1, Stats., Control or Direction of Employee

Although Peterson Produce and its truck drivers signed a contract stating that the drivers understood that they were self-employed and not under the control or direction of Peterson Produce, Section 108.02(12)(b) 1, Stats., requires that the employee must be free from the direction or control of the employer both in contract and in fact. There was credible and substantial evidence in the record that in fact, Peterson Produce did exert control or direction over the drivers of its trucks.

The Plaintiff argues that under the standards set out in Star Line Trucking Corp. v. DILHR, 109 Wis. 2d 266, the drivers were free from Plaintiff's control or direction. In Star Line, owner-operators of trucks leased the trucks to Star Line under an equipment lease agreement. The Supreme Court held that a clause in the agreement providing for right and power of the lessor to direct and control the owner-operators conduct did not alone establish control or direction under 108.02(12)(b) 1, Stats. The Court cited the following evidence in the record as being indicative of a lack of control or direction: (1) the drivers were considered "skilled operators" who owned their own truck equipment, (2) the drivers assumed responsibility for their vehicle maintenance, insurance and trip expenses, (3) the drivers sometimes refused to haul loads offered by Star Line, (4) the owner-operators sometimes engaged helpers to assist them in performing services for Star Line, (5) Star Line never exercised its termination rights over the owner-operators, (6) some of the owner-operators did terminate the relationship with Star Line, (7) the owner-operators could and did reject hauling contracts from Star Line, and (8) the means of performance was within the control and supervision of the owner-operators.

LIRC found that under the standards set out in Star Line the Plaintiff did have control or direction over the drivers. There is credible and substantial evidence in the record to support this finding.

First, the drivers in this case did not own their own truck equipment. Because the ability to use their skills as truck drivers depended on being supplied with trucks, the drivers were highly motivated to comply with the Plaintiff's instructions.

Second, there was evidence in the record that Plaintiff issued specific instructions to its drivers about the responsibilities involved in truck maintenance. Plaintiff required its

drivers to notify them if the trucks were in need of repair. In the case of a breakdown on the road, the drivers were required to notify Plaintiff promptly so that another truck could immediately be dispatched to complete the haul. Further, the drivers were required to have the trucks serviced at a Peterson Produce operated mechanical shop at specific intervals and to plan their routes accordingly. In order to prevent accidents, the drivers were prohibited by Plaintiff from parking the trucks on narrow streets. Finally, Plaintiff required that its drivers maintain the temperature inside the trucks, in the summer, by opening vents and in the winter, by turning the heaters to 58 degrees.

Third, there was evidence in the record that the Plaintiff exerted much control over the schedules of the drivers. The drivers were required to get permission from Plaintiff before taking vacations, were discouraged from taking vacations during busy periods, and were criticized for taking too much vacation. Moreover, although the drivers could arrange for their own back hauls, there was evidence that the drivers were encouraged to consider the Plaintiff's needs first and foremost in making these arrangements.³

Fourth, although the drivers could engage the services of helpers for unloading the trucks, the Plaintiff did not permit drivers to engage the services of substitute drivers as the owner-operators in Star Line could and did.

Fifth, there was evidence in the record that the drivers could be terminated at will. A reason Peterson Produce's President cited for possibly dismissing a driver was "sorriness". A driver would be considered to be "sorry" if he did not work enough hours. Moreover, a driver was expected to be courteous to Plaintiff's customers and to make prudent choices of

³The drivers did not have unbound discretion in choosing their back hauls. The drivers were expected to take a back haul of Plaintiff's potatoes if there was a load.

back hauls. A driver who did not perform as expected would be criticized by Plaintiff and if there were repeated incidents of rudeness or tardiness a driver would probably be terminated. In fact, Plaintiff exercised the right of termination.

There was credible and substantial evidence on the record to support LIRC's finding that Peterson Produce did exercise control or direction over the truck drivers.

B. Section 108.02(12)(b) 2, Stats., Services Performed in an Independently Established Trade, Business or Profession in Which the Individual is Customarily Engaged.

In Princess House, Inc. v. DIHLR, 111 Wis. 2d 46, 69, the Supreme Court explained that in the scheme of the Unemployment Compensation Act, Section 108.02(12)(b) 2, Stats., "is designed to exclude from coverage those persons who are unlikely to be dependent upon others, even though they may perform services for others, because they have their own established business." In further explanation of 108.02(12)(b) 2, Stats., the Court (quoting Wilcox, The Coverage of Unemployment Compensation Laws, 8 Vand. L. Rev. 245, 264 (1955.)) stated that,

The double requirement, that the worker's occupation be 'independently established' and that he be 'customarily engaged' in it, clearly calls for an enterprise created and existing separate and apart from the relationship with the particular employer, an enterprise that will survive the termination of the relationship.

Id. at 70.

In Keeler v. LIRC, 154 Wis. 2d 626, 633-34, the Supreme Court set out five factors, developed through case law, to be considered in making a determination of whether a person meets the requirement of being in an independently established trade, business or profession

in which he is customarily engaged. These five factors are; (1) integration, (2) advertising or holding out, (3) entrepreneurial risk, (4) economic dependence, and (5) proprietary interest.

Integration was explained by the Court in Keeler in negative terms. Integration is not present where an individual's activities are totally unrelated to the business activity conducted by the company retaining his services and the services performed by the individual do not relate to the activities conducted by the company retaining his services.⁴ Keeler at 633. In this case, the activities of the drivers, transporting loads of potatoes to potatoe chip factories, are directly related to the business activity of the Plaintiff. Moreover, the services performed by the drivers, driving the trucks that transport the potatoes, are also directly related to the business activities conducted by Plaintiff.

Advertising or holding out, "deals with the concept that a truly independent contractor will advertise or hold out to the public, or at least to a certain class of customers, the existence of its independent business." Keeler at 633. The Plaintiff concedes that the drivers did not advertise and there is no evidence on the record to indicate otherwise.

The Court in Keeler cites Princess House for its explanation of entrepreneurial risk. The Court stated that, "a truly independent businessman will assume the financial risk of the business undertaking." Keeler at 633. The drivers of Plaintiff's trucks paid for their fuel,⁵ speeding tickets and other citations, unloading costs in excess of \$35.00, lodging for the first night of a layover, and their own income and employment taxes. These contributions were

⁴The Court used the example of a tinsmith called upon to repair a company's gutters when the company is engaged in a business unrelated to either repair or manufacture of gutters.

⁵ However, the drivers were given an advance to provide for the cost of fuel which was later taken out of their receipts from the income of the load.

minimal, especially in comparison to the Plaintiff's contributions to the business, and did not amount to an assumption of the financial risk of the business undertaking. Further, the drivers were given appropriate compensation when the paperwork from their trips was processed rather than when Plaintiff was paid by its customers. The Plaintiff billed and collected from its customers and assumed the financial risk of the business.

If the economic relationship, "shows a strong dependence by the alleged employee on the alleged employer, the public policy behind the Unemployment Compensation Act would suggest that the dependent person have access to unemployment benefits." Keeler at 634. The drivers came to Peterson Produce with only their skills as truck drivers to offer. Plaintiff provided the equipment for the work, the trucks, and arranged for the front end hauls (and often the back end hauls) from which the drivers received income. The Plaintiff established and controlled the business contacts with its customers, billed and collected from customers, dispatched the trucks, and provided for most of the expenses involved in the trucking business. The drivers were involved only in the actual transporting of hauls and could not perform these services but for the Plaintiff's trucks and customers. At Plaintiff's insistence, the drivers worked full-time for Peterson Produce and so were dependent on Plaintiff for their primary source of income from work. The drivers were economically dependent on the Plaintiff.

A proprietary interest in a business includes the concept of proprietary control, "such as the ability to sell or give away some part of the business enterprise," as well as the ownership of various tools, equipment or machinery necessary in performing the services involved in the business. Keeler at 634. In this case, the drivers neither had the requisite proprietary control of the business nor ownership of various tools, equipment or machinery to

establish a proprietary interest in the business.

It is this last factor, proprietary interest, which perhaps most clearly distinguishes this case from Star Line. The owner-operators in Star Line could carry on their trade, business or profession upon the termination of the lease agreement.⁶ The class of persons exempted by 108.02(12)(b) 2, Stats., "cannot have its employment terminated at the will of the employing unit. Persons who pursue an established business of their own are not usually dependent on another for their economic survival." Princess House at 70-71. Upon termination from Peterson Produce the drivers had nothing to sell or give away as part of the business enterprise. While it is true that upon termination from Peterson Produce the drivers retained their skills as long haul truck drivers, this is the same kind of skill that any employee takes away from any employment.

CONCLUSION

Because the Plaintiff issued specific instructions to the drivers regarding the maintenance of the trucks and behavior toward customers, required that they adhere to schedule requirements, did not allow the drivers to employ substitute drivers, and could terminate the drivers at will, the Plaintiff exercised control or direction over the drivers. Because the drivers were integrated into the Plaintiff's business, did not advertise or hold out, did not bear the entrepreneurial risk of the business, were economically dependent on the Plaintiff and had no proprietary interest in the business their services were not performed in an independently established trade, business or profession in which they were customarily

⁶ This is precisely the reason the 175 owner-operators that work with Plaintiff are not at issue here.

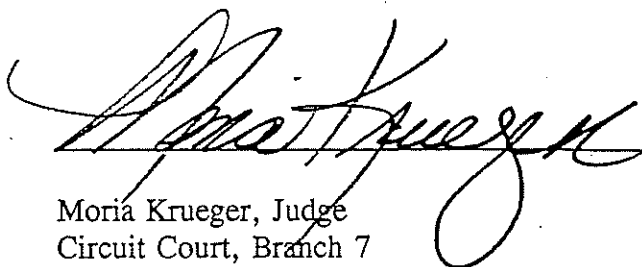
engaged. LIRC's finding that the truck drivers working for Peterson Produce, Inc. were employees under 108.02(12) Wis. Stats., was supported by credible and substantial evidence on the record and is affirmed.

ORDER

IT IS ORDERED that the decision of the Labor and Industry Review Commission is affirmed. Peterson Produce, Inc. is liable for past due and delinquent unemployment compensation contributions, the amount of which shall be determined on remand to the department.

Dated at Madison, Wisconsin this 7th day of October, 1991.

BY THE COURT:



Moria Krueger, Judge
Circuit Court, Branch 7

cc: Atty. Curtis C. Swanson & Atty. Sabin S. Peterson; Axley Brynelson
Atty. Peter W. Zeeh; Labor and Industry Review Commission.