

STATE OF WISCONSIN:

CIRCUIT COURT:

RACINE COUNTY:

RACINE PSYCHOLOGICAL SERVICES, S.C.,

Plaintiff,

DECISION AND ORDER  
RE: DEFINITION  
OF EMPLOYEE

-vs-

LABOR AND INDUSTRY REVIEW COMMISSION,

Case No. 91-CV-1222

Defendant.

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The plaintiff initially filed this action seeking judicial review and reversal of the defendant's decisions regarding several individuals working for the plaintiff. The decisions concluded that the individuals were under the control of the plaintiff and were not independent contractors. Therefore, it was held that the plaintiff was responsible for unemployment compensation contributions for each of the individuals.

On November 23, 1992, the parties entered into a stipulation which substantially limited the focus of this Court's review. Based upon the stipulation, the plaintiff is only contesting the defendant's decision relating to Dr. Charles A. Cahill which found him subject to the Wisconsin Unemployment Compensation Act.

The plaintiff is represented by Attorney John F. Kerscher of the firm of Brown, Black & Kerscher, and the defendant is represented by Attorney Peter W. Zeeh of the Enforcements Section of the Department of Industry, Labor and Human Relations. The parties submitted briefs to the Court pursuant to a briefing schedule, including a 46 page brief from Mr. Zeeh. The last brief

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ENFORCEMENTS  
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was received by the Court on February 8, 1993.

**SCOPE OF REVIEW**

The legislature has limited the scope of review in which courts may engage regarding administrative agency decisions.

Sec. 108.09(7)(b) Stats. states in part:

"Any judicial review under this chapter shall be confined to questions of law, and the provisions of Ch. 102 with respect to judicial review of orders and awards shall likewise apply to any decision of the commission reviewed under this section. . ."

Sec. 102.23(1)(a) requires that:

"The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive."

Sec. 102.23(1)(e) provides that:

". . .The court may confirm or set aside such order or award; and any judgment which may thereto have been rendered thereon; but the same shall be set aside only upon the following grounds:

. . . . .

(3) The findings of fact by the commission do not support the order or award."

Sec. 102.23(6) Stats. provides that:

"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 of the credibility of the evidence on any findings of fact. . ."

Keeping the above statutory constraints in mind, the focus of this Court's review is whether the facts as found by the defendant support its conclusion about Dr. Cahill's employment status as

defined in Sec. 108.02(12)(a) and (b) Stats. Sec. 108.02(12) defines an employe as follows:

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

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

1. That such individual has been and will continue to be free from the employing 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 plaintiff acknowledges that Dr. Cahill fits the general language in subparagraph (a) above; however, it maintains that he is excluded by subparagraph (b). This Court agrees with the plaintiff's contention and finds that the defendant's decision is not supported by credible and substantial evidence.

#### FACTS

The facts in this case are very straightforward and not subject to significant dispute. While findings of fact made by the commission are to be considered conclusive, that is different from the concept of the reviewability of the commission's conclusions and whether they are supported by credible and substantial

evidence. Transport Oil, Inc. v. Cummings, 54 Wis. 2d 256, 267; 195 N.W. 2d 649 (1972). Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion. Facts of mere conjecture or a mere scintilla of evidence are not enough to support LIRC's findings. Goldberg v. DILHR, 168 Wis. 2d 621, 626-627; 484 N.W. 2d 568 (Ct. App. 1992).

The plaintiff, Racine Psychological Services, S.C., is a corporation located in Racine which provides a range of psychological services to the Racine area. It is owned by two psychologists, Dr. Dale Martin Hayden and Dr. Paul Voelkel. It is significant to note that both men are psychologists and not psychiatrists holding medical degrees. As such, under Wisconsin law they are not permitted to prescribe medication.

From 1987 through 1989, the relevant time herein, Dr. Cahill provided services for the plaintiff. He is a physician licensed in the state of Wisconsin and a board certified psychiatrist. Dr. Cahill's services are important to the plaintiff because in order for it to be certified as an outpatient psychotherapy clinic under Wisconsin rules, there must be a psychiatrist on the staff. Certification is particularly important to the plaintiff because of a large contract with the County of Racine during that time. State certification under Wisconsin Administrative Code HSS 61 was one of the conditions of the contract with Racine County.

The record indicates that Dr. Cahill has a varied and wide ranging practice. In addition to providing services for the

plaintiff, he has a private practice in Milwaukee. He lists the Milwaukee location as his business address. He noted he does not see any patients from Racine at the Milwaukee location. Dr. Cahill worked for the plaintiff under an oral, not a written, contract. He is paid an hourly rate, which includes his seeing patients as well as his travel time.

Dr. Cahill further testified that he provides services in several other Wisconsin counties much the same as he does with the plaintiff. He listed the Sheboygan County Department of Human Services, Kewaunee County Community Services, Calumet County Human Services Department, and the Menomonee County Human Services Department as agencies with which he has similar arrangements.

He also testified that he was a part-time employee of the Manitowoc County Human Services Department. He distinguished his Manitowoc employment from that at Racine Psychological Services and the other agencies in that he had many more administrative duties and was an employee by virtue of a written contract that he had with the county. He noted that he was under the Wisconsin State Retirement Program through his work with Manitowoc County. Records for patients he sees at all the various counties are kept at the individual county locations because of logistics.

In its decision of January 31, 1991, the Labor and Industry Review Commission concluded that Dr. Cahill, as well as others working for the plaintiff which were the subject of the hearing, were not free from the corporation's control or direction within the meaning of Sec. 108.02(12)(b)1. The decision also concluded

that they did not perform their services for the corporation in an independently established trade, business or profession within the meaning of Sec. 108.02(12)(b)2.

#### DISCUSSION

The Wisconsin Supreme Court case of Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 330 N.W. 2d 169 (1983) provides important guidance in reviewing the commission's decision in this case. The Princess House case arose out of a claim for unemployment compensation by a woman laid off from Masterlock in Milwaukee who also had been a dealer for Princess House selling its gifts. The LIRC determined that Princess House was an employer and was liable to make contributions to the unemployment compensation fund, a decision which was ultimately affirmed by the Supreme Court.

The Princess House decision began with a several page review of basically undisputed facts. Before analyzing whether Princess House should be subjected to liability under the act, the Supreme Court recognized a need to put the matter in "perspective" by looking at the underlying purpose of the act and giving it "paramount consideration". The court noted:

"Hence, the statute is remedial in nature and should be liberally construed to affect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage earning status." Id. at p. 62 (emphasis added).

Keeping the declaration of policy of the legislature in mind and recognizing the realities of life in the United States, one has great difficulty in visualizing a board certified physician with

clients and patients in over six Wisconsin counties being economically dependent in his wage earning status. The instant case seems resolvable by a common sense application of the purpose of the act. Nevertheless, the review will not stop there.

The Princess House case goes on to analyze its facts under the two "positive tests" set forth by a differently numbered statute but identical predecessor to Sec. 108.02(12)(b). The two tests are: (1) the employee's freedom from control over job performance, and (2) the employee's performance of services in an independently established profession in which the individual is customarily engaged. In Princess House the Supreme Court "concluded" that the employer had met its burden in regard to the first test but not the second. Id. at p. 66.

The two tests must also be applied in the instant case. The first test questions whether Dr. Cahill has been and will continue to be free from Racine Psychological Services, S.C. control or direction over the performance of his services both under his contract and in fact. The LIRC decision on this point was not very specific regarding Dr. Cahill and lumped his situation in the decision with the several therapists also under consideration at that time. Those individuals were the subject of the stipulation subsequently entered into between the parties.

Dr. Cahill had no written contract with the plaintiff. His function with the plaintiff was professionally above and beyond what any other of its employees were able to do, including the plaintiff's two primary shareholders. As a physician, he was the

only one who could write prescriptions. The record is silent on what if any control the plaintiff had over Dr. Cahill by virtue of his oral agreement to work or as to what type of control was ever exercised in fact by the plaintiff over the doctor's work.

In the defendant's brief there is an effort to demonstrate that the plaintiff had a right to exercise control over Dr. Cahill's services if it chose to. However, the defendant's example of the plaintiff's ability to react to possible noncompliance by Dr. Cahill of Wisconsin Department of Health and Social Services administrative rules which could result in decertification of the clinic seems no more control than any independent contractor would be under if it failed to comply with the specifications of a job for which it was hired. This case presents much the same situation as in Princess House where it was found:

"There is no attempt at an itemization of circumstances that would or could result in termination. This very vagueness bespeaks a lack of control over the dealers by any terms of the contract. It is true also that dealers are to be bound to the code of ethics of the direct selling industry, but there is no explanation in the contract of the details of the course of conduct to be followed. We do not consider a general admonition to be 'ethical' evidence of contract control." Id. pp 66-67.

Furthermore, the instant case is highly distinguishable from the recent Court of Appeals case, Goldberg v. DILHR, Supra. The fact situation was similar to the instant case, but the employees at issue were three therapists who provided counseling services for patients at an outpatient psychiatric clinic in Kenosha. The decision affirmed the commission's finding on the element of



control under Sec. 108.02(12)(b)1. Because of the conclusion regarding the first element, the decision did not take up the second element of independently established professions under 108.02(12)(b)2.

The record in Goldberg revealed that the therapists were subject to supervision and oversight of their work by a licensed clinical psychologist or psychiatrist. It was inferred that a supervisor could request that the therapists' treatment change if it were considered inappropriate. No such evidence or inferences exist in the record of the instant case, nor could they. Dr. Cahill, with his medical degree and psychiatric certification, was well beyond the range of anyone else's professional supervisory competence at the plaintiff's clinic.

In Goldberg the Court of Appeals also looked at the economic interest that the clinic had in controlling the therapists in order to see that they complied with rules that would keep the clinic certified. It was noted that the therapists could be terminated at any time so that the clinic's certification for billing purposes would not be revoked.

That is substantially different from the instant case. While Dr. Cahill would have his own personal motivation to follow his profession's ethical standards, the clinic actually needed him "on board" in order to keep its certification. If he were terminated, it was the clinic that would be out of business, not him.

The evidence in the record fails to support a conclusion establishing control by the plaintiff over Dr. Cahill. Dr.

Cahill's situation, including his ability to virtually set his own hours, his compensation for travel time, his numerous other individual and agency clients and his superior educational credentials belies any real or imagined control that the plaintiff may have had over Dr. Cahill.

As to the second test, the evidence of Dr. Cahill's services being performed in an independently established profession in which he is customarily engaged as needed under Sec. 108.02(12)(b)2 is virtually absolute. On this point, the Princess House decision also discussed the public policy considerations behind the unemployment compensation act when it began the discussion of the (b)2 exclusion. The decision notes that the (b)2 exclusion:

" . . . 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 separately established business." Id. p 69.

The idea is that an individual who works for himself or herself may not be as likely to face the general risks of unemployment. Individuals who are engaged in an established business of their own are not likely to be economically dependent on others. Thus, the exception requires that the individual's work be independently established and also be work in which the individual is customarily engaged.

Based on the record, it is difficult to imagine someone more independently established in his profession than Dr. Cahill. His business address was in Milwaukee, not Racine. The patients with whom he dealt in Milwaukee were not those with whom he dealt in

Racine. In addition to his Milwaukee practice, he provided services for no less than five other agencies in five different counties. One of those departments even engaged him in such a manner that he was made eligible for benefits under the Wisconsin Retirement System. This clearly was an individual who independently serviced a tremendous number of individuals and agencies in his profession as a psychiatrist over a wide geographical area.

Termination of the professional/client relationship by any of these service recipients would have had virtually no impact on Dr. Cahill's ability to economically survive. While Dr. Cahill did see patients at the plaintiff's clinic, it must be viewed in light of the much larger clinical and consulting business which he conducted over a wide part of the state. Clearly, if the relationship of Dr. Cahill and the plaintiff were severed, it would be the plaintiff which would be put at economic risk, not Dr. Cahill.

The defendant attempts to apply various tests which have been utilized by courts in the past in determining whether the requirements of Sec. 108.02(12)(b)2 have been met. Those tests include the "integration test", the "proprietary interest test" and the "entrepreneurial risk test". These various tests are helpful in interpreting the statutory language in cloudy or close cases. However, for the reasons already cited, the facts of this case clearly show that the requirements of the Sec. 108.02(12)(b)2 part of the statutory employe definition exclusion have been overwhelmingly established.

ORDER

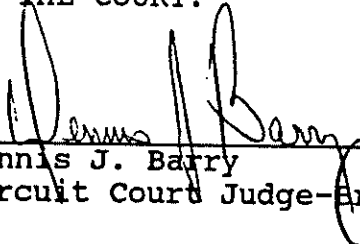
Based upon the foregoing, IT IS HEREBY ORDERED THAT:

(1) Pursuant to the previously filed stipulation of the parties, the defendant's decision as to all individuals other than Dr. Charles A. Cahill is affirmed.

(2) The defendant's decision as to Dr. Charles A. Cahill's status as an employee is reversed as not legally or factually supportable.

Dated at Racine, Wisconsin, this 29th day of March, 1993.

BY THE COURT:

  
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Dennis J. Barry  
Circuit Court Judge-Branch 5

CIVIL COURT  
FILED

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CLERK OF CIRCUIT COURT,  
RACINE COUNTY,