
STANLEY L. TERRY,

Plaintiff,

vs.

LABOR AND INDUSTRY REVIEW
COMMISSION,

Defendant.

Case No. 08CV008448

FILED
CIVIL DIVISION

01 DEC - 4 2008 01

JOHN BARRETT
Clerk of Circuit Court

DECISION AND ORDER

INTRODUCTION

Stanley Terry seeks judicial review of the State of Wisconsin's Labor and Industry Review Commission decision on May 16, 2008 finding that Terry concealed a material fact regarding his eligibility for unemployment insurance in violation of Wis. Stat. § 108.04(11)(a) and ordering a forfeiture of future unemployment benefits under Wis. Stat. §108.04(11)(be). This court granted review of the matter.

BACKGROUND

For the past twelve years, Stanley Terry has worked as a journeyman roofer. (Hearing Transcript (hereinafter "Hearing"), March 19, 2008, p. 4). It is undisputed that on January 9, 2005 an initial claim for unemployment benefits was filed under Terry's name, using his social security number, Personal Identification Number (hereinafter "PIN"), and other identifying information. All subsequent weekly claim certifications were made using Terry's social security number and PIN. Furthermore, the initial application and subsequent weekly certifications averred that Terry was available for full-time work at that time.

On February 25, 2005, Terry was incarcerated by the State of Wisconsin for charges relating to drug possession. (Hearing, p.6). Terry was not released until August of 2007. (Hearing, p.6). It is undisputed that weekly claim certifications were made for Terry in the weeks ending on March 5, March 12, and March 19, 2005.

In March 2005, the Department of Workforce Development ("Department") became aware of Terry's incarceration through Terry's previous employer. The Department initiated a review. Among other things, the Department alleged that Terry was not available for full-time work and the claim certification averring that Terry was available was a material concealment. Although the Department issued a determination on the issue in March 2005, Terry did not receive notice of the determination until December 2007. Terry filed his appeal of the Department's determination on January 28, 2008. Administrative Law Judge (hereinafter "ALJ") Caroline Stark found that Terry had established that his failure to file a timely request for a hearing was beyond his control within the meaning of Wis. Stat. §108:09(4) and ordered a new hearing.

At the new hearing on March 19, 2008, the Administrative Law Judge Steven P. Glick heard testimony from Terry. Specifically, Terry denied initiating the application for unemployment benefits and filing weekly claim certifications. (Hearing, p. 7-8). He further testified that his social security information, driver's license and birth certificate were lost when his wife's purse was stolen in the beginning of 2005. (Hearing, p.9). Finally, Terry acknowledged past incidents involving his concealments in claiming unemployment benefits. (Hearing, p.10-11)

On March 26, 2008 ALJ Glick issued his decision. The ALJ specifically found that the initial application and weekly certification process required such detailed and

personal information that Terry was most likely responsible. (ALJ Decision, March 26, 2008, p.1). Furthermore, the ALJ found that Terry most likely arranged for another individual to file the weekly certification once he was incarcerated by providing the individual with the proper identifying information. (ALJ Decision, p.1). Thus, the ALJ concluded that sufficient circumstantial evidence supported the conclusion that Terry concealed material facts from the Department in violation of Wis. Stat. 108.04(11)(a). (ALJ Decision, p.1). Given Terry's past history of concealment, the ALJ found that the initial assessment requiring a forfeiture of three times the weekly benefit rate for each act of concealment, totaling \$2,961, was reasonable. (ALJ Decision, p.1).

Terry filed his appeal on March 28, 2008 to the State of Wisconsin Labor and Industry Review Commission (hereinafter "LIRC"). The LIRC affirmed and adopted the findings and conclusions of ALJ Glick on May 11, 2008. Thereafter, Terry filed for judicial review of the LIRC's decision with this court. Terry, by counsel, submitted a brief in support of his petition on August 4, 2008. The LIRC submitted its brief on September 9, 2008. Terry filed his reply brief on September 24, 2008.

STANDARD OF REVIEW

A decision of the LIRC may only be reversed upon the following grounds: (1) the LIRC acted without or in excess of its power; (2) the LIRC's order was procured by fraud; or (3) the LIRC's findings of fact do not support the order or award. Wis. Stat. § 102.23(1)(e). The LIRC's findings of fact are binding on the court if it is supported by substantial and credible evidence on the record. *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169, 173-174 (1983).

The LIRC's legal conclusion is further accorded a varying amount of deference depending on the circumstances of the case. A court will give an agency's legal conclusion great weight deference if the agency was charged by the legislature with the duty of administering the statute; the agency's interpretation is one of longstanding; the agency employed its expertise or specialized knowledge in forming the interpretation; and the agency's interpretation will provide uniformity and consistency in applying the statute. *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102; *Bunker v. Labor and Industry Review Com'n*, 2002 WI App 216 at ¶ 26, 257 Wis.2d 255, 271, 650 N.W.2d 864; 872. If all four of the above standards are not met, only due weight deference may be required. *Harnischfeger* at 660 n. 4, 539 N.W.2d at 102. Under due weight deference, a more reasonable interpretation overcomes an agency's interpretation. *Margoles v. LIRC*, 221 Wis.2d 260, 265 n. 3, 585 N.W.2d 596 N.W.2d (Ct.App.1998).

DISCUSSION

On appeal, Terry raises the following arguments: 1) that the LIRC findings of fact did not support the conclusion that Terry committed concealment under Wis. Stat. § 108.04(11)(a); and 2) that the LIRC exceeded its powers when ordering Terry to forfeit benefits under an unreasonable interpretation of Wis. Stat. §108.04(11) because the claims constituting concealment were filed by an individual other than Terry.

Finding of Facts

The LIRC concluded that Terry was responsible for filing the fraudulent unemployment claims contrary to Wis. Stat. § 108.04(11)(a). The LIRC made this conclusion based on the fact that Terry's identifying information was used in the making of this claim. According to the Department's Handbook on Claiming Wisconsin

Unemployment Benefits, the information that would be needed to file an initial claim and subsequent weekly certifications include Terry's name, Terry's social security number, Terry's self created PIN number, Terry's employment history for the prior 18 months, and Terry's Wisconsin driver license number. Moreover, the LIRC noted that the weekly unemployment benefits went to Terry's address and there is no indication that these checks were returned as undeliverable, went un-cashed, or were intercepted.

This court believes that the above cited facts give rise to the reasonable inference that Terry filed the initial claim, was responsible for subsequent filings and received the benefits from this scheme. When vast amounts of personal information are accurately provided in order to file a claim, it is reasonable to infer that the person providing that information is the person most likely to have that information. In this case, that person is Terry. This conclusion is further supported by the fact that Terry was the person reaping benefits, by having the benefit checks sent to his home address. Thus, the LIRC's conclusion that Terry was responsible for the initial filing was supported by credible evidence and reasonable inferences made therein.

Furthermore, it was reasonable to infer that Terry with the assistance of another individual continued to file weekly certification after he was incarcerated. The weekly certifications continued using Terry's personal information. This information included Terry's social security number and PIN. While Terry was incarcerated and unable to make non-collect calls to directly file weekly certifications, it is undisputed that Terry was still able to communicate with third parties. Thus, Terry would be able to provide the information needed for weekly certification filings. This conclusion is strengthened by the fact that the address where the benefits checks went, Terry's home address, remained

unchanged. Thus, the LIRC's conclusion that Terry continued to be responsible for the filings was supported by credible evidence and reasonable inferences made therein.

Interpretation of Wis. Stat. §108.04

Wis. Stat. §108.04(a) punishes a claimant for concealing any material fact relating to eligibility in the filing of his or her application for benefits. The LIRC has interpreted this statute to include a claimant, who with the assistance of a third party, files a claim on the claimant's behalf. In effect, the LIRC argues that Terry constructively filed a claim when he handed over personal information to a third party with the knowledge and intention that the third party would use that information to file a claim on his behalf. However, Terry asks this court to read the statute more narrowly to focus on the actual physical filing. Terry urges this court to read the statute so that a person who has another person file a claim on his behalf is not in fact filing a claim and responsible for the information contained therein.

A court is not bound by an agency's interpretation of a statute. *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 659, 539 N.W.2d 98 (1995). However, a court must determine, "whether the circumstances of the case warrant deference to [an agency's] interpretation." *Brauneis v. LIRC*, 2000 WI 69 at ¶ 15, 236 Wis.2d 27, 612 N.W.2d 635. This court generally applies one of three standards when reviewing an agency's legal conclusions under a statute: great weight deference, due weight deference or *de novo* review. *Labor Ready, Inc. v. LIRC*, 2005 WI App 153, ¶ 9, 285 Wis.2d 506, 702 N.W.2d 27. A court must give great weight deference to LIRC's legal conclusions if all of the following apply: 1) the agency was charged by the legislature with the duty of administering the statute; 2) the agency's interpretation is one of longstanding; 3) the

agency employed its expertise or specialized knowledge in forming the interpretation; and 4) the agency's interpretation will provide uniformity and consistency in applying the statute. *Harnischfeger*, 196 Wis.2d at 660, 539 N.W.2d 98, 102. If the great weight deference is not applicable, the court reverts to due deference. *Id.*

In applying the four *Harnischfeger* standards to this case, this court believes that the LIRC's interpretation of the statute is entitled to due deference. While the LIRC fulfills the first requirement that it is charged with administering the statute, Wis. Stat. §108.09, this court finds that this is the first time that the LIRC's interpretation of Wis. Stat. § 108.04(11)(a) has been used to include a filing made by a third party on behalf of claimant. Therefore, the LIRC's legal conclusion is only entitled to due weight deference.

A reviewing court under due weight deference need not defer to an agency's interpretation which is not the interpretation the court considers most reasonable. *Beloit Education Asso. v. WERC*, 73 Wis.2d 43, 67-68, 242 N.W.2d 231, 242-43 (1976); see also *Margoles v. LIRC*, 221 Wis.2d 260, 265 n. 3, 585 N.W.2d 596 N.W.2d (Ct.App.1998) (holding that under a due weight deference standard, "a more reasonable interpretation overcomes an agency interpretation").

This court believes that the LIRC interpretation is the most reasonable. The language of Wis. Stat. §108(11)(a) provides that "If a claimant, in filing his or her application for benefits or claim for any week, conceals any material fact relating to his or her eligibility for benefits, the claimant shall forfeit benefits in accordance with par. (be)." The language of the statute and the Department's reading of it indicate that the legislature intended to prevent fraudulent concealments in claiming unemployment benefits. See generally, *Pickering v. LIRC*, 156 Wis.2d 361, 368, 456 N.W.2d 874, 877

(Ct. App.1990)("The Department of Labor's interpretation of unemployment compensation laws provides indicia of legislative intent.").

This court believes that this statutory reading is generally appropriate. This case is akin to a situation where another individual fills out a claimant's application because the claimant is physically or otherwise unable to. In law and in fact, we recognize that the person responsible for the filing is the claimant and not the person who actually speaks, writes or engages in the physical act. *See generally Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032 (1984); *May v. Buckeye Mut. Ins. Co.* 25 Wis. 291, 1870 WL 2130* 3. Where the application process and the information are done at the behest of the claimant, the person filing out the application is the implied or actual agent of the claimant. *Id.* For the above reasons, this court believes that the LIRC's interpretation of Wis. Stat. §108.05(11)(a) is the most reasonable and should be applied in this case.

Punishment

Under Wis. Stat. § 108.04(11)(b) allows the LIRC to punish the claimant for violations of Wis. Stat. § 108.04(11)(a) by requiring the forfeiture of benefits and disqualification from receiving benefits for acts of concealment. The statutory maximum forfeiture is four times the weekly benefit rate for each act of concealment. The penalty against Terry, imposing three times the weekly benefit, as ALJ Glick noted was a substantial penalty. However, the ALJ also recognized that the LIRC imposed such a penalty in consideration of Terry's acknowledge history of concealment in filing unemployment claims. In that context, the ALJ found that such a substantial penalty was reasonable. This court agrees with ALJ Glick's reasoning and conclusion.

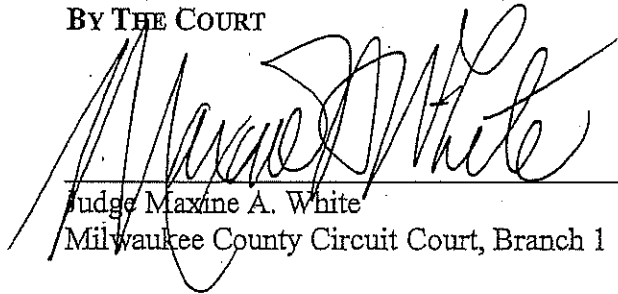
CONCLUSION AND ORDER

Based on a review of the record and briefs submitted by both parties, this court finds that Terry concealed a material fact in filing his unemployment claim within the meaning of Wis. Stat. §108.04(11)(a), and that the forfeiture in the amount stated by the LIRC was reasonable.

Accordingly, **IT IS HEREBY ORDERED** that the LIRC decision is **AFFIRMED**.

Dated at Milwaukee, Wisconsin this 4th day of December 2008.

BY THE COURT



Judge Maxine A. White
Milwaukee County Circuit Court, Branch 1

