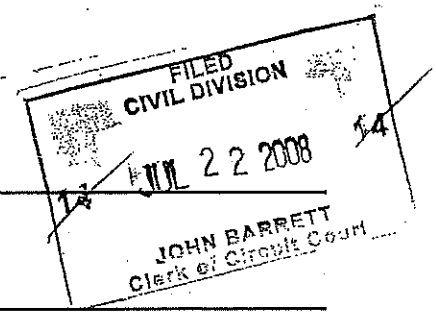
STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 14

WISCONSIN SOCCER ASSOCIATION,

Plaintiff,

v. Case No.: 08-CV-000102

LABOR AND INDUSTRY REVIEW COMMISSION,
and DEPARTMENT OF WORKFORCE DEVELOPMENT
Defendants.



DECISION

The Wisconsin Soccer Association ("WSA") appeals from a decision of the Labor and Industry Review Commission ("Commission") finding that the individuals that refereed the semi-final and final matches of the State Cup competition were employees of the WSA for purposes of unemployment compensation benefits. The issue on appeal is whether the referees in question were employees of the WSA, or were instead independent contractors. For the reasons set forth below, this Court reverses the Commission's decision.

BACKGROUND

The WSA is a non-profit organization that has two major divisions. (R. 154.) One of the divisions is the Wisconsin Youth Soccer Association ("WYSA"). *Id.* WYSA provides a variety of programs for children, including holding an annual State Cup competition. (R. 156.) The WSA pays the individuals that referee the semi-final and final soccer matches of the State Cup, but it does not pay the referees that officiate the preliminary rounds. *Id.*

On December 15, 2003, the Department of Workforce Development ("DWD"), made an initial determination regarding WSA's liability for unemployment insurance that:

> Wisconsin Soccer Association was liable for contributions and interest in the amount of $750.46 for the four quarters of 2002 and the first two quarters of 2003.

(R. 154, 177.) The WSA appealed this determination, and a hearing was held in the matter on December 18, 2006. (R. 161, 171.) During the hearing:

> ...[I]t was stipulated that a substantial portion of the additional contributions and interest was a result of payments made to individuals that were not considered to be statutory employees by the appellant.

(R. 154.) The ALJ issued his decision on May 22, 2007, in which he found that the referees in question were not statutory employees. (R. 152, 157.) The DWD appealed the decision to the Commission and on August 30, 2007, the Commission issued its decision. (R. 98, 148.)

However, shortly thereafter, on September 6, 2007, the Commission set aside its decision because the WSA claimed that it had filed a timely petition for Commission review in this matter. (R. 81.) The WSA established that it had filed a timely petition for Commission review, and the Commission issued its final decision on December 7, 2007. (R. 6, 52.)

STANDARD OF REVIEW

Judicial review of this matter is pursuant to Wis. Stat. § 102.23. Under Wis. Stat. § 102.23, this Court can set aside the Commission's decision only on 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.

WIS. STAT. § 102.23(1)(e).

The issue in this case is a mixed question of fact and law. *Larson v. LIRC*, 184 Wis. 2d 378, 391, 386 (1994). The Commission's findings of fact are conclusive if supported by substantial and credible evidence as long as it did not act fraudulently or exceed its powers. *Wisconsin Elec. Power Co. v. LIRC*, 226 Wis. 2d 778, 786 (1999). The application of those facts to Wis. Stat. § 108.02(12)(c) is a question of law. *Larson*, 184 Wis. 2d at 386-87. Although not bound by the agency's interpretation, the courts have generally applied three levels of deference to an agency's conclusions of law. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284 (1996). The three levels of deference are great weight, due weight, and *de novo* review. *Id.*

The parties dispute what level of deference should be accorded to the Commission's legal conclusions. The WSA argues that the Commission's legal conclusions should be reviewed *de novo* because the Commission's interpretation of Wis. Stat. § 108.02(12)(c) has been inconsistent. The WSA relies in large part on *Larson* for this argument, and includes recent decisions of the Commission as evidence of the Commission's inconsistent interpretation of this statutory provision. The Commission argues that its conclusions of law should be given great weight deference, and it relies primarily on *Margoles v. LIRC*, 221 Wis. 2d 260, 264 (1998), for its argument. The DWD argues that the Commission's conclusions of law should be given at least due deference.

In *Larson*, the issue was whether various individuals were employees of the plaintiff under Wis. Stat. § 108.02(12). 184 Wis. 2d at 384-85. More specifically, the

case involved the application of Wis. Stat. § 108.02(12)(b). *Id.* at 386. The court in *Larson* held that the Commission's legal conclusions would be reviewed *de novo*. The court stated that:

> Although great weight is given to the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying it, this deference is due only *if the administrative practice of applying the statute is long continued, substantially uniform and without challenge by governmental authorities and courts.*

Id. at 387 (emphasis original; cite, quotes and brackets omitted.) The court in *Larson* determined that the Commission's application of the statute had been challenged by the courts, and therefore there was "no clear administrative precedent" regarding the issue in the case. *Id.*

In *Margoles*, the issue was whether a physician was an employee under Wis. Stat, § 108.02(12). 221 Wis. 2d at 264. The court determined that all four requirements necessary for great weight deference, as set forth in *UFE*, were met. *Id.* at 267. Therefore, the court held that the Commission's conclusions of law were entitled to great weight deference. *Id.* The court made no mention of the holding in *Larson* or of any inconsistency in the Commission's interpretation of the statute.

Both *Larson* and *Margoles* addressed the application of Wis. Stat. § 108.02(12), but they came to markedly different conclusions as to what level of deference the Commission's legal conclusions were entitled to. *Margoles* was decided four years after *Larson* and is more recent precedent. *Margoles* makes no mention of any inconsistency in the Commission's application of the relevant statute. Also, *Margoles* applied the currently used four-part test for determining if great weight deference is appropriate, whereas *Larson* applied a different test. Moreover, the WSA has not cited to any recent

cases where the Commission was challenged on its application of the relevant statute, and the recent Commission decisions it cites to are not sufficiently inconsistent to preclude the Commission's legal conclusions in this case from receiving great weight deference. For these reasons, the Commission's legal conclusions in this matter will be entitled to great weight deference.

DISCUSSION

The issue in this case is whether the individuals who refereed the semi-final and final games of the Wisconsin State Cup competition during the relevant time period were employees, and thus entitled to unemployment compensation benefits under Chapter 108, Wis. Stats. Pursuant to Wis. Stat. § 108.02(12)(a), an employee is defined as:

> ...[A]ny individual who is or has been performing services for pay for an employing unit, whether or not the individual is paid directly by the employing unit, except as provided in par. (b), (bm), (c), (d), (dm) or (dn).

The parties do not dispute that the referees were paid by the WSA for their services. Therefore, the question is whether or not one of the exceptions to the statutory definition of "employee" applies to the referees.

The plaintiff is a non-profit organization, and as such, the relevant exception is Wis. Stat. § 108.02(12)(c), which states:

> Paragraph (a) does not apply to an individual performing services for a government unit or nonprofit organization, or for any other employing unit in a capacity as a logger or trucker if the employing unit satisfies the department:
>
> 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 or her services both under his or her 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 parties do not dispute that Wis. Stat. § 108.02(12)(c)1. has been satisfied. Rather, the dispute lies in whether or not Wis. Stat. § 108.02(12)(c)2. has been met.

In determining whether or not the services were "performed in an independently established trade, business, or profession in which the individual is customarily engaged," Wisconsin courts have applied a five-factor test. *Keeler v. LIRC*, 154 Wis. 2d 626, 632-34 (1990). The five factors are as follows: integration; advertising or holding out; entrepreneurial risk; economic dependence; and proprietary interest. *Id.* These factors are not to be mechanically applied, but should be:

> [A]nalyzed in light of the public policy of more fairly sharing the economic burden of unemployment for those economically dependent on another, not those who pursue an independent business.

Keeler, 154 Wis. 2d at 632. In addition, "[t]he weight given to the various factors and the importance of each varies according to the specific facts of each case." *Id.* at 634.

I. Integration

The first factor to consider is integration, which is "whether the services performed directly relate to the activities conducted by the company retaining those services." *Larson*, 184 Wis. 2d at 391, n. 6. This factor has been further explained as follows:

> This factor is best explained by example as the court did in *Moorman Mfg. Co. v. Industrial Comm'n*, 241 Wis. 200, 5 N.W.2d 743 (1942). The court illustrated this factor by using 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. Because the tinsmith's activities are totally unrelated to the business activity conducted by the company retaining his services, the services performed by the tinsmith do not directly relate to the activities conducted by the company retaining these services and these services were therefore not integrated into the alleged employer's business.

Keeler, 154 Wis. 2d at 633.

One of the activities that the WSA conducts is to sponsor and oversee the State Cup competition through WYSA. All of the matches held during the competition must necessarily be refereed, and as a result, the referees' services were directly related to and highly integrated into activities conducted by the WSA. Therefore, this first factor favors the referees being employees.

II. Advertising or holding out

The second factor is advertising or holding out, which has been explained as follows:

> This factor...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.

Id.

In its decision, the Commission did not specifically address what actions the referees took to advertise or hold themselves out. (R. 4.) Instead, the Commission concluded that "any actions the referees may take to hold themselves out to WSA or its member clubs as willing and able to provide refereeing services," did not affect who officiated the semi-final and final matches of the State Cup because of the method of selection used. *Id.* The referees were selected for these matches by assignors hired by the WSA, and the WSA itself had no say in who would referee the matches. *Id.*

The WSA argues that the Commission erred in narrowing the analysis of this factor to only advertising or holding out that was directed specifically at the WSA, rather than the public or a class of customers. This court wholeheartedly agrees.

The Keeler court recognized, if not emphasized, the obvious; offering, advertising or holding out of services to multiple members of the relevant economic community strongly indicates the existence of an independent, established trade or profession. Keeler, at 633.

There is overwhelming evidence in the record of significant holding out or advertising via word of mouth, internet, email, person to person—"hustling" of referee assignments---both by the vast majority of referees who worked the State Cup games and the soccer referee community at large. Tr. 44-47, 63. In fact, the record establishes that such efforts are essential to the financial viability of the referee's profession given the limits of the market; the competition in the market and the nature of the services offered. Tr. 51-52.

Demonstrating a fundamental misunderstanding of this guiding principal of Keeler, the LIRC focuses solely on the absence of direct holding out or advertising of services by the State Cup referees solely to the WSA. This focus, unsupported by and unwarranted under controlling case law, apparently lead the LIRC to view the extensive evidence of holding out activities as irrelevant. The evidence is not irrelevant. It is, to the contrary, directly relevant and compelling evidence of independently established professional services being offered to multiple consumers in the relevant market. Contrary to the LIRC decision, this factor strongly supports a conclusion that the referees are not employees of WSA.

III. Entrepreneurial risk

LIRC also demonstrated an unwarranted and unsupported singular focus in regard to this Keeler factor; referencing solely potential income from State Cup refereeing and surmising that resultant income could not defray the proportional expenses related to those assignments.

The record is quite clear that State Cup and other referees incur significant expense as a pre-condition of working games---State Cup and a myriad of others---and being remunerated for those services. Among those expenses are training and certification costs; transportation to and from assigned games; uniform and equipment costs. Tr. 48-50, 77-78. The record is also clear that referees run significant risk of loss--particularly those who do not successfully "hustle" assignments. Tr. 51-52, 61.

The nature of the services in issue necessarily entail somewhat nominal reward and related risk. However the magnitude of the risk is not determinative, Larson, 184 Wis. 2d at 394, Grutzner S.C. v. LIRC, 154 Wis. 2d 648, 453 N.W.2d 920 (1990), and the LIRC has often recognized this principal. Randy L. Eichman v. Wisconsin Technical College Foundation (January 18, 2007); Katie R. Williams v. MTEC (November 21, 2007).

Unquestionably, referees incur significant risk in the form of expenses necessarily incurred to secure game assignments. The "significance" of those expenses is in

recognition of the limits of the potential reward in view of the nature of the services at issue. The record establishes significant entrepreneurial risk which the LIRC wholly and inappropriately disregarded. This factor strongly supports the conclusion that the referees are not employees of the WSA.

IV. Economic dependence

The fourth factor is economic dependence, and this factor has been described as follows:

> If an examination of the economic relationship establishes that the alleged employee is independent of the alleged employer, **performs services and then moves on to perform similar services for another**, it is proof of an independent trade or business. On the other hand, 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 compensation benefits.

Keeler, 154 Wis. 2d at 633-34 (emphasis supplied).

In its decision, the Commission appears to acknowledge that referees were not economically dependent on the WSA State Cup matches. (R. 5.) However, the decision then goes on to minimize this factor by stating that the same pattern *might* be seen in "individuals who engage in concurrent employment for a number of different employers...." *Id.*

The record indicates that the State Cup matches were a small or "minimal" proportion of the overall refereeing work available, and that they were a small proportion of the work normally performed by the referees. *Id.* In addition, the referees in question routinely performed services for the WSA and then moved on to perform similar services for other soccer entities; the essence of this Keeler factor and a significant indicator of an independently established trade or profession The referees were not economically

dependent on the WSA. Testimony before the ALJ indicated that leagues, clubs, high schools and other entities pay more for a referee's services and an estimated 10% of a referee's income is likely to come from the WSA. Tr. 29. This factor favors the referees being independent contractors and not employees.

V. Proprietary interest

The fifth and final factor is proprietary interest, which "is used to determine whether the business was independently established." *Keeler*, 154 Wis. 2d at 634. This factor includes the following:

> [T]he ownership of the various tools, equipment, or machinery necessary in performing the services involved...also...the more sophisticated concept of proprietary control, such as the ability to sell or give away some part of the business enterprise.

Id.

In addition, the alleged employee's particular talents may be considered when analyzing this factor. *Larson*, 184 Wis. 2d at 395. See also *Margoles*, 221 Wis. 2d at 273. In *Larson*, the court stated that:

> [W]e do not read the supreme court to foreclose "independently established business" status from all individuals whose businesses depend on their own particular talents and not upon an extensive personnel pool or equipment inventory.

184 Wis. 2d at 395. However, even when an individual's particular talents are considered under this factor, evidence of tangible assets may still be relevant under the circumstances in determining if there was a proprietary interest. *Margoles*, 221 Wis. 2d at 273-74.

The Commission concluded that the referees had little they could freely transfer beyond their clothing and equipment, and that this was not sufficient to find a proprietary interest. (R. 4.) The Commission stated that the only way the referees could show a proprietary interest was if a referee assigned to officiate a particular State Cup match had the "unfettered ability to unilaterally transfer that right." *Id.* However, the Commission found that the evidence did not show that the referees had this ability. *Id.*

I will abide LIRC's finding that referees did not have the ability to unilaterally transfer the right to officiate a match to another referee, although the evidence in that regard admits of either factual conclusion. Tr. 62. However, balancing this consideration is the acknowledged right of referees—State Cup or otherwise---to accept or reject assignment at their whim. Tr. 27-29, 31.

More importantly, however, LIRC"s reliance on the absence of ownership of significant tangible assets is illogical given the nature of the services in issue. Larson, at 395. The sole product offered by the referees are their creative services rendering the traditional view of proprietary interest being dependent upon saleable tangible assets as virtually inapplicable and an inappropriate premise of the LIRC's decision.

CONCLUSION AND ORDER

An evaluation of the Keeler factors establishes that three of the five overwhelmingly support the conclusion that the referees were not employees of the WSA and were engaged in and independently established trade or profession in which they were customarily engaged and were not economically dependent upon the WSA. The

proprietary interest factor, when considered in the light of the service nature of the trade or profession also supports that conclusion. Only the integration factor supports the conclusion that the referees were employees. While this court owes great weight deference to the application of the statutory standard to the facts found by the Commission, the above analysis establishes that no reasonable application of the Keeler factors and statutory standard could lead to the conclusion that the referees were employees of the WSA.

Based upon a review of the entire record, **IT IS HEREBY ORDERED** that the decision of the Labor and Industry Review Commission is **REVERSED**.

Dated this 22 day of July, 2008 at Milwaukee, Wisconsin.

BY THE COURT:

JUDGE CHRISTOPHER FOLEY
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