State of Wisconsin

Labor and Industry Review Commission

Daniel R Tarpey
Claimant

Abby Windows LLC
Employer

Hearing No. 23002103MD

Unemployment Insurance Decision[1]

Dated and Mailed:

June 13, 2023

tarpeda_urr.doc:111

The commission **reverses** the appeal tribunal decision. Accordingly, the claimant performed services in employment covered by the Wisconsin Unemployment Insurance Law and wages paid by the employer to the claimant may be included in the department's computation of the claimant's base period wages.

The commission **remands** this matter to the department for investigation and, if appropriate, a determination on whether the claimant performed services as an employee.

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
Georgia E. Maxwell, Commissioner

/s/
Marilyn Townsend, Commissioner

[1] **Appeal Rights**: See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you **must** name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development. Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

Procedural Posture

This case is before the commission to consider the claimant's eligibility for unemployment insurance benefits. An administrative law judge of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision. The commission received a timely petition for review. The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing.

Findings of Fact and Conclusions of Law

The claimant worked for the employer as a Sales and Design Consultant for approximately one year. The employer is an exterior renovation company.

The claimant went into prospective customer's homes and sold doors, windows, roofs, gutters, and siding for the employer. The sales were for installed products and included the materials and labor to install them. The claimant was paid a 10% commission on sales and received half his commission when a sale was made and the remaining half after the homeowner paid their final bill. The claimant also attended meetings and trainings and performed other services for the employer such as picking up checks from homeowners, but he was not paid for this work.

The claimant performed services in covered employment and his wages may therefore be included as base period wages and used to calculate his benefit eligibility.

Memorandum Opinion

Wisconsin Stat. § 108.02(15)(k)16. provides that "Employment" does not include service "[b]y an individual who is engaged, in a home or otherwise than in a permanent retail establishment, in the service of selling or soliciting the sale of consumer products for use, sale, or resale by the buyer, if substantially all of the remuneration therefor is directly related to the sales or other output related to sales rather than to hours worked." Here, the claimant made sales in homeowner's homes, and he was paid a commission that was directly related to the sales rather than to hours worked. The question is whether the sales were "of consumer products for use, sale, or resale by the buyer."

Wisconsin Stat. ch. 108 does not provide a definition for the term consumer products. There is a definition for consumer product in Wis. Stat. § 100.42 but it relates to product safety and excludes items that, in the context of the statute in question, could be considered consumer products such as food. The commission is therefore not persuaded that this definition is the intended meaning of the term in ch. 108.

The Wisconsin Court of Appeals turned to federal law for guidance in interpreting a prior version of Wis. Stat. § 108.02 (15)(k)16 in *National Safety Associates, Inc. v. LIRC*, 199 Wis.2d 106 (1995). The issue in that case was related to the compensation paid to salespeople. The version of the statute in place at the time did not require that sales be "of consumer products for use, sale, or resale by the buyer."[2] However, the court found that the legislature intended to adopt a provision similar in scope to that found in 26 U.S.C. § 3508. The legislative history for the 2013 Act updating the Wisconsin statute indicates a further intent to mirror language found in 26 U.S.C. § 3508.[3] However, federal statutes do not provide a clear answer for the meaning of the phrase consumer products. There are at least four different definitions for the term in different federal statutes, none of which are clearly applicable to unemployment insurance or tax law.[4] The commission is therefore not persuaded that any of these definitions can reasonably be adopted as the intended definition of the term in the context of ch. 108.

The court in *Cleveland Inst. of Electronics* turns to the legislative intent for the enactment of 26 U.S.C. § 3508 to discern the meaning of consumer product. The commission similarly finds it appropriate to turn to legislative intent. The statute at issue is an exclusionary provision. That is, services that fall within the meaning of Wis. Stat. § 108.02(15)(k)16. are excluded from the definition of employment and therefore cannot be considered when determining an individual's eligibility for benefits. Ch. 108 is to be "liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status."[5] Therefore, exclusionary provisions should be narrowly construed.

The legislative history also provides information about the types of sales the Wisconsin legislature intended to include when it enacted this provision: sales of products from "producers such as Avon Products Inc., Amway, Mary Kay Inc., and Pampered Chef" made by "micro-entrepreneurs working part-time to earn extra income."[6] These types of sales differ from the sales made by the claimant because the products are packaged and distributed for use, as delivered, by the purchaser. The claimant made sales of installed construction materials. The sales included materials such as windows, doors, roofing materials, siding, and gutters as well as professional installation by crews with specialized knowledge and tools. The materials were not intended to be used by the homeowners prior to the professional installation. The sale was therefore a sale of construction materials and professional installation services, not consumer products. Because the claimant was not selling

---

[2] The prior version Wis. Stat. § 108.02(15)(k)16 read: "By an individual whose renumeration consists solely of commissions, overrides, bonuses or differentials directly related to sales or other output derived from in-person sales to or solicitation of orders from ultimate consumers, primarily in the home." This was updated in 2013 Wisconsin Act 104.

[3] *See* Hearing Materials, Assembly Committee on Labor (Oct. 23, 2013), available at: https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2013/ab449/ab0449_2013_10_23.pdf

[4] See *Cleveland Inst. of Electronics v. United States*, 787 F.Supp. 741, 746-747 (N.D. Ohio 1992).

[5] *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 62, 330 N.W.2d 169 (1983).

[6] *See* Hearing Materials, Assembly Committee on Labor (Oct. 23, 2013), available at : https://docs.legis.wisconsin.gov/misc/lc/hearing_testimony_and_materials/2013/ab449/ab0449_2013_10_23.pdf

consumer products, his services do not fall within the exception in Wis. Stat. § 108.02(15)(k)16. The administrative law judge's decision is reversed.

NOTE: The commission notes that the issue of whether the claimant performed services as an employee or as an independent contractor was noticed for hearing but was not addressed by the administrative law judge. The record is insufficient to determine whether the claimant performed services as an employee or an independent contractor. Department records indicate there has been no initial determination on this issue. Therefore, the commission remands the matter the to the department for an investigation and, if appropriate, a determination on this issue.

cc: ATTORNEY BRADLEY J DAGEN

ABBY WINDOWS LLC

ATTORNEY STEVEN M COUCH

AUSTIN ENGELBRECHT