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A party may file with the Supreme Court
a petition for review of a decision by
the Court of Appeals pursuant to s. 88.10
of the Wisconsin Statutes, pursuant to Rule
809.22.

NOTICE

This opinion is subject to future
modification. If published, the
official version will appear
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Official Reports.

No. 84-2474

STATE OF WISCONSIN IN COURT OF APPEALS
 DISTRICT IV

AMERICAN TRANSIT, INC.,
 Plaintiff-Appellant,

v.

STATE OF WISCONSIN LABOR AND
INDUSTRY REVIEW COMMISSION,
 Defendant-Respondent.

APPEAL from an order and a judgment of the circuit
court for Dane county: P. CHARLES JONES, Judge. Affirmed.

Before Gartzke, P.J., Dykman and Eich, JJ.

PER CURIAM. American Transit, Inc. appeals an
order and judgment affirming a decision of the Labor and
Industry Review Commission. The commission had upheld a
decision of an appeal tribunal of the Department of
Industry, Labor, and Human Relations denying as untimely the
company's request for a hearing to challenge an initial
assessment of taxes for unemployment compensation. The

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appeal tribunal determined that the company had not shown an
adequate justification for its submission of a hearing
request eleven days beyond the statutory deadline. In the

trial court and on appeal, the company argues that the initial determination of assessment exceeded the authority of the department and is null and void. The trial court concluded that the untimely hearing request prevented judicial review of the validity of the department's initial determination. We agree.

On June 18, 1979, the department made an initial determination which assessed American Transit additional taxes for unemployment compensation for the years 1975 through 1978 and for a portion of 1979. American Transit timely requested a hearing on the initial determination on July 10, 1979. The department eventually set aside the initial determination on September 4, 1980 and began proceedings against another employer for the tax. On June 24, 1983, the department issued a second initial determination against American Transit for the period 1975 through 1979. The initial determination identified July 15, 1983 as the last day for requesting a hearing on the assessment. On July 11, 1983, American Transit's president submitted a letter to the department stating the company's intention to pursue the matter "as far as necessary". The letter did not, however, contain a request for a formal hearing on the matter. On July 26, 1983, an attorney for the company

formally (but untimely) requested a hearing on the assessment. On September 6, 1983, the company submitted several justifications for the untimeliness of its hearing request: the hospitalization of the president of the company; the intention of the company to substitute the letter of July 15, 1983 as a request for a formal appeal; the prior dismissal of the 1979 proceedings; and the existence of a timely request for a hearing in the 1979 proceedings.

Both the trial court and the appellate court may conduct only a limited review of decisions of the department and commission. A party may commence an action for judicial review after exhaustion of administrative remedies. Sec. 108.09(7), Stats. The statutes limit the judicial review to questions of law, and the provisions of ch. 102, Stats., govern the procedure. Sec. 108.09(7)(b), Stats. The court may set aside an order if the commission has acted in excess of its powers, or if the order was procured by fraud or is unsupported by the findings of fact. Sec. 102.23(1)(d), Stats. Irregularities or errors which have no affirmative appearance of damage to the litigants must be disregarded, sec. 102.23(2), Stats., and the court may not substitute its judgment for that of the commission on findings of fact or on the weight and credibility of the evidence. Sec.

102.23(6), Stats. The court may, however, set aside an order of the commission and remand for further proceedings where the order is dependent upon a material and controverted finding of fact that is not supported by credible and substantial evidence. Sec. 102.23(6), Stats.

We will not examine the validity of the June 24, 1983 decision of the department. American Transit did not request a hearing before the appeal tribunal within twenty-one days of the decision under sec. 108.10(1), Stats. The president of American Transmitt submitted a letter dated July 11, 1983, which stated the company's intention to pursue the matter "as far as necessary"; but the letter did not request a hearing and cannot be an after-the-fact substitute for a proper request for a hearing. The notice of initial determination notified American Transit of its appeal rights, and it failed to take advantage of them. This precluded the appeal tribunal, the commission, and the trial court from reviewing the validity of the determination of the department, and it precludes us as well. The issue was not preserved for review.

American Transit requested a hearing on July 10, 1979, but we do not consider this to constitute an effective

request for a hearing in 1983. It does not allow a challenge to the validity of the June 24, 1983 decision. The 1979 request related to an earlier initial determination made on June 18, 1979, which was subsequently set aside by the department. Vacation of the determination nullified the request for hearing, and it was not revived by the new initial determination of June 24, 1983.

The provisions of ch. 108 provided American Transit a procedure which would have tested the validity of the department's determination, and it failed to invoke the available and adequate procedures for judicial review. Section 108.09, Stats., provides the exclusive method for judicial review of departmental orders. Schiller v. Wisconsin ILHR Department, 103 Wis.2d 353, 355, 309 N.W.2d 5, 6 (Ct. App. 1981).

American Transit argues that Sheehan v. Industrial Comm., 272 Wis. 595, 76 N.W.2d 343 (1956) and Folding Furniture Works v. Wisconsin L.R. Board, 232 Wis. 170, 285 N.W. 851 (1939), allow it to challenge the validity of the June 24, 1983 decision. We disagree. Sheehan stated that an appellate court may examine the jurisdiction of a trial court or an agency, 272 Wis. at 601-02, 76 N.W.2d at 347;

but there the litigants had made timely requests for departmental, administrative, judicial, and appellate review of the determination of the department. These requests allowed each level of review to examine the full range of issues presented. Sheehan does not support the theory that a timely review in an appellate court can reach issues which the litigants abandoned through an untimely review before the department.

Folding Furniture states that an individual may bring an action in equity to test the validity of an action of an agency if the statutory review procedures do not provide an avenue for judicial review of an issue. 232 Wis. at 193, 285 N.W. at 861. That is not the case here.

By the Court.--Order and judgment affirmed.

Publication in the official reports is not recommended.