

STATE OF WISCONSIN * CIRCUIT COURT * MILWAUKEE COUNTY

MARTIN GYORGY,

Petitioner,

LABOR AND INDUSTRY REVIEW
COMMISSION, and BIRCHWOOD
LAWNS, INC.,

Respondents.

Case No. 749-646

FILED

03 **JUL 11 1988** **03**

GARY J. BARCZAK
CLERK OF COURT

DECISION

This is an action for judicial review of a decision dated April 30, 1987, in which the Labor and Industry Review Commission ("LIRC") affirmed the decision of the appeal tribunal of the Department of Industry, Labor and Human Relations ("DILHR") denying petitioner, Martin Gyorgy, Jr., unemployment compensation benefits. The LIRC ordered petitioner to repay \$170 to the Unemployment Reserve Fund. Additionally, the LIRC, affirming the decision of the appeal tribunal, remanded the case to the lower tribunal to investigate a series of seven questions pertaining to petitioner's eligibility for unemployment compensation benefits.

Petitioner appeals to this court to reverse the LIRC's

decision to remand the case for investigation.

Petitioner was laid off from Birchwood Lawns, Inc., his place of employment, from week 51 of 1985 until week 10 of 1986. During this time he alleges he was not on the payroll, but continued to work and to punch the time clock. Petitioner received three checks during weeks 9 and 10 of 1986 which were labelled "payroll advances" and which totaled \$1,748.77. In February, 1986, petitioner returned to the employer's payroll.

On January 10, 1987, a deputy for the DILHR determined petitioner had not been eligible for benefits during weeks 9 and 10 of 1986, and was required to repay \$244. The issue of whether petitioner earned wages during weeks 9 and 10 was presented to an appeal tribunal for the DILHR. This tribunal found petitioner had earned \$145.73 each of the twelve weeks of his unemployment, was eligible for unemployment benefits of \$37 per week for weeks 9 and 10 of 1986, and was required to repay only \$170. The appeal tribunal further remanded the case to the department deputy "to investigate and issue initial determinations in weeks 9 and 10 of 1986." The appeal tribunal sought determinations of questions of petitioner's eligibility for unemployment compen-

sation benefits. These questions were whether petitioner or his employer concealed or conspired to conceal any earned wages or availability for work during the unemployment period, whether petitioner earned any wages or was available for work, and whether the employer paid any unemployment taxes on petitioner's services in 1986.

The decision, findings and conclusions of the appeal tribunal were affirmed and adopted by the LIRC. Petitioner appeals the decision of the LIRC.

The LIRC, the respondent of this action, submits first that this court does not have jurisdiction to review the LIRC's decision because petitioner is not appealing an "order or award granting or denying compensation." Section 102.23(1)(a), Wis. Stats. It asserts that in accordance with the above statute, the circuit court has jurisdiction to review a decision of an administrative agency only when the issue on appeal concerns the grant or denial of compensation. The petitioner has not submitted a response to the jurisdictional issue.

In order to determine the propriety of the remand order issued by the LIRC, this court must first determine whether it has jurisdiction to review the LIRC's decision.

The availability of judicial review of administrative agency decisions is specified in section 102.23(1)(a), Wis. Stats.:

The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02.

Respondent LIRC claims this court does not have jurisdiction since petitioner disputes the LIRC's remand order and not the portion of the decision concerning the compensation. The LIRC submits in its brief that the remand dispute is premature, as "such an order or award might ultimately result from the portion of the decision which is being complained of. However that result has not yet occurred."

The statute specifies that there must have been an order or award made before judicial review is proper. The statute, however, does not limit judicial review to the order or award, but simply requires that there is an order or award granting or denying compensation. Any appeal for judicial review before an order or award would be premature.

It is true that the circuit courts lack jurisdiction when

there has been no order or award, and caselaw supports this. Our supreme court in Chevrolet Div., G.M.C. v. Indus. Comm'n., 31 Wis.2d 481, 485, 143 N.W.2d 532 (1965), stated that "the Commission as a whole had never entered an order or award [in this case], and that the entry of such an order or award is a prerequisite to commencement of an action under this statute [sec. 102.23(1)]."

Likewise, in Guerin v. LIRC, 121 Wis.2d 183, 359 N.W.2d 162 (1984), the Wisconsin Supreme Court affirmed the circuit court's determination that it had no jurisdiction over premature claims. Petitioner had filed for special disability benefits without having retired.

The present case is unlike either Chevrolet or Guerin. Petitioner herein has, in fact, been awarded compensation. His complaint is not premature nor preliminary to a finding awarding or denying compensation. Simply because he has not appealed the award portion of the LIRC's decision does not mean he may not maintain an action in circuit court for judicial review of law or matters which he feels were in error. The criteria is that there be an order awarding or denying him compensation. Petitioner has had an award of compensation, and thus, his appeal to this court fulfills the requirement of sec. 102.23(1), Wis. Stats.

Having found that the Court does not lack jurisdiction to review the LIRC's determination, the Court will proceed to the next issue. Petitioner disputes the propriety of the Commission's remand order since it calls for investigation of petitioner's eligibility for compensation benefits. He claims that section 108.09, Wis. Stats., grants authority for remand of a case for further proceedings, a "quasi-judicial" function, as opposed to a "new or different investigation" which is an "executive" function and which is ordered by the Commission.

Section 108.09(3)(b), Wis. Stats., grants authority to an appeal tribunal to "affirm, reverse or modify the deputy's initial determination or set aside the determination and remand the matter to a department deputy for further proceedings." Similarly, sec. 108.09(6)(d), Wis. Stats., grants like authority to the Commission, and also grants authority to "order the taking of additional evidence as to such matters as it may direct, or it may remand the matter to the department for further proceedings."

Respondent interprets the statute as granting a "continuous line of authority within the Department and from the Department to the Commission to take whatever action is necessary to ensure that unemployment compensation benefits are provided in accordance

with the eligibility limits established by the legislature." The LIRC cites section 108.09(2)(b), Wis. Stats., which grants authority to the Commission to issue determinations, like the remand order, to "resolve any matters which may bar, suspend, terminate or otherwise affect the employe's eligibility for benefits."

The Commission, in remanding the series of seven questions to the department, sought investigation of matters which would seemingly affect petitioner's eligibility for compensation.

The Wisconsin Supreme Court determined that an administrative agency's interpretation of a statute "will not be set aside. . . unless it can be said the construction is clearly contrary to legislative intent." A.O. Smith Corp. v. DILHR, 88 Wis. 262, 267, 276 N.W.2d 279 (1979). Although the construction of a statute is a question of law and the Court is not bound by the interpretation given the statute by an administrative agency, the construction and interpretation of the statute adopted by the agency charged with the duty of applying the law is nevertheless entitled to great weight. Milwaukee County v. DILHR, 80 Wis.2d 445, 455, 259 N.W.2d 118 (1977). Generally, the reviewing court should not upset an administrative agency's interpretation of a

statute if there exists a rational basis for the interpretation. Wisconsin's Environmental Decade, Inc. v. DILHR, 104 Wis.2d 640, 644, 312 N.W.2d 749 (1981).

While sec. 108.09 allows "further proceedings" and does not specify further investigation as a reason for remand, the Court finds the Commission's interpretation of the statute as granting authority for remand for investigation is reasonable and in accordance with legislative intent. Any fraudulent or collusive activity by petitioner or his employer in concealing or conspiring to conceal petitioner's employment status would cause petitioner to be ineligible for compensation benefits. Section 108.04, Wis. Stats. The Court concludes the Commission, interpreting the statute, sought, by the remand, to fulfill legislative intent that no ineligible claimant receive compensation. Remand for the express purposes outlined by the Commission is permissible under Ch. 108. The Commission is affirmed on this issue.

Petitioner does not apparently seek review by this court of the evidence, although he states a few magical "buzz" words on p. 2 of his brief.¹ However, petitioner does not indicate precisely

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"Timely appeal was brought herein by the Petitioner and is now before the Court on issues of law and sufficiency of the evidence." (Emphasis supplied)

what evidence he wishes the court to review to determine whether certain findings--herein unnamed--are without support in the record. He simply tosses the issue off as basically irrelevant at this point.

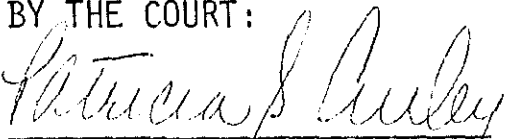
For purposes of this appeal, and because the actual amounts which may be in question for weeks 9 and 10 of 1986 do not justify lengthy consideration, petitioner will address only the questions of the authority of the Commission to direct the remand delineated above and the lack of sufficient cause upon this record to investigate the petitioner as well as the employer further.

(Petitioner's brief at page 4)

Termed this way, the Court does not find sufficiency of the evidence with respect to the award at issue here under the circumstances and has, therefore, confined itself solely to the issue of the Commission's ability to remand for further investigation. For the above reasons stated, this Court affirms the Commission's decision.

Dated this 11th day of July, 1988, at Milwaukee, Wisconsin.

BY THE COURT:


Hon. Patricia S. Curley
Circuit Court Judge