

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 01

MILWAUKEE COUNTY

DONNA J. PARKER

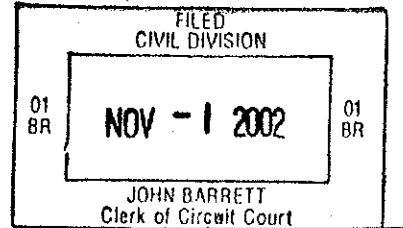
Plaintiff,

v.

Case No. 02CV002602

LABOR AND INDUSTRY  
REVIEW COMMISSION, and  
DAVIS & KUELTHAU, S.C.

Defendants.



## DECISION AND ORDER

### *Introduction*

The present case is before this Court on an appeal for review of a decision of the Labor and Industry Review Commission ("LIRC"). The LIRC decision affirmed the decision of Administrative Law Judge John Winderl ("ALJ Winderl"), which ordered Plaintiff Parker to repay \$4,800.00 to the Unemployment Reserve Fund.

### *Background*

Plaintiff Parker worked as a legal secretary for the law firm of Denny & Yarnisch for approximately two years.<sup>1</sup> The Plaintiff's final day of work at Denny & Yarnisch was April 27, 2001.<sup>2</sup> Plaintiff interviewed with Davis & Kuelthau on April 23, 2001, for a 'floater' position as a legal secretary.<sup>3</sup> Plaintiff expressed concern regarding the position

<sup>1</sup> Department of Workforce Development: Parker v. Davis & Kuelthau, S.C., at 2 (Dec. 11, 2001) ("Winderl Decision") (note that there is not a page number on this page in the record; however, it appears to be page two of ALJ Winderl's decision and contains ALJ Winderl's Findings of Fact and Conclusions of Law). *See also* Transcript of Hearing: Parker v. Davis & Kuelthau at 14-15 (Nov. 29, 2001) ("Transcript").

<sup>2</sup> Winderl Decision, at 2.

<sup>3</sup> *Id.*

because of parking and insurance issues.<sup>4</sup> Davis & Kuelthau, via their representative Sarah Luedke, extended an offer to Parker;<sup>5</sup> however, Parker expressed the insurance and parking concerns and informed Luedke that she needed time to consider whether to accept the position.<sup>6</sup> Thus, Parker informed Luedke that she would contact Luedke at a later time with her decision.<sup>7</sup>

Parker never informed Luedke of her decision.<sup>8</sup> Messages were left by Luedke on Parker's telephone answering machine on both May 8, 2001, and May 9, 2001.<sup>9</sup> The May 8, 2001, message indicated that Luedke wanted to know whether Parker had arrived at a decision, and the May 9, 2001, message indicated that Luedke needed an answer by the end of the day.<sup>10</sup>

Parker claims that she had decided to take the job and that she did receive the May 9, 2001 message.<sup>11</sup> However, Parker contends that she did not receive the message until after five o'clock in the evening on May 9, 2001.<sup>12</sup> Thus, argues Parker, she was unable to either accept or reject the offer.<sup>13</sup>

In his Findings of Fact and Conclusions of Law, ALJ Winderl stated:

The employee had been given an adequate opportunity to consider the employer's offer and either accept it or reject it. She could have contacted the employer following the day of the last message to explain that she did not receive the message in time to respond that day. It was her responsibility to inform the employer if she was or was not going to accept

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<sup>4</sup> *Id.*

<sup>5</sup> Transcript, at 6.

<sup>6</sup> *Id.* at 11-12.

<sup>7</sup> *Id.*

<sup>8</sup> Winderl Decision, at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> State of Wisconsin, Department of Workforce Development Claimant Statement: Donna J. Parker, at 1 (notes taken from telephone conversation of Sept. 10, 2001).

<sup>12</sup> Transcript, at 22; Winderl Decision, at 2.

<sup>13</sup> *Id.*

their offer of work. By failing to do so, she must be deemed to have failed to accept the offer of work.<sup>14</sup>

The wages, hours (including arrangement and number), and other conditions of the work offered were not substantially less favorable to the employee than those prevailing for similar work in the employee's labor market area; and the employee, as a claimant for unemployment benefits, was not for any other reason justified in failing to accept that work.<sup>15</sup>

Based on this rationale, the denial of benefits to Parker was affirmed by the appeal tribunal under ALJ Winderl.<sup>16</sup> Furthermore, the tribunal found that Parker was paid \$4,800.00 in unemployment benefits for which she was not eligible pursuant to Wis. Stat. § 108.03 (1).<sup>17</sup> Finally, the tribunal ruled that Parker must repay the \$4,800.00.<sup>18</sup> According to the tribunal, repayment by Parker was appropriate because none of the exemptions under Wis. Stat. § 108.22 (8)(c)(1)(a) and (b),<sup>19</sup> or Wis. Stat. § 108.04 (13)(f),<sup>20</sup> were applicable to Parker's situation. These exemptions would have allowed the Department of Workforce Development to waive recovery of erroneously paid benefits where the overpayment was the fault of the Department.<sup>21</sup> Thus, ALJ Winderl's Decision ordered Parker to Repay \$4,800.00 to the Unemployment Reserve Fund.<sup>22</sup>

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<sup>14</sup> Winderl Decision, at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3. The \$4,800.00 figure is for benefits paid "for weeks 19-34 of 2001." *Id.* Wis. Stat. § 108.03 (1) (2001) ("108.03. Payment of benefits. (1) Benefits shall be paid to each unemployed and eligible employee from his or her employers account, under the conditions and in the amounts stated in, or approved by the department pursuant to, this chapter, and at such times, at such places, and in such manner as the department may from time to time approve or prescribe.").

<sup>18</sup> Winderl Decision, at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* Wis. Stat. § 108.04 (13)(f) (2001) ("(13) N[otification as to ineligibility]. . . . (f) If benefits are erroneously paid because the employer fails to file a report required by this chapter, fails to provide correct and complete information on the report, fails to object to the benefit claim under s. 108.09 (1) or aids and abets the claimant in an act of concealment as provided in sub. (11), the employer is at fault. If benefits are erroneously paid because an employee commits an act of concealment as provided in sub. (11) or fails to provide correct and complete information to the department, the employee is at fault.").

<sup>21</sup> Winderl Decision, at 3. Wis. Stat. § 108.22 (8)(c)(1)(a) – (b) (2001) ("The department shall waive recovery of benefits that were erroneously paid if . . . [t]he overpayment was the result of a departmental error and was not the fault of any employer under s. 108.04 (13) (f); and [(sub. (b))], [t]he overpayment did

Parker appealed this decision to the Labor and Industry Review Commission, which affirmed ALJ Winderl's Decision.<sup>23</sup> LIRC agreed that Parker had "failed, without good cause, to accept an offer of suitable work."<sup>24</sup> Before LIRC, Parker continued to argue that she had not had a chance to accept Davis' offer of employment until after Friday, May 9, 2001, at five o'clock in the evening.<sup>25</sup> However, based on the testimony of the parties, ALJ Winderl's decision and the entire record, LIRC found that Parker "had adequate opportunity to give [Davis] . . . her decision," and that "the wages, hours and other conditions of the offer were prevailing for similar work in [Parker's] . . . locality."<sup>26</sup>

Before LIRC, Parker argued that she should not have to repay the \$4,800.00 in benefits; however, Parker confirmed that she had been paid those monies and that they payment was not a result of error on the part of the Department of Workforce Development.<sup>27</sup> Additionally, LIRC found no evidence that the Department of Workforce Development erred by paying Parker the \$4,800.00.<sup>28</sup>

The LIRC decision also noted that Parker had "failed to disclose that she [had] refused work when she filed her weekly benefit claim."<sup>29</sup> Consequently, LIRC concluded that Parker was partially responsible for the overpayment of benefits.<sup>30</sup> For a waiver of repayment by the Department of Workforce Development, the overpayment error must be

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not result from the fault of an employee as provided in s. 108.04 (13) (f), or because of a claimants false statement or misrepresentation.").

<sup>22</sup> Winderl Decision, at 3.

<sup>23</sup> Labor and Industry Review Commission: Donna Parker v. Davis & Kuelthau, at 1 (Feb. 21, 2002) ("LIRC Decision").

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> LIRC Decision, at 2.

<sup>29</sup> *Id.* Note that LIRC points out that Parker did not conceal Davis' offer before another, separate appeal tribunal; however, LIRC found that, while filing her weekly claims for benefits, Parker failed to report the Davis offer.

<sup>30</sup> LIRC Decision, at 2.

solely the fault of the Department.<sup>31</sup> As LIRC found that the error was not exclusively that of the Department because of Parker's failure to report, LIRC affirmed ALJ Winderl's conclusion that Parker must repay the \$4,800.00 in benefits that she had received.<sup>32</sup> Parker subsequently brought her case before this Court seeking relief from the LIRC decision.

#### *Legal Standards*

##### **Wis. Stat. § 102.23 (2001). Judicial review.**

(1) (a) 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 on it or not, is subject to review only as provided in this section and not under ch. 227 or s. 801.02 . . .<sup>33</sup>

(e) Upon such hearing, the court may confirm or set aside such order or award; and any judgment which may theretofore have been rendered thereon; but the same shall be set aside only upon 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.<sup>34</sup>

(6) If the commissions order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commissions order or award and remand the case to the commission if the commissions order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.<sup>35</sup>

##### **Wis. Stat. § 108.04 (8) (2001). Suitable work.**

(a) If an employee fails, without good cause, to accept suitable work when offered, the employee is ineligible to receive benefits until 4 weeks have elapsed since the end of the week in which the failure occurs and the employee earns wages after the week in which the failure occurs equal to at least 4 times the employees weekly benefit rate under s. 108.05 (1) in

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<sup>31</sup> *Id. See also*, Wis. Stat. § 108.22 (8)(c)(1)(a) – (b); Wis. Stat. § 108.04 (13)(f).

<sup>32</sup> LIRC Decision, at 1-2.

<sup>33</sup> Wis. Stat. § 102.23 (1)(a) (2001).

<sup>34</sup> Wis. Stat. § 102.23 (1)(e) (2001).

<sup>35</sup> Wis. Stat. § 102.23 (6)(2001).

employment or other work covered by the unemployment insurance law of any state or the federal government.<sup>36</sup>

**Wis. Stat. § 108.09 (2001). Settlement of benefit claims.**

(9) Payment of benefits. (a) Benefits shall be paid promptly in accordance with the departments determination or the decision of an appeal tribunal, the commission or a reviewing court, notwithstanding the pendency of the period to request a hearing, to file a petition for commission review or to commence judicial action or the pendency of any such hearing, review or action.<sup>37</sup>

(b) Where such determination or decision is subsequently amended, modified or reversed by a more recently issued determination or decision, benefits shall be paid or denied in accordance with the most recently issued determination or decision.<sup>38</sup>

(c) If any determination or decision awarding benefits is finally amended, modified or reversed, any benefits paid to the claimant which would not have been paid under such final determination or decision shall be deemed an erroneous payment. Sections 108.04 (13) (c) and (d), 108.16 (3) and 108.22 (8) shall apply to the charging and recovery of such erroneous payment.<sup>39</sup>

**Wis. Stat. § 108.22 (2001). Timely reports, notices and payments.**

(8)(a) If benefits are erroneously paid to an individual, the individuals liability to reimburse the fund for the overpayment may be set forth in a determination or decision issued under s. 108.09 Any determination which establishes or increases an overpayment shall include a finding concerning whether waiver of benefit recovery is required under par. (c) If any decision of an appeal tribunal, the commission or any court establishes or increases an overpayment and the decision does not include a finding concerning whether waiver of benefit recovery is required under par. (c), the tribunal, commission or court shall remand the issue to the department for a determination.<sup>40</sup>

(b) To recover any overpayment which is not otherwise repaid or recovery of which has not been waived, the department may offset the amount of the overpayment against benefits the individual would otherwise be eligible to receive, or file a warrant against the liable individual in the same manner as is provided in this section for collecting delinquent payments from employers, or both, but only to the extent of recovering the

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<sup>36</sup> Wis. Stat. § 108.04 (8) (2001).

<sup>37</sup> Wis. Stat. § 108.09 (9)(a) (2001).

<sup>38</sup> Wis. Stat. § 108.09 (9)(b) (2001).

<sup>39</sup> Wis. Stat. § 108.09 (9)(c) (2001).

<sup>40</sup> Wis. Stat. § 108.22 (8)(a) (2001).

- actual amount of the overpayment and any costs and disbursements, without interest.<sup>41</sup>

(c) 1. The department shall waive recovery of benefits that were erroneously paid if:

- The overpayment was the result of a departmental error and was not the fault of any employer under s. 108.04 (13) (f); and
- The overpayment did not result from the fault of an employee as provided in s. 108.04 (13) (f), or because of a claimants false statement or misrepresentation.<sup>42</sup>

**Wis. Stat. § 108.04. Eligibility for benefits.**

(13) (f) If benefits are erroneously paid because the employer fails to file a report required by this chapter, fails to provide correct and complete information on the report, fails to object to the benefit claim under s. 108.09 (1) or aids and abets the claimant in an act of concealment as provided in sub. (11), the employer is at fault. If benefits are erroneously paid because an employee commits an act of concealment as provided in sub. (11) or fails to provide correct and complete information to the department, the employee is at fault.<sup>43</sup>

In the absence of fraud, the commission's findings are conclusive.<sup>44</sup> This court reviews the findings of the commission to determine whether such findings are supported by evidence that is substantial and credible.<sup>45</sup> To be credible, evidence must be without conjecture or speculation.<sup>46</sup> To be substantial, evidence must be that upon which a reasonable person thereon might make a decision.<sup>47</sup>

If more than one inference is capable of being drawn from the evidence, the commission's act of drawing a permissible inference from that evidence is a conclusive

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<sup>41</sup> Wis. Stat. § 108.22 (8)(b) (2001).

<sup>42</sup> Wis. Stat. § 102.22 (8)(c) (1)(a) – (b) (2001).

<sup>43</sup> Wis. Stat. § 108.04 (13)(f) (2001).

<sup>44</sup> *Department of Industry, Labor & Human Relations, v. Labor & Industry Review Commission*, 155 Wis.2d 256, 262, 456 N.W.2d 162 (Ct. App. 1990); *Eastex Packaging Co. v. Department of Industry, Labor & Human Relations*, 89 Wis.2d 739, 745, 279 N.W.2d 248 (1979); *Nottleson v. Department of Industry, Labor & Human Relations*, 94 Wis.2d 106, 113-114, 287 N.W.2d 763 (1980); *Town of Russell Volunteer Fire Department v. Labor and Industry Review Commission*, 223 Wis.2d 723, 730, 589 N.W.2d 445 (Ct. App. 1998).

<sup>45</sup> *The Farmer's Mill of Athens, Inc., v. Department of Industry, Labor & Human Relations*, 97 Wis.2d 576, 580, 294 N.W.2d 39 (Ct. App. 1980).

<sup>46</sup> *Town of Russell*, 223 Wis.2d at 730 (citation omitted).

<sup>47</sup> *Id.*

act of fact-finding.<sup>48</sup> However, where only one inference is capable of being drawn from undisputed evidentiary facts, the drawing of such an inference is a question of law - not of fact.<sup>49</sup> The existence of conflicting evidence is not sufficient to reverse the commission's decision.<sup>50</sup>

A Court reviewing an agency decision has three standards of review available. The first is great weight deference, which "is applied if the agency's interpretation and application of the law at issue is long standing."<sup>51</sup> Under this standard, an agency decision will be reversed only if the agency's decision was irrational.<sup>52</sup> The second standard available to a reviewing Court is due weight deference, which is utilized where a case is "very nearly" a case of first impression.<sup>53</sup> The third standard is *de novo* review, which, if employed, affords the decision of the agency no weight.<sup>54</sup>

Issues regarding worker's compensation are governed by Chapter 102, Wis. Stats.<sup>55</sup> Courts recognize that the Labor and Industry Review Commission ("LIRC") has a long history of both interpreting and administering Chapter 102.<sup>56</sup> Courts also recognize LIRC's expertise in worker's compensation matters.<sup>57</sup>

#### *Analysis*

Upon review, this Court utilizes the great weight standard in regards to the findings of the Commission in the present case. In reviewing the entire record, including

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<sup>48</sup> *Farmer's Mill*, 97 Wis.2d at 580; *Eastex*, 89 Wis.2d at 746.

<sup>49</sup> *Kessler v. Industrial Commission*, 27 Wis.2d 398, 400, 134 N.W.2d 412 (1965).

<sup>50</sup> *Farmer's Mill*, 97 Wis.2d at 580.

<sup>51</sup> *Town of Russell*, 223 Wis.2d at 733-34 (citing *Sauk County v. WERC*, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991)).

<sup>52</sup> *Id.*

<sup>53</sup> *Town of Russell*, 223 Wis.2d at 733-34 (citing *Sauk County*, 165 Wis.2d at 413-414).

<sup>54</sup> *Town of Russell*, 223 Wis.2d at 733-34 (citing *Sauk County*, 165 Wis.2d at 414).

<sup>55</sup> See, e.g., Wis. Stat. § 102.01 (2001).

<sup>56</sup> *Town of Russell*, 223 Wis.2d at 733-34 (referring to *Harnischfeger Corp. v. Labor and Industry Review Commission*, 196 Wis.2d 650, 660, 539 N.W.2d 98, 102 (1995)).

the testimony and submissions of the parties, this Court examines the findings of the Commission to determine whether the Commission's decision was based on credible and substantial evidence. Consequently, this Court will not overturn the Commission's decision unless a review of the entire record finds the decision of the Commission to be irrational.

Having reviewed the record pursuant to this standard and the applicable statutes, this Court finds that decision of LIRC was made based on the credible and substantial evidence before it. There is no indication that the decision of the Commission was irrational. The record clearly indicates, and it is undisputed that Parker did not respond to the offer of employment by the deadline given by Davis & Kuelthau. Parker was offered the job on May 1, 2001, and had still not accepted or rejected the offer after eight days. Indeed, it is undisputed that a message was left by Sarah Luedke on May 8, 2001, inquiring as to whether Parker had made a decision. Additionally, it is undisputed that another message was left on May 9, 2001, in which Luedke stated that a decision was necessary by five o'clock that evening.

Parker claims that she did not get the message until after that five o'clock deadline, and that she therefore was unable to accept the job. Based on the record before it, and affirming ALJ Winderl's decision, LIRC concluded that the May 1, 2001, through May 9, 2001, time period had been an adequate amount of time during which Parker could have responded to Davis' offer. Affording great weight to the Commission, and recognizing that the evidence is credible, substantial, and that it is undisputed that this was the time period afforded to Parker for her decision, this Court agrees with LIRC's Opinion. The Commission's decision was not irrational. Therefore, this Court finds that

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<sup>57</sup> *Id.* at 734 (noting LIRC's eighty years of experience in dealing with Chapter 102 issues).

Parker was offered employment comparable to that which she had enjoyed at Denny & Yarnisch, that Parker had adequate and sufficient time to respond to the offer, and that she did not do so.

The next issue to be addressed is that of the \$4,800.00 in benefits that Parker received. The Commission, based on its findings, held that Parker must repay the entire amount to the Unemployment Reserve Fund. The Commission found that Parker had failed to report the Davis offer, and therefore was partially at fault. To waive repayment, the error must be solely that of the Department, and LIRC reasoned that Parker, by not reporting the offer, was partially at fault for benefits that were paid to her on the theory that she was unemployed.

The language of Wis. Stat. § 108.04 is clear: "If benefits are erroneously paid because an employee commits an act of concealment as provided in sub. (11) or fails to provide correct and complete information to the department, the employee is at fault."<sup>58</sup> As noted above, where more than one inference can be drawn from the evidence before the Commission, the Commission's drawing of an inference based on the evidence constitutes a conclusive finding of fact.<sup>59</sup> More than one inference could have been drawn from the evidence before the Commission regarding to what degree Parker had made the Department aware of Davis' offer. This is apparent because LIRC notes that Parker did not report the offer to the Department, yet an appeal tribunal found that Parker "did not conceal the offer of work."<sup>60</sup> Based on the evidence before it, LIRC inferred that Parker did not report the offer and committed an act of concealment. Such an inference is constitutes a conclusive finding of fact.

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<sup>58</sup> Wis. Stat. § 108.04 (13)(f).

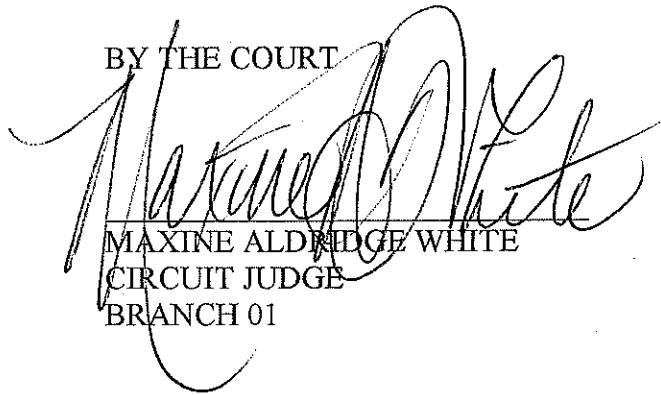
<sup>59</sup> *Supra*, pp. 7-8.

Thus, this Court finds that LIRC's conclusion that Parker was partially at fault is also based on the credible and substantial evidence in the record. Because waiver of repayment is only possible where the Department is exclusively at fault, this Court agrees that Parker, because she is partially at fault for the overpayment, is not entitled to waiver under Wis. Stat § 108.04 (13)(f). Therefore, this Court affirms the decision of LIRC that Parker repay, to the Unemployment Reserve Fund, \$4,800.00 in erroneously paid benefits.

#### ORDER

Based on the entire record, including the submissions and testimony of the parties, the decision of the Labor and Industry Review Commission is hereby affirmed.

Dated this at Milwaukee, Wisconsin, this 1<sup>st</sup> day of November 2002.

BY THE COURT  
  
MAXINE ALDRIDGE WHITE  
CIRCUIT JUDGE  
BRANCH 01

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<sup>60</sup> LIRC Decision, at 2.