

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 28

MILWAUKEE COUNTY

SCOTT H. SLANG,

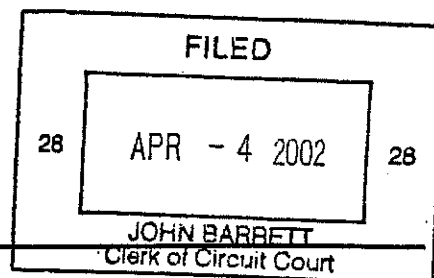
Petitioner,

v.

Case No. 01-CV-006583

LABOR AND INDUSTRY REVIEW
COMMISSION and 7UP BOTTLING OSHKOSH,

Respondents.



DECISION AND ORDER

Petitioner Scott Slang ("Slang") seeks review of a March 30, 2001 decision of the State of Wisconsin Labor and Industry Review Commission ("commission"). The commission affirmed a decision of the Department of Workforce Development that Slang's request for a hearing was untimely. Slang now appeals the commission's decision.

FACTUAL BACKGROUND

The facts as they relate to the procedural history in this case are not in dispute, therefore the court relies upon and incorporates herein the facts as set forth in the respondent's brief. On January 23, 2001 a deputy of the Department of Workforce Development issued an initial determination which found that in the week ending January 13, 2001, Slang quit his employment with 7Up Bottling Oshkosh within the meaning of Wis. Stat. § 108.04(7)(a). This resulted in suspension of Slang's eligibility for unemployment benefits pursuant to the statute. *Id.* Pursuant to Wis. Stat. § 108.09(2r),

Slang had 14 days from the date of issuance of the initial determination to file a written appeal. Slang's appeal was not received until February 8, 2001, which was two days past the 14-day statutory deadline.

A department hearing was held on March 27, 2001 to address the issue of whether Slang's request for a hearing on the merits had been late for a reason beyond his control, within the meaning of Wis. Stat. § 108.09(4)(c). On March 30, 2001, Administrative Law Judge Heide S. Mallon issued a decision which found that Slang's request for a hearing had not been late for a reason beyond his control, and that the initial determination therefore remained in effect. Slang appealed this decision to respondent Labor and Industry Review Commission, and on June 20, 2001, the commission issued a Decision and Memorandum Opinion affirming the ALJ's decision. Slang now appeals the commission's decision.

The basis of petitioner's argument is that his attorney's paralegal, Bryan Goeckerman, drafted the initial appeal letter on January 30, 2001. Goeckerman contends that he gave the appeal letter to his assistant, Timothy Long, on January 31, 2001, with directions to fax it to the department. On January 31, 2001, Long mistakenly faxed the letter to Goeckerman's fax number instead of to the department's fax number. Therefore, Slang argues that his request for a hearing on the merits was untimely filed for a reason beyond his control.

STANDARD OF REVIEW

This court reviews LIRC's decision pursuant to section 102.23(1), Wis. Stats, which provides that the court may set aside LIRC's decision only upon the following

grounds: (1) LIRC acted without or in excess of its powers; (2) the order was procured by fraud; (3) LIRC's findings of fact did not support its order.

The construction or application of a statute to a set of undisputed facts presents a question of law. *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 417 (1979). A reviewing court is not bound by the commission's determination of law. *State v. DILHR*, 101 Wis. 2d 396, 403 (1984). Even though we are presented with a question of law, Wisconsin courts may assign "great weight" to the agency's determination if the administrative agency's experience, technical competence and specialized knowledge aid the agency in its interpretation and application of the law. *Sauk County v. WERC*, 165 Wis. 2d 406, 413 (1991). In the present case, LIRC has experience in interpreting and applying Wis. Stat. § 108.09(4)(c), therefore this court applies the great weight standard of review. Under the great weight standard, this court will uphold LIRC's reasonable interpretation that is not contrary to the clear meaning of the statute, even if the court believes that an alternative interpretation is more reasonable. *UFE, Inc. v. LIRC*, 201 Wis. 2d 274, 286 (1996).

DISCUSSION

Both parties to this appeal agree that the appeal was untimely. There is no dispute as to the underlying facts in this case. According to Wis. Stat. § 108.09(4)(c):

LATE APPEAL. If a party files an appeal which is not timely, the department may schedule a hearing concerning the issue of whether the party's failure to timely file the appeal was for a reason *beyond the party's control*. ... If, after having testimony, the appeal tribunal finds that the party's failure to timely file an appeal was not for a reason beyond the party's control, the appeal tribunal shall issue a decision containing this finding and dismissing the appeal.

The crux of Slang's argument is that his failure to file a timely appeal was for a reason beyond his control. More specifically, Slang argues that his untimely appeal was the result of a paralegal's mistake, therefore the issue of timeliness was beyond his control.

What the petitioner fails to realize, however, is that the United States Supreme Court has expressly rejected the notion that a litigant may be excused for the misconduct of his counsel. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-34 (1962), the Court held:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'

Wisconsin courts have elaborated on this holding, stating:

Although Wisconsin courts may exercise their discretion in appropriate cases by not punishing litigants for their counsel's errors or misconduct, our cases establish that the litigant has no right to avoid the consequences of his attorney's conduct by disavowing the actions of counsel.

Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 284 (1991); *see also Wagner v. Springaire Corp.*, 50 Wis. 2d 212 (1971); *Dugenske v. Dugenske*, 80 Wis. 2d 64 (1977); *Paschong v. Hollenbeck*, 16 Wis. 2d 284 (1962); *Gaertner v. 880 Corp.*, 131 Wis. 2d 492 (Ct. App. 1986).

Although this court recognizes that the commission could have decided the other way (i.e. that the failure to file a timely appeal was beyond the petitioner's control), this court will sustain the commission's decision if it is reasonable. In the present case, the commission's interpretation and application of Wis. Stat. § 108.09(4)(c) to the undisputed facts was completely reasonable.

Additionally, although this decision rests on a finding that the commission's application of Wis. Stat. § 108.09(4)(c) to the undisputed facts was reasonable, the court notes the fact that the petitioner failed to comply with the briefing schedule. According to the briefing schedule, the petitioner's brief was due on or before November 12, 2001,

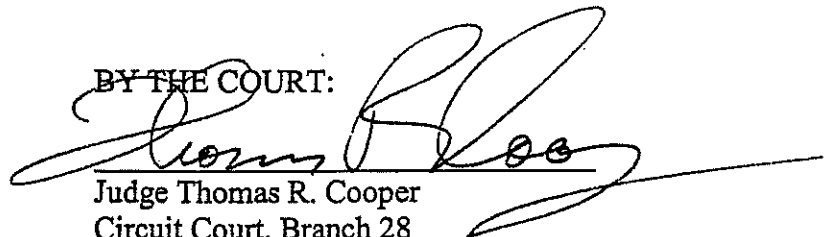
however this brief was not filed until February 4, 2002. The court is perplexed as to how a petitioner could fail to comply with a scheduling order (i.e. filing a brief almost 3 months late) considering the fact that the underlying issue on review revolves around timeliness.

CONCLUSION AND ORDER

THEREFORE, based on the reasons set forth in this decision, IT IS HEREBY ORDERED that the decision of the commission IS AFFIRMED.

Dated this 4 day of April, 2002, at Milwaukee, Wisconsin.

BY THE COURT:



Judge Thomas R. Cooper
Circuit Court, Branch 28
Case No. 01-CV-006583