

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY  
BRANCH #2  
Civil Division

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CHARLES H. WILLIAMS,  
Plaintiff,

-vs-

Case No. 683-627

WISCONSIN LABOR AND INDUSTRY  
REVIEW COMMISSION,

Defendant.

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MEMORANDUM DECISION

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This is an action for judicial review of a decision of the Labor and Industry Review Commission (Commission) pursuant to Sec. 108.09(7) Stats. The decision affirmed a decision of an appeal tribunal of the Department of Industry, Labor and Human Relations (Department) denying unemployment benefits to the Plaintiff Charles H. Williams.

After reviewing the record the Commission adopted the findings and conclusions of the appeal tribunal (Examiner John D. Winderl) as its own and as authorized by Sec. 108.09(6)(d) Stats. The Examiner had found that Williams did not appear in person at a public employment office to initiate a claim for

unemployment compensation benefits as required by Sec. 108.08(i) Stats. and Wisconsin Administrative Code, Sec. ILHR 129.01(1).

Williams is a former employee of Pepsi Cola Metropolitan Bottling Company. He was injured in an industrial accident on February 11, 1983, and in April of that year was terminated for reasons unrelated to the accident. As a result of that accident, however, he claimed Worker's Compensation benefits through October, 1983. The present claim is born of an assertion by Williams that he attempted to apply for unemployment benefits in October, 1983, but was told by Department personnel that his pending Worker's Compensation claim made him ineligible for unemployment benefits, and, therefore, a claim was not filed by him. Williams also contends that the same information was conveyed to him in a telephone conversation with a Department office a number of days later in October.

In January, 1985, Williams' Worker's Compensation claim was denied. Following this, two efforts were made to file unemployment benefits claims. A claim filed on February 8, 1985, was denied on February 27, 1985, because of the absence of "weeks worked" in the applicable base period. A subsequent claim was filed in March, 1985, seeking retroactive benefits from November 6, 1983 through February 2, 1985. This claim was denied on the

date of application by a Department deputy due to a failure to properly initiate the claim. From this determination Williams appealed on March 21, 1985.

In its written decision on May 31, 1985, Examiner Winderl affirmed the denial of Williams' claim by a Department deputy. Williams' petition for review of the Examiner's decision culminated in the Commission's decision which I am now called upon to review.

It is not necessary to set forth in detail the standard of review applicable to these cases. Suffice it to say that under Sec. 102.23(1) Stats. factual findings made by the Commission, acting within its powers are conclusive in the absence of fraud. Williams' thesis here is simply that the Commission's decision is not supported by substantial credible evidence. The case of R. T. Madden, Inc. v. ILHR Department, 43 Wis.2d 528 (1969), makes it clear that the appropriate test on review is whether there is any credible evidence in the record sufficient to support the findings made by the Department. Madden further emphasizes that this rule does not mean that the reviewing Court is to weigh conflicting credible evidence to determine what should be believed. This is because the question of credibility is solely within the province of the administrative agency.

In the instant case the Commission adopted the Examiner's findings that the Plaintiff did not properly initiate his claim as required by statute. Administrative Rule ILHR 129.01(1) clearly defines these requirements. The substance of this regulation makes it mandatory that the claimant report in person to a public employment office to initiate the benefit claim and thereafter, give due notice of unemployment by filing a claim form as provided in the regulation. In this case benefits are claimed by Williams from November 6, 1983, through February 2, 1985. It is not disputed that no claim was filed until February 8, 1985, which clearly is not in compliance with the law unless the notice requirements should have been waived by the Department. ILHR 129.01(3) provides for a waiver of notice, and makes it mandatory if exceptional circumstances are shown. Williams premises his claim of a waiver upon the fact that Department personnel erroneously informed him that he was ineligible for unemployment compensation benefits because of his pending Worker's Compensation claim. A Department representative, John Mand, who is an adjudication lead worker at the Milwaukee North office, testified in great detail as to the procedures employed at the office. He testified that a pending Worker's Compensation claim in no way disqualifies an individual

from receiving unemployment compensation. Williams asserts that because of the misinformation given him on his visit to the office in October, 1983, he is entitled to a waiver.

Williams' thesis assumes that the Commission was required to accept the Plaintiff's testimony as to what occurred in October, 1983, as a verity and this, despite Mand's testimony that initial interviewers in an employment office are trained to know the basic requirements for unemployment compensation benefits, Mand testified that it was the job of these interviewers to help potential claimants and not discourage the filing of claims.

I am somewhat straight-jacketed in my review of this record because the Commission was entitled to reject Williams' testimony, as an interested party when other evidence or inferences support a contrary conclusion. While it is true that the practices of the Department and the scope of interviewers' training is certainly not conclusive on the question of what transpired when Williams claims to have visited the office in October, 1983, the practices of the Department, as testified to by Mand, do support the finding that it is implausible that Williams could appear at the employment office and be misinformed in the manner that he claims. His credibility becomes further

suspect by his claim that he was also misinformed by a second person as to his ineligibility to file for unemployment benefits when he called on the telephone a number of days later. Without belaboring the point this situation is not atypical and raises the very question discussed in former Chief Justice George Currie's concurring decision in the now famous case of Neff v. Industrial Commission, 24 Wis.2d 207, cited in the Commission's brief. As pointed out in Neff, at page 217, there is the time-honored rule that positive uncontradicted testimony as to the existence of some fact (here Williams' claim that he was misinformed on two occasions as to his eligibility) cannot be disregarded by a Court or a jury in the absence of something in the case that discredits the same or renders it unreasonable against probabilities.

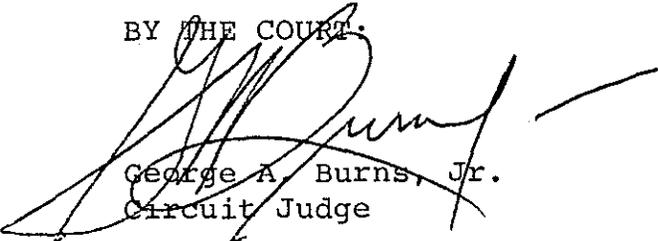
In the instant case as in Neff, the scenario relied upon by Williams, upon which he premises his waiver, concerns happenings at the employment office which the Department is unable to directly controvert. This is because Williams was unable to identify the persons to whom he spoke. All that is available then to test his credibility, aside from the manner in which he testified, are the reasonable probabilities of the substance of his testimony. In this type of situation, because of Williams'

interest in the outcome of this case the plausibility, particularly and Williams' credibility generally, must exclusively lie with the trier of fact. For this reason I am in agreement with the Commission's decision that Williams' testimony taken as a whole, justifies the Examiner's rejection of Williams' claim that he did not file for benefits in October, 1983, because he was told that he could not. Because the Examiner chose to disbelieve Williams' version of what happened, which finding was affirmed by the Commission, the Examiner's corollary findings that "in week 46 of 1983 through week five of 1985" Williams never properly initiated a claim for benefits as required by law is justified and that his failure to do so was not a proper subject for waiver.

The decision of the Commission is thereby affirmed in that there is a sufficient factual basis in the record to support the conclusions reached by the Examiner and the Commission. Counsel for the Commission shall prepare a brief order affirming the decision of the Commission.

Dated at Milwaukee, Wisconsin, this 15<sup>th</sup> day of October, 1986.

BY THE COURT:

  
George A. Burns, Jr.  
Circuit Judge