

DONALD F. ZITZNER,

Plaintiff,

vs.

MEMORANDUM DECISION AND ORDER

Case No. 91CV4968

Case No. 91CV4969

LABOR AND INDUSTRY REVIEW COMMISSION and
ACCURATE CONSTRUCTION, INC.,Defendants.

Plaintiff, Donald F. Zitzner (Zitzner), seeks judicial review, under secs. 108.09(7) and 102.23(1), Stats, of two determinations by the Labor and Industry Review Commission (LIRC) that he was employed by a corporation in which he owned or controlled, directly or indirectly, one-fourth or more of the ownership interest, within the meaning of sec. 108.04(1)(g), Stats. As a result of these determinations, Zitzner's unemployment compensation benefits were limited to four weeks for the years 1987 and 1988 and to approximately four weeks for the years 1989 and 1990. LIRC directed Zitzner to repay overpayments in unemployment compensation benefits totalling \$9,298.00 to the Unemployment Reserve Fund. In his petition for judicial review, Zitzner contends that the findings, inferences, conclusions and decisions of the Labor and Industry Review Commission are unsupported by substantial evidence in view of the entire record and are arbitrary and capricious. For the reasons set forth below, I affirm the decisions of LIRC.

BACKGROUND

For portions of 1987, 1988, 1989 and 1990, Donald Zitzner applied for unemployment compensation benefits. In support of his claims for benefits, Zitzner stated

that the corporation for which he worked, Accurate Construction, Inc., was owned by his mother and that he had no interest in the corporation other than in his employment as a foreman. Benefits were allowed in each of those years without any reduction or limitation.

In May of 1991, the Unemployment Compensation Division of the Department of Industry, Labor and Human Relations (DILHR) issued two separate initial determinations stating that Zitzner worked for a corporation in which he controlled, directly or indirectly, at least 25 percent of the ownership interest, however designated or evidenced, in 1987, 1988, 1989 and 1990. The first initial determination limited Zitzner's benefit eligibility to four weeks per year in 1987 and 1988 and the second initial determination limited Zitzner's benefit eligibility to approximately four weeks per year in 1989 and 1990.¹ Zitzner was directed to reimburse the Unemployment Reserve Fund for alleged overpayments totalling \$9,298.00.²

Zitzner appealed both initial determinations to DILHR on June 3, 1991. In response to these appeals, DILHR consolidated the two initial determinations and conducted a hearing on July 25, 1991. On August 2, 1991, the ALJ issued two Appeal Tribunal decisions. In the first decision, the ALJ found that the claimant was employed by a corporation in which he owned or controlled, directly or indirectly, one-fourth or more of the ownership interest

¹ Sec. 108.04(1)(g), Stats., provides in effect that if any individual claims benefits based on the individual's employment by a corporation and one-fourth or more of the ownership interest is owned or controlled by the individual, the individual's credit weeks based on such employment shall, if more than five, be reduced to five.

² Zitzner does not dispute the Department's calculations.

during week 17 of 1987 and week 18 of 1988. The ALJ found that the sole shareholder in the corporation, Zitzner's mother Patricia Zitzner, performed functions as corporate administrator from her home which included submitting bids, paying bills and performing other administrative tasks for the business. The ALJ found that Zitzner, together with his brother, directed the performance of all construction activities along with others who were hired to perform supervisory functions. According to the ALJ, Zitzner hired personnel, directed the actual construction part of the business, on occasion submitted bids and hired and fired employees, and continued to monitor the progress of corporate work even during the weeks in which he was in a layoff status. The ALJ concluded that Zitzner received benefits in the amount of \$4,348.00 for which he was not eligible within the meaning of sec. 108.03(1), Stats., and accordingly directed him to repay this amount to the Unemployment Reserve Fund.

In the second decision, the ALJ came to the same conclusion using the same reasoning regarding week 35 of 1989 and week 40 of 1990. Zitzner was ordered to repay the Unemployment Reserve Fund the total of \$4,950.00 for benefits he received in those weeks to which he was not entitled under sec. 108.03(1), Stats.

Zitzner appealed both decisions to the Labor and Industry Review Commission (LIRC). In two nearly identical decisions, LIRC affirmed both the findings of fact and conclusions of law in both of the ALJ's decisions. LIRC stated in part:

The claimant worked for a corporation in which his mother owned 100 percent of the outstanding stock. His mother also performed clerical and other administrative tasks. However, the claimant, along with his brother directed the performance of work on a daily basis. Under sec. 108.09(1)(g)3., his ownership interest was evidenced by, among other things, the control he exercised over the performance of work and his authority to make personnel

decisions. The claimant played a significant and crucial role in the day-to-day business of the corporation by virtue of such activities. For these reasons, the Commission affirmed the Appeal Tribunal Decision.

Zitzner then filed two actions for judicial review of LIRC's decisions and this court issued an order consolidating the two actions on June 4, 1992.

STANDARD OF REVIEW

Agency findings of fact made under ch. 108, Stats.; are conclusive if supported by any credible evidence and no court may substitute its judgment for that of the agency as to the weight or credibility of the evidence as to any finding of fact. Advance Die Casting Co. v. LIRC, 154 Wis.2d 239, 244 (Ct. App. 1989); Sections 102.23(1) & 102.23(6), Stats. A court is obligated to uphold the agency's findings even though they may be contrary to the great weight and clear preponderance of the evidence. Sears Roebuck & Co. v. DILHR, 90 Wis.2d 736, 744 (1979). A court should locate evidence which supports the decision, rather than weigh evidence opposed to the decision. Vande Zande v. DILHR, 70 Wis.2d 1086, 1097 (1975).

When LIRC has construed sec. 108.04(1)(g), Stats., courts should not upset the commission's judgment concerning questions of law, including the application of the statute to a particular set of facts if a rational basis exists for the commission's conclusion. Linse v. LIRC, 135 Wis.2d 399, 403 (Ct. App. 1986).

DECISION

Sec. 108.04(1)(g), Stats., provides:

The base period wages utilized to compute total benefits payable to an individual under s. 108.06(1) as a result of the following employment shall not exceed 10 times the individual's weekly benefit rate based solely on that employment under s. 108.05(1):

1. Employment by a partnership, if a one-half or greater ownership interest in the partnership is or during such employment was owned or controlled, directly or indirectly, by the individual's spouse or child, or by the individual's parent if the individual is under age 18, or by a combination of 2 or more of them.

2. Employment by a corporation, if one-half or more of the ownership interest, however designated or evidenced, in the corporation is or during such employment was owned or controlled, directly or indirectly, by the individual or the individual's spouse or child, or by the individual's parent if the individual is under age 18, or by a combination of 2 or more of them.

3. Except where subd. 2 applies, employment by a corporation, if one-fourth or more of the ownership interest, however designated or evidenced, in the corporation is or during such employment was owned or controlled, directly or indirectly, by the individual.

It is undisputed that Zitzner does not actually own at least 25 percent of the stock in Accurate Construction, Inc. Zitzner's father, Virgil Zitzner, owned all of the stock in the corporation while he was alive and, after his death in 1985, all of the stock passed to Zitzner's mother, Patricia Zitzner. Patricia was during 1987-1990 the sole shareholder of Accurate Construction, Inc. However, this is not determinative, for the statute covers not only those who own 25 percent but also those who control 25 percent of the ownership interest in the corporation.

In Linse, supra 135 Wis.2d at 404 the Court stated that "the legislature has specifically used the terms "own" and "control" in the disjunctive such that it may be possible for this person to control a corporation but not own it, or vice-versa, and still be subject to the statute." The appropriate inquiry, the court concluded, is "whether ownership or control, in reality exists. This is a mixed question of fact and law for the commission. The commission makes findings of fact, and based on those findings, makes a conclusion of law concerning whether ownership or control, in reality, exists." Id

In the present case, LIRC's findings of fact are all supported by substantial evidence in the record and its application of the statute to these facts is a rational reflection of legislative intent. First, Zitzner was a director in the corporation in each of the years at issue in this suit. Second, for 3 of the 4 years at issue here, Zitzner was the vice-president of the corporation. Third, Zitzner has worked for twenty years for the corporation and was promoted to co-foreman when his father died. Fourth, according to Zitzner's own testimony, he makes the daily decisions in the corporation such as hiring and firing employees, material ordering, some bidding, and supervising the workers on the job site not only when working but also to some degree when he is in lay-off status. By his own report, Zitzner would go to the job sites even when he was laid off to "look out for family interest". Fifth, Zitzner together with his brother and sister expect to inherit the business when their mother dies.

In comparison, Zitzner's mother who owned all of the corporation stock, handles the billing, receives employee time sheets and works on collections and bids. While there was some disagreement over the amount of time she devotes to the business, LIRC's finding that she works 1 to 4 hours per day is amply supportable by Zitzner's own original statement that his mother works "approximately 4 hrs. a week on company business." She does not go to the job sites and does not work out of the shop, but rather she performs her tasks from her home. The tasks she performs can reasonably be seen as largely clerical. It is also true that she signs for loans, executes lien waivers and is the only person with authority to draw checks on the corporation's account. However, at least as to the first two of these, this can reasonably be seen as more a requirement of third parties because of her sole shareholder status than an indication of control. Finally, one can reasonably draw the inference from her

statement that "I'm doing pretty much the same thing I did [as when my husband was alive] except if we need money or anything I get the loan and signs it all, I sign the checks, he signed the checks before. I sign the lien waivers..." that control of the corporation passed from her husband to Zitzner and Zitzner's brother who is also a foreman in the corporation, rather than to Zitzner's mother.

In assessing whether there is control "in reality", as Linse directs, a relevant consideration is the nature of the business itself. Here LIRC was dealing with a small, family run contracting business. Such an enterprise will rarely have long-term direction decisions as an ingredient of its operation, and Zitzner himself concurred in this observation as to Accurate Construction, Inc. The operative "control" in such a business is found in the control over its actual work projects. While Zitzner's mother was not divorced from this sphere of the company's business since she was involved in bidding, Zitzner can reasonably be seen as exercising the predominant role.

Zitzner argues that the factors relied upon in Linse to find control there by a non-stockholder are all missing here. However, the Court in Linse did not indicate that these factors were the exclusive considerations or necessary ingredients to a finding of control. On the contrary, Linse directed that the search be for whether control in reality was present "in each case." 135 Wis.2d at 404. Thus even if the factors the Court found important in Linse are absent here, that is not fatal.

In Linse, the court stated that a LIRC decision will not be set aside unless it is clearly contrary to the legislative intent, which the court articulated as follows: "It is quite obvious that the statute is designed to prevent self-employed individuals from using the unemployment

compensation fund to supplement their income by merely incorporating the family business.

The fiscal integrity of the state's compensation fund is a legitimate concern for the state."

Linse, supra 135 Wis.2d at 404. In the present case, LIRC's decision is not clearly contrary to this legislative intent, and it must, therefore, be upheld.

For all of the foregoing reasons,

IT IS ORDERED that the November 27, 1991 decisions of LIRC in these matters are hereby affirmed and this consolidated action is dismissed.

Dated this 13th day of November, 1992.

BY THE COURT

A handwritten signature in black ink, appearing to read "Michael Nowakowski", written over a horizontal line.

MICHAEL NOWAKOWSKI
CIRCUIT COURT JUDGE

cc: Attorney Daniel I. Droege, Jr.
Attorney Earl G. Buehler