

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 02-0471

Cir. Ct. No. 01-CV-40

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**WISCONSIN WORKER'S COMPENSATION UNINSURED
EMPLOYERS FUND, C/O GALLAGHER BASSETT SERVICES,
INC.,**

PLAINTIFF-APPELLANT,

PLEASANT VALLEY CONSTRUCTION, C/O SCOTT PAHOS,

INVOLUNTARY-PLAINTIFF,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
DAVID A. WESTPHAL,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washburn County:
EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. The Wisconsin Worker’s Compensation Uninsured Employers Fund (UEF) appeals from the circuit court’s order affirming a decision of the Labor and Industry Review Commission (LIRC). The issue is whether David Westphal was an employee of Pleasant Valley Construction when he was injured. We conclude that he was. Therefore, we affirm.

¶2 Westphal was injured when he fell from a ladder while helping to construct a pole barn. He filed a claim against Pleasant Valley Construction and the UEF for medical benefits and lost wages. The UEF denied the claim because it concluded that Westphal was not an employee of Pleasant Valley Construction, but rather was a partner in the enterprise along with Scott Pahos. Westphal appealed to LIRC. Concluding that Westphal was an employee, not a partner, LIRC awarded him benefits. The circuit court affirmed.

¶3 Resolution of this case turns on one question: whether David Westphal was an employee of Pleasant Valley Construction. This question presents mixed issues of law and fact. *See Michels Pipeline Constr., Inc. v. LIRC*, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995). The circumstances surrounding Westphal’s relationship to Pleasant Valley Construction present questions of fact. *See id.* We will uphold LIRC’s findings of fact if they are supported by substantial and credible evidence. WIS. STAT. § 102.23(6) (1999-2000).¹ LIRC’s conclusion that Westphal was an employee, not a partner, based on the facts presented is a question of law. *See id.* Where, as here, LIRC has expertise in an area—whether a person is an employee based on

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

the facts of the situation—we will accord LIRC’s decision on the issue great weight deference. *See UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284, 548 N.W.2d 57 (1996) (“Which level [of deference] is appropriate ‘depends on the comparative institutional capabilities and qualifications of the court and the administrative agency.’”).

¶4 LIRC concluded that Westphal was an employee because the evidence did not support UEF’s position that Pahos and Westphal mutually intended to form a partnership. “A partnership is an association of 2 or more persons to carry on as coowners a business for profit.” WIS. STAT. § 178.03(1). The supreme court has explained that there are four elements necessary to create a partnership under ch. 178: (1) the parties must intend to form a partnership and accept the legal requirements and duties necessary to such a relationship; (2) there must be a community of interest in the capital employed by the partnership; (3) each partner must have an equal voice in the management of the partnership operation; and (4) the profits and losses of the corporation must be shared and distributed. *Skaar v. DOR*, 61 Wis. 2d 93, 98-99, 211 N.W.2d 642 (1973).

¶5 With regard to the first element, LIRC found that there was no evidence that Westphal and Pahos had intended to accept the legal duties of a partnership. They had never discussed the federal and state tax filing requirements of a partnership and there was no financial structure, such as a checking account, that evidenced partnership. With regard to the second element, LIRC found that there was no capital investment into the partnership. With regard to the third element, LIRC found that Pahos individually secured the pole barn project from the customer, individually signed the contract, and controlled the money received from the customer. LIRC also found that Pahos was seen by all individuals who worked on the project as the person in charge. Finally, with regard to the fourth

element, LIRC found that there was no evidence that the profits and losses of Pleasant Valley Construction were shared and distributed, and there was no final accounting in the record from which distribution of profits or losses could be determined. Based on these factual findings, LIRC concluded that Westphal and Pahos had not mutually intended to form a partnership and that Westphal was an employee of Pleasant Valley Construction.

¶6 The UEF's argument is not, at bottom, that the facts found by LIRC are not supported by substantial and credible evidence. Instead, the UEF points to facts found by LIRC *that support a contrary legal conclusion*, such as the fact that Westphal was not paid by the hour and the fact that Westphal and Pahos discussed the project before Pahos signed the bid on behalf of Pleasant Valley Construction. According great weight deference to LIRC's decision, as we are required to do, we conclude that LIRC's legal conclusion that Westphal was an employee of Pleasant Valley is well-supported by the evidence and is not unreasonable. *See Theuer v. LIRC*, 2001 WI 26, ¶14, 242 Wis. 2d 29, 624 N.W.2d 110 (a decision entitled to great weight deference on review should be affirmed unless it is unreasonable). LIRC addressed each of the *Skaar* criteria and applied the facts of this case to those criteria.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

