COURT OF APPEALS
DECISION
DATED AND FILED

November 7, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1013 **Cir. Ct. No. 01-CV-2324**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DONALD FLOERCHINGER,

PLAINTIFF-APPELLANT,

V.

NESTLE TRANSPORTATION, TRANSPORTATION INSURANCE COMPANY, AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Donald Floerchinger appeals from an order affirming a decision of the Labor and Industry Review Commission (LIRC) on his worker's compensation claim. The issue is whether LIRC properly concluded that

Floerchinger was an independent contractor, and not an employee of Nestle Transportation, when he suffered a work-related injury. We affirm.

¶2 Floerchinger owned and operated a tractor used for hauling freight-loaded trailers. For several years he hauled freight exclusively for Nestle. Under the terms of Floerchinger's contract, which identified him as an independent contractor, Nestle provided the trailers to carry the loads, obtained necessary permits and licenses for his trips, provided a credit card for fuel purchases (but did not pay for them) and required him to rent and carry a satellite tracking system. The contract also required him to prominently display the name "Nestle" on his tractor. The contract forbade other freight hauling employment. Although Floerchinger could make assigned deliveries by any route he chose, Nestle paid him per mile based on its mileage calculation between the points of travel. On a limited number of short trips he received a flat fee. Floerchinger could refuse assignments, but doing so potentially reduced the number and desirability of future assignments. Additionally, Floerchinger claimed self-employment in his tax returns, and deducted office expenses, although he did not maintain an office outside his home. He paid his own expenses for trips, except tolls that Nestle deemed necessary.

¶3 Nestle used two types of drivers; those like Floerchinger pursuant to "independent contractor" agreements, and regular employees who received lower compensation for their trips, but who also received expenses and employee benefits such as pensions and medical insurance.

¶4 Independent contractors who meet certain criteria may not collect worker's compensation benefits. WIS. STAT. § 102.07(8)(b) (1999-2000).[1] There are nine such criteria, and one must meet all nine to forfeit worker's compensation protection. Section 102.07(8)(b)1-9. In this case, LIRC addressed each of the statutory criteria as follows.

¶5 (1) *Maintains a separate business with his or her own office, equipment, materials and other facilities*. Floerchinger owned the tractor, purchased a new one while driving for Nestle, and owned other accessory equipment such as a tools, tire chains, and flares. He did not have a formal office but "his home and his truck cab together" satisfied the office requirement. His exclusivity agreement with Nestle was voluntary, and was an independent business decision.

¶6 (2) *Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal and internal revenue service based on that worker's service in the previous year.* Floerchinger had a federal employer identification number and filed business tax returns.

¶7 (3) *Operates under contracts to perform specific services or work for specific amounts of money and under which an independent contractor controls the means of performing the services or work.* Floerchinger was paid based on the most direct routes for his deliveries, but was free to use other routes

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

if he so chose. He could refuse assignments. Nestle merely dictated the delivery deadline.

¶8 (4) *Incurs the main expenses related to the service or work that he or she performs under contract*. Floerchinger "paid for virtually every expense related to the services he performed under contract with Nestle." Nestle paid only certain necessary tolls.

¶9 (5) *Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service*. Floerchinger's contract expressly assigned liability to him. The fact that Nestle chose, for business purposes, not to invoke this contract provision on certain occasions did not remove Floerchinger's potential liability.

¶10 (6) *Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis*. Floerchinger received compensation on a per-job basis. Each job was independent.

¶11 (7) *May realize a profit or suffer a loss under contracts to perform work or service*. Floerchinger paid almost all expenses, and would suffer a loss if those expenses exceeded Nestle's fixed payment for a particular trip.

¶12 (8) *Has continuing or recurring business liabilities or obligations*. "No reasonable person could dispute the fact that the applicant had continuing and recurring business obligations in the operation of his trucking business."

¶13 (9) *The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures*. Floerchinger's sole means of profiting from his deliveries was to keep expenses below income.

His tax returns showed varying profit amounts, and a loss in one year of driving for Nestle.

¶14 Upon the findings and conclusions presented above, LIRC found that Floerchinger was ineligible for worker's compensation for his injury. The trial court's decision to affirm LIRC's conclusion resulted in this appeal. In it Floerchinger contends that LIRC erred by concluding that Floerchinger satisfied the first, third, and sixth criteria.

¶15 Our standard of review is as follows:

> When the question on appeal is whether a statutory concept embraces a particular set of factual circumstances, the court is presented with mixed questions of fact and law. The conduct of the parties presents a question of fact and the meaning of the statute a question of law. The application of the statute to the facts is also a question of law. However, the application of a statutory concept to a set of facts frequently also calls for a value judgment; and when the administrative agency's expertise is significant to the value judgment, the agency's decision is accorded some weight.

Michels Pipeline Constr., Inc. v. LIRC, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995) (quoting ***Applied Plastics, Inc. v. LIRC***, 121 Wis. 2d 271, 276, 359 N.W.2d 168, 171 (Ct. App. 1984)). Floerchinger contends that LIRC's errors were strictly ones of law, and we should therefore accord its decision no weight. However, in the trial court Floerchinger conceded that LIRC's decision should be accorded great weight. Under the great weight standard we uphold a reasonable statutory interpretation even if another interpretation is more reasonable. ***Lopez v. LIRC***, 2002 WI App 63, ¶10, 252 Wis. 2d 476, 642 N.W.2d 561.

¶16 Floerchinger first contends that his exclusivity contract with Nestle means that he did not satisfy the "separate business" requirement, as a matter of

law under binding supreme court precedent. He cites the following language in ***Employer Mutual Liability Insurance Co. v. DILHR***, 52 Wis. 2d 515, 520, 190 N.W.2d 907 (1971): "The evidence here reveals that [the claimant] had worked under lease agreements for [the company] and no one else for the past six years. This fact satisfies the requirement that he did not maintain a separate business." However, the ***Employer Mutual*** decision was decided under a vastly different test than the present WIS. STAT. § 102.07(8)(b) test. This court has noted that fact, and has declined to hold that an exclusive arrangement such as Floerchinger's precludes finding a separate business. *See* ***Jarrett v. LIRC***, 2000 WI App 46, ¶20 n.8, 233 Wis. 2d 174, 607 N.W.2d 326. We so hold in this case, as well. ***Employer Mutual*** is not binding precedent and the exclusivity of a person's employment does not by itself determine his or her independent contractor status. The remaining evidence provided LIRC a reasonable basis to conclude that Floerchinger maintained a separate hauling business with the equipment and facilities necessary to do so.

¶17 Floerchinger next contends that the evidence compelled the conclusion that he did not control the means of performing his deliveries. He notes numerous aspects of his trips that were dictated by Nestle. However, LIRC's decision to discount those aspects, and focus on other terms of the contractual relationship, was its prerogative. "We do not sift and weigh the evidence but, rather, examine the record for substantial and credible evidence to support LIRC's findings. *See* WIS. STAT. § 102.23(6)." ***Jarrett***, 2000 WI App 46 at ¶20. Floerchinger's freedom under the contract provides the necessary evidence under this standard, notwithstanding the contrary evidence he cites.

¶18 Floerchinger finally argues that he did not, under the agreement, receive compensation on a commission, per-job or competitive-bid basis. In his

view, the per-mile rate Nestle paid was not payment on a "per job basis." We disagree, as did LIRC. The per-mile rate was merely the tool used to compute the per-job payment. The fact remains that each trip Floerchinger made was an independent and separate transaction, and he was paid accordingly regardless of any other services he performed for Nestle. LIRC's conclusion that this qualified as a per-job payment is the only reasonable conclusion available.

By the Court.—Order affirmed.

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