COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 27, 1995

No. 95-2028

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

CRANBERRY SPRINGS, INC.,

Plaintiff-Respondent,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant,

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS,

Defendant.

APPEAL from an order of the circuit court for Washburn County: WARREN WINTON, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. The Labor and Industry Review Commission appeals an order of the circuit court reversing LIRC's decision that Cranberry Springs,

Inc., is liable for unemployment compensation contributions under ch. 108, STATS., for the years 1987, 1988 and 1989. At issue is whether Stanley Jonjak was an "employe" under § 108.02(12), STATS. If Stanley was not an employee, Cranberry would not have had sufficient agricultural employment to require Cranberry's compliance under Wisconsin's unemployment compensation law, ch. 108. *See* § 108.02(13)(c)1, STATS.[1] Because we conclude Stanley was an employee, we reverse the circuit court's order and affirm that part of LIRC's decision. However, because LIRC failed to make adequate findings of fact regarding certain payments to Stanley, we remand the case to the department for specific factual findings and a recalculation of Cranberry's contribution liability.

The background facts are undisputed. Cranberry operates a cranberry farm and is owned by members of the Jonjak family, including Stanley and Eric Jonjak. In 1985, Eric signed a management-caretaking contract under which he agreed to manage and operate Cranberry's marsh for the years 1986 and 1987. The contract provided that Eric would be solely responsible for all operating expenses of the marsh. In exchange for his services, Eric was paid $40,000 and received all of the proceeds from the sale of the cranberries. The contract also contained other provisions not relevant on appeal.

For the calendar year 1987, Eric and Stanley entered an agreement whereby Stanley would assume Eric's rights and obligations under the contract. Under this new agreement, Eric would receive proceeds from the crop harvested in 1986 and Stanley would receive proceeds from the 1987 crop. Additionally, Eric agreed to pay Stanley $20,000 for managing the marsh for 1987.

In July of 1987, the Department of Industry, Labor and Human Relations notified Cranberry that it had closed Cranberry's account in the Wisconsin Unemployment Reserve Fund because Cranberry did not have

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[1] Section 108.02(13)(c)1, STATS., provides in relevant part:

> Any employing unit which employs an individual in agricultural labor shall become an employer as of the beginning of any calendar year if the employing unit paid or incurred a liability to pay cash wages for agricultural labor which totaled $20,000 or more during any quarter in either that year or the preceding calendar year.

sufficient agricultural employment to require Cranberry's compliance under Wisconsin's unemployment compensation law, ch. 108, STATS. In 1990, the department conducted an audit and issued an initial determination that Cranberry had sufficient agricultural employment in the years 1987, 1988 and 1989 to require its compliance under ch. 108, largely due to payments it made to Stanley and Eric. Specifically, the department in two subsequent initial determinations found that Cranberry was liable for delinquent contributions, including late filing fees and interest, of approximately $13,000.

Cranberry appealed the department's initial determinations to the appeal tribunal, which issued findings of fact and conclusions of law affirming the department's initial determinations. Cranberry appealed to LIRC. LIRC affirmed in part and reversed in part, and remanded the case to the department for a recalculation of Cranberry's unemployment compensation contribution liability. Cranberry appealed LIRC's decision to the circuit court. The circuit court reversed LIRC's decision, determining that Cranberry owes no unemployment tax, penalty or interest. LIRC now appeals.

The first issue we address is whether Stanley was an "employe" under § 108.02(12), STATS., because if he was not an employee, Cranberry would not have had sufficient agricultural employment to require Cranberry's compliance under Wisconsin's unemployment compensation law, ch. 108.[2] *See* § 108.02(13)(c)1, STATS. Whether Stanley was an employee for unemployment contribution purposes requires a two-step analysis. *See* ***Keeler v. LIRC***, 154 Wis.2d 626, 631, 453 N.W.2d 902, 904 (Ct. App. 1990). Initially, it must be determined whether he performed services for pay; this burden falls on the department. *See* ***id***. If this is answered in the affirmative, the next step is to determine whether he is exempted by the provisions of § 108.02(12). *See* ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904. In order for employee status not to apply to Stanley, Cranberry must satisfy the two-part test under § 108.02(12)(b), STATS. *See* ***Larson v. LIRC***, 184 Wis.2d 378, 385, 516 N.W.2d 456, 459 (Ct. App. 1994). Section 108.02(12) provides in relevant part:

[2] Whether Eric was an employee under § 108.02(12), STATS., is not an issue before this court because LIRC concluded there was no evidence that Eric was paid any wages in 1987 or 1988 and, therefore, it modified the appeal tribunal decision to exclude any payments it had attributed to Eric in 1987 and 1988. LIRC acknowledges that on appeal, only Stanley's employment and wages are at issue.

> (a) "Employe" means any individual who is or has been performing services for an employing unit, in an employment, whether or not the individual is paid directly by such employing unit; except as provided in par. (b) or (e).
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> (b) Paragraph (a) shall not apply to an individual performing services for an employing unit if the employing unit satisfies the department as to both the following conditions:
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> 1. That such individual has been and will continue to be free from the employing unit's control or direction over the performance of his or her services both under his or her contract and in fact; and
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> 2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged.

The burden of proof is on Cranberry to demonstrate: (1) that it lacked control and direction over the alleged employee; and (2) that the services were performed by an individual customarily engaged in an independently established trade, business, or profession. *See* ***Larson***, 184 Wis.2d at 385, 516 N.W.2d at 459. If Cranberry fails to satisfy either part of the § 108.02(12)(b) test, Stanley is deemed an employee. *See* ***id***. at 385-86, 516 N.W.2d at 459.

Our scope of review is the same as the circuit court's, and we reach our decision without deference to that court's decision. ***Goldberg v. DILHR***, 168 Wis.2d 621, 626, 484 N.W.2d 568, 570 (Ct. App. 1992). The parties agree that under the appropriate standard of review, LIRC's factual findings may not be overturned unless they are unsupported by credible and substantial evidence.[3]

[3] LIRC points out that in ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 53, 330 N.W.2d 169, 173 (1983), our supreme court concluded that the enactment of § 102.23(6), STATS., providing that a circuit court may set aside the commission's findings of fact that are not supported by credible and substantial evidence, did not set a different standard than that approved in ***R.T. Madden, Inc. v. DILHR***, 43 Wis.2d 528, 547-48, 169 N.W.2d 73, 82 (1969), which stated that the test should be whether "there is any credible evidence in the record sufficient to support the finding." By concluding that we will uphold LIRC's findings if they are supported by substantial and credible evidence, we understand this to mean the standard articulated by our supreme court in ***Princess House***.

See ***Wisconsin Cheese Serv., Inc. v. DIHLR***, 115 Wis.2d 573, 576, 340 N.W.2d 908, 909 (Ct. App. 1983), citing § 102.23(6), STATS. Under this standard, if there is relevant, credible, and probative evidence upon which reasonable persons could rely to reach a conclusion, the finding must be upheld. ***Princess House, Inc. v. DIHLR***, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173-74 (1983). The determination whether a finding is supported by credible and substantial evidence must be made in light of the record as a whole. ***Wisconsin Cheese***, 115 Wis.2d at 576, 340 N.W.2d at 910. A finding is insufficiently supported if the evidence sought to be relied on is so discredited that it must be discarded as a matter of law. ***Id***.

While the parties agree on the standard for reviewing factual findings, they disagree on how this court should review LIRC's conclusions of law. LIRC argues we should give its conclusions great weight, while Cranberry suggests de novo review is appropriate in this case. Both positions find support in the law. This court has addressed the appropriate standard of review for conclusions of law in cases involving § 102.08(12)(b), STATS., and has issued conflicting determinations. In ***Larson***, this court concluded:

> Although great weight is given to the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying it, this deference is due only if "*the administrative practice [of applying the statute] is long continued, substantially uniform and without challenge by governmental authorities and courts.*" ... Our independent research shows that LIRC's application of this statute has not gone unchallenged by the courts. ... Thus, there is no clear administrative precedent regarding this issue. Therefore, we are not bound by LIRC's interpretation or application of the facts to this section, and we review this issue de novo.

Id. at 387-88, 516 N.W.2d at 459-60 (emphasis in original). However, a year later in ***Lifedata Medical Servs. v. LIRC***, 192 Wis.2d 663, 531 N.W.2d 451 (Ct. App. 1995), we concluded great weight was appropriate. We stated:

> LIRC has had extensive experience in interpreting § 108.02(12), STATS. Unemployment benefits are payable only to "employes"; therefore, each applicant for benefits must be examined to determine whether the individual is an "employe" entitled to benefits under §§ 108.03(1) and 108.04, STATS. Further, LIRC has had previous experience in determining whether individuals who are not payroll employees are nonetheless "employes" for the purposes of the unemployment compensation law.
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> In each of these cases, LIRC determined whether exemptions under § 108.02(12)(b), STATS., applied to professionals performing "on call" services for the employer. A review of these determinations convinces us that LIRC has applied its general expertise in determining whether an individual is an "employe" to fact situations very similar to those presented in this case. We therefore conclude that LIRC's determination that Lifedata exercises control and direction over its paramedical examiners is entitled to great weight.

Id. at 671-72, 531 N.W.2d at 455 (footnote omitted).

The parties have not addressed the apparent inconsistency in these two cases and, therefore, we decline to resolve the discrepancy between ***Larson*** and ***Lifedata***. Because our conclusion is the same under either standard, we will not reach this issue.

Whether Stanley's status under § 108.02(12), STATS., is a question of law or fact, or a mixed question, has also been the subject of conflicting treatment in the courts. LIRC points out that in ***Lifedata***, 192 Wis.2d at 670, 531 N.W.2d at 454, this court held that whether the examiners in question were employees as defined in § 108.02(12) is a question of law. Yet, our supreme court in ***Princess House***, 111 Wis.2d at 68, 330 N.W.2d at 180, suggested the issue is one of fact, concluding there was credible and substantial evidence in the record that the dealers involved failed to meet the test established in § 108.02(12)(b), STATS. A third position has also emerged, holding that whether an individual is an employee under § 108.02(12) is a mixed question of fact and

law. *See* ***Keeler***, 154 Wis.2d at 632, 453 N.W.2d at 904; *see also* ***Larson***, 184 Wis.2d at 386 n.2, 516 N.W.2d at 459 n.2 (concluding ***Princess House*** can be read to support the position that the issue is a mixed question). Because our conclusion is the same whether we review the issue as one of fact, law or mixed, we decline to resolve the discrepancy in these cases.

We begin by reviewing whether Stanley performed services for pay. *See* ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904. LIRC implicitly concluded he did and Cranberry does not contest this conclusion. Thus, our next step is to determine whether Stanley is exempted by § 108.02(12), STATS. *See* ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904. The burden of proof is on Cranberry to demonstrate: (1) that it lacked control and direction over Stanley; and (2) that the services were performed by an individual (Stanley) customarily engaged in an independently established trade, business or profession. *See* ***Larson***, 184 Wis.2d at 385, 516 N.W.2d at 459. Because Cranberry failed to demonstrate that it lacked control and direction over Stanley, we need not address whether the second requirement, § 108.02(12)(b)2, STATS., is satisfied.

The appeal tribunal found that during the time period covered by the initial determinations, Eric was Cranberry's president and Stanley was Cranberry's secretary/treasurer. LIRC adopted this finding and Cranberry does not dispute it. LIRC, in its memorandum opinion, concluded that an officer of a corporation who is serving the corporation in an employment capacity and is paid compensation from that corporation is an employe of the corporation, whether or not he controls it in his capacity as a stockholder. LIRC explained, "[I]t would be absurd to find that these individuals [Eric and Stanley] were free of the corporation's direction and control since they essentially were the corporation." We agree. Cranberry cannot claim that it lacked direction and control over Stanley when Stanley was an officer and, by virtue of his office, participated in the direction and control of the company.

Because it is undisputed that Stanley performed services for pay, *see* ***Keeler***, 154 Wis.2d at 631, 453 N.W.2d at 904, and because Cranberry has failed to meet its burden of proof under § 108.02(12)(b)1, STATS., we conclude Stanley was an employee for purposes of § 108.02(12)(a), STATS. *See* ***Larson***, 184 Wis.2d at 385-86, 516 N.W.2d at 459. Additionally, we note there are three additional, pertinent LIRC conclusions that have not been contested. First, LIRC concluded that the $20,000 Stanley received from Eric for performing the

management contract for 1987 constituted "wages," even though the payment was made in the form of debt forgiveness. Second, LIRC concluded that FICA payments Cranberry paid on behalf of its employees did not constitute "wages" and remanded the case to the department for a recalculation of contribution owed. Third, LIRC concluded there was no evidence Eric was paid any wages in 1987 or 1988 and, therefore, modified the appeal tribunal decision to exclude payments it had attributed to Eric and remanded the case to the department for a recalculation of contribution owed. Neither party challenges these conclusions on appeal and, therefore, we will not disturb them.

The only remaining issue is whether Cranberry paid wages of $20,000 or more in any one quarter in 1987, 1988 or 1989. Pursuant to § 108.02(13)(c)1, STATS., Cranberry must make unemployment compensation contributions for any calendar year in which $20,000 or more in wages is paid in any one quarter, and for any calendar year where the company satisfied this requirement in the preceding year. *See* § 108.02(13)(c)1, STATS. We begin by examining the year 1987. The $20,000 payment to Stanley in the form of debt forgiveness was paid for the first quarter in 1987. Thus, Cranberry must make contributions for the years 1987 and 1988.[4] *See* ***id***.

LIRC adopted the appeal tribunal's finding that in 1988 and 1989, Stanley received disbursements of $25,840 and $9,250, respectively. However,

[4] LIRC argues Cranberry is also liable for contributions in 1989 based on its subjectivity status in 1987. LIRC argues for the first time in its reply brief that once an employer becomes subject to ch. 108, STATS., it remains liable for contributions until its employer status is terminated under § 108.02(13)(i), STATS., which provides in relevant part: "An 'employer' shall cease to be subject to this chapter only upon department action terminating coverage of such employer." Under LIRC's analysis, because Cranberry in 1987 became an employer under § 108.02(13)(c)1, STATS., it would be liable for contributions thereafter until its coverage was terminated, regardless of whether it paid $20,000 in wages in any one quarter in subsequent years. However, interpreting the statute another way, one could argue that under the plain language of § 108.02(13)(c)1, Cranberry would only be liable for contributions in 1989 if it paid at least $20,000 in wages in any one quarter of 1988 or 1989.

Because LIRC did not address this issue in its decision, and because this issue was raised for the first time in LIRC's reply brief, we decline to decide which interpretation of the statutes is correct. Instead, it will be up to the department and LIRC to determine whether Cranberry will be required to make contributions for the year 1989, if on remand it determines there were wages paid in that year.

the appeal tribunal did not specify whether these payments were made in a single quarter, whether they constituted wages, or whether they were crop proceeds provided for in the management contract, which are excluded from the wage calculation as farm products or other goods or commodities. *See* LIRC's decision at 2. Therefore, we remand this case to the department for specific findings on the timing and nature of the payments to Stanley.

In conclusion, we reverse the circuit court's order concluding that Cranberry owes no unemployment taxes, penalties or interest for 1987-1989. Instead, we affirm LIRC's conclusion that Stanley was an employee under § 108.02(12), STATS., and that he was paid $20,000 in wages in the first quarter of 1987 in the form of debt cancellation. Furthermore, we have not altered LIRC's decision to send this case back to the department for a recalculation of contribution liability based on the exclusion of payments to Eric and FICA payments Cranberry paid on behalf of its employees. Additionally, because we conclude the appeal tribunal and LIRC failed to make adequate findings about the timing and nature of payments to Stanley, we remand the case to the department with specific instructions that it calculate Cranberry's contribution liability after it determines: (1) whether payments to Stanley other than the $20,000 debt forgiveness were wages or exempt payments of farm products or other goods or commodities; and (2) when wages were paid to Stanley.

By the Court.—Order reversed and cause remanded to the department with directions.

Not recommended for publication in the official reports.