COURT OF APPEALS
DECISION
DATED AND FILED

February 1, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 00-2533

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

NORDIC HILLS, INC. AND FIREMAN'S FUND INSURANCE COMPANY,

PLAINTIFFS-RESPONDENTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-CO-APPELLANT,

PAULINE L. HARPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Reversed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. Pauline L. Harper appeals the circuit court's reversal of a decision of the Labor and Industry Review Commission (LIRC) awarding her worker's compensation benefits after she was injured while performing services as a ski patroller for Nordic Hills. Because we conclude that LIRC's conclusion that Harper was an employee within the meaning of WIS. STAT. § 102.07(4) (1997-98)[1] was reasonable and that the administrative law judge (ALJ) did not erroneously exercise his discretion in scheduling a second hearing after Harper did not appear at the first, we reverse the decision of the circuit court and affirm LIRC's decision.

BACKGROUND

¶2 Harper sought worker's compensation benefits for an injury she sustained while patrolling the ski slopes at Nordic Hills on January 31, 1998. Nordic Hills denied the existence of an employer-employee relationship, and the matter proceeded to a hearing before an ALJ. Harper did not appear at the hearing, which was scheduled for November 16, 1998. The ALJ scheduled a second hearing for March 12, 1999, at which time he ruled that Harper's absence from the November 16 hearing was due to a legitimate and justified reason and that Nordic Hills was not prejudiced by the delay. Therefore, he accepted additional evidence, including Harper's testimony.

¶3 Harper and Nordic Hills agreed, and the ALJ found, that Harper was a member of the National Ski Patrol (NSP) who patrolled at Nordic Hills. She had applied for the job through the director of the Nordic Hills chapter of the NSP.

[1] All further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Harper worked a specific schedule drawn up by the ski patrol director, and her duties included opening the ski runs in the morning, clearing the ski runs of dangerous objects, patrolling the slopes for dangerous behavior, assisting injured skiers, completing accident reports, and operating the ski corral. As a ski patroller, Harper received a season ski pass for herself and her daughter, free beverages, food discounts, and discount vouchers for ski equipment from Nordic Hills.

¶4 Conflicting evidence was received over the relationship between Nordic Hills and the NSP. The ALJ found that Nordic Hills was a member of the National Ski Areas Association (NSAA), a trade association for ski area owners and operators. The ALJ found that the Joint Statement of Understanding between the NSP and the NSAA and the actual relationship of the parties established that: (1) Harper, as an NSP patroller, was under Nordic Hills's supervision and bound to abide by its policies and procedures; (2) Nordic Hills could dismiss any patroller at any time; (3) Nordic Hills had the ultimate right to supervise and control many of Harper's patrolling activities; (4) the benefits that Nordic Hills gave Harper constituted payment for hire; (5) Harper provided services to Nordic Hills that Nordic Hills required in order to operate its business; and (6) Harper's hire was pursuant to an implied contract. As a result, the ALJ concluded that Harper was an employee of Nordic Hills within the meaning of WIS. STAT. § 102.07(4) and that she was entitled to worker's compensation benefits.

¶5 LIRC, with one commissioner dissenting, adopted the ALJ's findings of fact and conclusions of law. Nordic Hills appealed to the circuit court, which reversed, concluding that LIRC's determination that a contract for hire existed was without a factual basis. LIRC appeals the decision of the circuit court.

DISCUSSION

Standard of Review.

¶6 We review the administrative agency's decision rather than that of the circuit court. ***Currie v. DILHR***, 210 Wis. 2d 380, 386, 565 N.W.2d 253, 256 (Ct. App. 1997). Whether an individual is an "employee" within the meaning of WIS. STAT. § 102.07(4) is a mixed question of fact and law that requires the application of a statutory standard to findings of fact. ***Village of Prentice v. DILHR***, 38 Wis. 2d 219, 221-22, 156 N.W.2d 482, 483 (1968). LIRC's factual findings must be upheld on review if there is credible and substantial evidence in the record on which reasonable persons could rely to make the same findings. ***Currie***, 210 Wis. 2d at 386-87, 565 N.W.2d at 256-57; WIS. STAT. § 102.23(6). We may not substitute our judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. ***Advance Die Casting Co. v. LIRC***, 154 Wis. 2d 239, 249, 453 N.W.2d 487, 491 (Ct. App. 1989). Rather, we must examine the record for credible and substantial evidence that supports the agency's determination. ***Currie***, 210 Wis. 2d at 387, 565 N.W.2d at 257.

¶7 Once the facts are established, however, the determination of whether those facts fulfill the statutory standard is a legal conclusion. ***Keeler v. LIRC***, 154 Wis. 2d 626, 632, 453 N.W.2d 902, 904 (Ct. App. 1990). Therefore, we will review LIRC's determination that Harper was an employee of Nordic Hills as a conclusion of law. We are not bound by an agency's conclusions of law in the same manner as by its factual findings. ***West Bend Educ. Ass'n v. WERC***, 121 Wis. 2d 1, 11, 357 N.W.2d 534, 539 (1984). However, we may nonetheless defer to the agency's legal conclusion.

¶8 An agency's interpretation or application of a statute may be accorded great weight deference, due weight deference or *de novo* review, depending on the circumstances. ***UFE, Inc. v. LIRC***, 201 Wis. 2d 274, 284, 548 N.W.2d 57, 61 (1996). We accord great weight deference only when all four of the following requirements are met: the agency was charged by the legislature with the duty of administering the statute; the interpretation of the agency is one of long standing; the agency employed its expertise or specialized knowledge in forming the interpretation; and the agency's interpretation will provide uniformity and consistency in the application of the statute. ***Id.*** Under the great weight standard, we will uphold an agency's reasonable interpretation that is not contrary to the clear meaning of the statute, even if we determine that an alternative interpretation is more reasonable. ***Id.*** at 287, 548 N.W.2d at 62.

¶9 We will accord due weight deference when "the agency has some experience in an area, but has not developed the expertise which necessarily places it in a better position to make judgments regarding the interpretation of the statute than a court." ***Id.*** at 286, 548 N.W.2d at 62. The deference allowed an administrative agency under due weight review is accorded largely because the legislature has charged the agency with the enforcement of the statute in question. ***Id.*** Under this standard, we will not overturn a reasonable agency decision that furthers the purpose of the statute unless we determine that there is a more reasonable interpretation under the applicable facts than that made by the agency. ***Id.*** Finally, we will employ *de novo* review when the legal conclusion reached by the agency is one of first impression or when the agency's position on the statute has been so inconsistent as to provide no real guidance. ***Id.***

¶10 "The correct test under Wisconsin law is whether LIRC has experience in interpreting a particular statutory scheme, not whether it has ruled

on precise, or even substantially similar, facts before." ***Town of Russell Volunteer Fire Dep't v. LIRC***, 223 Wis. 2d 723, 733, 589 N.W.2d 445, 451 (Ct. App. 1998). Here, LIRC is interpreting the statutory scheme outlined in ch. 102 of the Wisconsin Statutes. LIRC has administered the worker's compensation statutes for more than eighty years and, as a consequence, it has developed considerable expertise. ***Id.*** at 733-34, 589 N.W.2d at 451. Furthermore, LIRC's interpretation provides uniformity and consistency in the application of the law. Applying these criteria, we conclude that LIRC's decision that Harper was a ch. 102 employee must be given great weight deference. Accordingly, we will sustain LIRC's interpretation of the statute if it is reasonable, even though another interpretation might be more reasonable. ***Harnischfeger Corp. v LIRC***, 196 Wis. 2d 650, 661, 539 N.W.2d 98, 102 (1995).

¶11 We review Nordic Hills's claim that the ALJ erred in scheduling a second hearing under an erroneous exercise of discretion standard. ***Verhaagh v. LIRC***, 204 Wis. 2d 154, 160, 554 N.W.2d 678, 680 (Ct. App. 1996). Therefore, we will sustain the ALJ's exercise of discretion if it "was made based upon the relevant facts by applying a proper standard of law and represents a determination that a reasonable person could reach." ***Id.***

Employee Status.

¶12 Under the Worker's Compensation Act, the status of an employee is defined in WIS. STAT. § 102.07. This case focuses on the definition set out in subsection (4). Section 102.07 states in relevant part:

> "Employee" as used in this chapter means:
>
> …

> **(4)** (a) Every person in the service of another under any contract of hire, express or implied, all helpers and assistants of employes, whether paid by the employer or employe, if employed with the knowledge, actual or constructive, of the employer, including minors, who shall have the same power of contracting as adult employes ….

The supreme court has interpreted § 102.07(4) to require a contract of hire, express or implied, as an essential element of the definition of an employee. ***Lange v. DILHR***, 40 Wis. 2d 618, 623, 162 N.W.2d 645, 648 (1968). Furthermore, in order to establish a contract to render service for another, the latter must have the right under the contract to control the details of the work. ***Enderby v. Industrial Comm'n***, 12 Wis. 2d 91, 93, 106 N.W.2d 315, 316 (1960).

¶13 Nordic Hills disputes whether the ALJ correctly found that it had the right to control the details of Harper's work, and it challenges LIRC's determination that an implied contract for hire existed between Nordic Hills and Harper, claiming there was no mutual intent to contract for employment.[2] Nordic Hills first objects to LIRC's finding that it had the right to control Harper's daily activities.

¶14 The principal test for determining whether a ch. 102 employer-employee relationship exists is whether the alleged employer had the right to control the details of the employee's work. ***Kress Packing Co. v. Kottwitz***, 61 Wis. 2d 175, 182, 212 N.W.2d 97, 100 (1973). In making this determination, four secondary factors are considered: Whether there is "(1) [t]he direct evidence of the exercise of the right to control; (2) … payment of compensation; (3) the furnishing of equipment or tools for the performance of the work; and (4) the right

[2] Nordic Hills does not contest the finding that Harper acted "in the service of another;" therefore, we will not address that issue.

to fire or terminate the relationship." ***Id.*** at 182, 212 N.W.2d at 100-01. It is immaterial whether the alleged employer exercised the control as long as it had the right to do so. ***Village of Prentice,*** 38 Wis. 2d at 223, 156 N.W.2d at 484.

¶15 In regard to the issue of control, LIRC affirmed the findings of the ALJ. The ALJ found: (1) according to paragraph 1 of the Joint Statement of Understanding, an NSP ski patrol is under the supervision of the ski area management and must abide by the policies and procedures established by management; (2) patrollers had to obtain Nordic's permission to set up the ski corral; (3) if Nordic Hills required the patrollers to carry certain equipment, such as flashlights, and a patroller refused to do so, Nordic Hills had the right to remove the patroller from the premises; (4) Nordic Hills had the right to remove a patroller for intoxication; (5) Nordic Hills paid Harper with ski passes for her and her daughter and granted her discounts on food and free beverages; (6) Nordic Hills furnished some of the patrollers' equipment such as the telephone used for emergency calls and some toboggans; and (7) Nordic Hills had the right to ban any patroller from the premises, thereby terminating his or her employment. Those findings support all of the secondary factors of control set out in ***Kress***. Furthermore, our review of the record persuades us that there is substantial and credible evidence to support the factual finding that Nordic Hills had the right to control the details of Harper's work.

¶16 Nordic Hills also challenges LIRC's conclusion that a contract of hire existed, alleging there was no mutual agreement to contract for employment. To establish a ch. 102 employment relationship, there is no need for direct communication between the prospective employer and the prospective employee. ***Lange***, 40 Wis. 2d at 624, 162 N.W.2d at 648. However, a contract of hire cannot exist unless the employer pays the employee for the services performed, but the

payment need not be in money. ***Klusendorf Chevrolet-Buick, Inc. v. LIRC***, 110 Wis. 2d 328, 335, 328 N.W.2d 890, 894 (Ct. App. 1982).

¶17 LIRC found that Nordic Hills made payment for Harper's services by giving her season ski passes for herself and her daughter, free beverages, food discounts, and discount vouchers for ski equipment. LIRC also concluded that that the payment was pursuant to an implied contract. It did so by affirming the findings of the ALJ, who described the facts relevant to that conclusion:

> The Joint Statement of Understanding established …: (1) that [Harper], as a patroller, was under the supervision of Nordic and was bound to abide by the policies and procedures established by Nordic; (2) that Nordic had the right to dismiss any patroller, including [Harper], at any time; and (3) that Nordic had the ultimate right to supervise and control many of [Harper's] patrolling activities.
>
> Aside from the Joint Statement of Understanding, however, the actual relationship between [Harper] and Nordic also revealed an implied contract of hire. In order to become a patroller at Nordic's ski resort, [Harper] was required to complete a questionnaire regarding her qualifications. She obtained this questionnaire at the first aid station located on Nordic's premises. Thus, she applied for the job. Then the ski patrol director, also a NSP member, made the hiring decision. … Nordic, not the patrol director, issued applicant a free ski pass which she picked up at the pro shop. Thus, Nordic had knowledge of the hiring.
>
> After being hired, [Harper] worked specific hours and days according to a schedule developed by the patrol director. Unlike a volunteer, she was not free to set her own hours or come and go as she pleased. Both [Harper] and Nordic mutually understood the scope of her duties, which included, but were not limited to, opening up the ski runs in the morning, clearing the ski runs of dangerous obstacles, patrolling the slopes for dangerous behavior, assisting injured skiers, completing accident reports, and operating the ski corral. Nordic acquiesced in [Harper's] performance of all these duties.

¶18 All of the facts that LIRC affirmed are supported by credible and substantial evidence. Nordic Hills did not dispute Harper's testimony regarding the hiring process, her duties, or the terms of compensation. Because LIRC's findings of fact as affirmed from the ALJ's decision are supported by credible and substantial evidence, we may not set them aside. WISCONSIN STAT. § 102.23(6). Furthermore, given the facts found, LIRC's conclusion that Harper was an employee under an implied contract of hire with Nordic Hills is reasonable. Therefore, applying great weight deference to LIRC's interpretation of what constitutes a ch. 102 contract of hire, we affirm its determination.[3] Accordingly, we conclude that LIRC's determination that Harper was a ch. 102 employee of Nordic Hills is reasonable, and we affirm it as well.

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[3] Nordic Hills argues that we should follow the rule of ***Hoste v. Shanty Creek Mgmt., Inc***., 592 N.W.2d 360 (Mich. 1999). Hoste, an NSP patroller injured in the course of his duties, received benefits similar to those Harper received. The Michigan Supreme Court concluded that a contract of hire did not exist:

> [T]o satisfy the "of hire" requirement, compensation must be payment intended as wages, i.e., real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer.
>
> Keeping in mind these principles, we do not believe that the contract in this case was one "of hire." The privileges plaintiff received for patrolling were not a payment intended as wages because they were not substantial enough to induce a reasonable person to forfeit his common-law rights against Shanty Creek.

Id. at 366.

We decline to follow the reasoning in ***Hoste***. Because "Wisconsin's Worker's Compensation Act has its own set of policy values unassociated with other states' worker's compensation statutes," we do not look to other states' case law in interpreting Wisconsin's Act. ***Town of Russell Volunteer Fire Dep't v. LIRC***, 223 Wis. 2d 723, 737, 589 N.W.2d 445, 452 (Ct. App. 1998). To illustrate this point, ***Hoste*** relies on the proposition that a payment may be wages only if it is substantial enough to induce a reasonable person to forfeit common-law rights, a proposition not found in Wisconsin law.

Second Hearing.

¶19 Nordic Hills also asserts that the ALJ lacked the authority to schedule a second hearing to determine whether Harper's failure to attend the first hearing was excusable. As a result, Nordic Hills argues her claim should have been denied because there was no evidence presented at the first hearing that showed that she was performing ski patrol duties when she was injured. We disagree.

¶20 Authority to schedule hearings and to obtain evidence necessary for the effective administration of the Worker's Compensation Act rests with the Worker's Compensation Division. WISCONSIN STAT. § 102.18; WIS. ADMIN. CODE § DWD 80.12. An agency is afforded discretion to interpret its own rules of procedure established to carry out the tasks ascribed to it by the legislature. ***Verhaagh***, 204 Wis. 2d at 160, 554 N.W.2d at 680. Therefore, we review whether the ALJ erred in permitting evidence to be taken at a second hearing under the erroneous exercise of discretion standard. The burden of proof on this issue rests with the party claiming that the exercise of discretion was erroneous. ***Id.***

¶21 In deciding a worker's compensation claim, an ALJ is to "secure the facts in as direct and simple a manner as possible." WIS. ADMIN. CODE § DWD 80.12. When Harper did not appear at the November 16 hearing, the ALJ denied the request of Harper's attorney for an adjournment. In post-hearing briefs, Harper's counsel asked for a hearing to address whether Harper's failure to appear was excusable. The ALJ set a hearing for March 12, 1999. At that hearing, Harper testified that she had written the wrong date on her calendar and that she did not realize her error until her attorney called her at 4:00 p.m., by which time it was too late to arrange another child care worker for the children in her care. The

ALJ found that Harper's error in writing the wrong date in her calendar was a legitimate and justified reason for her non-appearance and that Nordic Hills was not prejudiced by the delay. The ALJ then allowed Harper and another witness to testify.

¶22 The ALJ considered all the facts relative to Harper's reason for failing to appear, which are undisputed, and he examined whether Nordic Hills would be prejudiced by permitting additional testimony. Thereafter, he concluded that he should continue to gather facts relevant to the controversy between the parties. The ALJ's decision furthered the goal of securing the facts necessary to resolve the dispute in as direct and simple a manner as possible and was a decision a reasonable ALJ could have reached. Accordingly, we conclude the ALJ did not erroneously exercise his discretion.

CONCLUSION

¶23 Because we conclude that LIRC's conclusion that Harper was an employee within the meaning of WIS. STAT. § 102.07(4) was reasonable and that the ALJ did not erroneously exercise his discretion in scheduling a second hearing after Harper did not appear at the first, we reverse the decision of the circuit court and affirm LIRC's decision.

By the Court.—Judgment reversed.

Not recommended for publication in the official reports.