

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 14, 1996

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

NOTICE

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

No. 95-1355

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

THOMSON NEWSPAPERS (WISCONSIN), INC.,

Plaintiff-Respondent,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION and
WISCONSIN DEPARTMENT OF INDUSTRY, LABOR and
HUMAN RELATIONS,**

Defendants-Appellants.

APPEAL from an order of the circuit court for Dane County:
ROBERT R. PEKOWSKY, Judge. *Reversed and cause remanded with directions.*

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby,
Reserve Judges.

PER CURIAM. The Labor and Industry Review Commission (LIRC or "the commission") and the Department of Industry, Labor and Human Relations (DILHR) appeal from a circuit court order reversing LIRC's decision. The circuit court held that newspaper bundle haulers are not newspaper

employees because they fall under the "newsboy" exception of § 108.02(15)(k)4, STATS. We conclude that the circuit court erred in applying the standard of review. We reverse the circuit court and remand to that court with instructions to reinstate LIRC's decision.

BACKGROUND

In 1991, DILHR initially determined that Thomson Newspapers, Inc. owed unemployment compensation taxes for income paid to its newspaper bundle haulers in various previous years. Thomson appealed this determination to a DILHR appeal tribunal which was conducted by an administrative law judge (ALJ). Thomson argued that bundle haulers fit under § 108.02(15)(k)4, STATS., which provides in relevant part: "'Employment' as applied to work for a given employer ... does not include service ... [a]s an individual selling or distributing newspapers or magazines on the street or from house to house." The ALJ agreed with Thomson and reversed. The ALJ found that the bundle haulers were not employees. However, LIRC held that bundle haulers are not exempt under § 108.02(15)(k)4 and are employees subject to unemployment compensation taxes. The circuit court reversed LIRC and found that the exemption applies and that bundle haulers are not employees subject to unemployment compensation taxes. Because we conclude that the circuit court erred, we reverse its order.

The parties agree that newspaper bundle haulers pick up newspapers from a paper's loading dock and distribute them in bundles to various locations, typically street corners. Bundle haulers devote a small amount of their time (10%) to delivering papers to individual sales outlets such as vending machines and commercial establishments. The bundles delivered to street corners are subsequently picked up by "motor carriers" who distribute papers to individual residences. The parties do not dispute that the motor carriers fit under the exemption. The disagreement is whether the bundle haulers do.

STANDARD OF REVIEW

In an unemployment compensation case, we review the decision of the commission, not that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). We will set the factual findings aside only if the commission acted without or in excess of its powers, if the award was procured by fraud, or if the commission's findings do not support the order or award. Section 102.23(1)(e), STATS. We examine the entire record to determine whether there is substantial and credible evidence which could support the findings, *Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54, 330 N.W.2d 169, 173-74 (1983), not whether there is evidence to sustain a finding not made, *Mednicoff v. DILHR*, 54 Wis.2d 7, 18, 194 N.W.2d 670, 675-76 (1972). If there is evidence upon which reasonable people could rely in reaching the conclusion, we must affirm. *Princess House*, 111 Wis.2d at 54, 330 N.W.2d at 173.

ANALYSIS

The parties point to various indicia of the haulers' working conditions to support their conflicting claims. In support of its argument that haulers are not employees, Thomson points out that the haulers fit under the § 108.02(15)(k)4, STATS., exemption because they "distribute" papers "on the street." Thomson also argues that bundle haulers are not employees because they drive their own vehicles, are free from any work rules, have no sick or vacation days, have their income reported on 1099 forms rather than W2 forms, and under National Labor Relations Board decisions, are not "employees" under federal common law.

LIRC argues that the exemption does not apply because bundle haulers distribute papers "to" the street for further delivery, as opposed to "on the street" to individual houses. LIRC also argues that haulers are employees because they have little practical independence, their operations are "integrated" with the newspapers', they do not advertise, and they have little entrepreneurial risk.

In view of our standard of review, we must affirm LIRC. LIRC determined that bundle haulers are employees. In so doing, it set forth its reasons on the record. The stated reasons rely upon criteria which "reasonable people" could use to come to the same decision LIRC reached. See *Princess*

House, 111 Wis.2d at 54, 330 N.W.2d at 173. The record shows that the haulers are employees in view of their financial dependence on the newspapers for which they work, their lack of entrepreneurial risk, and their failure to advertise. This constitutes substantial and credible evidence to support LIRC's decision. See *id.* at 54, 330 N.W.2d at 173. We recognize that other decisions could be made, but we do not search the record for evidence to sustain a finding not made. *Mednicoff*, 54 Wis.2d at 18, 194 N.W.2d at 675-76.

Thomson argues that we should not grant deference to LIRC because it has little experience in determining whether bundle haulers are employees. We disagree. LIRC's expertise lies in determining whether Wisconsin workers are "employees." Cf. *School Dist. of Drummond v. WERC*, 120 Wis.2d 1, 7, 352 N.W.2d 662, 666 (Ct. App. 1984). If LIRC's decisions were worthy of deference only if it had previously ruled on the particular type of worker at issue in any case, the legislature would not have made LIRC's decisions presumptively controlling. See § 102.23(1)(e), STATS.

Because we find no reason to reject LIRC's conclusion, we reverse the circuit court and remand with instructions to reinstate LIRC's decision.

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

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.