COURT OF APPEALS
DECISION
DATED AND FILED

December 4, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0731

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

GOODYEAR TIRE & RUBBER CO.,

PLAINTIFF-RESPONDENT,

V.

LABOR & INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

WAYNE A. HENDERSON,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Reversed.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. The Labor and Industry Review Commission (LIRC) appeals a circuit court order made pursuant to §§ 108.09(7) and 102.25,

STATS., which set aside and remanded a decision LIRC had made granting unemployment compensation benefits to Wayne A. Henderson. However, because there is substantial and credible evidence in the record to support LIRC's finding that Henderson was able and available to work at least 15% of the suitable jobs in his labor market area, we reverse the order of the circuit court and reinstate LIRC's grant of benefits to Henderson.

BACKGROUND

Wayne Henderson worked as a team leader and store manager for the Goodyear Tire & Rubber Company for approximately six years. Prior to his management experience, he had been an automobile salesman and a tire repairman. He had a high school diploma, and had taken a few college business courses, but he had no other specialized training or skills. In January of 1995, he injured his shoulder, neck and back on the job, while breaking down steel equipment with a sledgehammer. On April 14, 1995, he re-injured his back lifting tires. He tried to return to work April 17, 1995, but was physically unable to perform his job duties. Shortly thereafter, Goodyear suspended, and then terminated Henderson.[1]

Henderson filed a claim for unemployment compensation benefits on May 8, 1995. At that time, his doctor had released him to do light duty work, but advised that he was unable to perform any repetitive pushing, pulling, bending, twisting or lifting. He further restricted him to lifting or carrying no more than ten pounds. On June 2, 1995, DILHR made an initial determination that Henderson

[1] Goodyear apparently contested, in a separate proceeding, whether Henderson's termination was for cause or the result of a workplace injury, but that issue is not before us on this appeal.

was ineligible for unemployment compensation because he was unable to perform at least 15% of the suitable jobs in his labor market as of week nineteen in 1995. Henderson appealed, and a hearing was held before an administrative law judge (ALJ). On August 22, 1995, the ALJ reversed the initial determination and granted benefits. This time, Goodyear appealed. On November 8, 1995, the commission remanded the matter for additional testimony regarding Henderson's ability to perform suitable jobs. On February 16, 1996, the commission reversed the tribunal's decision, thereby denying benefits. However, on May 3, 1996, after reconsideration, the commission issued an amended decision reversing itself and granting benefits, because it had made a mathematical error in its initial determination. Goodyear petitioned for judicial review. The circuit court set aside the commission's decision and remanded the matter to LIRC because it concluded that LIRC's decision depended on a factual finding regarding the percentage of suitable jobs in the Milwaukee area job market that was not adequately supported in the record. Determination of the correct percentage of jobs suitable for Henderson is the major issue on appeal.

A labor market analyst, Ronald Ramlow, testified at two hearings. It was his opinion that there were roughly 700,000 jobs in the Milwaukee area job market. These jobs included more than 15,000 individual job titles, but could be classified into ten to twelve general categories of jobs. Ramlow stated that Henderson was qualified to work in five of these general categories: sales; service; clerical; factory and professional/technical/managerial.[2] He explained that

[2] The circuit court took Ramlow's later testimony that there were other categories which might include truck driver or laborer to mean that there might be some other suitable *jobs* available, in apparent conflict with his testimony that there were only five *categories* of jobs Henderson was qualified to perform.

sales jobs comprised 9% of the entire Milwaukee area labor market, service jobs comprised 18% of the market, clerical jobs comprised 17% of the market, factory jobs comprised 16% of the market, and professional/technical/managerial jobs comprised 26% of the market. He did not break down the remaining 14% of the jobs into categories of jobs which Henderson, by implication, was not qualified to perform.

Henderson was physically able to perform only sedentary jobs because they required lifting no more than ten pounds and no repetitive bending, etc. In this regard, Ramlow testified that 9% of the sales jobs were sedentary, as were 2% of the service jobs, 63% of the clerical jobs, 3% of the factory jobs, and 41% of the professional/technical/managerial jobs. Ramlow also noted that, although 41% of the professional/technical/managerial jobs were sedentary, Henderson would be able to perform only 5% of all of the professional/ technical/managerial jobs because the remainder required a college degree, which Henderson did not have.

Based on this record, LIRC found that Henderson was suspended in week fifteen of 1995 because he was unable to do suitable work for the employer. It also found that 86% of the jobs in the general Milwaukee area labor market were suitable for Henderson, and further concluded that as of week nineteen of 1995, he was able and available to work 15.88% of those jobs. Goodyear maintains on appeal that the 86% figure and the 15.88% figure are not supported by credible evidence in the record; first, because 14% of jobs in the market were unaccounted for, and second, because Ramlow failed to testify as to what percentage of each suitable category was actually comprised of suitable jobs.

DISCUSSION

Standard of Review.

This court reviews the administrative agency's decision rather than that of the circuit court. ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981). LIRC's factual findings must be upheld on review if there is any credible and substantial evidence in the record upon which reasonable persons could rely to make the same findings. *See* ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983); § 227.57(6), STATS. A reviewing court may not substitute its judgment for that of the agency as to the weight or credibility of the evidence on any finding of fact. *See* ***Advance Die Casting Co. v. LIRC,*** 154 Wis.2d 239, 249, 453 N.W.2d 487, 491 (1989); § 227.57(6). Rather, it must examine the record for credible and substantial evidence which supports the agency's determination.

Suitable Work.

The unemployment compensation statutes limit eligibility for benefits to those formerly employed who are both able to work and available for work. Section 108.04(1)(b), STATS.[3] The standard for determining when an employee is able and available for work is further refined in the Wisconsin Administrative Code:

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[3] Section 108.04(1)(b), STATS., provides in relevant part:

> An employe is ineligible for benefits:
>
> 1. While the employe is unable to work, or unavailable for work, if his or her employment with an employer was suspended by the employe or by the employer or was terminated by the employer because the employe was unable to do, or unavailable for, suitable work otherwise available with the employer.
> 2.

> (2) A claimant is not considered to be able to work or available for work in any given week if:
>
> …
>
> (b) The claimant's physical condition or personal circumstances over which the claimant has no control limit the claimant to less than 15% of the opportunities for suitable work, including all such jobs whether vacant or filled, in the claimant's labor market area….

WIS. ADM. CODE § ILHR 128.01(2)(b).[4] Suitable work is administratively defined as "work that is reasonable considering the claimant's training, experience, and duration of unemployment as well as the availability of jobs in the labor market." WIS. ADM. CODE § ILHR 100.02(1)(q).[5] The labor market area is administratively defined as "a geographical area in which there are jobs deemed to be suitable work for the claimant and which encompasses the geographical area in which workers with similar occupational skills customarily travel to obtain or perform suitable work." WIS. ADM. CODE § ILHR 100.02(1)(i).[6]

The parties agree that Henderson's labor market area was southeastern Wisconsin (including Milwaukee, Waukesha, Ozaukee and Washington counties), and that he was physically restricted to sedentary jobs during the claimed benefit weeks in question. They also agree that the determination of the percentage of suitable work which he was able to perform requires application of a mathematical formula, in which the percentage of each suitable type of job which Henderson was physically able to perform would be multiplied by the percentage of that type of job in the entire labor market area, and the resulting percentage figures would be summed and then divided by the ratio of

[4] This section has been renumbered to DWD 128.01(2)(b).

[5] This section has been renumbered DWD 100.02(61).

[6] This section has been renumbered DWD 100.02(35).

suitable work to all work in the labor market area. They disagree whether Henderson's physical restrictions permitted him to perform at least 15% of the opportunities for suitable work in the Milwakuee area, because they disagree about whether LIRC used the correct suitable work ratio for its calculation. In other words, Goodyear would have this court set aside the finding that Henderson was qualified for only 86% of the jobs in his labor market area.

LIRC calculated the percentage of suitable work which Henderson was able and available to perform as follows:

Category suitable for W.H.	**% of category W.H. could perform**		**% of category in labor market area**		**% of all labor market area jobs W.H. could perform**	**% of suitable jobs which W.H. could perform**
Sales	9%	x	9%	=	0.81%	
Service	2%	x	18%	=	0.36%	
Clerical	63%	x	17%	=	10.71%	
Factory	3%	x	16%	=	0.48%	
Prof/Tech/Mgmt	5%	x	26%	=	1.3%	
			86%		13.66%	13.66% ÷ 86% 15.88%

Goodyear challenges this calculation on the grounds that it fails to include other types of jobs which may have been suitable for Henderson.

Goodyear first points to the following exchange in the record:

> Q: So your conclusion today that someone with a high [school] diploma and years of business, a couple of years of training, and but with his sedentary

> restrictions, is only eligible for 3 percent[7] of the jobs in the marketplace?
>
> A: Those categories that we were talking about the professional, technical and managerial, sales, clerical, factory, et cetera—
>
> Q: How about the entire marketplace, is there other jobs that we didn't get into? How about store clerk, what, whatever else we didn't—
>
> A: Well, that's part of sales.
>
> Q: Okay, are there other (one word unintelligible)—
>
> A: You know, that would be some of the other ones, miscellaneous, which is like truck driving or laborer.

Goodyear claims that this exchange shows that 14% of the jobs in the relevant labor market area were not included in one of the five categories established by Ramlow, and therefore, LIRC's calculation is in error. However, aside from the fact that Ramlow never said Henderson was suited by training and education to perform any of these other jobs, Goodyear's argument also ignores Ramlow's earlier testimony:

> Q: Do you recall Mr. Henderson's testimony identifying the types of work he has performed and his educational and training background?
>
> A: Yes.
>
> Q: Using that information could you identify the types of work he's qualified to perform.
>
> A: Sales, management, service when he said he was mounting tires, whatever, back an x number of years ago and I think he could do clerical work also, filing, a minimum of clerical duties so I think those four, sales,

[7] This 3% figure, which directly contradicts the expert's 16% figure from the first hearing, was the expert's "guess" at the remand hearing, made without the benefit of a calculator. LIRC was entitled to give more weight to the original figure arrived at through a demonstrated application of raw data.

> management, service and clerical. Well he could do factory too, you could add that too.

Thus, taken in conjunction with Ramlow's testimony that there were ten to twelve different categories of jobs available in the Milwaukee area job market, a reasonable person could rely on this evidence, as did LIRC, for the conclusion that the five categories named by Ramlow were the *only* categories containing work which it would be reasonable to expect Henderson to perform given his training and experience.

Goodyear nonetheless maintains that even if Henderson were qualified only for certain categories in general, he might be qualified to perform some miscellaneous jobs within categories that were not in the named group of five. It asserts the case should be remanded so that Ramlow can testify with more specificity. We disagree. It would be unreasonable to require a witness to give an itemization of the suitability of 15,000 individual jobs.[8] Breaking the job market into ten to twelve different categories of jobs is sufficient for the purpose of identifying types of jobs which are suitable for a person with a known level of education and training. Further, Goodyear had ample opportunity to cross-examine Ramlow at the two hearings held before the ALJ. If it did not do so to the extent it now believes advantageous, that is not a basis upon which we can overturn LIRC's factual findings. Therefore, we conclude there is substantial and credible evidence in the record to support LIRC's findings, and therefore, we must reinstate its award of benefits.

CONCLUSION

[8] Of course, we do not mean to suggest that a witness could not testify with more specificity if he or she had more specific data at his disposal.

Evidence of an unemployment compensation claimant's ability to perform suitable jobs in his or her job market may be based on the suitability of general job categories rather than a breakdown of suitability for individual jobs, and it may be inferred from testimony that certain categories are suitable, while other categories are not. All of the factual findings necessary to LIRC's calculation that Henderson was able and available to perform 15.88% of the jobs in the labor market area have support in the record. Therefore, we are compelled to reverse the order of the circuit court and reinstate LIRC's determination that Henderson was eligible for unemployment compensation beginning in week nineteen of 1995.

By the Court.—Order reversed.

Not recommended for publication in the official reports.