COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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.

Appeal No. 2007AP1037 **Cir. Ct. No. 2006CV7272**

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

J.B. HUNT TRANSPORT, INC.,

PETITIONER-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION AND JOHN D. HILL,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed*.

Before Curley, P.J., Wedemeyer and Fine, JJ.

¶1 CURLEY, P.J. J.B. Hunt Transport, Inc. (J.B. Hunt) appeals from an order of the trial court upholding the Labor and Industry Review Commission's (LIRC) determination that Wisconsin has jurisdiction over John D. Hill's worker's compensation claim. Because LIRC's findings of fact are supported by credible

and substantial evidence and its interpretation of WIS. STAT. § 102.03(5) (2001-02) was reasonable, we affirm based on LIRC's conclusion that Hill's employment was "principally localized" in Wisconsin.[1]

I. BACKGROUND.

¶2 While working for J.B. Hunt as a truck driver, Hill sustained an injury when the semi-tractor trailer he was driving rolled over on the New Jersey turnpike. Authorities at the scene did not find Hill to be at fault, and instead, issued citations to J.B. Hunt. Notwithstanding, J.B. Hunt investigated the accident and deemed it preventable. As a result, J.B. Hunt terminated Hill's employment.

¶3 Following the accident, Hill, a resident of Wisconsin, sought worker's compensation benefits in the state of Wisconsin. In response, J.B. Hunt argued that Wisconsin did not have jurisdiction over the dispute. A hearing was held before an administrative law judge (ALJ), following which the ALJ concluded that Wisconsin had jurisdiction and awarded compensation and benefits to Hill for J.B. Hunt's unreasonable refusal to rehire him, pursuant to WIS. STAT. § 102.35(3). J.B. Hunt appealed the ALJ's decision to LIRC.

¶4 Following its review, LIRC adopted the ALJ's findings and order as its own. The ALJ's findings of fact included the following:

> During the hearing, [Hill] stated that he completed paper work prior to his employment and one of the instructors in Chicago told him that he was to write in a home terminal in Johnson Creek, Wisconsin. [Hill] said that the instructor told him that would be the location where he would park his tractor when he was at his home

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> residence in Milwaukee, Wisconsin. The Johnson Creek location was a garage space which was leased by [J.B. Hunt] from another business. One of the documents presented at the hearing was [J.B. Hunt]'s Exhibit 2, which was [a] photocopy of the application for employment completed and signed by the applicant. Page 1 of the application lists [Hill]'s terminal as "Johnson Creek."
>
> During the hearing, [J.B. Hunt] offered the testimony of Mr. William Thomas Edwards, a safety manager with [J.B. Hunt] based out of the headquarters in Lowell, Arkansas. During questioning by this Administrative Law Judge, Mr. Edwards was shown the application for employment noting the "Johnson Creek" terminal. Mr. Edwards testified that based upon the document, it led him to believe that [Hill] was a Johnson Creek terminal hire.

Edwards also testified at the hearing that no J.B. Hunt personnel are stationed on-site at the Johnson Creek location.

¶5 Hill testified before the ALJ that in the six-month period he was employed by J.B. Hunt prior to his termination, he parked his truck at the Johnson Creek location approximately three or four times because he otherwise "stayed out on the road quite a long time." He would leave his truck in Johnson Creek and return to his hometown when he was off duty. On those occasions when he returned to Wisconsin, Hill stated that he typically would drop off cargo in Wisconsin prior to parking his empty truck at the Johnson Creek location. Hill further testified that he would generally pick up a load of cargo in Wisconsin when he resumed working after having parked his truck in Johnson Creek. Aside from those occasions when he parked his truck at the Johnson Creek location, Hill testified that he was, for the most part, continuously on the road.

¶6 LIRC affirmed the ALJ's order and found that the evidence in the record established that Hill's employment was principally localized in Wisconsin.[2] Accordingly, LIRC concluded that this state had jurisdiction over Hill's worker's compensation claim. J.B. Hunt sought review of LIRC's decision and order in the trial court. The issue presented for the trial court's review was whether Wisconsin has jurisdiction to administer the worker's compensation claim at issue. J.B. Hunt challenged LIRC's award of worker's compensation benefits on grounds that LIRC had no credible and substantial evidence on which to find that Hill was hired by J.B. Hunt in Wisconsin or that his employment with J.B. Hunt was principally localized in Wisconsin, as required by WIS. STAT. § 102.03(5).

¶7 The trial court affirmed LIRC's order based on its conclusion that the record contained credible and substantial evidence to support LIRC's factual findings. Although the trial court acknowledged LIRC's erroneous finding that "all of [Hill's] driving originated from the Johnson Creek location in Wisconsin," it upheld LIRC's order because the ALJ's other findings of fact accurately reflected the use of the Johnson Creek location and the record provided further support. J.B. Hunt now appeals.

II. ANALYSIS.

¶8 On appeal, we review LIRC's decision, not the trial court's. ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 930, 541 N.W.2d 241

[2] LIRC also concluded that an employment contract between J.B. Hunt and Hill was made in Wisconsin. As stated later in this opinion, the employment contract issue is not dispositive for purposes of this appeal, and as a result, we need not discuss it. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide non-dispositive issues).

(Ct. App. 1995). Whether Hill's worker's compensation claim is within this state's jurisdiction presents a mixed question of fact and law: the circumstances of his employment present questions of fact, while LIRC's conclusion that Hill's claim is subject to this state's jurisdiction presents a question of law. *See* ***id.*** at 931.

> When presented with a mixed question of fact and law on administrative review, we employ the following standard of review:
>
> > LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence. The drawing of one of several reasonable inferences from undisputed facts also constitutes fact finding. Any legal conclusion drawn by LIRC from its findings of fact, however, is a question of law subject to independent judicial review.
> >
> > 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.

Id. (quoting ***Applied Plastics, Inc. v. LIRC***, 121 Wis. 2d 271, 276, 359 N.W.2d 168 (Ct. App. 1984) (citations omitted)). For evidence to be deemed credible, it must "exclude[] speculation and conjecture." ***Bretl v. LIRC***, 204 Wis. 2d 93, 100, 553 N.W.2d 550 (Ct. App. 1996). To be substantial, the standard "is not a preponderance of evidence, but relevant evidence which a reasonable mind might accept as adequate to support a conclusion." ***Id.*** Where there is conflicting evidence, we refrain from evaluating it in relation to the other evidence presented; rather, "we will affirm if there is credible evidence to support the finding

regardless of whether there is evidence to support the opposite conclusion." ***Id.*** at 100-01.

¶9 We afford LIRC's interpretation of WIS. STAT. § 102.03(5) either great weight, due weight, or no deference, depending on its expertise in addressing the issue. ***Stoughton Trailers, Inc. v. LIRC***, 2007 WI 105, ¶26, ___ Wis. 2d ___, 735 N.W.2d 477.

> An agency's interpretation of a statute is entitled to great weight deference when: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in the application of the statute.
>
> We grant an intermediate level of deference, due weight, "where an agency has some experience in the area, but has not developed any particular expertise in interpreting and applying the statute at hand" that would put the agency in a better position to interpret the statute than a reviewing court.
>
> > The deference allowed an administrative agency under due weight is not so much based upon its knowledge or skill as it is on the fact that the legislature has charged the agency with the enforcement of the statute in question. [Under the due weight standard] ..., a court will not overturn a reasonable agency decision that comports with the purpose of the statute unless the court determines that there is a more reasonable interpretation available.
>
> We apply de novo review when "there is no evidence that the agency has any special expertise or experience interpreting the statute[,] ... the issue before the agency is clearly one of first impression, or ... the agency's position on an issue has been so inconsistent so as to provide no real guidance."

Id., ¶¶27-29 (citations omitted; alterations in ***Stoughton Trailers***).

¶10 "While the difference between 'due' and 'great' deference is often elusive, it makes little difference in most cases, for in both instances the central question is whether the agency's decision is reasonable." ***Jackson v. Employe Trust Funds Bd.***, 230 Wis. 2d 677, 686 n.3, 602 N.W.2d 543 (Ct. App. 1999). Whereas, under the due weight standard of deference, "we will sustain the agency's reasonable determination *unless* an opposing interpretation is more reasonable, … under the great-weight deference rule, the reasonableness of the agency's interpretation is the *only* question." ***Id.*** (emphasis in ***Jackson***).

¶11 J.B. Hunt concedes that "[o]rdinarily, due weight would be the appropriate level of deference owed by reviewing courts where LIRC determines benefit rights based on statutory jurisdictional provisions"; however, based on its argument that LIRC lacked credible evidence to support its jurisdictional conclusion, J.B. Hunt contends that LIRC exceeded its statutory authority under WIS. STAT. § 102.23(6) (2003-04), and, as such, no level of deference is applicable.[3] In contrast, LIRC argues that its interpretation should be afforded great weight deference.

¶12 Because we conclude that LIRC's findings are supported by credible evidence, we will not heed J.B. Hunt's request that we afford the findings no

[3] WISCONSIN STAT. § 102.23(6) (2003-04) states:

> **(6)** If the commission's order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission's order or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

deference. Rather, under either the due weight standard of deference (conceded as the fall-back standard by J.B. Hunt) or great weight deference (as argued by LIRC), we uphold LIRC's interpretation because it is reasonable. *See* ***Jackson***, 230 Wis. 2d at 686. In addition, we are not persuaded that J.B. Hunt's interpretation is more reasonable. ***Id.***

¶13 WISCONSIN STAT. § 102.03(5) serves as the statutory basis for the administration of worker's compensation benefits resulting from out-of-state injuries. It provides:

> **(5)** If an employee, while working outside the territorial limits of this state, suffers an injury on account of which the employee, or in the event of the employee's death, his or her dependents, would have been entitled to the benefits provided by this chapter had such injury occurred within this state, such employee, or in the event of the employee's death resulting from such injury, the dependents of the employee, shall be entitled to the benefits provided by this chapter, if at the time of such injury any of the following applies:
>
> (a) His or her employment is principally localized in this state.
>
> (b) He or she is working under a contract of hire made in this state in employment not principally localized in any state.
>
> (c) He or she is working under a contract made in this state in employment principally localized in another state whose worker's compensation law is not applicable to that person's employer.
>
> (d) He or she is working under a contract of hire made in this state for employment outside the United States.
>
> (e) He or she is a Wisconsin law enforcement officer acting under an agreement authorized under s. 175.46.

Id.

¶14 Because Hill's injury occurred outside Wisconsin, he can present a claim for worker's compensation benefits in Wisconsin if he shows either that his employment with J.B. Hunt was principally localized in Wisconsin or that he was working under a contract made in this state. *See* ***id.*** J.B. Hunt argues that the evidence is insufficient for Hill to make either showing. We first address whether Hill's employment with J.B. Hunt was principally localized in Wisconsin as resolution of this issue eliminates the need for us to address whether Hill was working under a contract made in this state.

¶15 According to J.B. Hunt, LIRC's determination that Hill's employment was principally localized in Wisconsin was based on the erroneous finding that "all of his driving originated from the Johnson Creek location in Wisconsin." Based on our review of the record, this argument over-emphasizes one misstatement and disregards the other credible evidence in the record.

¶16 The statement on which J.B. Hunt relies is found in LIRC's "Memorandum Opinion," which follows LIRC's signed order affirming the findings and order of the ALJ. As indicated, LIRC expressly adopted the ALJ's findings as its own. The ALJ's findings do not hinge on the specific finding that Hill made all his deliveries from Johnson Creek, Wisconsin. Indeed, no language to this effect is found in the ALJ's findings of fact.[4] In addition, other than one

[4] The closest language in the ALJ's decision that we can find is the following: "Based upon the record made, I find the applicant has established that his contract of employment and hauls he made beginning from the Johnson Creek, Wisconsin terminal is sufficient to make him subject to the Worker's Compensation Act." The aforementioned language, however, does not support J.B. Hunt's contention that the ALJ's order, which LIRC adopted, "base[d] liability on the specific finding that Hill made *all* his deliveries from Johnson Creek, Wisconsin." (Emphasis added.) Rather, the language in the ALJ's decision reflects Hill's testimony that on occasions when he returned to Wisconsin, Hill typically dropped off cargo in Wisconsin prior to parking the empty truck at Johnson Creek, and when he set out on the road after returning to his home, he typically picked up cargo in Wisconsin.

statement in its Memorandum Opinion following its signed order that "all of [Hill's] driving originated from the Johnson Creek location in Wisconsin," LIRC makes no further mention of this finding.

¶17 While we acknowledge, like the trial court did, that the statement in LIRC's Memorandum Opinion was erroneous based on the record before us, we disagree with J.B. Hunt's contention that "LIRC's Memorandum Opinion and the department order LIRC adopted base liability on the specific finding that Hill made all his deliveries from Johnson Creek, Wisconsin." Other findings by the ALJ support the conclusion that Hill's employment was principally localized in Wisconsin. These findings, in relevant part, can be summarized as follows: Hill's completed paperwork reflected a home terminal in Johnson Creek, Wisconsin; Hill was told that he would use the Johnson Creek location to park his tractor-trailor when he was at his home residence in Milwaukee, Wisconsin; and J.B. Hunt's safety manager testified that Hill was considered a Johnson Creek terminal hire.

¶18 J.B. Hunt goes on to argue that the trial court's suggestion that there is other evidence in the record from which LIRC might have drawn support, was improper, as "those potential alternate findings are not contained in the LIRC order under review." Again, we disagree.

¶19 There is no requirement that LIRC specifically list in its order any and all evidence in the record on which it relies to support its findings of fact, as J.B. Hunt seems to argue. Rather, "LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence." ***Michels Pipeline***, 197 Wis. 2d at 931 (quoting ***Applied Plastics***, 121 Wis. 2d at 276) (citations omitted). Here, the record contains credible and substantial evidence supporting LIRC's findings of fact. The record reflects that in the six-

month period he was employed by J.B. Hunt prior to his termination, Hill parked his truck at the Johnson Creek location approximately three or four times. On his way to Johnson Creek, Hill typically would drop off cargo in Wisconsin, and upon returning to work following a stay at his home, he would pick up cargo in Wisconsin. Other than those occasions when he parked his truck at the Johnson Creek location, Hill was, for the most part, continuously on the road.

¶20 J.B. Hunt does not dispute these findings; instead, it relies on evidence in the record that supports its position. However, it is long-settled that:

> [E]ven though the evidence could have led to a contrary but equally rational inference, the finding for that reason would not be upset.
>
> 'The question is not whether there is credible evidence in the record to sustain a finding the commission didn't make, but whether there is any credible evidence to sustain the finding the commission did make.'

Briggs & Stratton Corp. v. DILHR, 43 Wis. 2d 398, 403, 168 N.W.2d 817 (1969) (quoting ***Unruh v. Industrial Comm'n***, 8 Wis. 2d 394, 398, 99 N.W.2d 182 (1959)).

¶21 Even defining "principally," as J.B. Hunt does, to mean "primarily," "chiefly," or "mainly," our conclusion remains the same. J.B. Hunt emphasizes Hill's testimony that he used the Johnson Creek location to park only three to four times. Although Hill may have parked in Wisconsin only three to four times, there is no evidence in the record that he parked in another J.B. Hunt terminal more frequently.[5] Furthermore, the fact that Hill parked his truck at the Johnson Creek

[5] The record includes a list of trips taken by Hill to various states during his employment with J.B. Hunt. It is not clear from the list whether Hill used J.B. Hunt terminals for parking or any other employment-related purpose in those other states, or whether he simply passed through those states in the course of picking-up and dropping-off cargo for J.B. Hunt clients.

location on only three or four occasions during the scope of his six-month employment with J.B. Hunt does not automatically refute the conclusion that his employment, transient though it was, nevertheless was principally localized in this state.

¶22 J.B. Hunt asserts that Hill's contacts with Wisconsin during the course of his employment were no greater than his contacts with many other states and notes that most of Hill's loads originated in Ohio. Despite documentation reflecting that Hill had contact with other states, and in particular, frequented Ohio on a number of occasions in the course of his employment with J.B. Hunt, LIRC concluded that Hill's employment was principally localized in Wisconsin. As detailed, there is credible and substantial evidence to support the factual findings that led LIRC to this conclusion; consequently, LIRC's determination is conclusive. *See* ***Vocational, Technical & Adult Educ., Dist. 13 v. DILHR***, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977) ("If … different inferences can reasonably be drawn from the evidence, then a question of fact is presented and the inference actually drawn by the Commission, if supported by any credible evidence, is conclusive.").

¶23 Following our review of the record, we conclude that there is credible and substantial evidence to sustain LIRC's finding that Hill's employment was principally localized in Wisconsin. We further note that LIRC's order is consistent with the general principle employed by courts of liberally construing the Worker's Compensation Act "to effectuate [its] goal of compensating injured workers." ***Weiss v. City of Milwaukee***, 208 Wis. 2d 95, 102, 559 N.W.2d 588 (1997). Based on the foregoing, we deem LIRC's interpretation of WIS. STAT. § 102.03(5) reasonable; moreover, even using the due weight standard of

deference, J.B. Hunt has not persuaded us that an opposing interpretation is more reasonable. *See* ***Jackson***, 230 Wis. 2d at 686. Accordingly, we affirm.

¶24 J.B. Hunt also argues that Hill's contract of employment with J.B. Hunt was not made in Wisconsin. However, because we conclude that Hill's employment was principally localized in Wisconsin, we need not address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide non-dispositive issues).

By the Court.—Order affirmed.

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