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SUPREME COURT OF WISCONSIN
Appeal No. 2022AP13
Trial Court Case No. 2020CV579
Case Classification Code 30607

Amazon Logistics, Inc.,

Plaintiff-Respondent-Petitioner,

vs.

Wisconsin Labor and Industry Review
Commission,

Defendant-Appellant,

Department of Workforce Development UI Div.
Bureau of Legal Affairs,

Defendant-Co-Appellant.

On Review of a Decision of the Court of Appeals, District 4,
Reversing an Order of the Circuit Court for Waukesha County
Honorable Michael O. Bohren, Circuit Judge, Presiding

Brief of Defendant-Appellant
Wisconsin Labor and Industry Review Commission

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October 6, 2023

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ISSUES

1. Should reviewing courts give due weight to the experience, technical competence, and specialized knowledge of the commission in decisions arising under Wis. Stat. ch. 108?

Answer by the court of appeals: The court of appeals did not resolve this issue because it found that its conclusions remained the same whether or not it gave due weight to the commission's technical expertise and specialized knowledge.

Answer by the circuit court: The circuit court did not address this issue.

2. Does the court of appeals have the authority to overrule or reconsider its prior unpublished opinions?

Answer by the court of appeals: No.

Answer by the circuit court: The circuit court did not address this issue.

3. Are delivery service workers performing services for Amazon Logistics, Inc. doing so as employees?

Answer by the court of appeals: Yes.

Answer by the circuit court: No.

STATEMENT OF THE CASE

Defendant-appellant Labor and Industry Review Commission (commission) adopts and incorporates as if restated herein the Statement of the Case set forth in Defendant-co-appellant Department of Workforce Development's response brief to this Court in this matter.

ARGUMENT

- I. **Reviewing courts review the commission's conclusions of law de novo but should afford due weight to the commission's statutory interpretation taking into account the commission's experience, technical competence, and specialized knowledge.**
 - A. Courts review the commission's decision pursuant to Wis. Stat. §§ 108.09(7) and 108.10(4) and that review is confined to questions of law.

The commission's decisions regarding the status and liability of an employing unit are reviewed under Wis. Stat. § 108.10(4) and are subject to judicial review only as provided in Wis. Stat. § 108.09 and not under ch. 227 or § 801.02. *See* Wis. Stat. §§ 108.10, 108.09(7)(c)1., and *Schiller v. Department of Labor & Human Relations*, 103 Wis. 2d 353, 355, 309 N.W.2d 5 (Ct. App. 1981). Courts review the commission's decision, not the circuit court's decision. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶84, 382 Wis. 2d 496, 914 N.W.2d 21. Judicial review of the commission's decision is confined to questions of law. Wis. Stat. § 108.09(7)(b). A reviewing court may set aside the commission's order only upon one or more of the following grounds: that the commission acted without or in excess of its powers, that the order was procured by fraud, or that the findings of fact by the commission do not support the order. Wis. Stat. § 108.09(7)(c)6. The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. Wis. Stat. § 108.09(7)(c)1. If the commission's order depends on any fact found by the

commission, a reviewing court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any findings of fact. Wis. Stat. § 108.09(7)(f). Reviewing courts may set aside the commission's order and remand the case to the commission if the commission's order depends on any material and controverted finding of fact that is not supported by credible and substantial evidence. *Id.*

- B. Courts review the commission's conclusions of law de novo but should afford due weight to the commission's statutory interpretations.

In *Tetra Tech*, this Court ended its former practice of *deferring* to administrative agencies' legal conclusions. Instead, this Court held that it will give "due weight" to the experience, technical competence and specialized knowledge of an administrative agency. *Tetra Tech*, 2018 WI 75, ¶108. This, the Court explained, is not *deference* to an agency's interpretation or application of the law, but a matter of *persuasiveness*. *Id.* at ¶¶ 78-79. A reviewing court benefits from the agency's analysis, particularly when the statute being interpreted is one the agency was charged with administering and the agency has at least some expertise in the interpretation of the statute. *Id.* at ¶¶ 84, 73, n.42. As the court of appeals noted, courts have not been consistent in considering the commission's experience, technical competence, and specialized knowledge and giving its legal conclusions due weight following the *Tetra Tech* decision. *Amazon Logistics, Inc., v. Labor and Industry Review Comm'n*, 2023 WI App 26, ¶¶ 22-24, 407 Wis. 2d 807, 992 N.W.2d 168. *See also Catholic Charities Bureau, Inc. v. State Labor & Industry Review Comm'n*, 2023 WI App 12, ¶19 n. 9, 406 Wis. 2d 586, 987 N.W.2d 778. However, the *Tetra Tech* decision itself indicates that its due weight analysis applies on judicial review in actions brought under Wis. Stat. §§ 102.23 and 108.09(7), not only those under Wis. Stat. ch. 227:

This decision applies to judicial review of all administrative agency decisions. While chapter 227 applies to judicial review of most administrative decisions, it does not apply to all. See, e.g., Wis. Stat. § 102.23 (establishing procedures for judicial review of workers compensation orders).

Tetra Tech, 2018 WI 75, ¶11 n.8. This is consistent with this Court’s analysis in *Tetra Tech* which detailed the judiciary’s history of giving persuasive weight to agency’s statutory interpretations, a practice which arose through common law over the course of many decades and beginning prior to the adoption of Wis. Stat. § 227.20(2) (now numbered as § 227.57(10)). See *Tetra Tech*, 2018 WI 75, ¶¶ 18-34. In *Borgnis v. Falk Co.*, 147 Wis. 327, 357, 133 N.W. 209 (1911), this Court recognized that agencies may be “endowed with very broad powers” and their “conclusions may be given great dignity and force, so that courts may not reverse them unless the proof be clear and satisfactory that they are wrong.” In *Wisconsin Axle Div. v. Industrial Comm’n*, 263 Wis. 529, 537b, 60 N.W.2d 383C (1953), a worker’s compensation case not reviewed under ch. 227 but heard after the adoption of Wis. Stat. § 227.20 and before this Court’s development of its deference doctrine, this Court gave “great weight” to the statutory interpretation of the Industrial Commission. It follows that, when an agency has extensive experience interpreting a statute that it has been charged by the legislature with administering, reviewing courts should consider the agency’s experience and expertise and give “respectful, appropriate consideration to the agency’s views” when interpreting that statute, whether or not the judicial review action arises under ch. 227. See *Tetra Tech*, 2018 WI 75, ¶ 78.

- C. The commission has extensive experience, technical competence, and specialized knowledge interpreting the definition at issue here that this Court should take into account in giving the commission’s interpretation respectful, appropriate consideration.

The commission satisfies the “due weight” considerations that make its analysis particularly persuasive to reviewing courts: “the statute is one that the

agency was charged with administering” and “the agency has at least some expertise in the interpretation of the statute in question.” *See Tetra Tech*, 2018 WI 75, ¶¶ 84, 73, n.42. This Court also stated that in assessing the persuasiveness of an agency’s perspective, the court considers:

(1) whether the legislature made the agency responsible for administering the statute in question; (2) the length of time the administrative agency’s interpretation has stood; (3) the extent to which the agency used its expertise or specialized knowledge in developing its position; and (4) whether the agency’s perspective would enhance uniformity and consistency of the law.

Id. at ¶ 79.

The commission is charged with administering the unemployment insurance laws. Wis. Stats. §§ 103.04(1), 108.10(2) and (3), and 108.09(6). *See also Margoles v. State Labor & Industry Review Comm’n*, 221 Wis. 2d 260, 267, 585 N.W.2d 596 (Ct. App. 1998), *DaimlerChrysler v. Labor & Industry Review Comm’n*, 2007 WI 15, ¶12, 299 Wis. 2d 1, 727 N.W.2d 311. The commission and its predecessor agencies have a long history, dating back to 1933, of administering the unemployment insurance program (formerly known as unemployment compensation), which from its inception has required the agency to determine which workers qualified for benefits and which employers were subject to tax. *See* Laws of Special Session 1931-32 Ch. 20.,¹ *Central Wisconsin Trust Co. v. Industrial Comm’n*, 236 Wis. 496, 295 N.W. 711 (1941) and *Moorman Mfg. Co. v. Industrial Comm’n*, 241 Wis. 200, 5 N.W.2d 743 (1942).

Reviewing courts have recognized the commission’s experience, expertise, and specialized knowledge in cases involving the interpretation of Wis. Stat. § 108.02(12), the definition of “employee.” In *Margoles*, 221 Wis.2d at 267, the court stated:

¹ available online at: <https://docs.legis.wisconsin.gov/1931/related/acts/31ssact020.pdf/>

(1) LIRC is the agency charged with administering § 108.02(12), at the administrative review level; (2) LIRC has clearly interpreted and applied § 108.02(12) in numerous cases in order to determine whether particular workers were “employees” within the meaning of that statute; (3) LIRC used its expertise and specialized knowledge in applying the statute in this case; and (4) LIRC’s interpretation will provide uniformity and consistency in the application of § 108.02(12).

In *Lifedata Medical Servs. v. Labor & Industry Review Comm’n*, 192 Wis. 2d 663, 671-672, 531 N.W.2d 451 (Ct. App. 1995), the court stated:

LIRC has had extensive experience in interpreting § 108.02(12), STATS. Unemployment benefits are payable only to “employees”; therefore, each applicant for benefits must be examined to determine whether the individual is an “employee” 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 “employees” for the purposes of the unemployment compensation law.

See also Gilbert v. Labor & Industry Review Comm’n, 2008 WI App 173, ¶ 11, 315 Wis. 2d 726, 762 N.W.2d 671.

The commission has expertise in interpreting Wis. Stat. § 108.02(12) in its current form which took effect on July 4, 2010. *See* 2009 Wis. Act 287. The commission has issued numerous decisions interpreting this statute. The commission posts decisions on its website that its staff determine may be useful as research tools. These decisions represent a small portion of the decisions issued by the commission. The commission has posted 25 such decisions interpreting this version of the statute on its website.² The commission’s decision at issue in this case was issued March 12, 2020. *Amazon Logistics Inc.*, UI Dec. Hearing No. S1800148MW (LIRC March 12, 2020). (LIRC App. p. 4).³ In the

² These decisions are available by searching for “108.02(12)” or topic codes “EE 450,” “EE 409,” and “EE 410” on the commission’s Unemployment Insurance Decisions website available here: https://lirc.wisconsin.gov/ui_decisions.htm

³ The commission’s supplemental appendix is abbreviated “LIRC App.”

prior calendar year, 2019, the commission issued 55 decisions in employer tax or liability cases. Between 2010 (when the current version of Wis. Stat. § 108.02(12)(bm) went into effect), and the end of 2019, the commission issued 380 employer tax or liability decisions.⁴

The commission's expertise regarding the conditions contained in Wis. Stat. § 108.02(12)(bm) is also evidenced by the use of its decisions by the Unemployment Insurance Advisory Council recommending legislation that resulted in the current version of § 108.02(12)(bm). *See Report of Committee to Review the Unemployment Insurance Statutory Definition of "Employee," Submitted to the Wisconsin Unemployment Insurance Advisory Council* (June 25, 2009). Such reports or analyses have been relied upon by this Court in prior cases. *See Operton v. Labor & Industry Review Comm'n*, 2017 WI 46, ¶¶40, 44, 375 Wis. 2d 1, 894 N.W.2d 426; *Milwaukee County v. Department of Labor & Human Relations*, 80 Wis. 2d 445, 452, 259 N.W.2d 118 (1977).

D. The commission's perspective in interpreting Wis. Stat. § 108.02(12) enhances the uniformity and consistency of the law.

Cases arising under Wis. Stat. § 108.02(12)(bm) that require the commission to determine whether workers are employees of a putative employer are necessarily fact intensive. The employer has the burden of proof and must provide evidence sufficient to show that the workers at issue meet 2 separate conditions. The statute provides five factors the commission considers in

⁴ These statistics are available in the commission's 2019 statistics report available here: <https://lirc.wisconsin.gov/pdf/2019%20STATS.pdf>. Employer tax and liability cases often, but not always, involve interpreting Wis. Stat. § 108.02(12). Also note that some of the cases categorized as "Unemployment Insurance" cases in this report involve interpretation of Wis. Stat. § 108.02(12) but are not included in the numbers reported for "Employer Tax or Liability" cases because they involved benefits for an individual rather than an employer's tax status or

(continued on next page)

determining whether the first condition is met. The second condition requires a showing that workers meet at least six of the nine sub-conditions listed in Wis. Stat. § 108.02(12)(bm)2. In interpreting the many factors and conditions at issue in this statute, the commission considers the facts of each case in the context of the purpose of the statute. As a definitional statute, the purpose of Wis. Stat. § 108.02(12) is to distinguish those workers who are employees, and therefore potentially eligible for benefits, from those who are not. The purpose of the exception in Wis. Stat. § 108.02(12)(bm) is specifically to distinguish those workers who operate a stand-alone business. This purpose underlines the commission's interpretation of the statute and is particularly important in determining that the interpretation offered by the commission of the conditions found in Wis. Stat. § 108.02(12)(bm)2.a., g., h., and i. is more persuasive than that offered by Amazon Logistics, Inc.

In addition the commission has consistently been guided by this Court's statement that the purpose of the Unemployment Insurance statute is

to relieve "unemployed workers" and "wage earners..." the act contemplates compensation for loss of earnings by workers. This must be given great--even controlling--effect, in determining who are employees under the act as it is the employees who are to receive the compensation provided for.

Moorman Mfg., 241 Wis. 200 at 204-205. Later, in *Princess House, Inc. v. Department of Labor & Human Relations*, 111 Wis. 2d 46, 330 N.W.2d 169 (1983), this Court approvingly cited *Moorman Mfg.* and stated the unemployment insurance statute "should be liberally construed to effect unemployment compensation coverage for workers who are economically dependent upon others in respect to their wage-earning status." The commission's interpretations incorporating these principles over many decades

liability. Additionally, cases reported for 2010 and 2011 may involve analysis of the prior version of the statute.

provide consistency and uniformity in the resolution of the fact intensive cases arising under Wis. Stat. § 108.02(12).

II. The court of appeals has the power to reconsider or overrule unpublished court of appeals cases.

A. Unpublished court of appeals decisions are not precedential and not binding on any court including the court of appeals itself.

This Court made clear in *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), that the court of appeals does not have the power to overrule published decisions of the court of appeals. Rather, this Court is the only court in the state with the power to overrule, modify, or withdraw language from a published opinion of the court of appeals. *Id.* at 189-190.

Wis. Stat. § 752.41(2) provides that “Officially published opinions of the court of appeals shall have statewide precedential effect.” Wis. Stat. § 809.23(3) provides:

- (a) An unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).
- (b) In addition to the purposes specified in par. (a), an unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31 (2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not an authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Therefore, an unpublished opinion of the court of appeals, even one authored by a member of a three-judge panel after July 1, 2009, is not precedent and not binding on any court in this state which necessarily includes the court of appeals.

- B. The department's request that the court of appeals reconsider an unpublished court of appeals decision was not a request to overrule that decision and the court of appeals has the authority to act on such a request.

The department asked the court of appeals to reconsider a conclusion related to the appropriate interpretation of Wis. Stat. § 108.02(12)(bm)2.h. found in *Varsity Tutors*, an unpublished court of appeals decision authored by a member of a three-judge panel and issued on October 15, 2019. See court of appeals Reply Brief by Defendant-Co-Appellant Department of Workforce Development (LIRC App. pp. 51-52) and *Varsity Tutors LLC v. Labor & Industry Review Comm'n*, No. 2018AP1951, unpublished slip op., (WI App Oct. 15, 2019) (LIRC App. p. 25). The court of appeals interpreted this as a request to overrule *Varsity Tutors*, stated it did not have the authority to do so, and cited *Cook. Amazon Logistics*, 2023 WI App 26, ¶127. However, because *Varsity Tutors* is unpublished, the rule from *Cook* that the court of appeals does not have the power to overrule published court of appeals opinions does not apply. Further, because the decision is unpublished, by the plain language of Wis. Stat. § 809.23(3)(b), it is not precedent and it is not binding on any court of this state including the court of appeals.

Although the court of appeals could find *Varsity Tutors* persuasive and choose to follow it, this Court should clarify that the court of appeals is under no obligation to do so. Indeed, because *Varsity Tutors* is not precedential, the court of appeals has the authority to issue a decision contrary to it without distinguishing it or explicitly overruling it. The request to reconsider *Varsity Tutors* is better understood, not as a request to overrule a prior decision, but as part of the department's argument that the court should not find the analysis in *Varsity Tutors* persuasive. This Court should clarify that the court of appeals erred in stating "Only our supreme court has the authority to overrule a previous opinion of the court of appeals" in reference to an unpublished opinion. See *Amazon Logistics*, 2023 WI App 26, ¶127.

III. Delivery service workers performing services for Amazon Logistics, Inc. did so as employees.

Defendant-appellant Labor and Industry Review Commission (commission) adopts and incorporates as if restated herein Argument Sections I., II., III A., and III. B. 1., 3., and 5. - 10. of Defendant-co-appellant Department of Workforce Development's response brief to this Court in this matter.

The commission adopts and incorporates as if restated herein the first six paragraphs of Argument Section III. B. 2. of the Department's response brief. With respect to Wis. Stat. § 108.02(12)(bm)2.b., the commission agrees with the Department that this condition is not met because the workers did not maintain their own offices or perform most of their services in a facility or location chosen by the worker. However, to the extent the court reaches the second part of Wis. Stat. § 108.02(12)(bm)2.b., which requires that the worker "uses his or her own equipment or materials in performing the services," the commission disagrees with the Department's analysis. Because the workers needed both a vehicle and a smartphone to perform the delivery services and provided their own phone and car for these purposes, the commission concluded that they did, in fact, use their own equipment or materials in performing the services.

In addition, the commission disagrees with the Department's discussion of Wis. Stat. § 108.02(12)(bm)2.d. found in Argument Section III. B. 4. and stands by its analysis of this condition found in the commission's decision. *Amazon Logistics Inc.*, UI Dec. Hearing No. S1800148MW, pp. 14-15 (LIRC March 12, 2020) (LIRC App. pp. 17-18).

CONCLUSION

This Court ended its long tradition of giving deference to state agencies' interpretations of statutes. In doing so, it recognized that much of its history of deferring to agencies was rooted in reasoning that supports the finding that when an agency charged with administering a statute has expertise in interpreting that

statute, the agency's interpretation of the statute is beneficial to the reviewing court and its views may be afforded more persuasive weight than alternative interpretations provided by parties who do not have the expertise possessed by the agency. This Court should therefore afford due weight to the commission's interpretations of Wis. Stat. § 108.02(12).

The Court should affirm the outcome of the court of appeals' decision while clarifying the meaning of Wis. Stat. § 108.02(12)(bm)2. and correcting the court of appeals' error related to its authority to reconsider unpublished decisions.

October 6, 2023

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,292 words.

Dated October 6, 2023

Electronically signed by, Jennifer P. Carter

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CERTIFICATION REGARDING SUPPLEMENTAL APPENDIX

CONTENTS AND CONFIDENTIALITY

I certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated October 6, 2023.

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