

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 2010

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. 2008AP3073

Cir. Ct. No. 2008CV82

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEPHEN D. WILLETT, S.C.,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Price County:
DOUGLAS T. FOX, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Stephen D. Willett, S.C. appeals an order dismissing a complaint seeking judicial review of a Labor and Industry Review Commission decision. Claiming that it did not fail to name a necessary adverse

party as a defendant in the matter, Willett contends the circuit court erred by dismissing the complaint. We reject Willett's argument and affirm the order.

BACKGROUND

¶2 The underlying case arose from an application for unemployment insurance filed by Tasha Werner, after she left the employment of Riiser Energy. During its investigation of Werner's claim for unemployment benefits, the Department of Workforce Development discovered that Werner also worked for Willett. The department consequently sought to ascertain whether Werner worked for Willett as an employee or an independent contractor—if the former, her remuneration would constitute wages for unemployment insurance purposes, while if the latter, it would not. It is undisputed that after an investigation, the department determined Werner's services had been performed as Willett's employee. Werner's status as an employee rather than an independent contractor impacts Willett's liability for state unemployment compensation taxes.

¶3 Willett consequently sought review of the adverse determination and after a hearing at which Werner testified, an appeal tribunal affirmed the initial determination. On further review, the commission affirmed and adopted the findings of the appeal tribunal. Included with the commission's decision was an appeal rights enclosure providing that any action for judicial review "must be commenced against the commission, and any other adverse party or parties must also be made a defendant or defendants." The enclosure defined "adverse party" as "a party in whose favor the decision was made." The enclosure further indicated "[f]or disputed benefit claims involving an employer and employee, the prevailing employer or employee must be joined as a defendant in addition to the commission."

¶4 Willett timely initiated a circuit court action for judicial review of the commission’s decision, but named only the commission as a defendant in the matter. Based on Willett’s failure to name Werner as a defendant in the action, the commission moved to dismiss the case. After a hearing, the court granted the dismissal motion on grounds that Willett’s failure to name an adverse party deprived the court of its competency to proceed. This appeal follows.

DISCUSSION

¶5 WISCONSIN STAT. § 108.09(7) provides that judicial review of a commission decision regarding unemployment compensation is commenced in accordance with WIS. STAT. § 102.23. That statute provides, in relevant part:

Within 30 days after the date of an order or award made by the commission ... any party aggrieved thereby may by serving a complaint [on the commission] and filing the summons and complaint with the clerk of the circuit court commence, in circuit court, an action against the commission for the review of the order or award, *in which action the adverse party shall also be made a defendant.*

Section 102.23(1)(a). (Emphasis added.) Because the requirements for obtaining judicial review of a commission decision involving unemployment benefits are clearly set forth in §§ 108.09(7) and 102.23(1), our supreme court requires “strict compliance.” *Brandt v. LIRC*, 166 Wis. 2d 623, 634-35, 480 N.W.2d 494 (1992). If a party seeking judicial review fails to comply with § 102.23(1)(a), the circuit court cannot proceed with the case and must dismiss the action with prejudice. *Miller Brewing Co. v. LIRC*, 173 Wis. 2d 700, 706, 495 N.W.2d 660 (1993).

¶6 Willett argues he did not fail to comply with WIS. STAT. § 102.23 because Werner is not a necessary adverse party under the joinder statute, WIS. STAT. § 803.03. Willett’s citation to the joinder statute, however, is misplaced.

Our supreme court has utilized three approaches in specifically examining whether a party is adverse under § 102.23(1)(a):

(1) a party in whose favor an award has been made is an adverse party; (2) a party whose interest is in conflict with the modification or reversal of the administrative decision sought by the action for judicial review is an adverse party; and (3) a party whose interests were adverse to the appellant during the administrative proceedings is adverse to an appellant in an action for judicial review.

Miller Brewing Co., 173 Wis. 2d at 716. We conclude Werner is adverse to Willett under each of the three approaches.

¶7 As the commission explains, when an individual files a claim for unemployment insurance, the amount of benefits he or she is entitled to depends upon the wages in his or her “base period.” The base period is defined as the first four of the five most recently completed calendar quarters. WIS. STAT. § 108.02(4). The claimant’s weekly benefit rate is based upon the amount of wages in the quarter in which the claimant was paid the highest total wages of the four quarters in the base period. WIS. STAT. § 108.05. By operation of WIS. STAT. § 108.06(1), the claimant’s maximum benefit entitlement is then calculated at 26 times the claimant’s weekly benefit rate. Therefore, any decision that increases the wages in a claimant’s base period, increases the claimant’s weekly benefit rate and, ultimately, his or her overall benefit entitlement. Conversely, any decision that decreases the wages in a claimant’s base period, decreases the claimant’s weekly benefit and his or her overall benefit entitlement.

¶8 Here, the commission’s decision held that Werner’s base period wages included \$7,779.18 in earnings received as a Willett employee, thereby increasing her overall benefit entitlement. Because Werner is a party “in whose favor an award has been made,” she is adverse to Willett. The same reasoning

makes Werner both a party whose interest conflicts with the reversal of the commission's decision and a party whose interests were adverse to Willett during the administrative proceedings.

¶9 Willett nevertheless argues that Werner is not an “adverse party” because she continues to work for and, therefore, has never made an unemployment insurance claim directly against Willett. Willett is mistaken. WISCONSIN STAT. § 108.02(4m)(a) defines a claimant's base period wages as all earnings for wage-earning service that are paid to an employee during the base period as a result of employment for an employer. Therefore, Werner's claim for unemployment insurance was not against a particular employer but, rather, is a claim for benefits based upon all the wage-earning employment in her base period.

¶10 Because Werner is an adverse party, Willett's failure to name her as a defendant in its action for judicial review of the commission's decision was fatal to the circuit court's competency to proceed. *See Holley v. DILHR*, 39 Wis. 2d 260, 264-65, 268, 158 N.W.2d 910 (1968). We therefore affirm the court's dismissal of the complaint.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

