COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 16, 1995

NOTICE

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.

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

No. 94-2889

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

PAMELA B. FOARD, d/b/a
LES ARTISTES AGENCY,

Plaintiff-Respondent,

v.

LABOR AND INDUSTRY
REVIEW COMMISSION,

Defendant-Appellant,

DEPARTMENT OF INDUSTRY,
LABOR AND HUMAN RELATIONS,

Defendant.

APPEAL from an order of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

ANDERSON, P.J. The Labor and Industry Review Commission (commission) appeals from an order of the circuit court reversing

the commission's decision that musicians hired by Pamela Foard constituted employees for purposes of unemployment compensation contribution. Because we conclude that the musicians were independent contractors, we affirm the trial court's order.

Foard operates a sole proprietorship known as Les Artistes Agency. Les Artistes is a musical entertainment agency placing musicians with clients seeking entertainment for gatherings and social events. Foard stated that when a client requests music for a particular occasion, Foard contacts musicians, asks about their availability and tells them the compensation. If the musicians are available and willing to do the job, Foard gives them details about the job's location and when they should arrive. When the job is finished, she compensates them for the agreed upon amount.

An administrative law judge (ALJ) affirmed the Department of Industry, Labor and Human Relations' initial determination that Foard had payroll based on services performed by employees. The ALJ stated that Foard "is liable for contributions based on the payroll including the musicians performing services for her business." Foard appealed the matter to the commission which modified and, as modified, affirmed the ALJ's decision. Foard subsequently appealed the commission's decision to the circuit court. The court reversed the commission's decision, concluding that "the musicians hired by Foard were not her employees under § 108.02(12), STATS." The commission appeals.

Whether the musicians working for Les Artistes were Foard's

employees for unemployment contribution purposes requires a two-step analysis. Initially, we determine whether the alleged employees performed services for pay. ***Keeler v. LIRC***, 154 Wis.2d 626, 631, 453 N.W.2d 902, 904 (Ct. App. 1990). If this is answered in the affirmative, the next step is to determine whether the individuals are exempted by the provisions of § 108.02(12), STATS. ***Id.*** In order for employee status not to apply to the musicians, Foard must satisfy the two-part test under § 108.02(12)(b). Section 108.02(12) provides in relevant part:

> EMPLOYE. (a) "Employe" means any individual who is or has been performing services for an employing unit, in an employment, whether or not the individual is paid directly by such employing unit; except as provided in par. (b) or (e).
>
> (b) Paragraph (a) shall not apply to an individual performing services for an employing unit if the employing unit satisfies the department as to both the following conditions:
>
> 1. That such individual has been and will continue to be free from the employing unit's control or direction over the performance of his or her services both under his or her contract and in fact; and
> 2. That such services have been performed in an independently established trade, business or profession in which the individual is customarily engaged.

If Foard fails to satisfy either part of the test under sub. (b), the individuals are deemed employees. ***Larson v. LIRC***, 184 Wis.2d 378, 385-86, 516 N.W.2d 456, 459 (Ct. App. 1994).

In this appeal, the parties dispute the standard of review applicable to the commission's decision under § 108.02(12), STATS. The commission argues that its holding that the musicians did not perform their

services within the context of independently established trades, businesses or professions in which they were customarily engaged is a finding of fact and not a conclusion of law. Thus, it asserts that the commission's determination must be affirmed because it is supported by
credible evidence in the record. In contrast, Foard argues that the commission's decision as to whether Foard met her burden under § 108.02(12)(b)2 is a question of law.

We begin our analysis of the appropriate standard of review with the familiar rule that we review the findings of the commission, not the circuit court. ***Larson***, 184 Wis.2d at 386, 516 N.W.2d at 459. Whether the employer met his or her burden under both parts of the test is a mixed question of fact and law. ***Id.*** In ***Larson***, we stated: "[T]he parties do not dispute the historical facts in this case. Thus, this issue involved the application of facts to the § 108.02(12)(b), STATS., standard and LIRC's determination that Larson failed to bear his burden of proof is a conclusion of law." ***Id.*** at 386-87, 516 N.W.2d at 459 (citations omitted).

In the present case, the commission argues that because the facts are not undisputed, the commission's determination must be treated as a finding of fact. We disagree. When dealing with a mixed question of fact and law, we apply a mixed standard of review. *See* ***Hemstock Concrete Prods. v. LIRC***, 127 Wis.2d 437, 439, 380 N.W.2d 387, 389 (Ct. App. 1985). We will accept the commission's findings of fact if they are supported by credible and substantial evidence. *See* ***id.*** Whether the facts as found by the commission

meet the legal standard articulated in § 108.02(12)(b), STATS., is a question of law. *See* ***id.***

Alternatively, the commission argues that if its decision is a conclusion of law, we should give some deference to the commission's conclusions. We reject this assertion because it is contrary to this court's decision in ***Larson.*** As stated in that case:

> Although great weight is given to the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying it, this deference is due only if the administrative practice of applying the statute is long continued, substantially uniform and without challenge by governmental authorities and courts. [Emphasis, alterations and quoted source omitted.]

Larson, 184 Wis.2d at 387, 516 N.W.2d at 459-60. In ***Larson,*** we concluded that the commission's application of § 108.02(12), STATS., had not gone unchallenged by the courts; thus, there was no clear administrative precedent regarding this issue. ***Id.*** at 387, 516 N.W.2d at 460. We therefore determined that we were not bound by the commission's interpretation or application of the facts to this section and would review the issue de novo. ***Id.*** at 387-88, 516 N.W.2d at 460. We proceed in the same manner in the present case.

It is undisputed that the alleged employees performed services for pay. We therefore move on to the next step where Foard must make a prima facie showing as to each part of the test under § 108.02(12)(b), STATS. *See* ***Larson***, 184 Wis.2d at 387-88, 516 N.W.2d at 460. However, because the commission conceded the first part of the test, namely, that the musicians in

question have been and will continue to be free from Foard's control or direction over the performance of their services both under their contracts and in fact, the only issue remaining is whether Foard met the second part of the test.

We must decide whether Foard made a prima facie showing that the musicians performed their services in an independently established profession in which they were customarily engaged. In ***Keeler***, this court articulated five interrelated factors which were used in determining this question. ***Keeler***, 154 Wis.2d at 632, 453 N.W.2d at 904. The factors were listed as follows: integration, advertising or holding out, entrepreneurial risk, economic dependence and proprietary interest. ***Id.*** at 633-34, 453 N.W.2d at 905. Importantly, the court in ***Keeler*** stated that these factors were "not to be mechanically applied, but analyzed in light of the public policy of more fairly sharing the economic burdens of unemployment for those economically dependent on another, not those who pursue an independent business." ***Id.*** at 632-33, 453 N.W.2d at 904. We stress that these factors are merely guidelines to assist in the analysis as to whether an employer/employee relationship exists. As the court stated in ***Keeler***: "The weight given to the various factors and the importance of each varies according to the specific facts of each case." ***Id.*** at 634, 453 N.W.2d at 905.

In the present case, we conclude that Foard presented evidence sufficient to establish a prima facie case that the musicians performed their services in an independently established profession in which the musicians

were customarily engaged. We agree with Foard that the commission applied the five factors mechanically and in a manner inconsistent with the purpose of the Unemployment Compensation Act. First, looking at the integration factor, we restate our position in ***Larson***:

> [I]f the alleged employee performs services not directly related to the alleged employer's business, this fact would tend to show that the individual is not an employee. However, the converse is not true—all individuals who perform services related to the activities conducted by the company retaining these services are not by that factor alone deemed employees under the Unemployment Compensation Act.

Larson, 184 Wis.2d at 391 n.7, 516 N.W.2d at 461. The commission's reliance on the fact that the services performed by the musicians were similar to Foard's business was misplaced. Whether the services were similar does not determine the type of relationship that existed between Foard and the musicians.[1]

As for entrepreneurial risk, we must also analyze this factor in light of the musical entertainment industry. The musicians invested time and money in their own musical instruments and expenses associated with their services. They were also responsible for their own practice time. Although the musicians' entrepreneurial risk might not have been as great as Foard's, the magnitude of the risk is not, by itself, determinative. ***Id.*** at 394, 516 N.W.2d at 462. "Instead, the proper consideration is whether the facts are probative of an

[1] This is also true with the advertising factor which may not be applicable to the entertainment industry. As the trial court stated: "[T]he musicians in this case are engaged in a profession in which reputations and services are spread more through word-of-mouth than by formal advertising."

enterprise created and existing separate and apart from the relationship with the particular employer." ***Id.*** (quoted source omitted). The facts referred to above are probative of the musicians' involvement in enterprises created and existing separate and apart from the relationship with Foard.[2]

More telling of the relationship between Foard and the musicians is the factor of economic dependence. The record illustrates that the musicians were economically independent. The musicians were not guaranteed work and they were free to decline work. The musicians' percentage of income from the agency was generally less than five percent of their total annual income. The musicians were also known to go out and get their own business. There is no evidence that the musicians were economically dependent on Foard for their livelihood. Evidence indicates that their independently established professions would survive the termination of their relationship with Foard. *See* ***Larson***, 184 Wis.2d at 393, 516 N.W.2d at 462. Because we hold that Foard satisfied her burden under both parts of § 108.02(12)(b), STATS., we affirm the order of the

[2] We further conclude that the proprietary interest factor does not apply in this particular situation. We agree with this court's position in ***Larson*** that independently established business status is not foreclosed to all people "whose businesses depend on their own particular talents and not upon an extensive personnel pool or equipment inventory." ***Larson v. LIRC***, 184 Wis.2d 378, 395, 516 N.W.2d 456, 463 (Ct. App. 1994).

circuit court.

By the Court.—Order affirmed.

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