

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 21, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

FRANK D. HURST CORPORATION,

PLAINTIFF-APPELLANT,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND STATE
OF WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND
HUMAN RELATIONS, N/K/A DEPARTMENT OF
WORKFORCE DEVELOPMENT,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Frank D. Hurst Corporation appeals a judgment affirming a decision of the Labor and Industry Review Commission that photographic negative retouchers are employees of Hurst and not independent

contractors. LIRC concluded that Hurst failed to carry its burden of establishing that the workers were free from its control or direction and that their services have been performed in an independently established trade, business or profession. *See* § 108.02(12)(b), STATS. Because LIRC's findings of fact are supported by sufficient evidence and its application of the facts to the law is reasonable, we affirm the judgment.

This court has a very limited scope of review. LIRC's findings of fact must be upheld if they are supported by substantial evidence, even if they are contrary to the great weight and clear preponderance of the evidence. *See Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 78, 330 N.W.2d 169, 185 (1983). Substantial evidence has been defined as evidence sufficient to exclude speculation or conjecture. *L&H Wrecking Co. v. LIRC*, 114 Wis.2d 504, 508, 339 N.W.2d 344, 346 (Ct. App. 1983). LIRC's conclusions of law, while not conclusive, are entitled to considerable deference. Because LIRC is charged with administering the unemployment compensation statutes and has a long history of determining whether workers are employees or independent contractors, we must give great weight to its application of the statute to the facts. *See CBS, Inc. v. LIRC*, No. 96-3707, slip op. at 7-8 (Wis. June 30, 1998.) In other words, we must affirm LIRC's application of § 808.02(12)(b), STATS., if it is reasonable. An unreasonable interpretation is one that "directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise without rational basis." *Id.* at 8-9.

LIRC found that Hurst maintained the right or power to control the workers, regardless of whether it exercised that right. *See Stafford Trucking v. DILHR*, 102 Wis.2d 256, 263, 306 N.W.2d 79, 83 (Ct. App. 1981). Hurst provided detailed training and instruction on how to do the retouching work. The

ultimate customers, the photographers, did not directly communicate with the retouchers, did not know the retouchers by name and were not able to select a specific retoucher. Hurst paid the retouchers for their services regardless of whether the photographers paid Hurst. The workers' ability to refuse work, set their own hours, file no reports and attend no meetings are similar to the circumstances described in *Tri-State Home Improv. Co. v. LIRC*, 111 Wis.2d 103, 106-07, 330 N.W.2d 186, 187-88 (1983), where the workers were held to be employees. These factors support LIRC's conclusion that Hurst maintained the right to control and direct the workers' activities.

The evidence also supports LIRC's conclusion that the retoucher's services have not been performed in an independently established trade, business or profession. It is not sufficient to show that the workers occasionally performed services for someone other than the employer or that the worker was not forbidden to do so. Rather, the question is whether the workers were customarily engaged in an entrepreneurial business that originated and exists apart from the relationship with Hurst, under circumstances where the worker's business can survive termination of the relationship with Hurst. LIRC reasonably concluded that Hurst failed to establish its workers had economic independence, that their services were not necessary to and directly related to Hurst's business, that the retouchers advertised or held themselves out to do similar work for others, that the workers were economically independent, that they exposed themselves to entrepreneurial risks or that they had a business that they could sell or transfer to another. *See Princess House*, 111 Wis.2d at 69-74, 330 N.W.2d at 180-83; *see also Sears Roebuck & Co. v. DILHR*, 90 Wis.2d 736, 750, 280 N.W.2d 240, 246 (1979); *Transport Oil v. Cummings*, 54 Wis.2d 256, 167, 195 N.W.2d 649, 655 (1972).

By the Court.—Judgment affirmed.

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

