COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1588 **Cir. Ct. No. 2014CV2234**

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

MEGAN J. CORONADO,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

REGIS CORP.,

DEFENDANT.

APPEAL from an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. Megan J. Coronado appeals from a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) which dismissed her unemployment appeal as untimely. Coronado contends that her failure to timely appeal a series of adverse unemployment benefits determinations was due to a reason beyond her control within the meaning of WIS. STAT. § 108.09(4)(c) (2013-14).[1] Because LIRC's decision was reasonable and supported by credible and substantial evidence, we affirm.

¶2 Coronado has a longstanding and well-documented learning disability that makes it difficult for her to process and retain written information. When Coronado first applied for unemployment benefits in 2011, she obtained assistance from her mother and indicated to the Department of Workforce Development (DWD) that she was learning disabled. Coronado continued to file weekly claim certifications until the start of September 2013.

¶3 Sometime around August 2013, DWD questioned Coronado's eligibility for unemployment benefits in connection with work performed for an employer. On September 21 and 24, 2013, DWD mailed five separate determinations to Coronado's address of record, finding that as to a number of weeks for which she received unemployment benefits, she failed to report work performed and wages earned on her weekly certifications. Each determination set forth the weeks in question and stated:

> NO BENEFITS ARE PAYABLE FOR THE ABOVE WEEK(S).

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

> THIS DECISION RESULTS IN AN OVERPAYMENT OF $ [a specified amount] WHICH MUST BE REPAID BY THE CLAIMANT.
>
> SEND A CHECK OR MONEY ORDER, PAYABLE TO UNEMPLOYMENT INSURANCE, TO THE UNEMPLOYMENT INSURANCE DIVISION, … [address provided].
>
> THE DEPARTMENT WILL WITHHOLD UNEMPLOYMENT BENEFITS PAYABLE FOR FUTURE WEEKS TO OFFSET OVERPAYMENTS OF UNEMPLOYMENT INSURANCE ….

The determinations also warned that DWD could "SEEK CRIMINAL PROSECUTION" and set forth the respective appeal deadlines, indicating the determinations would become final unless an appeal was received or postmarked by October 7 or 8, 2013.[2] Coronado took no action during the appeal period and the determinations became final.

¶4 In May 2014, after learning that her prior year's tax refund had been intercepted by DWD, Coronado sought to appeal the adverse determinations with the assistance of counsel. Coronado did not dispute that her appeal was late but asserted its untimeliness was attributable to her learning disabilities and that this

[2] Pursuant to WIS. STAT. § 108.09(2r), an appeal of a determination concerning an unemployment claim must be received or postmarked fourteen days after the date the determination is mailed to the party. Coronado's determinations were mailed on two different days, resulting in two separate deadlines.

constituted a reason beyond her control within the meaning of WIS. STAT. § 108.09(4)(c).[3]

¶5 DWD scheduled a hearing on the timeliness of Coronado's appeal before an administrative law judge (ALJ). Extensive evidence was presented about Coronado's learning disability and her ongoing need for assistance in understanding and processing written information. Coronado testified that she did not recall having received the initial determinations from DWD. There was no dispute that the determinations were mailed to her mother's home, the address Coronado provided to DWD. Coronado could not recall precisely where she lived in the fall of 2013 but indicated she resided at least in part at her mother's house. She stated she received all mail at her mother's address but did not retrieve it on a daily basis. She testified that in the past, she had problems receiving her mail there because there were "a lot of people in and out of the house." Though she did not recall receiving the initial determinations, she did recall receiving "bills" from DWD in late 2013 through early 2014. She testified she asked for her mother's assistance but that she was unable to help.

¶6 Over Coronado's objection, the ALJ took administrative notice of documents in LIRC's record which predated the determinations and indicated that

[3] In pertinent part, WIS. STAT. § 108.09(4)(c), provides:

> If a party files an appeal which is not timely, an appeal tribunal shall review the appellant's written reasons for filing the late appeal. If those reasons, when taken as true and construed most favorably to the appellant, do not constitute a reason beyond the appellant's control, the appeal tribunal may dismiss the appeal without a hearing and issue a decision accordingly. Otherwise, the department may schedule a hearing concerning the question of whether the appeal was filed late for a reason that was beyond the appellant's control.

(1) on September 12, 2013, DWD mailed a notice of interview to Coronado, and (2) on September 19, 2013, an adjudicator from DWD conducted a telephone interview with Coronado concerning the disputed benefits. Coronado testified she was unable to recall either the notice or the interview.

¶7 The ALJ issued five decisions adverse to Coronado, determining the reason her appeal was untimely was not a reason beyond her control. The ALJ explained that because Coronado testified she did not recall having received the determinations, her inability to understand the documents or to realize she needed to seek assistance was not immediately relevant:

> Instead, the claimant contended that she did not receive the determination in a timely manner and was unaware of its contents until shortly before filing the appeal. She conceded, however, that the determination might have been received by someone else in her household or might have been otherwise misplaced. In addition, the claimant had spoken to the department regarding her benefits eligibility shortly before the initial determination was issued, and therefore would have been put on notice to look for correspondence from the department. She also was filing weekly claims for benefits shortly before the appeal period and was physically present during the appeal period to receive mail at the address of record. In light of these circumstances and in light of the presumption that mail properly addressed is received, the claimant's evidence is unpersuasive that the failure to file a timely appeal was due to circumstances beyond the claimant's control. Accordingly, the claimant's late request for a hearing was not for a reason beyond the claimant's control.

¶8 Coronado then filed a timely petition for LIRC review of the ALJ's adverse decisions. After reviewing Coronado's brief and the record of the hearing, LIRC affirmed and adopted the ALJ's decisions, stating:

> [T]he record does not support a conclusion that the claimant's appeal was filed late because the claimant has a learning disability. There is no evidence in the record to indicate that the claimant's failure to file timely appeals was because she attempted to read the initial determinations

> but could not understand them. To the contrary, the claimant testified that she could not recall having received the initial determinations at all. *(T. 50: 17-19).* The claimant went on to explain that there were a lot of times when she did not get her mail because there are a lot of people in and out of her house and she would not necessarily be the one picking up the mail. *(T. 56).* She also indicated that she lived at the address to which the determinations were sent off and on, but was sometimes residing elsewhere. *(T. 55).* The commission agrees with the administrative law judge that the claimant's testimony fell short of establishing that the initial determinations were not delivered to her most recent address of record by the United States Postal Service or that, if she did not personally receive them, this was due to any circumstance beyond her control. Finally—and although the commission wishes to emphasize that the claimant did not testify that her appeals were late due to any reason related to a learning disability—the record contains evidence to suggest that the claimant was capable of handling some aspects of her unemployment insurance claim on her own *(T. 65: 19-25)* and, further, that she sought and received assistance from her mother when needed *(T. 58)*. Under all the circumstances, the commission agrees with the appeal tribunal that the claimant failed to demonstrate that her appeals were filed late due to a reason beyond her control. The appeal tribunal decisions are, accordingly, affirmed.

After LIRC declined to reconsider its decision, Coronado commenced an action seeking judicial review in the circuit court. The circuit court agreed with LIRC's decision and denied the appeal. Coronado now appeals to this court.

¶9 In pertinent part, WIS. STAT. § 108.09(4)(c) provides that after reviewing a party's reasons for filing a late appeal, an appeal tribunal shall determine whether "the appeal was filed late for a reason that was beyond the appellant's control." If so, the appellant may appeal the initial determination on the merits. *See* § 108.09(4)(c). If not, the appeal is dismissed. *See* ***id***. Coronado argues that her appeal was late for reasons beyond her control, specifically, her learning disability, which prevents her from understanding and recalling written information and from acting on her own initiative.

¶10 On appeal, this court reviews the decision of LIRC and not that of the circuit court. ***Stoughton Trailers, Inc. v. LIRC***, 2007 WI 105, ¶26, 303 Wis. 2d 514, 735 N.W.2d 477. LIRC's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. ***Michels Pipeline Constr., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995); *see also* WIS. STAT. § 102.23(6). "Substantial evidence is less of a burden than preponderance of the evidence in that any reasonable view of the evidence is sufficient." ***Bernhardt v. LIRC***, 207 Wis. 2d 292, 298, 558 N.W.2d 874 (Ct. App. 1996). Our role on appeal is to search the record for evidence supporting LIRC's factual determinations, not to search for evidence against them. *See* ***Vande Zande v. DILHR***, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶11 However, we are not bound by an agency's conclusions of law and will apply varying levels of deference depending on the agency's expertise in the area of law at issue. ***Stoughton Trailers***, 303 Wis. 2d 514, ¶26. The three possible levels of review are great weight deference, due weight deference, and de novo review. ***Id***. Great weight deference is appropriate where: (1) the agency is charged by the legislature with administering the statute at issue, (2) the interpretation of the statute 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. ***Brown v. LIRC***, 2003 WI 142, ¶16, 267 Wis. 2d 31, 671 N.W.2d. 279. "Under this standard, we uphold LIRC's interpretation and application of the statute as long as it is reasonable and consistent with the statute's language, regardless of whether other interpretations are reasonable." ***Hubert v. LIRC***, 186 Wis. 2d 590, 597, 522 N.W.2d 512 (Ct. App. 1994).

¶12 Though Coronado concedes that great weight deference would normally be appropriate given LIRC's experience and expertise in interpreting and applying the unemployment statutes, she contends we should review LIRC's decision in the present case de novo because it is inconsistent with prior LIRC decisions. We disagree. "A de novo standard of review is applicable only when the issue before the agency is clearly one of first impression or when an agency's position on an issue has been so inconsistent so as to provide no real guidance." ***Lopez v. LIRC***, 2002 WI App 63, ¶11, 252 Wis. 2d 476, 642 N.W.2d 561. ***Lopez*** acknowledges the potential propriety of de novo review where the body of an agency's prior decisions has resulted in significantly different results. Its rationale does not apply here, where Coronado claims LIRC's position in her case is inconsistent with its prior consistent decisions. Additionally, the ***Lopez*** court rejected a similar argument, observing that different factual situations will lead to different decisions and that great weight deference "will continue to provide uniformity and consistency in [the statute's] application." ***Id.***, ¶¶14-15.

¶13 Applying great weight deference, we determine that LIRC reasonably concluded that Coronado failed to establish that her late appeal was attributable to reasons beyond her control. Coronado testified she could not recall having received or seen the determinations. Assuming the truth of her statement, there are three possible scenarios: (1) the determinations were never delivered; (2) the determinations were delivered but Coronado did not receive or open them; or (3) Coronado attempted to read the determinations, took no further action, and has no recollection of that event. LIRC reasonably determined that the first two

possibilities do not constitute reasons beyond Coronado's control.[4] To the extent Coronado apparently advocates the third scenario, LIRC determined that on this record, she fell short of establishing that she attempted but was unable to read the determinations. Given the myriad alternative explanations for Coronado's inability to recall the determinations, this finding is supported by substantial evidence and must be upheld. *See* ***Bernhardt***, 207 Wis. 2d 292, 299 (If the evidence permits more than one inference, "the drawing of one such permissible inference by LIRC is an act of fact finding, and the inference so derived is conclusive on the reviewing court.") (citation omitted).

¶14 LIRC further concluded that even if Coronado attempted to read but could not understand the determinations because of her learning disabilities, this did not constitute a reason beyond her control. Coronado never testified that she tried to read the determinations or that despite the inclusion of strongly-worded, large-print cautionary warnings, her learning disability prevented her from understanding the need to seek out assistance from DWD or her mother. As stated by LIRC, the record "contains evidence to suggest that the claimant was capable of handling some aspects of her unemployment claim on her own and, further, that she sought and received assistance from her mother when needed." In other words, LIRC found that despite her learning deficits, Coronado had the ability to seek help when necessary. This finding is supported by substantial evidence. We cannot substitute our judgment with respect to witness credibility or the weight to be accorded the evidence supporting any finding of fact. ***Id.*** at 298.

[4] LIRC agreed with the ALJ "that the claimant's testimony fell short of establishing that the initial determinations were not delivered to her most recent address of record by the United States Postal Service or that, if she did not personally receive them, this was due to any circumstance beyond her control."

By the Court.—Order affirmed.

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