

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 24, 2009

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. 2008AP2856

Cir. Ct. No. 2007CV421

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CHAD HALL,

PETITIONER-APPELLANT,

V.

**SCHOOL DISTRICT OF ST. CROIX FALLS, WAUSAU BUSINESS
INSURANCE COMPANY AND STATE OF WISCONSIN LABOR AND
INDUSTRY REVIEW COMMISSION,**

RESPONDENTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Polk County:
ROBERT RASMUSSEN, Judge. *Affirmed.*

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

¶1 PER CURIAM. Chad Hall appeals a judgment affirming a Labor and Industry Review Commission decision denying his claim for worker's compensation benefits. Hall argues the Commission erred by concluding he was

not an employee of the School District of St. Croix Falls at the time of his injury. We reject Hall's arguments and affirm the judgment.

BACKGROUND

¶2 In October 2003, Hall signed a contract with the school district to be a volunteer assistant basketball coach. Pursuant to the "volunteer coaches" contract, Hall agreed "to work the hours assigned, perform whatever duties, [and] attend such meetings and training programs as are assigned by the Board of Education through your supervisor." The contract indicated compensation would be "\$.00" and listed no fringe benefits. In December 2003, Hall injured his left knee while practicing with the basketball team. He ultimately underwent arthroscopic surgery to reconstruct his anterior cruciate ligament.

¶3 After Hall applied for worker's compensation benefits, the school district balked, arguing Hall was not an employee and, therefore, not eligible for benefits. An administrative law judge determined an employer-employee relationship existed at the time of Hall's injury. After a credibility conference with the ALJ, the Commission reversed the ALJ's findings and dismissed Hall's application. On certiorari review, the circuit court affirmed the Commission's decision and this appeal follows.

DISCUSSION

¶4 Judicial review of worker's compensation decisions is limited in scope. *See* WIS. STAT. § 102.23.¹ On appeal, this court reviews the Commission's

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

findings of fact and conclusions of law, not those of the circuit court. *See UPS v. Lust*, 208 Wis. 2d 321, 560 N.W.2d 301 (Ct. App. 1997). The Commission's findings of fact are conclusive on appeal as long as they are supported by credible and substantial evidence. *See 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). Credible evidence is that which excludes speculation and conjecture. *See Bumpas v. DILHR*, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980). Substantial evidence is not a preponderance of evidence, but relevant evidence that a reasonable person might accept as adequate to support a conclusion. *See Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). Our role on appeal is to search the record for evidence supporting the Commission's factual determinations, not to search for evidence against it. *See Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶5 As a preliminary matter, the parties dispute the proper level of deference this court should accord the Commission's legal conclusions. However, regardless what level of deference we apply, if any, we conclude that Hall's arguments fail.

¶6 The foundation of the Worker's Compensation Act is the existence of an actual employer-employee relationship. *Wendlandt v. Industrial Comm'n*, 256 Wis. 62, 67, 39 N.W.2d 854 (1949). With the exception of volunteer firefighters, who are deemed employees pursuant to WIS. STAT. § 102.07(7), the Worker's Compensation Act does not cover volunteers. *Bituminous Casualty Co. v. Industrial Comm'n*, 245 Wis. 337, 340-41, 13 N.W.2d 925 (1944). In determining the existence of an employer-employee relationship under the Act, our supreme court has held that the test established in *Kress Packing Co. v. Kottwitz*, 61 Wis. 2d 175, 182, 212 N.W.2d 97 (1973), continues to have vitality in

determining whether a person is an employee under WIS. STAT. § 102.07(4)(a).² *Acuity Mut. Ins. Co. v. Olivas*, 2007 WI 12, ¶87, 298 Wis. 2d 640, 726 N.W.2d 258. As the *Acuity Mutual* court acknowledged:

Kress Packing established the primary test for determining an employer-employee relationship: Does the alleged employer have a right to control the details of the work? In assessing the right to control, four secondary factors are considered: (1) direct evidence of the exercise of the right of control, (2) method of payment of compensation, (3) furnishing of equipment or tools for the performance of the work, and (4) right to fire or terminate the employment relationship.

Id., ¶88. The test is fact specific, *id.*, and in the present case, the parties focus on whether Hall received compensation. Wages are a necessary part of any employer-employee relationship; however, the wages need not be money. *Klusendorf Chevrolet-Buick, Inc. v. LIRC*, 110 Wis. 2d 328, 335, 338 N.W.2d 890 (Ct. App. 1982).

¶7 Hall contends he received compensation in both tangible and intangible forms. Although Hall was paid no wages by the school district, he argues he received tangible compensation in the form of coaching shirts, a duffle bag, transportation to games on the team bus, a key to the facility and a pass for all conference basketball games. Hall also had unlimited access to the school locker room, weight room and gym to work out and exercise on his own. These claimed benefits, however, were merely incidental to Hall's position and of otherwise

² Relevant to this appeal, "employee" is defined under the statute as "[e]very person in the service of another under any contract of hire, express or implied, all helpers and assistants of employees, whether paid by the employer or employee, if employed with knowledge, actual or constructive, of the employer[.]" WIS. STAT. § 102.07(4)(a).

minimal value—they could not reasonably give rise to an expectation on Hall’s part that he was an employee of the school district.

¶8 Hall additionally emphasizes that at the end of the 2003-04 coaching season, the paid coaches gave Hall approximately \$600 in appreciation for his work as an assistant coach. The evidence, however, establishes that the money from the coaches was merely gratuitous and not sanctioned by the school district. Hall nevertheless attempts to compare the \$600 he received to the gratuities left for wait staff in restaurants. We are not persuaded. Unlike Hall, restaurant wait staff receive a base pay from their employer that is then supplemented with any gratuities received.

¶9 Citing a Michigan case discussed by the *Klusendorf* court, Hall claims he received intangible compensation in the form of valuable resume-building experience. The *Klusendorf* court acknowledged that in *Betts v. Ann Arbor Public Schools*, 271 N.W.2d 498 (Mich. 1978), “a practice teacher who received no money, but training, college credits, and a prerequisite for a state certificate was entitled to worker’s compensation benefits when injured at the employer’s school.” *Klusendorf*, 110 Wis. 2d at 335. Unlike the “practice teacher” in *Betts*, however, Hall testified he never expected to receive any payment for his work, nor did he receive any school credit or teaching certification as a result of his position. Moreover, as the circuit court noted, it would be purely speculative to attach a dollar value to the “experience” Hall gained.

¶10 Based on our review of the record, we conclude there was no evidence of an implied agreement for payment. Further, the items Hall received were either gratuitous or of minimal value and, therefore, insufficient to establish an employer-employee relationship. Because there is credible and substantial

evidence to support the Commission's decision denying Hall's claim for worker's compensation benefits, we affirm the judgment.

By the Court.—Judgment affirmed.

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

