

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 4, 2012

Diane M. Fremgen
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. 2012AP273
STATE OF WISCONSIN**

Cir. Ct. No. 2011CV9112

**IN COURT OF APPEALS
DISTRICT I**

NIKOLA PETROVIC,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION, DBG EXPRESS
TRUCKING, LLC AND WIS WC UEF,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DENNIS P. MORONEY, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Nikola Petrovic appeals from a circuit court order affirming a decision of the Labor and Industry Review Commission (LIRC) that denied him worker's compensation benefits. LIRC, affirming the decision of an administrative law judge, concluded that Petrovic was an independent contractor

and not an employee of DBG Express Trucking, LLC (DBG Trucking), when he sustained a work-related injury. We affirm.

BACKGROUND

¶2 Petrovic suffered an injury in November 2009 while hauling cargo as a truck driver. He applied for worker's compensation benefits, alleging that DBG Trucking was his employer. DBG Trucking did not carry worker's compensation insurance, so the Wisconsin Worker's Compensation Uninsured Employers Fund (UEF) handled the claim. The UEF contended that Petrovic was not employed by DBG Trucking but instead was an independent contractor. The matter proceeded to a hearing before an administrative law judge.

¶3 The evidence developed at the hearing reflected that DBG Trucking serves as a middleman for entities with cargo to ship and truck drivers under contract with DBG Trucking. Bojan Delipara, the owner of DBG Trucking, explained that customers call his company and tell him where their cargo is located, when the customers require pickup and delivery of their goods, and the fees that the customers propose to pay for shipping. The drivers tell Delipara when they are available and how far they are willing to drive. Delipara then offers each customer's proposal to an available driver. The driver can accept or refuse the proposal or ask Delipara to try to negotiate a higher fee for the transport.

¶4 The drivers under contract with DBG Trucking may drive for other companies but the drivers must first notify Delipara. He explained that notification is necessary because the drivers' trucks display MC (motor carrier) and Department of Transportation numbers assigned to DBG Trucking, and the displays must be removed before the drivers haul cargo for another company.

¶5 Delipara testified that in November 2009 he had contracts with four truck drivers, including Petrovic. The contract between Petrovic and DBG Trucking is in the record and identifies Petrovic as an independent contractor. Pursuant to the contract, Petrovic received ninety percent of the gross receipts of each delivery that he completed, and DBG Trucking received a ten percent commission. Delipara did not deduct any taxes from the amounts he paid to Petrovic, but Delipara did deduct from those amounts \$300 a week to pay for cargo liability insurance. Delipara said that he obtains insurance for all of the drivers he works with to allow them to take advantage of a multiple contractor discount. The drivers, however, pay the cost of insurance coverage.

¶6 Petrovic also testified. He said that he owned the truck that he used to haul cargo for DBG Trucking and that he paid for all of the costs of maintaining the truck, including licensing fees, registration, and repairs. He said that DBG Trucking paid him only for freight-hauling assignments that he accepted and that he could refuse an assignment that he did not want. He chose his own route for each assignment that he accepted, and he was responsible for the expenses, including tolls and fuel costs, associated with hauling each load of cargo. He said that he has a federal tax identification number, and he filed tax returns in 2007 and 2008 that included a Schedule C: Profit or Loss from Business. Copies of those tax returns are in the record. On each Schedule C, Petrovic stated a business address that is also his home address, he reported a profit each year, and he deducted business expenses, including insurance. He testified that he kept all the records necessary for his work either in his home or in his truck. He acknowledged that he spent a brief period driving for another trucking company but then resumed driving for DBG Trucking until he was injured.

¶7 Based on the foregoing evidence, the administrative law judge determined that Petrovic was an independent contractor and not an employee of DBG Trucking at the time of his injury. LIRC affirmed the decision of the administrative law judge. The circuit court affirmed in turn, and this appeal followed.

DISCUSSION

¶8 Our scope of review is identical to that of the circuit court. *Hill v. LIRC*, 184 Wis. 2d 101, 109, 516 N.W.2d 441 (Ct. App. 1994). “We review the [C]ommission’s factual findings and legal conclusions, not those of the circuit court.” *Epic Staff Mgmt., Inc. v. LIRC*, 2003 WI App 143, ¶13, 266 Wis. 2d 369, 667 N.W.2d 765. We are bound by LIRC’s findings of fact if credible evidence exists to support them, “even if LIRC’s findings appear contrary to the great weight and clear preponderance of the evidence.” *Hill*, 184 Wis. 2d at 110-11. We are not bound by an administrative agency’s conclusions of law. *Weston v. DWD*, 2007 WI App 167, ¶12, 304 Wis. 2d 418, 737 N.W.2d 74.

¶9 Petrovic asserts that, at the time of his injury, he was an employee of DBG Trucking and not an independent contractor for purposes of the Worker’s Compensation Act. The determination is governed by a nine-part statutory test

described in WIS. STAT. § 102.07(8)(b)1.-9. (2009-10).¹ A worker who meets all of the statutory criteria is an independent contractor rather than an employee and

¹ WISCONSIN STAT. § 102.07(8)(b) provides:

(b) An independent contractor is not an employee of an employer for whom the independent contractor performs work or services if the independent contractor meets all of the following conditions:

1. Maintains a separate business with his or her own office, equipment, materials and other facilities.
2. Holds or has applied for a federal employer identification number with the federal internal revenue service or has filed business or self-employment income tax returns with the federal internal revenue service based on that work or service in the previous year.
3. Operates under contracts to perform specific services or work for specific amounts of money and under which the independent contractor controls the means of performing the services or work.
4. Incurs the main expenses related to the service or work that he or she performs under contract.
5. Is responsible for the satisfactory completion of work or services that he or she contracts to perform and is liable for a failure to complete the work or service.
6. Receives compensation for work or service performed under a contract on a commission or per job or competitive bid basis and not on any other basis.
7. May realize a profit or suffer a loss under contracts to perform work or service.
8. Has continuing or recurring business liabilities or obligations.
9. The success or failure of the independent contractor's business depends on the relationship of business receipts to expenditures.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

therefore is not eligible for worker's compensation benefits under the act. *See Jarrett v. LIRC*, 2000 WI App 46, ¶¶1, 22, 233 Wis. 2d 174, 607 N.W.2d 326.

¶10 Petrovic contends that he did not satisfy the criteria set forth in WIS. STAT. § 102.07(8)(b)1.² He argues that “he did not maintain a separate business with his own office, equipment, materials and other facilities.” LIRC, however, concluded otherwise.

¶11 Application of a statutory standard to facts found by an agency is a question of law. *Margoles v. LIRC*, 221 Wis. 2d 260, 264, 585 N.W.2d 596 (Ct. App. 1998). On review, we afford the agency one of three levels of deference: great weight, due weight, or no deference. *See id.* at 264-65. Great weight deference is appropriate where: (1) the legislature has charged the agency with the duty of administering the statute; (2) the agency's interpretation is long-standing; (3) the agency's interpretation is based on its specialized knowledge or expertise; and (4) the agency's interpretation provides consistency and uniformity in applying the statute. *Id.* at 265. We give due weight deference when an agency decision does not meet all of the criteria for great weight deference or the decision “is ‘very nearly one of first impression.’” *Estate of Hagenstein v. DHFS*, 2006 WI App 90, ¶20, 292 Wis. 2d 697, 715 N.W.2d 645 (citation omitted). *De novo* review, conducted with no deference to the agency, is appropriate where the issue is clearly one of first impression or where an agency's position on an issue has

² Petrovic states that he “is asking the Court for clarification as to only the first element of the nine-part test of Section 102.07(8)(b).” He appears to concede that he satisfies the eight factors defining an independent contractor set forth in WIS. STAT. § 102.07(8)(b)2.-9. Indeed, he chides the UEF for devoting five pages of its appellate brief to a discussion of those eight factors because “those factors [are] not certified on appeal.” We conclude that he has abandoned any possible challenge to the agency's conclusion that he satisfied the conditions described in § 102.07(8)(b)2.-9.

been so inconsistent that it provides no real guidance. *UFE Inc. v. LIRC*, 201 Wis. 2d 274, 285, 548 N.W.2d 57 (1996).

¶12 LIRC contends that we should afford great weight deference to the conclusion that Petrovic maintained his own business within the meaning of WIS. STAT. § 102.07(8)(b)1. LIRC’s position is compelling. We recently observed that, “[a]t this point, there can be no dispute that the Commission has developed a long-standing interpretation of the rules governing the employer-employee relationship and has used its expertise and specialized knowledge in crafting that interpretation.” *County of Barron v. LIRC*, 2010 WI App 149, ¶23, 330 Wis. 2d 203, 792 N.W.2d 584. Additionally, “the Commission’s interpretation of WIS. STAT. § 102.07 and related statutes provides uniformity and consistency.” *County of Barron*, 330 Wis. 2d 203, ¶23.

¶13 Petrovic nonetheless asserts that we should conduct a *de novo* review because, he says, LIRC inconsistently applies WIS. STAT. § 102.07(8)(b)1. In support of this contention, he directs us to “compare *Floerchinger v. Nestle Transp.*, WC Claim No. 2000-017699, [2001 WL 1019954], (LIRC Aug. 15, 2001) with *Tucker v. Ace World Wide Moving & Storage*, WC Claim No. 1999-057774, [2001 WL 355483], (LIRC March 2, 2001).” Petrovic offers no further discussion of *Floerchinger* or *Tucker*, and our review of these two administrative decisions does not satisfy us that LIRC inconsistently applies the statute. Rather, in both *Floerchinger* and *Tucker*, LIRC examined the facts to determine whether they demonstrated that the truck driver seeking worker’s compensation benefits was an independent contractor or an employee in relationship to a putative employer.

¶14 In *Floerchinger*, LIRC determined that a worker was an independent contractor. See *id.*, 2001 WL 1019954 at *5. LIRC found that the driver’s “home and his truck cab together served as the only office he needed to maintain his business.” *Id.* at *2. LIRC further found that the driver owned the truck he used for hauling freight, could freely terminate his relationship with the putative employer, and, if he did so, could continue his trucking business with other companies. *Id.* at *2-*3. LIRC concluded that the truck driver maintained a separate business for purposes of WIS. STAT. § 102.07(8)(b)1. *Floerchinger*, 2001 WL 1019954 at *3. Further, LIRC noted that it had reached a similar conclusion under similar circumstances in *Blose v. Roberts Trucking Inc.*, WC Claim No. 1998040771, 1999 WL 1277503 (LIRC Dec. 8, 1999). See *Floerchinger*, 2001 WL 1019954 at *3.

¶15 In *Tucker*, LIRC determined that a truck driver was an employee rather than an independent contractor. See *Tucker*, 2001 WL 355483 at *1. Petrovic apparently considers this result inconsistent with the decision reached in *Floerchinger*. As LIRC points out, however, in both cases LIRC considered the specific facts presented in light of WIS. STAT. § 102.07(8)(b)1. LIRC found in *Tucker* that the truck driver did not maintain the trappings of a business, and LIRC concluded that “[t]he fact that the [truck driver] may have gotten some extra forms from the employer, which he kept to be completed at a later date, did not establish that he maintained or owned a separate business with his own office equipment, materials and other facilities.” *Id.* at *1. We are not persuaded that a comparison of *Floerchinger* with *Tucker* demonstrates such marked inconsistency as would allow a conclusion that the agency offers “no real guidance” to applicants for worker’s compensation.

¶16 Petrovic further asserts that we should conduct a *de novo* review because “application of rules of statutory construction are not within LIRC’s area of experience and specialized knowledge.” In support, he cites *Sauk County v. WERC*, 165 Wis. 2d 406, 477 N.W.2d 267 (1991). Our examination of *Sauk County* reveals that the supreme court reviewed some issues in that case without deference to the underlying decision of the administrative agency, explaining: “[a]lthough we normally accord an agency’s interpretation of a statute great weight, we cannot do so here because this is a case of first impression, and there is no precedent for the [agency’s] decision. Therefore, the standard of review on these two issues must necessarily be *de novo*.” *Id.* at 414. Petrovic fails to explain why *Sauk County* supports *de novo* review in his case, which does not present issues of first impression. We decline to construct an argument for him. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶17 In light of LIRC’s expertise in interpreting and applying WIS. STAT. § 102.07 generally, and LIRC’s familiarity with applying § 102.07(8)(b)1. to truck drivers specifically, we agree with LIRC that we must review its application of the statute here with great deference. *See County of Barron*, 330 Wis. 2d 203, ¶23. Under this standard, we will uphold LIRC’s conclusion that Petrovic maintained his own business if the agency’s decision is reasonable, even if another application of the statute is more reasonable. *See Margoles*, 221 Wis. 2d at 264.

¶18 Petrovic argues that he did not satisfy WIS. STAT. § 102.07(8)(b)1., because he did not have an “individual, distinct, or disconnected office space.” LIRC reasonably concluded otherwise. The evidence showed that Petrovic kept the records that he needed for his work in his truck or in his home, and he filed tax forms that disclosed a business address that was also his home address. Neither WIS. STAT. § 102.07(8)(b)1., nor any controlling authority cited to us by the

parties, requires that an independent contractor maintain a particular kind of office. To the contrary, we sustained LIRC’s conclusion that a truck driver was an independent contractor when that truck driver kept his records and his truck at his home. *See Jarrett*, 233 Wis. 2d 174, ¶19.

¶19 Petrovic also argues that he did not maintain his own business because he could not “work for other carriers while working for DBG [] Trucking.” This argument is unavailing. Although Wisconsin courts in the past gave substantial weight to a worker’s exclusive relationship with a putative employer, those courts construed an earlier version of WIS. STAT. § 102.07(8) that included a factor not at issue here, namely, “whether the worker held himself out to and rendered service to the public.” *See Jarrett*, 233 Wis. 2d 174, ¶20 & n.8. Moreover, in this case, the evidence showed that Petrovic could, and at one time did, choose to drive his truck for another carrier, and LIRC thus reasonably concluded that Petrovic was not economically dependent on DBG Trucking. We have long recognized that “economic dependence ... refers to the survival of the individual’s independently established business if the relationship with the putative employer ceases to exist. If the individual’s business would also cease to exist, this fact is probative of an employer/employee relationship.” *See Larson v. LIRC*, 184 Wis. 2d 378, 392, 516 N.W.2d 456 (Ct. App. 1994) (citation omitted) (discussing application of the unemployment compensation statute). The evidence here supported LIRC’s finding that Petrovic could continue his business with another carrier if DBG Trucking ceased to exist.

¶20 Next, Petrovic asserts that LIRC’s application of WIS. STAT. § 102.07(8)(b) to the facts in this case is inconsistent with the legislature’s intent and therefore cannot be sustained under even the greatest level of deference. *See Citizens’ Util. Bd. v. PSC*, 211 Wis. 2d 537, 552-53, 565 N.W.2d 554 (Ct. App.

1997) (application of a statute in a manner that contravenes legislative intent is unreasonable and cannot be upheld). We are not persuaded. We have previously recognized that “§102.07(8)(b) was intended to provide the sole test for determining whether a worker is an independent contractor under the [Worker’s Compensation] Act.” *Jarrett*, 233 Wis.2d 174, ¶17. Nothing in Petrovic’s submission convinces us that the fact-intensive inquiry LIRC conducted here contravened the intent of the legislature when it required application of a multi-faceted test to determine the employment status of a worker.

¶21 Indeed, based upon facts markedly similar to those developed during the administrative proceedings here, we held that substantial and credible evidence supported LIRC’s finding that a truck driver maintained a separate business within the meaning of WIS. STAT. § 102.07(8)(b)1. *See Jarrett*, 233 Wis. 2d 174, ¶19. In that case, the driver owned his own truck, was responsible for its maintenance and upkeep, had his own federal tax identification number, kept his records and his truck at his home, received a percentage of the gross receipts for each load of freight that he hauled, and paid for his own expenses. *See id.* We explained: “[r]egardless of the inferences we might draw, substantial and credible evidence supports LIRC’s finding that th[e] element [set forth in § 102.07(8)(b)1.] was satisfied.” *Jarrett*, 233 Wis. 2d 174, ¶19.

¶22 Petrovic, as did the truck driver in *Jarrett*, points to evidence that might support a finding that he did not maintain a separate business. Our role, however, is not to make factual findings from the evidence presented. *See id.*, ¶20. “We may not substitute our judgment for LIRC’s as to the credibility of witnesses or the weight to be accorded to the evidence.” *Hill*, 184 Wis. 2d at 111. Our role is to “examine the record for substantial and credible evidence to support

LIRC's findings.” *Jarrett*, 233 Wis. 2d 174, ¶20. The record amply supports LIRC's findings here. We affirm.

By the Court.—Order affirmed.

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

