

STATE OF WISCONSIN
SUPREME COURT

Case No. 2020AP520

FILED
JUN 30 2021

CLERK OF SUPREME COURT
OF WISCONSIN

Friendly Village Nursing and Rehab, LLC
and Friendly Village Healthcare Center,
Plaintiffs-Appellants-Petitioners,

v.

State of Wisconsin Department of Workforce Development
and
State of Wisconsin Labor and Industry Review Commission,
Defendants-Respondents,

v.

Rhineland Healthcare Operator 150, LLC,
Defendant.

**MOTION TO STRIKE A PART OF
PLAINTIFFS-APPELLANTS-PETITIONER'S
REPLY BRIEF
BY DEFENDANTS-RESPONDENTS
DEPARTMENT OF WORKFORCE DEVELOPMENT
AND
LABOR AND INDUSTRY REVIEW COMMISSION**

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Attorney for	Attorney for
Defendant-Respondent	Defendant-Respondent
State of Wisconsin Department of Workforce Development	State of Wisconsin Labor and Industry Review Commission
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Defendants-Respondents Department of Workforce Development and Labor and Industry Review Commission, by their attorneys, Ryan X. Farrell and Kim T. Castelaz, move the Court to strike a footnote from the reply brief of Plaintiffs-Appellants-Petitioners Friendly Village Nursing and Rehab, LLC and Friendly Village Healthcare Center, filed with this Court on June 18, 2021.

Friendly Village's reply brief, in a footnote on page 12, states:

¹ To date, Petitioners calculate the difference between the two rates to have been approximately \$140,359.

However, **no evidence was introduced at the administrative hearing** about Friendly Village's unemployment insurance contribution rate or taxable payroll, so this assertion is unsupported by the record.

Friendly Village cites nothing in the hearing record to support the "approximate" sum provided in the footnote. This is because there is nothing in the record to support it.

This Court's review, like the review of the circuit court, the court of appeals, and the Labor and Industry Review Commission, is confined to the record of the administrative hearing held before the administrative law judge. Wis. Stat.

§ 108.09(7) (applies to review of cases arising under Wis. Stat. § 108.10) and Wis. Admin Code § LIRC 1.04.¹

Friendly Village's footnote cites a sum calculated "to date." However, the Court reviews the Commission's decision, dated April 24, 2019. (Petitioner's Appendix at 22). The Court may not consider information unavailable to the Commission when it reached its decision because judicial review is limited to the record established before the administrative law judge.

Parties cannot supplement an administrative record in the judicial review process.² "It is well established that reviewing courts are limited to the record and are bound by the record."³ Materials not introduced into evidence at hearing cannot later become evidence in an action before a court because a court is without power to go beyond the record.⁴

¹ *Weibel v. Clark*, 87 Wis. 2d 696, 708, 275 N.W.2d 686 (1979).

² *Int'l Harvester Co. v. Indus. Commission of Wisconsin*, 157 Wis. 167, 172, 147 N.W. 53, 55 (1914).

³ *Kenwood Merchandising Corp. v. LIRC*, 114 Wis. 2d 226, 236, 338 N.W.2d 312 (Ct. App. 1983).

⁴ *Wisconsin E.R. Board v. J.P. Cullen & Son*, 253 Wis. 105, 107, 33 N.W.2d 182 (1948); *Century Building Co. v. Wisconsin E.R. Board*, 235 Wis. 376, 291 N.W. 305, 307 (1940) (the statute does not contemplate that any evidence be produced before the court); *see also* Wis. Stat. § 108.09(7)(c)5. ("[T]he commission shall make return to the court of all documents and materials on file in the matter, all testimony that has been taken, and the commission's order and findings. Such return of the commission, when filed in the office of the clerk of the circuit court, shall constitute a judgment roll in the action ...").

It is not a court's role to weigh unsupported, non-record evidence proposed to it.⁵ An argument based on a factual predicate outside the record cannot be considered by a court.⁶

Even if, arguendo, this Court allowed Friendly Village to flaunt the procedural rules in actions for judicial review of administrative hearings, the footnote still must be stricken because Friendly Village failed to articulate a basis and methodology for its calculation. It is elementary that parties proposing an answer to a mathematical equation must show their work.⁷

Also, the footnote is misleading because other, unmentioned factors affect unemployment contributions paid by an employer, including: the employer's taxable payroll; the amount of unemployment claims filed; the employer's reserve fund balance; and any applicable interest or penalties charged

⁵ *Vande Zande v. ILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975); *Kannenbergh v. LIRC*, 213 Wis. 2d 373, 384, 571 N.W.2d 165 (Ct. App. 1997).

⁶ *Jenkins v. Sanbourin*, 104 Wis. 2d 309, 313-314, 311 N.W.2d 600 (1981), citing *Onderdonk v. Lamb*, 79 Wis. 2d 241, 249, 255 N.W.2d 507 (1977).

⁷ *Cf. Lindevig v. Dairy Equip. Co., a Div. of DEC Int'l*, 150 Wis. 2d 731, 740, 442 N.W.2d 504 (Ct. App. 1989) (assertions as to the amount of losses have no evidentiary value unless supported by computation), quoting *Maslow Cooperage Corp. v. Weeks Pickle Co.*, 270 Wis. 179, 191, 70 N.W.2d 577 (1955) ("Where damages are susceptible of precise proof, or of estimation by those having knowledge, or are capable of proof with certainty, such proof must be adduced").

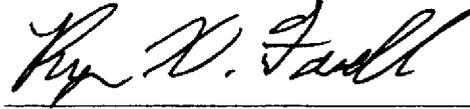
by the Department.⁸ Contributions are determined by rate and taxable payroll. Rates are determined by the reserve fund balance and taxable payroll. Reserve fund balance is determined by contributions and claims. Interest and penalties are not part of the tax contributions but may be part of any balance owed.

The Department of Workforce Development and the Labor and Industry Review Commission respectfully request this Court to strike footnote 1 under Heading IV. B. on page 12 from Friendly Village's reply brief because the footnote is unsupported, it relies upon information not introduced into evidence at the administrative hearing, and it was not part of the record before the administrative law judge or the Labor and Industry Review Commission.

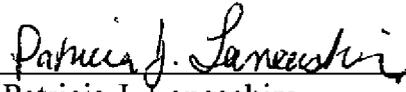
⁸ For an explanation of unemployment account successorship, the Court may refer to Defendants-Respondents' brief at pages 1-2 and 53-54.

Dated this 30th day of June, 2021.

Respectfully submitted,



Ryan X. Farrell
State Bar No. 1074303
Attorney for State of Wisconsin,
Department of Workforce Development



Patricia J. Lancashire,
State Bar No. 1003590, on behalf of
Kim T. Castelaz
State Bar No. 1003754
Attorneys for State of Wisconsin,
Labor and Industry Review Commission

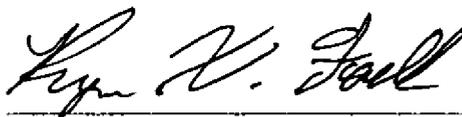
**CERTIFICATION REQUIRED BY
RULES OF APPELLATE PROCEDURE
Wis. Stat. §§ 809.80(1) to (3) and 809.81**

I hereby certify that this Motion to Strike conforms to the rules contained in s. 809.80(1) to (3) for a document filed and served on paper.

I further certify that this Motion to Strike conforms to the rules contained in s. 809.81.

A copy of this certificate has been served with the paper copies of this motion with the court and served on all opposing parties.

Dated this 30th day of June, 2021.



Ryan X. Farrell
State Bar No. 1074303
Attorney for State of Wisconsin,
Department of Workforce Development

CERTIFICATION OF MAILING

I, Ryan X. Farrell, certify that I am, and at all times during this service was, not less than 18 years of age and not a party to the matter concerning which service was made.

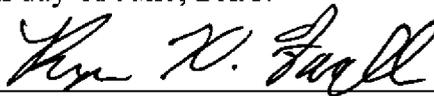
I further certify that service of the Motion to Strike a Part of Plaintiffs-Appellants-Petitioner's Reply Brief by Defendants-Respondents State of Wisconsin, Department of Workforce Development and State of Wisconsin, Labor and Industry Review Commission, was made on June 30, 2021, by United States Postal Service, first-class mail, postage prepaid on:

Atty. Alon Stein
Stein Law Offices
1455 E. Golf Road, Suite 202
Des Plaines, IL 60016

Rhineland Healthcare Operator 150, LLC
c/o Cogency Global Inc.
901 S. Whitney Way
Madison, WI 53711-2553

Under penalty of perjury, I declare the foregoing is true and correct.

Dated this 30th day of June, 2021.



Ryan X. Farrell
State Bar No. 1074303
Attorney for State of Wisconsin,
Department of Workforce Development