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STOUGHTON TRAILER, INC.,

Plaintiff,

v.

Case No. 97 CV 1180

LABOR AND INDUSTRY REVIEW  
COMMISSION and EUGENE WINGER,

Defendants.

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DECISION AND ORDER

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Plaintiff Stoughton Trailer, Inc. ("Stoughton") seeks review pursuant to sec. 108.09(7), Stats., of the Decision issued March 31, 1997, by the Labor and Industry Review Commission ("LIRC"). That decision affirmed a decision rendered on October 30, 1996, by Administrative Law Judge James Sturm which determined, following a hearing on October 29, 1996, that employee Eugene Winger was eligible for unemployment compensation benefits. For the reasons stated below, the Court affirms LIRC's decision.

FINDINGS OF FACT

The following is a summary of the Findings of Fact as made by the ALJ and adopted by LIRC in its March 26, 1997, Decision:

Eugene Winger worked for four years as an assembler and welder for Stoughton Trailer, a manufacturer of truck trailers. His last day of work was July 23, 1996.

Stoughton Trailer's attendance policy assesses points for each occurrence of absenteeism or tardiness. Tardiness of up to four hours is assessed an occurrence of .5 points. A tardiness for more than four hours or a full day absence accounts for one occurrence. Six occurrences, after warnings or counseling, would result in termination. A warning or occurrence may be

appealed by the employee.

Winger received three warnings in 1996, following several absences and tardiness for various reasons that included personal and family illness and transportation problems. On July 12, 1996, he was less than four hours late. He received a warning or counseling record stating that his point total was at 5 and that termination would result when his point total reached six.

On July 23, 1996, Winger reported to work but became dizzy. He left work after notifying a co-worker that he was leaving. He drove to a hospital where he was diagnosed as dehydrated. He was rehydrated intravenously. Winger then reported back to work and his employment was terminated.

The ALJ found that Mr. Winger's actions were not properly considered misconduct under the statute because "[h]is absences, in most cases and particularly the final one, were for valid reasons and with notice to the employer even though he only notified a co-worker. Moreover, his intentions were always toward keeping his job despite circumstances that compelled him to miss work."

LIRC adopted the ALJ's Findings of Fact and affirmed the decision on appeal. Stoughton Trailer then commenced this review via complaint filed on April 30, 1997.

#### STANDARD OF REVIEW

At issue here is LIRC's application of sec. 108.04(5), Stats. The specific question presented to the Court is whether LIRC erred in concluding that Winger's discharge was not for misconduct connected to his work. This is a question of law, and as such, is reviewable *ab initio*. § 227.57(5), Stats. Nevertheless, in recognition of LIRC's extensive experience in interpreting and applying the "misconduct" standard, the Court will accord LIRC's legal

conclusions "great weight" deference. UFE Inc. v. LIRC, 201 Wis. 2d 274, 284 (1996). Accordingly, the Court will uphold LIRC's reasonable interpretation of sec. 108.04(5), Stats., as long as it is not contrary to the clear meaning of the statute. Id. at 287.

In addition, LIRC's findings of fact are conclusive and this Court may not substitute its judgment for that of the commission provided the findings are supported by credible and substantial evidence. Sec. 102.23(6), Stats. "Substantial evidence" is that which is relevant, credible and probative and of a quantity which will permit a reasonable factfinder to base a conclusion upon it. Princess House, Inc. v. DILHR, 111 Wis. 2d 46, 54 (1983).

### DISCUSSION

Stoughton Trailer argues that LIRC's decision should be reversed because there is no credible evidence on the record to substantiate its conclusion that Mr. Winger's absence was for valid reasons and that adequate notice was given. The Court disagrees.

Mr. Winger testified that shortly after beginning work on July 23, 1996, he felt dizzy, weak and sick, and was having difficulty standing. He decided that he needed to see a doctor, and although he did not take time to locate a supervisor, he did tell a co-worker that he was leaving. Mr. Winger conceded that because of his condition, he was not thinking as clearly as he might have been. He went to the Mercy Hospital emergency room where it was discovered that his heart rate and blood pressure were elevated and he was so dehydrated that he needed to be rehydrated intravenously. Upon release he was instructed to rest at home for 48 hours. Despite this instruction, Mr. Winger returned to his job at Stoughton Trailers where he was discharged.

Both the ALJ and LIRC found Mr. Winger to be a credible witness. LIRC noted in its

decision that Mr. Winger always notified his employer of his absences, but did not call in when he was tardy. Although he could not remember specific absences, he testified that they were because either he was ill or his children were ill. Other absences were caused by bad weather and car problems. It was on this basis that LIRC found that Mr. Winger's absences "were generally for valid reasons and with notice to the employer." (LIRC Mar. 31, 1997, Decision at 2). With respect to Stoughton Trailer's contention that Mr. Winger could have either seen the nurse on the premises or gone to a Stoughton doctor when he was ill on July 23, 1996, LIRC concluded that the fact that Mr. Winger was medically unable to work renders the existence of other treatment options irrelevant. Moreover, Mr. Winger's actions in returning to work directly after being released from the emergency room with instructions to rest for two days gave credence to his statements regarding his other absences.

Stoughton Trailer now argues to this Court that there is no credible evidence supporting the conclusion that Mr. Winger's absence was for a valid reason. Clearly the evidence that was presented, including Mr. Winger's testimony, the doctor's directions and the emergency room bill credibly and substantially supports LIRC's conclusion that the absence was for a valid reason and with notice to the employer. It is not within this Court's province to engage in a reweighing of the evidence that was before LIRC, even if it had the desire to do so.

The Court also concludes that LIRC correctly applied sec. 108.04(5), Stats., to the facts of this case. For the purposes of unemployment compensation law "misconduct" is defined as

"conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer."

Boynton Cab Co. v. Neubeck & Ind. Comm., 237 Wis. 249, 259-60 (1941). Here, where Mr. Winger's absences were for valid reasons and reasonable notice was given to Stoughton Trailer, LIRC correctly concluded that "misconduct" had not occurred.

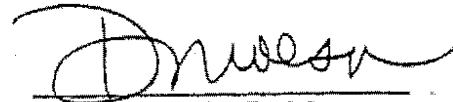
ACCORDINGLY,

The Decision by the Labor and Industry Review Commission is hereby AFFIRMED.

SO ORDERED.

Dated this 12<sup>th</sup> day of January, 1998.

BY THE COURT:



Hon. Daniel R. Moeser  
Circuit Judge, Branch 11

cc: Atty. James E. Hammis  
Atty. David B. Nance