STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION

[redacted]

Appellant, Hearing No. 20005619MD

v.

Department of Workforce Development UI Division,

Appellee.

BRIEF OF THE APPELLANT [redacted]

¶

INTRODUCTION

Mrs. [redacted] is a 75-year-old tour guide whose employer ceased operation due to the ongoing Covid-19 pandemic. The Department of Workforce Development ("DWD") determined she was not able and available for suitable work because she stated she would work full-time if the job was safe. In denying Mrs. [redacted] unemployment benefits because she expressed a preference for safe work, the DWD is effectively saying she must be willing to accept dangerous work.

STATEMENT OF FACTS

I. Procedural History

Mrs. [redacted]'s employer was the Wisconsin State Capital Department of Administration. The Capital closed, and her job as a tour guide ceased operation, in response to Governor Evers's Safer at Home Executive Order #12[1], on March 27, 2020. Mrs [redacted] applied for

[1] "Non-essential business and operations must cease" https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx

unemployment on or around April 5, 2020. She was issued an initial determination denying her unemployment on May 8, 2020. Mrs. [redacted] filed a timely appeal and attended an appeal hearing with ALJ Volkman on August 4, 2020. ALJ Volkman issued a decision affirming the DWD's determination on August 11, 2020. Mrs. [redacted] filed a timely appeal to the Labor and Industry Review Commission ("LIRC").

II. Factual History

Mrs. [redacted] is a 75-year-old former schoolteacher who has worked as a tour guide at the Wisconsin Capital for ten years. Synopsis 2; Synopsis 5. The Capital closed on March 27, 2020 in direct response to Governor Evers's Safer at Home Executive Order #12. Synopsis 2. When working, her hours depended upon how many people signed up for tours at the capital, but her hours never fell below 25 per week. *Id.*

After her job ceased operations, Mrs. [redacted] filed for unemployment. An adjudicator called her inquiring about the nature of her separation from employment, specifically if Mrs. [redacted] was able and available for full-time work. Synopsis 3. Mrs. [redacted] stated that she was able and available to work but that it was an unsafe environment for her to be working in, since she is 75 years old. *Id.* (The CDC states that the risk of Covid-19 having damaging effects increases with a person's age.[2] Governor Evers's Exec. Order #12 states that "7. Elderly people and those who are vulnerable as a result of underlying health conditions should take additional precautions."[3]) However, in her hearing Mrs. [redacted] stated that if her employer had continued to schedule her for shifts she would have continued to work. Synopsis 3. Mrs. [redacted]'s primary reason for this was because she felt safe working at the Capital during that time. *Id.* She

[2] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html
[3] https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx

elaborated that she would work through the pandemic depending on how safe the environment was. *Id.* She stated this further depends on the precautions taken by the employer. *Id.*

Repeatedly Mrs. [redacted] stated that she did not know how to answer the questions asked of her by the adjudicator regarding whether she would accept a hypothetical job offer. Synopsis 5. Mrs. [redacted]s husband, present at the appeal hearing, echoed this sentiment, stating that when she applied for unemployment benefits, it was "very early during that Covid-19 period and people didn't know how to properly take precautions…" but that Mrs. [redacted] is "able and available to work." *Id.* The facts determinative according to ALJ Volkman were Mrs. [redacted]'s less than 32-hours-a-week schedule and her statement that her acceptance of work depended upon whether the job was "safe." Appeal Decision 3, ¶ 4.

ARGUMENT

I. The decision of the Appeal Tribunal is not supported by the record.

The decision of the Appeal Tribunal is not supported by the record. To be eligible for unemployment benefits, a claimant must be able to perform and be available for suitable work. DWD 128.01(1), *see* Wis. Stat. § 108.04(2). What constitutes "suitable work" is defined as "work that is reasonable considering the claimant's training, experience, and duration of unemployment as well as the availability of jobs in the labor market." DWD 100.02(61). There is a presumption, rebuttable by evidence of the contrary, that a claimant is able and available for suitable work if a claimant has complied with statutory work search requirements, or work searches are waived. DWD 128.01(2),

The "able to perform suitable work" requirement is a low threshold to meet. It requires that a claimant have the "physical and psychological ability to engage in some substantial gainful employment in suitable work." DWD 128.01(3).

The "available for work" requirement is a higher threshold to meet. It requires that a claimant maintain "an attachment to the labor market and is ready to perform full-time suitable work in the claimant's labor market area." DWD 128.01(4). A claimant is unavailable for suitable work if they are "withdrawn from the labor market." *Id.* LIRC, echoed by state circuit courts, states that inquiry into claimant availability refers to their availability "in the general labor market." *Biby v. Seek Career Staffing Inc*, UI Hearing No. 12604814MW (LIRC February 26, 2013); *see also, G. G. Barnett Transport Inc. v. Labor and Industry Review Commission and Shelly L. Culver*, No. 11-CV-495 (Wis. Cir. Ct. Dodge County Nov. 9, 2011).

In March, 2020, the DWD issued an emergency rule that waived the four work search activities normally required of claimants by Wis. Stat. § 108.04 (2) (a) 3. DWD 128.01(7). Specifically, the rule states that Wisconsin is in a public health emergency as declared by Executive Order # 72[4], and "a public health emergency constitutes four work search actions for each weekly claim filed by a claimant during the public health emergency, unless federal law requires the claimant to actively seek work to qualify for federally funded benefits." DWD 127.01(2m)(b). The rule further states that "there is no work available for employees during a public health emergency." DWD 128.01(7).

Turning to the current case, ALJ Volkman did not contend that Mrs. [redacted] was not able to perform suitable work. However, ALJ Volkman did determine that she is unavailable for suitable work. This is not supported by the record. Mrs. [redacted] stated that but for her work closing in response to Governor Evers's Executive Order she would have continued to work. Mrs. [redacted] is not required to perform work search activities. She ought to be granted the

[4] "…a public health emergency, as defined in Section 323.02(16) of the Wisconsin Statutes, exists for the State of Wisconsin." https://evers.wi.gov/Pages/Newsroom/Executive-Orders.aspx

presumption, given her fulfillment of statutory requirements, that she is able and available for suitable work.

ALJ Volkman seems to allege that Mrs. [ ]'s classification as a part-time worker and her preference for safe work are evidence that she is withdrawn from the labor market. However, these factors are immaterial to her commitment and connection to the labor market, particularly during a public health emergency. First, Mrs. [ ]'s hours were scheduled by her employer and dependent upon the number of patrons visiting the Capital, and she should not be penalized for her employer's choice to hire more workers at part-time rather than fewer workers at full-time. Furthermore, Mrs. [ ] worked as a schoolteacher for years, and has been at her current position as a tour guide for a decade. This is illustrative of her commitment and connection to the general labor market. Second, Mrs. [ ]'s statement that she would only accept safe work is a reasonable request, particularly of a 75-year-old woman, who falls squarely within the high-risk population. She stated this to an adjudicator in April, 2020, When she stated her preference for safe work to the adjudicator in April, 2020, when the uncertainty about how the pandemic would affect the nation was particularly acute. Mrs. [ ]s difficultly in answering an abstract question about a hypothetical job offer, should not be the basis for her denial of unemployment.

Continuing, Mrs. [ ] reasonably relied on the DWD's emergency rule in not completing four work searches and in not applying for any jobs as of the date of her appeal hearing. It is incongruous for the DWD to publicly state that no jobs are available during a public health crisis, while having a determination of eligibility turn on whether a claimant has applied for jobs. The emergency rule is remedial, ultimately meant to expand the number of people considered eligible for benefits. Mrs. [ ] is in the class of people this expansion ought affect, as she is able to perform work, has maintained connection and commitment to the labor market

for decades, and should not be forced to complete work search activities during a global pandemic in order to receive benefits. Nor should Mrs. [redacted] be penalized for her reliance on these waivers.

II. ALJ Volkman misapplied the law concerning what constitutes withdrawal from the labor market.

ALJ Volkman misapplied the law concerning what constitutes withdrawal from the labor market. A claimant need not pledge to work *any* job to be deemed able and available for suitable work, as suitable work is defined as those jobs that are reasonable for the claimant to perform. *See* DWD 100.02(61). Furthermore, LIRC has held that an employee can prefer certain work, or for a certain quality of employment, without being withdrawn from the general labor market. *Frederick Willert, v. Two Rivers Public School*, UI Hearing No. 88-401443MN (LIRC February 23, 1989). For instance, in *Willert*, LIRC found that a school principal was able and available for suitable work despite stating a "reluctance to accept" work below a certain salary. Though the Appeal Tribunal determined that this reluctance overly restricted the principal's availability, LIRC reversed this decision, noting that a salary preference is "understandable" and that there were jobs in the general labor market, suitable to the principal's experience and work history, that offered salaries within his stated preference. *Id.* Conversely, an employee cannot have a preference so specific that they would not accept work in the general labor market. *Esparza v. Department of Industry, Labor & Human Relations*, 132 Wis. 2d 402, 409, 393 N.W.2d 98 (Ct. App. 1986) (in which an employee was deemed unavailable for suitable work because he state "he would not have accepted a job with another employer").

Beyond preferences, employees can, at times, demand certain conditions of their job—namely, a safe workplace. LIRC has held that "where an employee is asked to work in an

environment containing a known hazard, the employer is obligated to offer the employee some assurance that the job can be performed safely." *Deppisch v. Advanced Restoration Inc.*, UI Hearing No. 01601864WB (LIRC July 6, 2001) (in which an employee quit for good cause after her employer refused to maintain proper safety practices). Indeed, the Occupational Safety and Health Act requires that employers "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 USC 654 § 5 (a)(1). The OSH Act only applies to private sector workers in Wisconsin; however, Wis. Stat. § 101.055(1) expresses the legislatures intent that public sector workers receive the same rights and protections as private sector employees. This statute further states that employers have a duty to "furnish employment which shall be safe for the employees… and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters." Wis. Stat. § 101.11(1).

Turning to Ms. [redacted] ALJ Volkman contends that her preference for safe work withdraws her from the labor market. To determine that Mrs. [redacted] is unavailable for suitable work because she desired safe work is to say that she is required to accept dangerous work. This is in direct contradiction of the federal and state imposition of the duty of employers to provide a place of employment free from known hazards. 29 USC 654 § 5 (a)(1), Wis. Stat. § 101.11(1). A preference for safe work should be considered at least as "understandable" as a salary preference. *See, Willert*, UI Hearing No. 88-401443MN (LIRC February 23, 1989).

CONCLUSION

For DWD to determine that a person in a recognized high-risk group must pledge to accept work that has a high likelihood to expose them to a deadly airborne virus in order to receive unemployment benefits is unjust. For the above stated reasons, Mrs. [redacted] respectfully

requests that the Commission reverse the decision of the Appeal Tribunal and find her eligible to receive unemployment benefits as otherwise qualified.

Dated: October 7, 2020

Respectfully Submitted

Emma Woods
Representative of the Employee