COURT OF APPEALS
DECISION
DATED AND FILED

March 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2666

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARK JOHNSON (DECEASED), C/O THERESA JOHNSON-BUHRANDT,

PLAINTIFF-APPELLANT,

V.

LABOR & INDUSTRY REVIEW COMMISSION, CITY OF MILWAUKEE PUBLIC WORKS AND CITY OF MILWAUKEE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Reversed.*

Before Fine, Schudson, and Curley, JJ.

PER CURIAM. Theresa Johnson-Buhrandt, the widow of Mark Johnson, appeals from the circuit court order affirming the Labor & Industry Review Commission's denial of a fifteen per cent increase in her compensation benefits under § 102.57, STATS. She presents several arguments, many of which

we need not address because, we conclude, LIRC failed to determine whether the City violated the safe place statute and might also have failed to apply the proper legal standard. Accordingly, we reverse and remand for LIRC to do so.

Johnson was employed by the City of Milwaukee as an arborist. While working as the foreman of a tree-cutting crew, he was killed when a tree fell on him during a tree felling operation. Johnson-Buhrandt received worker's compensation benefits as a result of her husband's death. She also sought additional compensation under § 102.57, STATS., which provides:

> **Violations of safety provisions, penalty.** If injury is caused by the failure of the employer to comply with any statute or any lawful order of the department [of workforce development], compensation and death benefits provided in this chapter shall be increased 15% but the total increase may not exceed $15,000. Failure of an employer reasonably to enforce compliance by employes with that statute or order of the department constitutes failure by the employer to comply with that statute or order.

Johnson-Buhrandt based her § 102.57 claim on the City's alleged failure to comply with § 101.11, STATS., the "safe place statute," which, in relevant part, states:

> **Employer's duty to furnish safe employment and place. (1)** Every employer shall furnish employment which shall be safe for the employes therein … and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes ….
>
> **(2)** (a) No employer shall require, permit or suffer any employe to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or

> neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employes[.]

Johnson-Buhrandt contended that the City failed to adequately train the tree-cutting crew, particularly with respect to communication methods for determining exactly when a tree should fall, and that this failure was a cause of the accident that killed her husband.

The administrative law judge agreed, concluding:

> Mark Johnson's death was not merely a tragic accident. It was caused by the failure of the City to adequately train its personnel in tree felling operations, specifically on the issues of tree removal and having a standard signal to be communicated among the crew, and such failure is a violation of sec. 101.11, Stats., in that the employer failed to provide employment as safe as the nature of employment would reasonably permit and failed to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe.

LIRC reversed, concluding: "[I]t is not sufficient to demonstrate a violation of the safe place statute[;] the applicant must establish that the violation was a *substantial cause* of the accident. The applicant has not established that any failures in training or communication were a *substantial cause* of the … accident." (Emphasis added.)

The circuit court affirmed. It did so, however, noting two problematic aspects of LIRC's decision.

First, the circuit court observed that although LIRC acknowledged "that the allegations and lack of training trigger the application of the safe place statute to this case as a matter of law," LIRC's decision "failed to specifically address whether the safe place statute had been violated." The circuit court, therefore, went on to reach its own conclusion, stating:

> [T]he ALJ determined that the safe place statute had been violated. LIRC made no contrary findings in this regard in its Memorandum Opinion. Indeed, LIRC conceded that the training was inadequate and could have been better. Moreover, it is undisputed that the Bureau of Forestry took steps to improve the training of its arborists. Accordingly, this Court holds that their [sic] is substantial and credible evidence in the record to support a finding that the safe place statute was violated.

Second, the circuit court pointed out that LIRC, in its memorandum opinion reversing the ALJ's decision, applied an incorrect standard when it stated that even if LIRC "'were to find that the employer violated the safe place statute,'" the additional fifteen per cent award would not be required unless the safe place statute violation was "'established to have been a *substantial cause* of the accident.'" (Circuit court decision, quoting LIRC decision; emphasis added by circuit court). Correctly citing the standard articulated in ***Milwaukee Forge v. DILHR***, 66 Wis.2d 428, 225 N.W.2d 476 (1975), the circuit court explained: "LIRC's use of the term 'substantial cause' appears to be an erroneous description of the test of causation under Wisconsin law. The safety statute violation need not be a substantial cause of the injury but need only be a substantial factor in bringing about the injury." *See* ***id.*** at 437, 225 N.W.2d at 480 (where employer violated safe place statute, award of additional compensation under § 102.57, STATS., depended on whether employer's conduct constituting the violation "was a substantial factor in bringing about the injury" and employee's safety rule violation was not a superseding cause).

As the supreme court explained, "In a proper case, an award of increased compensation [under § 102.57, STATS.] can be based upon a finding of a violation of the Safe Place Statute without a finding of a violation of any particular safety order." ***Milwaukee Forge***, 66 Wis.2d at 434, 225 N.W.2d at 479. Once the violation of the safe place statute has been established, the award of increased

compensation depends on whether the employer's violation "was a substantial factor in bringing about the injury." ***Id.*** at 437, 225 N.W.2d at 480. In the instant case, although LIRC's decision seems to come close to determining whether the City violated the safe place statute, and seems to come close to applying the standard articulated in ***Milwaukee Forge***, the record does not establish that LIRC actually did either.

Whether the City violated the safe place statute presents a factual question for LIRC to determine, and LIRC's findings are conclusive if supported by any credible evidence. *See* ***RTE Corp. v. DILHR***, 88 Wis.2d 283, 288, 276 N.W.2d 290, 293 (1979). Although the circuit court reached its own conclusion that the City had violated the safe place statute, LIRC, as the circuit court correctly pointed out, "failed to specifically address whether the safe place statute had been violated."

Whether LIRC applied the correct legal standard presents a legal question generally subject to *de novo* review, according deference to LIRC's decision in appropriate cases. *See* ***Oscar Mayer Foods Corp. v. LIRC***, 145 Wis.2d 864, 868-69, 429 N.W.2d 89, 91 (Ct. App. 1988). Although the Attorney General argues that the difference between LIRC's statement of "substantial cause" and ***Milwaukee Forge***'s statement of "substantial factor" is merely "splitting hairs," that split may be significant, or merely semantic, depending on the facts of a case. Indeed, as the Attorney General, quoting ***Vinograd v. Travelers Protective Ass'n***, 217 Wis. 316, 258 N.W. 787 (1935), reminds us, "each worker's compensation case is governed by its own facts and circumstances" and "'the language of an opinion must be considered in connection with the particular facts involved.'" ***Id.*** at 321, 258 N.W. at 789. Moreover, while the Attorney General contends that LIRC, despite invoking language differing

from that of ***Milwaukee Forge***, "had the correct rule of causation in mind," the Attorney General does not explain how we also might reach such an apparently telepathic conclusion. Simply stated, the record in this case does not enable us to ascertain whether LIRC, repeatedly invoking "substantial cause," was actually applying the "substantial factor" standard.

Accordingly, we reverse the circuit court order affirming LIRC's decision and remand the case for LIRC to determine (1) whether the City violated the safe place statute; and (2) whether any such violation was a "substantial factor in bringing about" Johnson's death.[1]

By the Court.—Order reversed.

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

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[1] Should LIRC find that the City violated the safe place statute, its determination of whether the violation "was a substantial factor in bringing about" Johnson's death will also require proper application of the presumption articulated by the supreme court in ***Van Pool v. Industrial Commission***, 267 Wis. 292, 64 N.W.2d 813 (1954). In ***Van Pool***, the supreme court stated:

> [W]hen one owing a duty to make a place or an employment safe fails to do it and that accident occurs which performance of the duty was designed to prevent, then the law presumes that the damage resulted from – was caused by – the failure. The presumption may be rebutted, but if not rebutted by evidence, the plaintiff has met his burden of proof.

Id. at 295, 64 N.W.2d at 814-15 (internal quotation marks and quoted sources omitted); *see also* ***Fondell v. Lucky Stores, Inc.***, 85 Wis.2d 220, 230-31, 270 N.W.2d 205, 211 (1978) (addressing presumption in case involving safe place statute violation). Although the circuit court opined that ***Van Pool*** was distinguishable because it "deals solely with … a violation of a specific safety order," we note that the supreme court's decision in ***Van Pool*** encompassed the violation of the safe place statute. After all, ***Van Pool***, in articulating this presumption quoted from ***Umnus v. Wisconsin Public Service Corp.***, 260 Wis. 433, 51 N.W.2d 42 (1952), which specifically applied the presumption to a safe place statute case. *See* ***Umnus***, 260 Wis. 438-39, 51 N.W.2d at 45.