COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP217 **Cir. Ct. No. 2012CV825**

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

COUNTY OF OUTAGAMIE,

PETITIONER-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND MICHAEL DENGEL,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. The County of Outagamie appeals a circuit court order that affirmed a Labor and Industry Review Commission decision to grant worker's compensation coverage for injuries Michael Dengel sustained when he slipped on ice on his driveway. The County argues Dengel was not performing

service growing out of and incidental to his employment within the meaning of WIS. STAT. § 102.03(1)(c)1.[1] at the time he was injured. Because we conclude the Commission's determination that Dengel was injured while completing a "special errand" is reasonable and not contrary to our case law, we affirm the circuit court's order and the Commission's decision.

BACKGROUND

¶2 Dengel was a maintenance worker for Outagamie County. As part of his employment, Dengel and other maintenance workers were subject to a mandatory pager policy known as "pager duty." Dengel was assigned "pager duty" once every six weeks. While on "pager duty," Dengel was required to carry a pager during the hours when no other maintenance workers were on duty—specifically, weeknights from midnight to 7:00 a.m., and weekends from midnight Friday to 7:00 a.m. Monday. The County paged workers only if there was a maintenance emergency that could not wait until normal business hours. Upon receiving a "page," Dengel was required to report to the maintenance building within thirty minutes. A maintenance worker responding to a page was paid overtime from the moment the worker received the page until the worker resumed the activity he or she was doing when the worker received the page.[2] Accordingly, a maintenance worker responding to an emergency page was paid for travel time to and from work.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] There was conflicting testimony on when overtime pay began and ended. However, the administrative law judge (ALJ) made a factual determination that a maintenance worker received overtime pay from the moment he or she received the page until the worker resumed his or her pre-page activity. The Commission adopted the ALJ's factual determination.

¶3 On Sunday, January 4, 2009, at approximately 11:30 a.m., Dengel was on pager duty and received a page. At the time Dengel received the page, he was relaxing at home, probably watching television. The area was in the midst of an ice storm and individuals were advised not to travel because of the hazardous road conditions. However, Dengel reported to work in response to the page, repaired a door at the Outagamie County Jail, and left for home.

¶4 Dengel made it to his garage without incident. However, to reenter his house, Dengel needed to step on his driveway and walk around the back of his vehicle. Dengel's driveway was "glazed with ice," and Dengel grabbed a handful of salt to throw on his path of travel toward his house. As Dengel tossed the salt, he slipped on ice, fell, and injured himself. Dengel brought a claim for worker's compensation benefits.

¶5 Hearings were held before an administrative law judge (ALJ), who determined Dengel was injured while performing service growing out of and incidental to his employment and was therefore entitled to benefits. Specifically, the ALJ determined Dengel was injured within the course of his employment because, at the moment Dengel was injured, he was on a "special errand" for the County that had not yet concluded. The ALJ also determined Dengel was injured within the course of his employment because the County was paying Dengel overtime at the moment he was injured. The Commission affirmed the ALJ's determinations.[3]

[3] The ALJ also determined Dengel was injured within the course of his employment because, in addition to the overtime pay he received for responding to the page, Dengel was being paid one dollar per hour for being on "pager duty." The Commission modified the ALJ's decision to remove this determination, reasoning it was unnecessary.

¶6 The County requested judicial review, and the circuit court affirmed the Commission's decision. The County appeals.

DISCUSSION

¶7 In an appeal following an administrative agency decision, we review the decision of the agency, not that of the circuit court. ***McRae v. Porta Painting, Inc.***, 2009 WI App 89, ¶5, 320 Wis. 2d 178, 769 N.W.2d 74. Whether an employee is in the course of employment when injured presents a mixed question of fact and law. ***Ide v. LIRC***, 224 Wis. 2d 159, 164, 589 N.W.2d 363 (1999). We uphold the Commission's factual findings if they are supported by "credible and substantial evidence." ***Id.***, ¶9; *see also* WIS. STAT. § 102.23(6). An agency's interpretation and application of a legal standard may be entitled to deference on review. ***Virginia Sur. Co. v. LIRC***, 2002 WI App 277, ¶11, 258 Wis. 2d 665, 654 N.W.2d 306. Courts reviewing an appeal of an agency decision apply either great weight deference, due weight deference, or no deference (de novo review) to an agency's legal conclusions. ***McRae***, 320 Wis. 2d 178, ¶5.

¶8 Our supreme court has summarized the three levels of deference as follows:

> An agency's interpretation of a statute is entitled to great weight deference when: (1) the agency was charged by the legislature with the duty of administering the statute; (2) the interpretation of the agency is one of long-standing; (3) the agency employed its expertise or specialized knowledge in forming the interpretation; and (4) the agency's interpretation will provide uniformity in the application of the statute.
>
> We grant an intermediate level of deference, due weight, "where an agency has some experience in the area, but has not developed any particular expertise in interpreting and applying the statute at hand" that would put the agency in a

> better position to interpret the statute than a reviewing court.
>
> ….
>
> We apply de novo review when "there is no evidence that the agency has any special expertise or experience interpreting the statute[,] ... the issue before the agency is clearly one of first impression, or ... the agency's position on an issue has been so inconsistent so as to provide no real guidance."

Stoughton Trailers, Inc. v. LIRC, 2007 WI 105, ¶¶27-29, 303 Wis. 2d 514, 735 N.W.2d 477 (citations omitted). Where great weight deference is appropriate, the agency's determination will be sustained if reasonable—even if another determination is more reasonable. ***Barron Elec. Co-op. v. PSC***, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997). Where due weight deference is given, we will sustain an agency's determination if reasonable, unless another interpretation is more reasonable. ***Id.*** at 762-63. Finally, under de novo review, "the weight to be afforded [the agency's] interpretation is no weight at all." ***Id.*** at 763 (citation omitted).

¶9 The parties dispute the appropriate standard of review to apply to the Commission's legal determinations. Dengel contends the Commission's legal conclusions are entitled to great weight deference because the Commission has developed significant expertise in administering the worker's compensation statutes and legal doctrines, and determining whether an employee is acting within the scope of his or her employment. The County, however, argues we owe no deference to the Commission's legal conclusions because the Commission has "misinterpret[ed] judicial case law regarding coverage for injuries occurring off the premises of the employer."

¶10 Based on the Commission's duty to administer the worker's compensation statue at issue here, its longstanding interpretation of that statute and legal doctrines used in this case, its expertise, and the benefit of consistent decisions, we agree with Dengel that the requirements for great weight deference are satisfied. *See, e.g.*, ***Estate of Fry v. LIRC***, 2000 WI App 239, ¶¶4, 8, 13, 239 Wis. 2d 574, 620 N.W.2d 449 (commission's interpretation and application of worker's compensation statute and corresponding legal doctrine entitled to great weight deference). Accordingly, we give great weight deference to the Commission's decision.

¶11 However, we agree with the County that the deference given to an agency "does not apply when the agency's determination conflicts with prior case law established by our supreme court." ***Doering v. LIRC***, 187 Wis. 2d 472, 477, 523 N.W.2d 142 (Ct. App. 1994) (citations omitted). Therefore, to the extent the County argues the Commission has misinterpreted our case law, "we must independently review the application of prior case law to the set of undisputed facts presented." ***Id.***

¶12 Dengel brought his worker's compensation claim under WIS. STAT. § 102.03. That statute sets forth "conditions of liability" that must be met in order for an applicant to receive benefits under the Worker's Compensation Act. *See* WIS. STAT. § 102.03(1)(a)-(e). At issue in this case is whether Dengel was, "at the time of the injury," "performing service growing out of and incidental to his … employment." *See* WIS. STAT. § 102.03(1)(c)1. This statutory clause is used interchangeably with the phrase "course of employment." ***Weiss v. City of Milwaukee***, 208 Wis. 2d 95, 104, 559 N.W.2d 588 (1997). "Both phrases refer to the 'time, place, and circumstances' under which the injury occurred." ***Id.*** at 104-05.

¶13 In applying WIS. STAT. § 102.03, it is well established that "the typical employee going to or from work is not covered until he or she reaches the employer's premises. An employee going to work is ordinarily in the prosecution of his or her own business, not performing services incidental to employment." ***Doering***, 187 Wis. 2d at 479. "However, courts have created many exceptions to this so called 'coming and going' rule." ***Id.*** For example, an employee may be in the course of employment while going to or from work if the employee is performing a "special errand" for the direct benefit of the employer, *see, e.g.*, ***Horvath v. Industrial Comm'n***, 26 Wis. 2d 253, 259-61, 131 N.W.2d 876 (1965), or if "the employer provides the transportation as part of the employment or pays for the expenses related to the employee's travel," *see, e.g.*, ***Doering***, 187 Wis. 2d at 479, 486-87; *see also* ***Krause v. Western Cas. & Sur. Co.***, 3 Wis. 2d 61, 68, 87 N.W.2d 875 (1958).

¶14 In this case, the Commission first determined Dengel was injured during the course of his employment because he was injured while engaged in a "special errand" for the County. The "special errand" exception to the "coming and going" rule provides that an employee is in the course of employment while traveling to or from work if he or she is performing a special errand for the employer. ***Id.*** ("[I]f the overtime work involves a special and extraordinary trip for the benefit of the employer, it has several times been held that the trip becomes part of the service." (quoting 1 LARSON, LAW OF WORKMEN'S COMPENSATION § 16.12) (emphasis omitted)). The effect of the special errand exception is to confer portal-to-portal coverage. 1 LARSON'S WORKERS' COMPENSATION LAW § 14.05(2) (2013); *see also* ***Horvath***, 26 Wis. 2d at 260-61. With portal-to-portal coverage, an employee is deemed to be in the course of his or her employment

from the time the employee crosses the "portal" of his or her home to the time the employee returns to his or her home. 1 LARSON'S, *supra* § 14.05(2).

¶15 Both parties agree Dengel's response to the maintenance emergency page constituted a special errand. The County, however, argues Dengel's special errand ended before Dengel was injured. Specifically, the County asserts that, upon his arrival in his garage, Dengel had reached the "portal" of his home and was therefore not in the course of his employment when he subsequently slipped, fell, and was injured on his driveway. The County also contends the Commission's determination that Dengel was injured during the course of his employment misinterprets and impermissibly expands the scope of the special errand exception as outlined in ***Horvath***. It emphasizes that, in ***Horvath***, the special errand exception was applied to an employee who was injured en route to her house, and, in this case, "Dengel was not injured in an accident on his way home from work. Dengel returned to his home safely and then fell on his own driveway."

¶16 We reject the County's arguments. First, the County's argument that Dengel's special errand ended overlooks the Commission's factual determinations that Dengel was relaxing *inside* his house when he received the emergency page, that the page required Dengel to leave the comforts of his home to travel in the ice storm, and that, after completing the maintenance work, Dengel was required to step on the icy driveway in order to reenter his house. As the Commission reasoned, because Dengel was entitled to portal-to-portal coverage but had not reentered his house or resumed his pre-call activities, Dengel was still on the special errand and acting within the course of his employment when he was injured. The Commission's determination that Dengel was still subject to the special errand exception's portal-to-portal coverage at the time he was injured is

not unreasonable. *See* ***Barron***, 212 Wis. 2d at 761. Therefore, we defer to the agency's decision.

¶17 Second, although we agree with the County that we would owe no deference to an agency decision that conflicts with a decision of our supreme court, *see* ***Doering***, 187 Wis. 2d at 489, we disagree that the Commission's decision misinterprets and impermissibly expands the scope of the special errand exception as outlined in ***Horvath***. Though Horvath was injured en route to her house as opposed to on premises owned by her, the mere fact that Dengel reached premises owned by him before he was injured does not automatically mean he was no longer on a special errand. The ***Horvath*** court cited the following situation as an example of the application of the special errand rule:

> [A] bookkeeper, who normally worked five days a week, but who was asked to come to the office for about an hour on Saturday morning to get out certain records and go over them with an accountant who was preparing an income tax report. Her husband drove her to the shop, waited for her in the car, and then drove her home. After she left the car, she crossed the public sidewalk and, *about half-way between the sidewalk and her house, on premises owned by her and her husband, she slipped and fell*. Compensation was based squarely on the special errand rule ….

Horvath, 26 Wis. 2d at 260 (quoting 1 LARSON, LAW OF WORKMEN'S COMPENSATION § 16.12) (emphasis added).

¶18 Here, similarly, Dengel left his house on a special errand for the County but was injured on premises owned by him before he was able to reenter his house or engage in pre-call activities. As the Commission noted, Dengel "was still in the process of returning from his trip" when he fell in the driveway—"he had not resumed personal on-call activities and no significant deviation took place." The Commission's determination that Dengel's injury occurred during his

special errand is consistent with ***Horvath***. Accordingly, we uphold the Commission's decision that Dengel was injured during the course of his employment.

¶19 Further, because we affirm the determination that Dengel was still on the special errand when injured, we need not consider the County's argument that worker's compensation coverage after the special errand ended was inappropriate because Dengel did not work from home. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed); ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground").

¶20 The County also argues the Commission's application of the paid travel exception, which is a second exception to the coming and going rule, is inconsistent with our case law. It contends the fact that Dengel was being paid overtime at the moment of injury does not mean he was acting within the course of his employment. However, because we conclude the Commission reasonably determined Dengel was injured during a "special errand" and that determination is not inconsistent with our case law, we need not consider whether Dengel's receipt of overtime pay at the moment of injury also indicates he was injured during the course of his employment. *See* ***Gross***, 227 Wis. at 300; ***Blalock***, 150 Wis. 2d at 703.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).