COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2747-FT

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

WISCONSIN ELECTRIC POWER COMPANY,

PLAINTIFF-APPELLANT,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-RESPONDENT,

SCOTT OVERBYE,

DEFENDANT.

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

Before Fine, Schudson and Curley, JJ.

CURLEY, J. Wisconsin Electric Power Company (WEPCO) appeals from the trial court's order affirming the Labor and Industry Review

Commission's (LIRC) decision which affirmed the decision of the Administrative Law Judge (ALJ). LIRC found that Scott Overbye, a WEPCO employee, was not engaged in a deviation, as that term is used in § 102.03(1)(f), STATS. (the Worker's Compensation Law's traveling employee statute), when he was fatally injured. We conclude that Overbye exhibited "a meaningful manifestation" to engage in a deviation that was "for a private or personal purpose" pursuant to § 102.03(1)(f). We find LIRC's decision unreasonable under the facts because it directly contravenes the exemption found in the statute and the case law interpreting it. Accordingly, we reverse.

I. BACKGROUND.

Scott Overbye worked as an engineer for WEPCO. In late January 1995 he attended a week-long employment-related seminar in Irvine, Texas, which ended at noon on Friday. In preparation for his trip, he contacted the travel agency handling WEPCO's account. During his discussions with the agent, he was told that he could elect to take advantage of WEPCO's travel policy which would reimburse him for one night's expenses for food, lodging and transportation if he would return on Saturday rather than on Friday afternoon because the airfare was cheaper on Saturday. He was cautioned that he would only be reimbursed if the expenses did not exceed the airfare savings and that he was responsible for any other expenses related to his decision to stay over. Overbye elected to stay over not one, but two extra nights and made travel arrangements to return to Milwaukee on Sunday. He also made travel arrangements for his wife to fly to Texas on Friday and return with him on Sunday.

Following the conclusion of the seminar and after eating lunch, Overbye, his wife, and a fellow employee, Don Kerber, began driving to Fort

Worth, Texas, approximately thirty miles away, to sightsee. They were about twenty-one miles from their hotel in a car being driven by Overbye when they were involved in a tragic car accident. As a result, Overbye's wife died instantly, Overbye himself died later, and Kerber was seriously injured.

An application was submitted on behalf of Scott Overbye seeking various indemnity benefits and medical expenses from his employer. The ALJ determined that Overbye was in the course of his employment at the time of the accident and was entitled to worker's compensation. WEPCO appealed this decision to LIRC who affirmed, finding that Overbye was not engaged in a personal deviation as "innocent reasonable recreational activities during the course of a business trip are not a deviation." This determination was appealed to the circuit court and affirmed.

II. ANALYSIS.

In ***CBS, Inc. v. LIRC***, 219 Wis.2d 565, 579 N.W.2d 668 (1998), the supreme court addressed the issue of whether a traveling employee's injury as a result of a skiing accident was a covered injury under the Wisconsin Worker's Compensation statute. *See **id.***; § 102.03(1)(f), STATS.

In reviewing the agency's interpretation of § 102.03(1)(f), STATS., the supreme court concluded that the proper standard to apply was "great weight" deference.

> Great weight deference to an agency's interpretation of a statute is appropriate when: (1) the agency is charged by the legislature with administering the statute; (2) the interpretation of the agency is one of long standing; (3) the agency employed its expertise and specialized knowledge in forming the interpretation; and (4) the agency's

> interpretation will provide uniformity in the application of the statute.

Id. at 573, 579 N.W.2d at 672 (citation omitted). In ***CBS, Inc.***, the supreme court determined all four factors were met. The supreme court noted that through § 102.14, STATS., LIRC is charged with administering Chapter 102. Also, the court opined that the second and third factors were met "by the fact that LIRC has interpreted the traveling employee provision for the last fifty-three years." ***Id.*** at 574, 579 N.W.2d at 672. The supreme court found that the fourth factor was met because uniformity will be provided by applying LIRC judgments rather than those of various courts in interpreting traveling employee cases. ***Id.*** The same analysis applies in this case and, likewise, all four factors are met. *See* ***id.***

We thus apply great weight deference to this case which also turns on the interpretation of § 102.03(1)(f), STATS., the statute which proscribes the payment of benefits for workers injured during business travel. Section 102.03(1)(f) creates a rebuttable presumption that a traveling employee is performing services incidental to his employment at all times on a business trip and the burden of proving a personal deviation is upon the employer. Section 102.03(1)(f), STATS., reads:

> Every employe whose employment requires the employe to travel shall be deemed to be performing service growing out of and incidental to the employe's employment at all times while on a trip, except when engaged in a deviation for a private or personal purpose. Acts reasonably necessary for living or incidental thereto shall not be regarded as such a deviation. Any accident or disease arising out of a hazard of such service shall be deemed to arise out of the employe's employment.

As noted, LIRC's determination is entitled to great weight deference and this court is obligated to affirm the LIRC's interpretation of § 102.03(1)(f) if it

is reasonable. An unreasonable interpretation of a statute has been defined as one that "directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise … without rational basis." ***CBS, Inc.***, 219 Wis.2d at 574, 579 N.W.2d at 672 (internal quotation marks and quoted source omitted) (ellipses in ***CBS, Inc.***). We conclude that, under the facts of this case, LIRC's decision that Overbye's side trip to Fort Worth to sightsee was not a deviation because "innocent reasonable recreational activities during the course of a business trip are not a deviation" is contrary to the statute's wording and intent. It is also contrary to case law interpreting it. We also reverse because LIRC apparently relied on case law which has since been overturned and because WEPCO successfully rebutted the presumption by producing uncontroverted evidence that Overbye exhibited "a meaningful manifestation" of his intention to voluntarily engage "in a deviation for a private or personal purpose" when he embarked on his sightseeing trip.

In its written decision, LIRC asserts, "[i]f a generalization is possible from the case law, it is that innocent, reasonable recreational activities during the course of a business trip are not a deviation." The decision then quotes a handbook, stating that "[a]cts that are reasonably necessary for living, such as eating, sleeping, and reasonable recreation, are not regarded as deviations from employment." JOHN D. NEAL & JOSEPH DANAS, JR., WORKER'S COMPENSATION HANDBOOK § 3.25 (3d ed. 1990). With these underpinnings established, the commission went on to characterize Overbye's trip to Fort Worth, Texas not as a side trip for personal reasons, but rather "an innocent diversion while in the Dallas-Fort Worth area on a business trip" and then concluded that he was engaged in "reasonable recreation incidental to living." Unfortunately, LIRC's recital of the general law describing the status of the Worker's Compensation Law

around the country is incomplete as it fails to note the exception found in § 102.03(1)(f) and ignores the case law interpreting it. As a result, its determination is unreasonable.

LIRC's decision first relied on ***Hansen v. Industrial Commission***, 258 Wis. 623, 46 N.W.2d 754 (1951), for its conclusion that Overbye was engaged in "reasonable recreation incidental to living" when he was fatally injured. In ***Hansen***, however, the issue was not whether recreation can constitute a deviation. Rather, the issue was when to apply the presumption that "any injury occurring during such employment shall be deemed to arise out of his employment," ***id.*** at 626, 46 N.W.2d at 756, when very little is known about the circumstances surrounding the employee's death. Hansen was in Arizona on business. He was last seen dining at a restaurant and night club called The Cavern. The next day his body was found some distance from The Cavern. Given the dearth of factual information concerning the events which led to Hansen's death, the supreme court, in reversing the trial court, stated "[t]here is no evidence that Hansen had, for the time being, abandoned his employment in favor of a private or personal enterprise so as to constitute a completed deviation." ***Id.*** at 627, 46 N.W.2d at 756. As a result, the supreme court applied the presumption that he was injured during his employment. ***Hansen*** does not support LIRC's all-encompassing proclamation that all innocent reasonable recreational activities are not deviations. In fact, ***Hansen*** supports the opposite conclusion because there is evidence that Overbye "abandoned his employment in favor of a private or personal enterprise."

Unlike the sketchy facts in ***Hansen***, the facts in this case reveal that Overbye's employee duties were entirely completed at the time of the accident and that Overbye began his brief two-day holiday with his wife after the conclusion of his seminar. Also, the surviving employee's testimony confirmed that Overbye's

decision to drive to Fort Worth, Texas was motivated by his desire to sightsee. Applying the ***Hansen*** principles to these facts leads to the conclusion that Overbye was engaged in a private and personal enterprise at the time of the accident.

LIRC also relied on the court of appeals' decision in ***CBS, Inc. v. LIRC***, 213 Wis.2d 285, 570 N.W.2d 446 (Ct. App. 1997), *aff'd by* ***CBS, Inc. v. LIRC***, 219 Wis.2d 565, 579 N.W.2d 668 (1998), for its conclusion that Overbye was engaged in "reasonable recreation incidental to living" and thus fell under the statutory presumption. In ***CBS, Inc.***, Richard Kamps was hired by CBS to travel to and work at the Olympic games in Lillehammer, Norway. Kamps and his crew received a day off from work, during which time Kamps was injured while skiing. The crew went skiing as a group, upon the suggestion of Kamps's immediate supervisor. Although disputed, it appears CBS provided the group with ski lift passes and transportation. ***CBS, Inc.***, 219 Wis.2d at 569 n.4, 579 N.W.2d at 669 n.4.

While the instant case addresses the identical issue of employee recreation while traveling, we note that the apparent language relied upon by LIRC for its claim that all recreational activities fall within the presumption of the statute was specifically overruled by the supreme court. In affirming the court of appeals decision, the supreme court remarked that "[w]hile we agree that in some cases, including this one, recreational activities have been considered usual and proper under the statute, to the extent the court of appeals concluded as a matter of law that a traveling employee's recreational activities always fit the presumption of Wis. Stat. § 102.03 (1) (f), we overrule that language." ***CBS, Inc.***, 219 Wis.2d at 583, 579 N.W.2d at 676. Consequently, the sweeping premise underlying LIRC's decision that all "innocent reasonable recreational activities during the course of a business trip are not a deviation" is simply not the law in Wisconsin.

Further, the law relied upon by LIRC in ***CBS, Inc.***, which was subsequently overruled by the supreme court, conflicts with case law interpreting the statute. An examination of the statute's language reveals that the general presumption of coverage applies "except when [an employee is] engaged in a deviation for a private or personal purpose." Section 102.03(1)(f), STATS. Thus, the issue is not whether recreational activities can fall within the presumption; case law dictates they can, but whether Overbye "engaged in a deviat[ion] for a private or personal purpose."

The test for deciding when a deviation is for a private or personal purpose can be found in ***Hunter v. ILHR***, 64 Wis.2d 97, 218 N.W.2d 314 (1974). "Whether there is a deviation depends upon whether there is established some … meaningful manifestation to engage in activities purely personal to the employee. The test is whose purpose was served." ***Id.*** at 103, 218 N.W.2d at 317 (internal quotation marks omitted) (footnotes omitted; ellipses in ***Hunter***). Given the undisputed facts of this case, Overbye's actions, while innocent and recreational, were nonetheless motivated by his "purely private and personal purpose." Overbye decided to take a private trip with his wife after the conclusion of his employer-sponsored seminar. It is quite likely his decision to do so was influenced by the fact his employer was willing to pay for an additional night's lodging and food in exchange for a lower airfare expense. This fact, however, does not trump the exception set out in the statute, nor does it require an abandonment of the case law test determining when a deviation is personal. Unfortunately, LIRC seized upon WEPCO's willingness to absorb some of Overbye's expenses and made it the paramount consideration. The deciding issue is not whether Overbye was getting his expenses paid or whether his employer profited by his stay, but rather, whether the deviation was "purely private and

personal." Applying the ***Hunter*** test as to what constitutes a deviation leads to the conclusion that Overbye manifested an intention to voluntarily engage in a deviation for a private and personal purpose. His employment duties had ended and Overbye was embarking on a brief mini-vacation. Thus, in manifesting an intent to engage in a purely personal activity, his own, not his employer's, purpose was being served.

Although LIRC's written decision noted the existence of several cases that found a traveling employee's actions constituted a deviation, it concluded that "these cases either involve a worker who consumes large amounts of liquor generally prior to engaging in rather dangerous behavior, or a worker who leaves the city that was the destination of the business trip, or a worker who does both." Surprisingly, LIRC overlooked the fact that Overbye fell into the second category inasmuch as he left the city "that was the destination of the business trip." LIRC also failed to note the similarities between the facts in this case and those found in ***Neese v. State Medical Society of Wisconsin***, 36 Wis.2d 497, 153 N.W.2d 552 (1967). In ***Neese***, the facts established that Neese traveled extensively throughout the state on behalf of his employer who paid many of his expenses. One evening while on the road he decided to dine at a restaurant located in Minneapolis about thirty to thirty-two miles from his next morning's stop. In route, he was injured in a car accident. In determining that Neese's purpose in going to Minneapolis was "private and personal," the supreme court concluded that "at the time of the accident appellant was at a place where neither the duties of his employment nor acts of living called for his presence." ***Id.*** at 509, 153 N.W.2d at 559.

Overbye was twenty-one miles away from his hotel, on his way to sightsee in a city thirty miles away from his hotel when he was fatally injured. His

employment-related duties had ended at noon. The only tie between Overbye and his employment at the time of the accident was the agreement of his employer to pay his food and lodging for one of the two days during which he planned to vacation with his wife in Texas. Like Neese, neither the duties of Overbye's employment nor acts of living called for his presence in Fort Worth, Texas. Thus, we must conclude that Overbye was also engaged in a private and personal purpose.

We are mindful of our obligation to give great weight deference to LIRC's decision, but affirming its logic in this case would totally eviscerate the statute's exception and case law interpreting it. LIRC's broad interpretation would result in all injuries occurring during innocent recreational pursuits to be compensable. As the supreme court cautioned in ***CBS, Inc.***, that is not the current state of the law.

In sum, we conclude that LIRC's decision was unreasonable because it both failed to apply the statutory exception and relied upon case law which has been overruled. Further, LIRC ignored case law interpreting the statutory language "except when engaged in a deviation for a private or personal purpose" in rendering its decision. Accordingly, we reverse.

By the Court.—Order reversed.

Recommended for publication in the official reports.

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SCHUDSON, J. *(dissenting).* The majority opinion provides a reasonable assessment of the facts and a reasonable application of the law. It does not, however, provide the *only* reasonable assessment of the facts and application of the law. I think the case is a close one and, therefore, I would affirm.

Six high hurdles, all solidly in place in ***CBS, Inc. v. LIRC***, 219 Wis.2d 565, 579 N.W.2d 668 (1998), must be cleared to reverse LIRC's decision: (1) consistent supreme court holdings that "'work[er]'s compensation law must be liberally construed to include all services that can be reasonably said to come within it.'" ***Id.*** at 580, 579 N.W.2d at 675 (citation omitted); (2) the "legislature['s] … intent to give traveling employees broader protection when their employment caused them to be away from home." ***Id.***; (3) "the legislature['s] word[ing] [of § 102.03(1)(f), STATS.] as a presumption in favor or coverage for traveling employees … [in] recognition of 'the complexities of daily existence,'" ***Id.*** at 576, 579 N.W.2d at 673 (citation omitted); (4) the "legislat[ure's] intent to 'make liability dependent on a relationship to the job, in a liberal, humane fashion, with litigation reduced to a minimum.'" ***Id.*** (citation omitted); (5) the case law recognition that a traveling employee "'is not required to seek immediate seclusion in a hotel and remain away from human beings at the risk of being charged with deviating from his employment.'" ***Id.*** (citation omitted); and (6) the standard of review requiring "great weight deference" to LIRC. ***Id.*** at 573-74, 579 N.W.2d at 672.

In this case, Scott Overbye provided a benefit to WEPCO – reducing its airfare costs by staying an additional night. Although Mr. Overbye elected to have his wife join him and stay a second additional night, his accident occurred within the first additional twenty-four hour period – the time during which he was conferring the benefit to WEPCO. Further, Mr. Overbye's tragic accident occurred during what was to have been a sightseeing excursion within thirty miles of his hotel – an activity and a distance that frequently are incidental to business travel.

Thus, while the majority's view is not unreasonable, LIRC's view seems, at the very least, just as reasonable. As the supreme court reiterated in ***CBS, Inc.***:

> In cases where the evidence is evenly balanced and an inference may be drawn one way as easily as another, the scale should be turned in favor of the claimant, principally because it was the intent and purpose of the act to bring border-line cases under it and to close up avenues of escape which would naturally be suggested to those seeking to evade liability under the act.

Id. at 582, 579 N.W.2d at 676 (quoting ***City of Phillips v. DILHR***, 56 Wis.2d 569, 580, 202 N.W.2d 249, 255 (1972)). Indeed, even accepting the majority's view of the facts of this case, one could hardly conclude that LIRC's view "'directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise … without rational basis.'" ***CBS, Inc.***, at 574, 579 N.W.2d at 672 (citation omitted; ellipses in ***CBS, Inc.***).

Acknowledging that the "presumption in favor of coverage for traveling employees is a recognition of 'the complexities of daily existence,'" ***id.*** at 576, 579 N.W.2d at 673 (citation omitted), and seeing nothing unreasonable in LIRC's conclusion that Mr. Overbye's sightseeing excursion was a "reasonable

recreational activit[y]" incidental to his business trip, I agree with LIRC's conclusion. But even if I disagreed, I certainly could not say that LIRC's conclusion "'directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise … without rational basis.'" ***Id.*** at 574, 579 N.W.2d at 672 (citation omitted).

Accordingly, I conclude that WEPCO has failed to clear any of the six high hurdles and, giving great weight deference to LIRC as I must, I would affirm.