COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-3577

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

HERITAGE MUTUAL INSURANCE COMPANY AND LARSEN LABORATORIES, INC.,

PLAINTIFFS-APPELLANTS,

v.

WILLIAM E. LARSEN AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Heritage Mutual Insurance Company appeals from a final order of the circuit court, which confirmed the Labor and Industry Review Commission's (LIRC) determination that William E. Larsen sustained a

compensable injury. Heritage also appeals the trial court's decision to reverse LIRC's determination that the award should be reduced by 15%.

¶2 Heritage claims that LIRC's decision was not reasonable given the evidence in the record. Because LIRC could reasonably conclude that Larsen sustained a compensable accidental injury in the course of his employment, we affirm.

I. BACKGROUND

¶3 This appeal concerns the application of WIS. STAT. § 102.03(1)(f) (1997-98)[1] commonly referred to as the "traveling employee statute."[2] The basic facts in this appeal are not in dispute; the inferences drawn from the facts, however, are in dispute. We relate them in abbreviated form.

¶4 At the time that Larsen was injured, he and his wife jointly owned Larsen Laboratories, Inc. The company was engaged in the metal analysis business primarily for foundries. Among his other duties, Larsen was in charge of sales for the services provided by the company. Routinely, Larsen would contact customers by telephone and follow up, if necessary, with a personal visit to close a sale. This practice applied not only to current customers, but also to potential

[1] All references to the Wisconsin Statutes will be to the 1997-98 version unless otherwise noted.

[2] WISCONSIN STAT. § 102.03(1)(f) provides:

> 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.

customers. On the date of the injury, January 31, 1996, Larsen and his wife owned a forty-acre tract of land near Tigerton, Wisconsin. They kept a mobile home on this lot, which was used for both recreational and business purposes.

¶5 On January 31st, Larsen left his company office in Oak Creek, Wisconsin, at approximately 12:30 p.m., with the intention of driving to the mobile home, staying overnight, and then, on the following day, calling upon a former customer, Aarow Electric, located in nearby Shawano, Wisconsin. Before Larsen left, he called his neighbor, Wally Seefeldt, and asked him to plough his driveway entrance. He took along some company paper work. The drive to Tigerton took approximately three hours. At approximately 3:30 p.m., Larsen arrived in Tigerton. He purchased some groceries at a Red Owl food store, purchased some shelled corn at the Tigerton Feed Mill to feed the wild life, and then stopped at the Split Rock tavern to relax. While there, Larsen consumed four or five mixed drinks, which was his normal daily practice. He arrived at the tavern at about 4:15 p.m. and left around 6:15 p.m. He then drove directly to the mobile home located three and one-half miles away. His intention was to prepare a pizza and then do some business paperwork. The temperature was approximately twenty-five degrees below zero.

¶6 On that same day, Larsen had started a diet, and had taken two Dexatrim pills: one in the morning and one at noon. Although Seefeldt had ploughed the mobile home's driveway, there remained about five inches of snow on the sidewalk and steps to the entrance of the mobile home. Initially, because of the accumulation of snow, Larsen had difficulty opening the outer storm door. He was unable to unlock the inner door with a new key he recently had made. In his efforts to open the door, he began to feel dizzy. His dizzy condition was such that he became concerned that he might fall down. Larsen hit the door with a shovel,

but it would not open. Finally, he broke a plastic window which allowed him to reach in and open the door from the inside and push it open. The last thing Larsen remembers was being half in and half out of the doorway entrance. The following morning he woke up about 8:45 a.m., and found himself on the floor just inside the inner door. Both doors were partially open. It was cold and both his hands and feet hurt. Soon he received a telephone call from his wife and, shortly thereafter, his neighbors, the Seefeldts, showed up at his door. After some discussion and reluctance, Larsen allowed the Seefeldts to take him to the Shawano Medical Center. As a result of this incident, all of his fingers and most of each thumb had to be amputated because of frostbite.

¶7 Larsen filed a worker's compensation claim for indemnity and expenses. An administrative law judge found that although Larsen was engaged in a business trip at the time of his injuries, he nevertheless had entered a zone of danger not created by the condition of employment, but rather a personal deviation, which did not entitle him to benefits. Larsen appealed to LIRC.

¶8 LIRC overruled the ALJ decision and found that the evidence led to the inference that Larsen's purpose in going to Tigerton on the date of the accident was business-related. It concluded that the zone of special danger; i.e., exposure to cold weather, was occasioned by reason of employment activity. LIRC further found that Larsen was intoxicated and that this condition was a substantial factor in causing his injuries. Pursuant to WIS. STAT. § 102.58, it reduced Larsen's indemnity benefits by 15%.

¶9 Heritage petitioned for a review of LIRC's decision in circuit court. The circuit court affirmed LIRC's decision awarding Larsen benefits, but reversed

its decision to reduce the benefits by 15%. Heritage now appeals the award of benefits; Larsen argues that LIRC's 15% reduction of his award was unwarranted.

II. ANALYSIS

¶10 In reviewing a determination of LIRC, this court's scope of review, both as to facts and the law, is the same as that of the circuit court. *See* ***C.W. Transport, Inc. v. LIRC***, 128 Wis. 2d 520, 525, 383 N.W.2d 921 (Ct. App. 1986). The validity of the circuit court decision is not at issue, because the task of this court is merely to determine whether LIRC's decision was correct. *See* ***Langhus v. LIRC***, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996).

¶11 Deciding whether or not an employee is acting within the course of his or her employment under the Worker's Compensation Act is a mixed question of fact and law for LIRC to decide. *See* ***Ide v. LIRC***, 224 Wis. 2d 159, 164, 589 N.W.2d 363 (1999). The conduct of the employee that is placed in issue requires a finding of fact, and the application of the relevant statute to the conduct presents a question of law. *See* ***id.*** at 164-65.

¶12 When we are presented with a mixed question of fact and law in an administrative review, we employ the standard of review set forth in ***Michels Pipeline Construction, Inc. v. LIRC***, 197 Wis. 2d 927, 541 N.W.2d 241 (Ct. App. 1995):

> LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence. The drawing of one of several reasonable inferences from undisputed facts also constitutes fact finding. Any legal conclusion drawn by LIRC from its findings of fact, however, is a question of law subject to independent judicial review.

Id. at 931 (citation omitted).

¶13 For questions of law, we generally apply one of three levels of deference to the agency's conclusion: "great weight," "due weight," or no deference. For agency findings of fact, we apply the "substantial evidence" standard. *See* ***Sea View Estates Beach Club, Inc. v DNR***, 223 Wis. 2d 138, 148, 588 N.W.2d. 667 (Ct. App. 1998). "Where great deference is appropriate, the agency's interpretation will be sustained if it is reasonable—even if an alternative reading of the statute is more reasonable." ***Barron Elec. Coop. v. Public Serv. Comm'n***, 212 Wis. 2d 752, 761, 569 N.W.2d 726 (Ct. App. 1997). We will also defer to an agency's interpretation "'if it is intertwined with value and policy determinations'" inherent in the agency's decision-making function. *See* ***id.***

¶14 For findings of fact,

> The question is not whether there is evidence to support a finding that was not made, but whether there was evidence to support a finding that was, in fact, made by the commission. We thus need not consider whether there was credible evidence that would have supported a contrary inference or conclusion.

Brickson v. DILHR, 40 Wis. 2d 694, 699, 162 N.W.2d 600 (1968).

¶15 We conclude that it is proper to apply the great weight deference to LIRC's interpretation of WIS. STAT. § 102.03(1)(f) in this case based upon the application of the four-factor test as enunciated in ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 572-73, 579 N.W.2d 668 (1998). That being the posture of our analysis, we shall affirm LIRC's interpretation of WIS. STAT. § 102.03(1)(f) if it is reasonable; i.e., has a rational basis. *See* ***id.*** at 573.

¶16 Heritage proffers several bases for contending that LIRC erred. It first asserts that there is no support in the evidence for LIRC's finding that Larsen's purpose in going to Tigerton on January 31, 1996, was business-related.

Relying on ***Pressed Steel Tank Co. v. Industrial Comm'n***, 255 Wis. 333, 335, 38 N.W.2d 354 (1949), Heritage argues that this determination ought to be rejected as based upon assumed facts which were nonexistent. This assertion is based upon a year-old letter dated January 25, 1995, whereby Larsen requests the opportunity to bid on testing work for Aarow Electric of Shawano, Wisconsin. Heritage argues that this stale letter cannot be a reasonable basis to conclude that Larsen's trip was business-related. If that were the only evidence in the record relating to the drive to Tigerton, Heritage would win the day. But, it was not.

¶17 Aarow had been a customer of Larsen's and he wanted to re-acquire its business. It is uncontroverted that Larsen either called or visited Aarow every six months to a year in his effort to acquire Aarow as a customer. He needed to obtain a technical certification before he could restart business with Aarow; yet, the only way this could be achieved was to obtain an order from a customer that required certification. LIRC found this stratagem credible. In addition, LIRC, noting the severity of the weather, the length of the drive, that the neighbor Seefeldt had a key to the mobile home, that Larsen had, in fact, spoken to Seefeldt that morning to plough his driveway, and that he never hunted that time of year, inferred that the purpose of the trip was business-related.[3] We cannot conclude that LIRC's credibility-based findings and inferences drawn therefrom were unreasonable.

¶18 The second basis for Heritage's appeal is its disagreement with LIRC's conclusion that it failed to meet its burden to rebut the statutory

[3] There is also a suggestion in the record that, because of Larsen's less than tranquil married life, he drove to Tigerton because he was feuding with his wife. LIRC accorded this suggestion little weight.

presumption created in WIS. STAT. § 102.03(1)(f). The statute creates a presumption that a traveling employee performs services incidental to his employment at all times on a business trip until he returns from the trip. *See* ***CBS, Inc.***, 219 Wis. 2d at 578-79. To rebut the presumption, two requirements must be established: (1) a deviation by the employee from the business trip; and (2) such deviation must be for a personal purpose not reasonably necessary for living or incidental thereto. *See* ***Hunter v. DILHR***, 64 Wis. 2d 97, 101-02, 218 N.W.2d 314 (1974). A determination of a deviation for private or personal purposes or of acts reasonably necessary for living or incidental thereto are questions of law. Nevertheless, these determinations call for a value judgment requiring a determination as to what extent we should substitute our evaluation for that of the administrative agency. *See* ***Nottelson v. DILHR***, 94 Wis. 2d 106, 115-17, 287 N.W.2d 763 (1980). When the expertise of the administrative agency is significant to the determination of the legal question, the agency's decision, although not controlling, should be given weight and, in this case, great deference. *See* ***CBS, Inc.***, 219 Wis. 2d at 572-73. Thus, we shall affirm LIRC's interpretation of WIS. STAT. § 102.03(1)(f) if it is reasonable. *See* ***CBS, Inc.***, 219 Wis. 2d at 573.

¶19 Heritage contends that LIRC's failure to find a deviation on Larsen's part is not "reasonable" because substantial evidence suggests that Larsen deviated from the course and scope of his employment activities by consuming unreasonably large quantities of alcohol before arriving at his mobile home. In succinct terms, Heritage argues that the evidence provides a clear rebuttal of the statutory presumption. We are not convinced.

¶20 The burden of proving a personal deviation by an employee on a trip is upon the party asserting the deviation. *See* ***id.*** at 579. Our supreme court has

declared "that the effect to be given the presumption was primarily for [LIRC] to determine and that [an appellate court] would review [LIRC's] determination under the limited circumstances provided in the 'any credible evidence' test." ***Goranson v. DILHR***, 94 Wis. 2d 537, 552, 289 N.W.2d 270 (1980). Our task is only to decide whether LIRC properly concluded that the evidence relied upon by Heritage was insufficient to rebut the presumption.

¶21 LIRC found that, even if Larsen had deviated from acts reasonably necessary for living by going to the tavern, the deviation had ceased by the time he arrived at the mobile home. It opined that the determinative fact was that Larsen was performing acts reasonably necessary to living when his injury occurred. *See* ***CBS, Inc.***, 219 Wis. 2d at 577. Larsen was trying to enter his domicile for the night when he was injured. LIRC's conclusion that Heritage did not meet its burden of overcoming the presumption is supported by credible evidence.

¶22 Next, Heritage asserts that our supreme court's decisions in ***Sauerwein v. DILHR***, 82 Wis. 2d 294, 262 N.W.2d 126 (1978), ***Hunter v. DILHR***, 64 Wis. 2d 97, 218 N.W.2d 314 (1974), ***Dibble v. DILHR***, 40 Wis. 2d 341, 161 N.W.2d 913 (1968), ***Tyrrell v. Industrial Comm'n***, 27 Wis. 2d 219, 133 N.W.2d 810 (1965), and ***Simons v. Industrial Comm'n***, 262 Wis. 454, 55 N.W.2d 358 (1952), all require reversal as a matter of law. We disagree for a very fundamental reason. The determined facts in each of these decisions are so different from the facts of this case that we give no weight to their citation as authority to reverse.

¶23 Last, Heritage contends that LIRC erroneously applied the "positional risk analysis" when it concluded that Larsen's injury arose out of

employment under WIS. STAT. § 102.03(1). For the doctrine of "positional risk analysis" to apply:

> "…'all that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose.' In other words, there is a causal connection between the employment and the injury where the employee is obligated by his employment to be present at the place where he encounters injury through the instrumentality of a third person or an outside force. Such cases include, among others, accidents arising from horseplay, weather conditions, and assaults."

American Motors Corp. v. Industrial Comm'n, 1 Wis. 2d 261, 273, 83 N.W.2d 714 (1957) (citations omitted).

¶24 In applying this doctrine, LIRC explained: "Utilizing the positional risk analysis, the zone of special danger to which the applicant was exposed was the extremely cold weather in Tigerton that night, and it was by reason of an employment activity (sheltering himself for the night) that the applicant was exposed to this special danger."

¶25 In response, Heritage cites ***Goranson***, where our supreme court upheld a denial of worker's compensation benefits where the dispute was whether the accident arose out of the driver's employment. *See* ***id.***, 94 Wis. 2d at 555. Heritage relies upon the following language from ***Goranson***: "An employee may wilfully do a wrongful act for purposes entirely foreign to his employment, and while so acting take himself without the scope of his employment…. Such a departure … measured in terms of time and space, may be very slight." ***Id.*** (citations omitted).

¶26 In ***Goranson***, the applicant, a charter bus driver, was injured after he drove a group of people to Green Bay. *See* ***id.*** at 541-42. In Green Bay, the driver

checked into a hotel along with his passengers. *See* ***id.*** Later in the evening, he leaped from his third floor room onto the roof of another section of the hotel two floors below, sustaining a broken hip and other injuries. *See* ***id.*** There was evidence that he had been drinking throughout the evening with a woman and that he quarreled with her just before jumping. *See* ***id.*** at 556. Our supreme court declared, "The situation in which Mr. Goranson found himself was not one which was created by the risk of staying at the hotel." ***Id.*** at 557. By analogy, Heritage argues that the situation in which Larsen found himself—passed out cold on a rapidly cooling mobile home floor—was not created by the risk of going to Tigerton on a cold January day. A subsequent explication of ***Goranson***, however, causes Heritage's analogy to limp.

¶27 In ***Weiss v. City of Milwaukee***, 208 Wis. 2d 95, 559 N.W.2d 588 (1997), the supreme court had occasion to refine ***Goranson***. It stated:

> [T]he [***Goranson***] court determined that the accident did not arise out of the driver's employment, because the injuring force was purely personal to him.
>
> The facts of this case are distinguishable from those in ***Goranson***. In ***Goranson***, the bus driver's employment did not contribute to or facilitate the accident causing the injury he suffered jumping from the hotel window.

Id. at 108 (citation omitted).

¶28 Here, LIRC found that Larsen "[w]hen injured … was simply attempting to enter his domicile for the night, an act reasonably necessary for living." Based on the record evidence, this was not an unreasonable finding and fulfills the requirement of WIS. STAT. § 102.03(1)(f). Unlike Goranson, Larsen's plan to stay overnight in his mobile home in order to conduct business the following day, provided the occasion for the accident which caused the injury he suffered. Furthermore, there was no direct evidence that the "injuring force was

purely personal to him." Larsen did not suffer any injury until after he sought shelter for himself for the evening, an activity, that under the circumstances, was incidental to employment. Due to the nature of the evidence in the record and the lack of evidence to the contrary, it was not unreasonable for LIRC to infer that the business circumstances of Larsen's trip to Tigerton on January 31, 1996, caused him to be in the zone of special danger, whereby he was exposed to sub-zero temperatures.

¶29 The last issue is whether there is credible evidence in the record to support LIRC's finding that Larsen's intoxication was a substantial factor in causing his frostbite injuries. The employer bears the burden of proof to establish the fact of intoxication and that the injury was caused in part by intoxication to sustain a 15% reduction in compensation benefits under WIS. STAT. § 102.58. *See* ***Haller Beverage Corp. v. DIHLR***, 49 Wis. 2d 233, 237, 181 N.W.2d 418 (1970).

¶30 Larsen drank four or five mixed drinks within one hour and forty-five minutes, just before he drove to his mobile home. Because it was customary for him to engage in such a habit, Larsen claimed he was not intoxicated. Contrary to Larsen's assertion, the record contains three medical reports supporting the conclusion that he passed out because of ethanol abuse. We conclude there is support in the record for LIRC's finding that Larsen was intoxicated. The question of the causal link between intoxication and the injury, however, is quite another issue.

¶31 LIRC inferred that Larsen's "intoxication was a substantial factor in causing" his frostbite injuries, "because it is probable that he remained asleep for such an extended period due in part to his intoxication." The inferred determination of the existence of a substantial factor is a fact-finding process. Just

as we can assume that the trial court determined a fact in a manner that supports the trial court's ultimate fact determination, *see* ***Sohns v. Jensen***, 11 Wis. 2d 449, 453, 105 N.W.2d 818 (1960), so can we engage in the same process in reviewing the determinations of LIRC. But, we can only make that assumption when the evidence exists in the record to support the "assumed fact." If the record does not support the "assumed fact" then the finding of the "assumed fact" is clearly erroneous and cannot be sustained.

¶32 The trial court explicated:

> [T]he record does not contain any evidence that a person is more likely to remain asleep if he or she is intoxicated, the Commission just believed it to be probable. Furthermore, the record does not contain any evidence that if Larsen would not have remained asleep for such a long time he would not have received frostbite. At the time Larsen "passed out," the outside temperature was twenty-five degrees below zero. The Commission did not make a finding that Larsen's drinking contributed to his passing out.

There is no evidence how the consumption of alcohol may affect sleeping patterns. Of further note is Larsen's habit of regularly indulging in four or five of the same type of drinks after work without ever having passed out. LIRC did not discount this testimony. We adopt the trial court's analysis and decision, including the trial court's decision to overturn the reduction made by LIRC.

By the Court.—Order affirmed.

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