COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2679

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

JEANETTE KSIONEK,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

DEFENDANT,

DEPARTMENT OF EMPLOYEE TRUST FUNDS AND GROUP INSURANCE BOARD,

INTERVENORS-APPELLANTS.

APPEAL from an order of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE C.J. The Department of Employe Trust Funds and Group Insurance Board (collectively the department) appeal from an order declaring that the department has no right to settlement proceeds from Jeanette Ksionek's action filed pursuant to the Americans with Disabilities Act (the Act). The department, as fiduciary for the Employe Trust Fund, argues that it is entitled to reimbursement for payments made to Ksionek pursuant to an income continuation insurance plan. The department argues that the circuit court should have given great weight deference to its interpretation of WIS. STAT. ch. 40[1] and the income continuation insurance contract. It additionally argues that the circuit court erred by failing to conclude that the department is entitled to reimbursement under either (1) the terms of the income continuation insurance contract; (2) the provisions of WIS. STAT. § 40.08(4); or (3) the doctrine of equitable subrogation. We reject the department's arguments and affirm the order.

BACKGROUND

¶2 Ksionek was employed by the Department of Health and Family Services, a state agency, and participated in an income continuation insurance plan offered by the Group Insurance Board. In July 1995, Ksionek became ill, started working half-time and began receiving income continuation insurance benefits. In February 1996, she was terminated from her employment for medical reasons. Ksionek continued to receive income continuation insurance benefits until June of 1998.

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

¶3 Ksionek filed suit in federal court claiming she was wrongfully terminated in violation of the Act. In October 1998, the parties agreed to settle Ksionek's claim. Pursuant to the settlement agreement, Ksionek was reinstated at the Department of Health and Family Services and received approximately $58,000 in back pay. In addition, the settlement agreement provided, in relevant part:

> 5. The State of Wisconsin will pay to the Department of Employe Trust Funds such amount *as the plaintiff lawfully may be required to pay as reimbursement* for income continuation payments received by the plaintiff.
> 6. The State of Wisconsin will pay to the plaintiff for damages the sum of $25,000, less any payment made to the Department of Employe Trust Funds under Paragraph 5 of this agreement. (Emphasis added.)

¶4 Ksionek commenced this action in circuit court, seeking declaratory judgment for the proper distribution of the settlement proceeds. The circuit court concluded that the department does not possess any legal right to a claim for the $25,000 settlement proceeds. This appeal followed.

ANALYSIS

¶5 The department initially argues that the circuit court erred by failing to apply great weight deference to its interpretation and conclusions. In the alternative, the department contends that it is entitled to reimbursement for the income continuation insurance benefits Ksionek received by virtue of (1) the repayment obligation imposed on Ksionek by the insurance contract's terms; (2) the department's right of recovery pursuant to WIS. STAT. § 40.08(4); and (3) the doctrine of equitable subrogation.

A. GREAT WEIGHT DEFERENCE

¶6 The department argues for the first time on appeal that the circuit court erred by failing to give great weight deference to the department's interpretation of both the income continuation insurance contract and WIS. STAT. ch. 40.[2] The "great weight" standard, which provides the highest level of deference, is afforded to an agency's conclusion of law or statutory interpretation when the following four elements are met: "(1) the agency is responsible for administering the statute, (2) the agency['s] conclusion or interpretation is long standing, (3) the agency employed its specialized knowledge or expertise in forming the conclusion or interpretation, and (4) the agency['s] interpretation provides consistency and uniformity in the application of the statute." ***Knight v. LIRC***, 220 Wis. 2d 137, 148, 582 N.W.2d 448 (Ct. App. 1998). Under the "great weight" standard, we "must uphold the agency['s] interpretation if it is reasonable and if it is not contrary to the clear meaning of the statute." ***Id***. Further, we will sustain an agency's reasonable interpretation even if there is a more reasonable interpretation available. *See* ***Margoles v. LIRC***, 221 Wis. 2d 260, 265, 585 N.W.2d 596 (Ct. App. 1998).

¶7 Here, we conclude that there is insufficient evidence to prove that the department's interpretation is long-standing. This court has recognized that to determine whether an agency's interpretation is long-standing, "the key … is the agency's experience in administering the particular statutory scheme—and that

[2] Generally, this court declines to consider issues raised for the first time on appeal. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). Although the department concedes that it raises this issue for the first time on appeal, we will address the issue of whether the department's interpretation should be afforded great weight deference as a matter of law. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980).

experience must necessarily derive from consideration of a variety of factual situations and circumstances." ***Barron Elec. Coop. v. PSC***, 212 Wis. 2d 752, 764, 569 N.W.2d 726 (Ct. App. 1997).

¶8 The department contends that it has long determined amounts that may be lawfully reimbursed to the Employe Trust Fund when income continuation insurance benefits are duplicated by subsequent integrated benefit payments. It further contends that the Group Insurance Board has long-standing expertise hearing appeals from the department's determinations. Conceding, however, that "[t]here are no reported cases in which the issue has been addressed by a court," the department nevertheless argues that its interpretation is an integral part of the administration of the income continuation insurance plan. It further concedes that the group insurance board's determinations cannot be cited as evidence of the agency's long-standing interpretation because they are confidential and not publicly available. Given the lack of evidence as to the asserted long-standing nature of the agency's interpretation, we conclude that we need not afford great weight deference to the department's interpretations or conclusions. *See* ***Knight***, 220 Wis. 2d at 148.

B. THE TERMS OF THE INCOME CONTINUATION INSURANCE CONTRACT

¶9 Under the terms of the settlement agreement, the State is required to pay the Employe Trust Fund for the amount that Ksionek is lawfully required to pay as reimbursement for income continuation payments she received. The settlement agreement further provides that the State will pay Ksionek $25,000 damages, less the payments it must make on her behalf to the Employe Trust Fund. The department contends that the income continuation insurance contract's terms "lawfully require" Ksionek to reimburse the Employe Trust Fund, thus

requiring the State to reimburse the fund from the $25,000 otherwise set aside as damages under the settlement agreement. We disagree.

¶10 The interpretation of an insurance contract is a question of law that this court reviews de novo. *See* ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis. 2d 627, 635-36, 586 N.W.2d 863 (1998). The interpretation of an insurance contract is controlled by principles of contract construction. *See* ***General Cas. Co. v. Hills***, 209 Wis. 2d 167, 175, 561 N.W.2d 718 (1997). "The primary objective in interpreting a contract is to ascertain and carry out the intentions of the parties." ***Id.*** To that end, "the language of an insurance policy should be interpreted to mean what a reasonable person in the position of the insured would have understood the words to mean." ***Id.***

¶11 In the present case, the department argues that the income continuation insurance contract obligates Ksionek to repay insurance benefits later duplicated from the integrated benefit sources specified in § 5.16 of the contract, thus triggering the State's obligation under the settlement agreement to reimburse the Employe Trust Fund from the $25,000 otherwise set aside as damages under the agreement. Section 5.16 provides in relevant part that the benefit payments from income continuation insurance "shall be reduced *by benefits* paid or payable from … any employer liability law." (Emphasis added.) The $25,000 at issue from the settlement agreement, however, was set aside as damages arising from Ksionek's claim under the Act and may not therefore be characterized as "benefits paid" from an employer liability law. Because the $25,000 constitutes damages, as opposed to benefits paid, we conclude that Ksionek was not obligated under § 5.16 of the insurance contract to repay the income continuation insurance benefits she received.

C. WISCONSIN STAT. CH. 40

¶12 The department additionally argues that it is entitled to reimbursement under WIS. STAT. § 40.08(4), entitled "Retention of payments." Section 40.08(4) provides, in relevant part:

> Unless voluntarily repaid ... the department may retain out of any annuity or benefit an amount as the department in its discretion may determine, for the purpose of reimbursing the appropriate benefit plan accounts for … any money paid, plus interest at the effective rate of the fixed annuity division, to any person or estate, through misrepresentation, fraud or error.

Although the department concedes that the income continuation insurance benefits were not paid in error at the time they were made, it nevertheless contends that "[w]hen the Settlement Agreement provided [Ksionek] with compensation for that time, the original assumption was mistaken, or in error." We are not persuaded. Section 40.08(4) provides a right of retention for money paid in error. The department concedes that the insurance benefits were not paid in error. That Ksionek may have subsequently received a duplicative payment via her settlement agreement does not make the original payment erroneous, as contemplated by the statute.

¶13 In any event, WIS. STAT. § 40.08(4) only permits the department to "retain" funds out of any "annuity or benefit." Because the department is not seeking to retain funds, but rather seeks to recoup amounts set aside as damages under a settlement agreement, we conclude that § 40.08(4) is inapplicable to the instant facts.

D. EQUITABLE SUBROGATION

¶14 Finally, the department argues that the circuit court erred by concluding that it was not entitled to equitable subrogation. When applied in the insurance context, the doctrine of subrogation "deals with the right of the insurer to be put in the position of the insured in order to pursue recovery from third parties, legally responsible to the insured, for a loss paid by the insurer to the insured." ***Cunningham v. Metropolitan Life Ins. Co.***, 121 Wis. 2d 437, 444, 360 N.W.2d 33 (1985). "The purpose of subrogation is to place the loss ultimately on the wrongdoers." ***Id.*** Subrogation may exist "by operation of law, i.e. equitable subrogation, or may arise by contract of the parties, i.e. conventional subrogation." ***Id.*** at 445. The party seeking to prove subrogation "has the burden of introducing evidence to that effect." ***Id.*** at 445-46. Where, as here, there is no express subrogation clause contained in the insurance contract, "the policy itself must be analyzed to determine whether it is a policy of investment or a policy of indemnity." ***Id.*** at 446. The distinction between indemnity and investment determines the availability of equitable subrogation.

> If the contract is found to be one of indemnity, this court will allow the insurer to receive subrogation, even in the absence of an express subrogation clause. If the contract is found to be one of investment, this court will not permit the insurer to receive subrogation in the absence of an express subrogation clause.

Id. at 446.

¶15 ***Cunningham*** involved a dispute between an insurer and its insured over settlement proceeds arising from a wrongful death action against third-party tortfeasors. Interpreting two different riders contained in the insurance policy, the ***Cunningham*** court determined that one rider constituted an indemnity contract,

subject to subrogation, and the other rider constituted an investment contract, not subject to subrogation. In the present case, the circuit court concluded that the instant language was nearly identical to the ***Cunningham*** rider language found to be an investment contract without subrogation rights. ***Cunningham***'s "investment contract" rider provided:

> The hospitalization benefits otherwise provided for any hospital confinement of the *Employee* shall be reduced by any benefits paid or payable on account of hospital confinement for the same period or any part thereof from any fund, other insurance, or other arrangement, provided or established in conformity with any state or other governmental disability or cash sickness or hospital benefits law.

Id. at 452 (emphasis in original). The ***Cunningham*** court determined the rider was an investment contract without subrogation rights because the insurer failed to put any evidence into the record that would demonstrate that the settlement proceeds came from a fund referred to in the rider. *See* ***id.***

¶16 The department argues that unlike the ***Cunningham*** insurer, it has demonstrated that the settlement proceeds came from a fund referred to in § 5.16 of the income continuation insurance contract. We disagree. The department seeks reimbursement out of the $25,000 set aside as damages arising from Ksionek's claim under the Act. It has failed to prove that the reimbursement sought has come from any "benefit" received. Thus, like the rider in ***Cunningham***, § 5.16 creates an investment contract without subrogation rights.[3]

[3] We refrain from addressing any alternative arguments because only dispositive issues need be addressed. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

By the Court.—Order affirmed.

Recommended for publication in the official reports.