COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP841 **Cir. Ct. No. 2016CV247**

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

EMPLOYERS ASSURANCE CORP AND MARKETPLACE FOODS INC.,

PLAINTIFFS-RESPONDENTS,

V.

LINDA SCHUE-NILLES,

DEFENDANT-APPELLANT,

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-CO-APPELLANT.

APPEAL from an order of the circuit court for Barron County: J. MICHAEL BITNEY, Judge. *Reversed.*

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. Linda Schue-Nilles and the Labor and Industry Review Commission appeal from a circuit court order that vacated the commission's decision awarding her worker's compensation benefits.[1] Schue-Nilles contends that the commission's decision is reasonable and is therefore entitled to deference. We agree with Schue-Nilles and on that basis reverse the circuit court order and reinstate the commission's decision awarding benefits.

BACKGROUND

¶2 On or about December 29, 2013, Schue-Nilles worked at the deli counter of Marketplace Foods. At the end of her workday, but before she had punched out, Schue-Nilles fell while putting on her snow boots in the back room of her workplace. She suffered an ACL tear and a meniscus tear. An administrative law judge ("ALJ") awarded her worker's compensation benefits. Marketplace Foods and its insurer, Employers Assurance Corporation,[2] appealed to the commission. The commission agreed with the ALJ's decision, concluding that Schue-Nilles' injury arose out of her employment.[3] Marketplace Foods sought judicial review, and the circuit court vacated the commission's decision, on

[1] For simplicity, we refer to these appellants collectively as "Schue-Nilles."

[2] For simplicity, we refer to Marketplace Foods and Employers Assurance collectively as "Marketplace Foods."

[3] The commission modified the ALJ's decision by reducing the treatment expenses to be reimbursed by Marketplace Foods. These modifications are not relevant to this appeal.

the ground that the injury did not arise out of Schue-Nilles' employment. Schue-Nilles and the commission now appeal.

DISCUSSION

¶3 The sole issue for this appeal is whether Schue-Nilles' injury arose out of her employment. *See* WIS. STAT. § 102.03(1)(e) (2013-14)[4] (requiring that a compensable injury "arises out of the employee's employment"). Marketplace Foods does not dispute the Commission's factual findings on this issue. Instead, Marketplace Foods argues that the commission made a legal error when it concluded on these facts that Schue-Nilles' injury arose out of her employment.

¶4 The application of a statutory standard to a set of facts presents a question of law. *See* ***Brown v. LIRC***, 2003 WI 142, ¶11, 267 Wis. 2d 31, 671 N.W.2d 279. "[A]n important principle of administrative law is that, in recognition of the expertise and experience of an agency, a court will in certain circumstances defer to the agency's interpretation and application of a statute." ***Id.***, ¶12. There are three levels of deference typically afforded an agency determination: great weight deference, due weight deference, or de novo review with no deference. ***Id.***, ¶13.

¶5 Great weight deference is appropriate where: (1) the agency is charged by the legislature with administering the statute at issue; (2) the agency's interpretation of the statute is longstanding; (3) the agency employed its expertise

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

or specialized knowledge in its interpretation; and (4) the agency's interpretation will provide consistency in the application of the statute. *See* ***id.***, ¶16.

¶6 Schue-Nilles argues that the commission's interpretation and application of WIS. STAT. § 102.03(1)(e) is entitled to great weight deference. *See* ***E.C. Styberg Eng'g Co., Inc. v. LIRC***, 2005 WI App 20, ¶¶19-22, n.6, 278 Wis. 2d 540, 692 N.W.2d 322 (concluding that the commission's determination of whether an injury arises out of employment "involves a value judgment as to what constitutes employment and its incidents" that is entitled to deference).

¶7 Marketplace Foods states in conclusory fashion that we should review the question of law independently of the commission. To support this proposition, it cites our decision in ***Michels Pipeline Const., Inc. v. LIRC***, 197 Wis. 2d 927, 931, 541 N.W.2d 241 (Ct. App. 1995). However, that decision expressly states that "the application of a statutory concept to a set of facts frequently also calls for a value judgment; and when the administrative agency's expertise is significant to the value judgment, the agency's decision is accorded some weight." ***Id.*** Marketplace Foods also cites our supreme court's decision in ***deBoer Transp., Inc. v. Swenson***, 2011 WI 64, ¶31, 335 Wis. 2d 599, 804 N.W.2d 658. However, that decision identifies the three possible standards of review for an agency decision—great weight deference, due weight deference, and de novo review. *See* ***id.***, ¶32.

¶8 There is no developed argument from Marketplace Foods that addresses the appropriate standard of review in this case or that responds to Schue-Nilles' argument in support of great weight deference. Accordingly, we deem Marketplace Foods to have conceded that great weight deference is appropriate.

See ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶9 Under the great weight standard, we defer to the "[c]ommission's interpretation and application of the statute to the facts found unless the interpretation is unreasonable." *See* ***Heritage Mutual Ins. Co. v. Larsen***, 2001 WI 30, ¶27, 242 Wis. 2d 47, 624 N.W.2d 129. The burden is on the party challenging the agency action to prove that the agency's interpretation is unreasonable. *See* ***Harnischfeger Corp. v. LIRC***, 196 Wis. 2d 650, 661, 539 N.W.2d 98 (1995).

¶10 In deciding the "arises out of employment" test, the commission concluded that Schue-Nilles was in the workplace and had not yet punched out when she was injured while putting on her snow boots. The commission then concluded that Schue-Nilles "did not suffer an idiopathic or unexplained fall" and her injury occurred while "engaged in an everyday activity" while still at work.[5]

¶11 Marketplace Foods relies on the positional risk doctrine discussed in ***Cutler-Hammer, Inc. v. Industrial Comm'n***, 5 Wis. 2d 247, 253-54, 92 N.W.2d 824 (1958).[6] Based on that doctrine, Marketplace Foods argues that the commission misapplied the law when it awarded benefits without a finding that

[5] The commission also applied the coming and going rule, which states that "[a]ny employee going to and from his or her employment in the ordinary and usual way, while on the premises of the employer … is performing service growing out of and incidental to employment." WIS. STAT. § 102.03(1)(c)2. Marketplace Foods does not challenge this aspect of the commission's decision.

[6] Marketplace Foods relies on a purported direct quote from ***Cutler-Hammer, Inc. v. Industrial Comm'n***, 5 Wis. 2d 247, 253-54, 92 N.W.2d 824 (1958), to argue that a "hazard of employment must exist for an injury to arise out of employment." We note that the supposed direct quotation that Marketplace Foods included in its brief does not appear anywhere in the cited decision. We caution counsel on his obligation not to misrepresent authorities to this court.

Schue-Nilles was injured due to a hazard of employment. Specifically, Marketplace Foods contends that an injury arises out of employment only if workplace conditions subjected the employee to a zone of danger or hazard of employment.

¶12 We disagree with Marketplace Foods' reading of the applicable case law. Our supreme court has held that the positional risk doctrine discussed in ***Cutler-Hammer*** is negated by a determination that the injury was not of an idiopathic nature; that is, a condition personal to the employee such as a heart attack from nonwork-related underlying causes. *See* ***Cmelak v. Industrial Comm'n***, 27 Wis. 2d 552, 566, 135 N.W.2d 304 (1965); and ***Jenson v. Employers Mut. Cas. Co.***, 161 Wis. 2d 253, 271-72, 468 N.W.2d 1 (1991).

> The ***Cutler-Hammer*** case has made it clear, however, that the employment does not have to proximately cause the accident or injury, but it is required that the obligation or circumstances of employment have placed the worker at the particular place where the injury occurs. It is also required that the force be one not personal to the employee … rather it means that the occurrence cannot be of a solely idiopathic nature.

Cmelak, 27 Wis. 2d at 556-57 (footnote omitted).

¶13 So, once the commission concluded that the injury to Schue-Nilles' knee was not idiopathic, the further conclusion that Schue-Nilles' injury arose out of her employment is straightforward because the employment does not have to proximately cause the injury. Instead, all that is required is that the circumstances

of her employment put Schue-Nilles at the particular place where the injury occurred and it was not an idiopathic injury.[7]

¶14 In sum, Marketplace Foods has not satisfied its burden of demonstrating that the commission's interpretation and application of WIS. STAT. § 102.03(1)(e) is unreasonable. We therefore conclude that the commission acted reasonably in awarding worker's compensation benefits to Schue-Nilles.

CONCLUSION

¶15 For the reasons stated above, we reverse the circuit court's order and reinstate the commission's decision awarding benefits.

By the Court.—Order reversed.

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

[7] Even if the commission's determination that Schue-Nilles' injury was not idiopathic is considered a finding of fact, the result is the same because Marketplace Foods does not dispute the commission's factual findings on this issue.