COURT OF APPEALS
DECISION
DATED AND RELEASED

June 13, 1995

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

NOTICE

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

No. 94-3430-FT

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

WINTZ COMPANIES and EMPLOYEES INSURANCE OF WAUSAU, a mutual company,

Plaintiffs-Appellants,

v.

LABOR AND INDUSTRY REVIEW COMMISSION and LAVERNE J. HOWELL,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Wintz Companies and its insurer appeal a judgment affirming a LIRC decision that orders Wintz to pay worker's compensation to Laverne Howell, a truck driver who was injured while en route to pick up his truck.[1] Wintz argues that LIRC misapplied the law because

[1] This is an expedited appeal under RULE 809.17, STATS.

it focused on Howell's belief that he should be paid for the travel rather than on the contract between Wintz and Howell. We reject this argument and affirm the judgment.

Wintz employed Howell as a truck driver at the time of the accident. After an unrelated injury, Howell informed Wintz that he was available to return to work. Howell was told to make travel arrangements to Kansas City where a rig was waiting for him. He was initially told to travel by Greyhound Bus, but was unable to make satisfactory arrangements because of a strike. He was then told to look into airfare. When he called back and reported the price of an airline ticket, he was told by a dispatcher to hold while she conferred with supervisors. The dispatcher then told Howell to get to Kansas City any way he could. He chose to ride with a relative and, en route to Kansas City, was involved in a traffic accident in which he sustained serious injuries.

Ordinarily, travel to and from work is not considered within the scope of employment for worker's compensation purposes. ***Brown v. Industrial Comm'n***, 263 Wis. 569, 571, 295 N.W. 695, 695 (1941). An employee's injuries suffered while going to and from work is compensable where the employer provides transportation as part of the employment or pays for the expenses related to the employee's travel. ***Doering v. LIRC***, 187 Wis.2d 472, 479, 523 N.W.2d 142, 145 (Ct. App. 1994). The employer is liable if it agreed to provide transportation and exercised certain control over the means of transportation such as the vehicle to be used or the destination travelled. ***Id***.

We must uphold LIRC's findings of fact if there is substantial evidence to support the findings. Substantial evidence exists when reasonable minds could have reached the same conclusion that was reached by the commission. ***Samens v. LIRC***, 117 Wis.2d 646, 660, 345 N.W.2d 432, 437 (1984). We must give deference to LIRC's interpretation of a statute when its experience, technical competence and specialized knowledge aid it in its interpretation and application of the statute, and we must affirm its conclusions if they are rational. ***West Bend Educ. Assoc. v. WERC***, 121 Wis.2d 1, 12, 357 N.W.2d 534, 539 (1984). LIRC has developed significant expertise in determining whether an employee is acting within the scope of its employment and its decision in such matters should be given deference. ***Nigbor v. LIRC***, 120 Wis.2d 375, 380-84, 355 N.W.2d 532, 537 (1984). It is the function of LIRC, not this court, to determine the credibility of witnesses and to weigh and decide

what should be believed. ***Eastex Packaging Co. v. DILHR***, 89 Wis.2d 739, 745, 279 N.W.2d 248, 250 (1979).

Sufficient evidence supports LIRC's finding that Wintz agreed to pay for Howell's transportation and exercised control over the means of transportation. Wintz correctly notes that Howell's unilateral expectations are not sufficient to create an agreement. Likewise, Wintz's post-accident decision to refuse to pay compensation is not dispositive. Rather, the parties' words and conduct created an implied contract that required Wintz to pay for Howell's transportation. *See* ***California Line Assoc. v. Wisconsin Liquor Co.***, 20 Wis.2d 110, 122, 121 N.W.2d 308, 315 (1963). An implied contract differs from an expressed contract only in the method of proof. ***Theuerkouf v. Sutton***, 102 Wis.2d 176, 183, 306 N.W.2d 651, 657 (1981). The implied contract is established by proof of circumstances from which the parties' intent is implied as a matter of fact. ***Id***. Howell testified that Wintz had been previously compensated for travel under circumstances that LIRC reasonably concluded were similar to the circumstances presented here. Howell's father, who also worked for Wintz, stated that it was commonplace for the company to pay for travel. In addition, Howell's conversation with the dispatcher would make little sense if Wintz did not agree to pay for the travel. Wintz's concern over the price of airfare implies that Wintz intended to pay for the ticket.

Wintz also exercised control over the mode of transportation. Howell's discussion with the dispatcher allows the inference that Wintz maintained the right to choose the mode of transportation and the destination. The evidence presented to LIRC is sufficient to allow it to find that Howell was injured in the course of his employment and entitled to compensation for those injuries.

By the Court.—Judgment affirmed.

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