COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2255 **Cir. Ct. No. 2012CV2868**

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

MILWAUKEE TRANSPORT SERVICES, INC.,

PLAINTIFF-APPELLANT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION AND ISAAC BRACEY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: WILLIAM S. POCAN, Judge. *Affirmed*.

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

¶1 FINE, J. Milwaukee Transport Services, Inc., appeals the circuit court's order affirming an order entered by the Labor and Industry Review Commission determining that Isaac Bracey, a Milwaukee Transport bus driver, is entitled to worker's compensation benefits. Milwaukee Transport argues that the

Commission erred because it contends that Bracey substantially deviated from the course and scope of his employment when he was injured. Milwaukee Transport also contended for the first time in its appeal to the circuit court that Bracey's injuries were "idiopathic" and, for that additional reason, did not arise out of his employment. We affirm.

I.

¶2 Milwaukee Transport hired Bracey in September of 1993 to drive a bus. According to Bracey's testimony before the agency, a young man "in his late teens or early 20's" with an expired transfer ticket attempted to ride the bus Bracey was driving in January of 2010. Bracey told the man that the transfer was "no good" and asked him to "Please, get off[.]" The man called Bracey "a bald headed black Bitch," threw a fake punch at him and, as the man was getting off the bus, "harked up and spit on" Bracey, hitting him "on the top of [the] shoulder and bottom of [the] cheek."

¶3 In response, Bracey "jumped up" and got off the bus "to pursue him." Within a couple steps, however, Bracey fell. Bracey crawled back onto the bus. The incident lasted less than one minute. Bracey drove the bus, but later called for help and was taken to the hospital. Bracey had ruptured his left Achilles tendon and right quadriceps tendon, which were surgically repaired. Bracey's physician said he could go back to work in May of 2010 with a five percent permanent partial disability at the left ankle and right knee.

¶4 Bracey sought worker's compensation for lost wages, medical expenses, and permanent disability. Milwaukee Transport refused to pay, arguing

that Bracey's injuries did not occur during the scope of his employment and therefore were not compensable under WIS. STAT. § 102.03(1)(c) and (e).[1] The administrative law judge found that Bracey was not entitled to worker's compensation because he violated Milwaukee Transport's rules that a driver: (1) should not leave his seat unless a driver needs to help a disabled passenger or defend himself from danger: (2) should have had the bus's safety shield up; and (3) should not have confronted a passenger. Although the administrative law judge ruled that when Bracey left the bus he "was not performing a service to his employer" and, therefore was not entitled to worker's compensation, he also said: "I want to start out by saying that I probably would have acted in the same way the applicant did. When someone spits on you, that is an insult. I probably would have chased after the individual, confronted him and possibly tried to obtain an arrest from the authorities." The Commission reversed the administrative law judge's decision. The Commission "assume[d] that [Bracey] deviated from his employment by leaving the bus to chase the passenger who spat on him" but that:

[1] WISCONSIN STAT. § 102.03(1) provides, as material:

> **(1)** Liability under this chapter shall exist against an employer only where the following conditions concur:
>
> (a) Where the employee sustains an injury.
>
> (b) Where, at the time of the injury, both the employer and employee are subject to the provisions of this chapter.
>
> (c) 1. Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment.
>
> ….
>
> (e) Where the accident or disease causing injury arises out of the employee's employment.

> [Bracey's] response to being spat upon was unquestionably impulsive. Further, the deviation did not last more than 30 seconds according to the elapsed time on the CD video, and again, he went no further than three or four yards from the bus. [Bracey's] actions at most constituted an impulsive, momentary, and insubstantial deviation that does not bar recovery. The commission therefore finds [Bracey] sustained a compensable injury, that is, one arising out of his employment with the employer while performing services growing out of and incidental to that employment.

(Footnote omitted.)

¶5 The circuit court affirmed.

II.

¶6 We review the Commission's decision, not the circuit court's. *See* ***Hill v. Labor & Industry Review Commission***, 184 Wis. 2d 101, 109, 516 N.W.2d 441, 445 (Ct. App. 1994). The Commission's factual findings are invulnerable when "they are supported by credible and substantial evidence." ***General Casualty Co. of Wis. v. Labor & Industry Review Commission***, 165 Wis. 2d 174, 178, 477 N.W.2d 322, 324 (Ct. App. 1991). Substantial evidence is relevant, credible, and probative evidence on which it is reasonable to rely to reach a conclusion. ***Sills v. Walworth County Land Management Committee***, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 549, 648 N.W.2d 878, 883. Our review and level of deference owed to the Commission on legal issues depends upon its experience and expertise in the area. *See* ***Andersen v. Department of Natural Resources***, 2011 WI 19, ¶26, 332 Wis. 2d 41, 55, 796 N.W.2d 1, 8 ("While we are not bound by an agency's conclusions of law, this court has articulated three levels of deference that we may accord an agency's statutory interpretation and application: great weight deference, due weight deference, and no deference."). Further, we must liberally construe the statute to bring borderline cases under it. ***Wisconsin***

Electric Power Co. v. Labor & Industry Review Commission, 226 Wis. 2d 778, 796, 595 N.W.2d 23, 31 (1999). Thus, when more than one inference may be drawn, the Commission should draw the inference in favor of coverage. ***Ibid.*** If the Commission's decision is reasonable, we may not second-guess it. *See* ***ibid.***

¶7 The parties disagree on how much deference we should give to the Commission's decision. The Commission argues we should give it "great weight" deference. Milwaukee Transport argues we should give the Commission no deference because, as it argues, this is the first time the Commission has applied WIS. STAT. § 102.03(1)(c) and (e) to "allow the injury itself to dictate the nature of a deviation."

¶8 As noted, there are three levels of deference that courts use when reviewing administrative decisions, and they "'take into account the comparative institutional qualifications and capabilities of the court and the administrative agency.'" ***Brown v. State Department of Children and Families***, 2012 WI App 61, ¶22, 341 Wis. 2d 449, 465, 819 N.W.2d 827, 835 (quoted source omitted). "The first level of deference, 'great weight' deference, applies when: (1) the legislature charged the agency with the duty of administering the statute; (2) the agency's statutory interpretation is one of longstanding; (3) 'the agency employed its specialized knowledge or expertise in forming the interpretation;' and (4) 'the agency's interpretation will provide consistency and uniformity in the application of the statute.'" ***Ibid.*** (quoted source omitted). "The second level of deference, 'due weight,' applies 'when the agency has some experience in an area but has not developed the expertise that places it in a better position than the court to make judgments regarding the interpretation of the statute.'" ***Ibid.*** (quoted source omitted). "The third and lowest level of deference, *de novo* review, applies 'where it is clear from the lack of agency precedent that the case is one of first impression

for the agency and the agency lacks special expertise or experience in determining the question presented.'" ***Id.***, 2012 WI App 61, ¶22, 341 Wis. 2d 449, 465–466, 819 N.W.2d 827, 835 (quoted source omitted).

¶9 We give "great weight" deference to the Commission's decision here because: (1) the legislature has charged the Commission with administering the worker's compensation statute, (2) the Commission has been interpreting this statute for a long time, (3) it has developed expertise in this area as a result, and (4) applying its interpretation will provide uniformity and consistency in the law's application. "[T]he Commission need not have decided a case with identical or similar facts in order for its decision to be given great weight deference." ***Honthaners Restaurants, Inc. v. Labor & Indus. Review Commission***, 2000 WI App 273, ¶12, 240 Wis. 2d 234, 243, 621 N.W.2d 660, 664. Further, although the Commission has not decided a case where a bus driver is injured almost immediately after getting off his bus to chase a passenger who spit on him, the Commission has substantial experience in deciding scope of employment cases under the worker's compensation statute. *See* ***Nigbor v. Department of Industry, Labor and Human Relations***, 120 Wis. 2d 375, 384, 355 N.W.2d 532, 537 (1984) ("We conclude that the Commission has developed significant expertise in determining when an employee is acting within the scope of his employment."). Additionally, the Commission, contrary to Milwaukee Transport's contention, did not "allow the injury itself to dictate the nature of a deviation."

¶10 Giving an agency decision "great weight" deference means that we will uphold its determination "as long as it is reasonable, even if we conclude that another interpretation is equally or more reasonable." ***Anderson***, 2011 WI 19, ¶27, 332 Wis. 2d at 55, 796 N.W.2d at 8.

¶11 Here, the Commission's decision provides, as material:

- "To be liable for disability from an injury, an injured worker must establish both that the accident or disease causing injury arose out of the applicant's employment and that, at the time of the injury, the worker was performing services growing out of and incidental to his or her employment. See Wis. Stats. § 102.03(1)(c)1 and (e)."

- "Upon entering the employer's premises and beginning work, an employee is presumed to be continuing to work … [unless the employee] has removed himself therefrom" in an act of "deviation."

- "[T]he [Wisconsin] supreme court has 'moved away from the harsh rule that any deviation from employment would prevent an award of benefits and adopted the rule that an impulsive, momentary, and insubstantial deviation will not bar recovery.'" (Quoting ***Nigbor***, 120 Wis. 2d at 384, 355 N.W.2d at 537.)

- "[T]he commission shall assume that the applicant deviated from his employment by leaving the bus to chase the passenger who spat on him."

- "However, the applicant's response to being spat upon was unquestionably impulsive. Further, the deviation did not last more than 30 seconds according to the elapsed time on the CD video, and again, he went no further than three or four yards from the bus. The applicant's actions at most constituted an impulsive, momentary, and insubstantial deviation that does not bar recovery. The commission therefore finds the applicant sustained a compensable injury, that is,

> one arising out of his employment with the employer while performing services growing out of and incidental to that employment."

¶12 Giving the Commission's decision "great weight" deference, we conclude that it was reasonable. Although Bracey broke rules by chasing the unruly passenger, what Bracey did, as the Commission found, was impulsive, momentary, and an insubstantial deviation—it was a fleeting, knee-jerk reaction provoked by an unruly passenger. Bracey then returned to his seat and continued to drive the bus. At the hearing, Bracey testified that he didn't "know what my intent was. I just got spit on, and I kind of made a human reaction." He testified that he would not have chased the spitter far, "I wasn't going to catch that guy."

¶13 Milwaukee Transport argues that the deviation was substantial because Bracey broke rules by getting out of his seat and leaving the bus to go after someone for personal reasons, and points out that Bracey admitted that he was not going after the spitting passenger to collect a fare or to benefit the bus company. Milwaukee Transport thus argues that Bracey "abandoned" his work duties by attempting to chase the spitting passenger and the deviation would have been much longer if Bracey had not fallen. The Commission's determination to the contrary was, under the circumstances of this case, entirely reasonable. Thus, we affirm. *See* ***Anderson***, 2011 WI 19, ¶27, 332 Wis. 2d at 55, 796 N.W.2d at 8.[2]

[2] The Commission's decision states that "the applicant slipped on ice and fell." Milwaukee Transport argues that there is no evidence to support the finding that Bracey slipped on *ice*. The Commission concedes on appeal that there is no reference to ice in the Record. Nevertheless, the *cause* of Bracey's fall is not material; the issue before us is whether the Commission acted within the scope of its authority when it determined that Bracey's deviation was not so substantial so as to deprive him of his entitlement to compensation. As we have seen, Milwaukee Transport also argued in its appeal to the circuit court that Bracey's injuries were (continued)

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

"idiopathic" and, for that additional but related reason, those injuries did not arise out of his employment. Although the circuit court rejected this contention, we, as we have already noted, review the Commission's decision, not that of the circuit court. We therefore do not address Milwaukee Transport's "idiopathic" contention. *See* ***Behnke v. Department of Health and Social Services***, 146 Wis. 2d 178, 182 n.2, 430 N.W.2d 600, 602 n.2 (Ct. App. 1988).