COURT OF APPEALS DECISION DATED AND RELEASED

OCTOBER 18, 1995

NOTICE

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.

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

No. 94-2843

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

STEVEN D. KINNEY (deceased)
and CARLENE KINNEY,

Plaintiffs-Appellants,

v.

STEMPERS I-94 SHELL, INC.,
SHELBY INSURANCE COMPANY, INC.,
LABOR AND INDUSTRY
REVIEW COMMISSION and
WISCONSIN WORK INJURY
SUPPLEMENTAL BENEFIT FUND,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Carlene Kinney appeals from a judgment affirming a decision of the Labor and Industry Review Commission (LIRC) denying Kinney worker's compensation death benefits for her son's death at

Stemper's I-94 Shell. Kinney challenges the evidence supporting LIRC's determination that at the time of his death, Steven Kinney was outside the course of his employment. She also argues that in denying benefits, LIRC was required to find that Steven had wholly and completely deviated from his employment and that LIRC improperly relied on statements given to police by Steven's murderers. We conclude there was no error in LIRC's consideration of the police statements and that sufficient credible evidence supports LIRC's determination that Steven had substantially deviated from his employment at the time of his death. We affirm the judgment.

Steven was employed as a cashier at Stemper's Shell, a gas station and convenience store open twenty-four hours a day, every day of the week. On December 30, 1986, Steven began working his usual shift from 3:00 p.m. to 11:00 p.m. Sometime during his shift, Steven agreed to substitute for employee Luigi Aiello and he continued working into the next shift. During the evening or in the early hours of December 31, another employee of the station, John Ekornaas, came to the station and remained there. Ekornaas was not scheduled to work and was not at the station in the capacity of his employment.

Shortly before 4:04 a.m. on December 31, Steven and Ekornaas were murdered inside the station. Their bodies were found in a back utility room separated from the merchandise and cashier area of the station by another room and door. The men's wallets were taken as well as the money from the cash register. During questioning, Aiello admitted involvement in the murders. He gave a statement which indicated that he and another, Spriggie Hensley, had gone to the station to sell drugs to Steven and Ekornaas. Aiello stated that Hensley had beaten the men over a debt Steven owed. Hensley also gave a statement indicating that a drug deal was going to be made at the station and he was along only at Aiello's behest. Aiello and Hensley were convicted of the murders and armed robbery.

The administrative law judge (ALJ) concluded that there was no evidence that Steven had engaged in any unlawful activity on the night of his death. The ALJ rejected as incredible the statements of the murderers and determined that Steven's death was attributable to the special dangers associated with the type of employment since robbery was a motivational factor in the assault on Steven. Death benefits were awarded.

LIRC found that Steven, by voluntarily admitting Aiello and Hensley to the station and going in the back room with them, acted contrary to his employer's rules and for the purely personal purpose of engaging in an illegal drug transaction. LIRC reversed the ALJ's decision and denied benefits.

To establish liability for worker's compensation, it must be proved that at the time of the injury the employee was (1) performing service growing out of and incidental to his or her employment, and (2) that the injury arises out of the employment. *See* ***Nash-Kelvinator Corp.v. Industrial Comm'n***, 266 Wis. 81, 84, 62 N.W.2d 567, 569 (1954). This case involves the first test—whether at the time of his death, Steven was performing service in the course of his employment.[1] Once it is established that the employee entered upon the performance of his or her duties and was found dead at a place where the employee might have been in discharge of his or her duties, but there are no witnesses to confirm that he or she was in the performance of duties, the claimant enjoys a presumption that the employee was in the continuance of his or her employment at the time of death. *See* ***Kosteczko v. Industrial Comm'n***, 265 Wis. 29, 31, 60 N.W.2d 355, 356 (1953); ***Tewes v. Industrial Comm'n***, 194 Wis. 489, 494, 215 N.W. 898, 899-900 (1928). However, the presumption is rebutted by any evidence that the employee deviated from employment or acted in disobedience of an employer's rule for his or her own personal benefit. ***Tyrrell v. Industrial Comm'n***, 27 Wis.2d 219, 225-26, 133 N.W.2d 810, 814 (1965); ***M.W. Martin, Inc. v. Industrial Comm'n***, 13 Wis.2d 574, 582-83, 109 N.W.2d 92, 96-97 (1961).

The deviation test asks whether "the employee engaged in some activity of his [or her] own which has no relation to his [or her] employer's business?" ***Krause v. Western Casualty & Sur. Co.***, 3 Wis.2d 61, 72-73, 87 N.W.2d 875, 882 (1958). We reject Kinney's contention that it must be established that the employee wholly, totally or completely deviated from his or her employment. A "complete deviation doctrine," as coined by Kinney, has not

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[1] We need not consider the "positional risk" doctrine. That doctrine states that an accident arises out of employment if the conditions or obligations of employment create a zone of special danger out of which the incident causing the injury arose and it applies only to the determination of whether the injury arises out of employment. ***Goranson v. DILHR***, 94 Wis.2d 537, 555, 289 N.W.2d 270, 279 (1980). An employee may step outside of the scope of employment even in situations where the positional risk doctrine might otherwise apply. ***Id.***

been adopted.[2] The standard is whether a substantial deviation, as opposed to an impulsive, momentary or insubstantial deviation, occurred. ***Nigbor v. DILHR***, 120 Wis.2d 375, 384, 355 N.W.2d 532, 537 (1984). The deviation may be slight in terms of the length of time involved or distance traveled. ***Tyrrell***, 27 Wis.2d at 226, 133 N.W.2d at 814.

The issue is whether sufficient evidence supports LIRC's determination that Steven had substantially deviated from his employment at the time of his death. LIRC's findings of fact are conclusive if there is any credible evidence to support those findings. ***West Bend Co. v. LIRC***, 149 Wis.2d 110, 117-18, 438 N.W.2d 823, 827 (1989). Moreover, we cannot substitute our judgment for that of LIRC in respect to the credibility of a witness or the weight to be accorded to the evidence supporting any finding of fact. ***Id.*** at 118, 438 N.W.2d at 827. The "any credible evidence" test applies. ***Id.***

Contrary to Kinney's assertion, LIRC's conclusion can be based on reasonable inferences drawn from the evidence.[3] If different inferences can reasonably be drawn from the evidence, a question of fact is presented and the inference drawn by LIRC, if supported by any credible evidence, is conclusive. ***Eastex Packaging Co. v. DILHR***, 89 Wis.2d 739, 746, 279 N.W.2d 248, 251 (1979).

The gas station owner testified that it had been communicated to all employees the rule that employees of the station were not to be on the premises unless they were working their scheduled shift or were customers. Following a robbery at the station on December 24, 1986, a rule was instituted that on the third shift the door to the station was to be locked. During that shift, no one, not even customers, was to be allowed inside, and all transactions were to be handled through a cash window. The station manager indicated that the employees were not issued keys to the station and that the only key available to

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[2] Kinney principally argues that ***Tyrrell v. Industrial Comm'n***, 27 Wis.2d 219, 133 N.W.2d 810 (1965) and ***Kosteczko v. Industrial Comm'n***, 265 Wis. 29, 60 N.W.2d 355 (1953), establish the "complete deviation doctrine." Those cases do not so hold. It simply happens to be the facts of those cases that a complete deviation was found.

[3] Kinney asserts that LIRC's findings cannot be made based upon inference and cites ***Eastex Packaging Co. v. DILHR***, 89 Wis.2d 739, 279 N.W.2d 248 (1979), in support of that assertion. It is a misstatement of ***Eastex***.

employees was hanging on a hook inside the station. The manager also testified that Steven had inquired about obtaining cocaine and that Steven had indicated that he had previously purchased cocaine from Aiello. This evidence is sufficient to support LIRC's inference that Steven voluntarily admitted Aiello and Hensley for personal purposes.[4]

LIRC also looked at the statements Aiello and Hensley gave the police. Kinney argues that because each man's statement pointed the finger at the other, the statements constitute inherently incredible evidence which could not overcome the presumption of continuity of employment. Evidence is incredible only when it is in conflict with the uniform course of nature or with fully established or conceded facts. ***Haskins v. State***, 97 Wis.2d 408, 425, 294 N.W.2d 25, 36 (1980). Inconsistencies and contradictions in the statements of witnesses do not render the testimony inherently or patently incredible, but simply create a question of credibility for the trier of fact to resolve. *See* ***id.***

The ALJ rejected Aiello and Hensley's statements as incredible and self-serving. When addressing the statements, LIRC properly noted that because the evidence was documentary, the ALJ had not made the credibility assessment based on the witnesses' appearance before the ALJ. Thus, LIRC was in an equal position to determine the credibility of the evidence. LIRC found portions of the statements consistent on certain occurrences that night and relied on those portions. It was within LIRC's province to do so.

Aiello's and Hensley's statements established that there was some kind of drug debt owed that made them want to threaten Steven or Ekornaas, or both. Aiello and Hensley went to the station for the purpose of completing a drug transaction and extracting payment on the debt. Aiello called the station to let Steven know they were on their way. After gaining admittance into the station, Aiello turned off the exterior lights and pumps. Steven and Ekornaas went into the back room for the purpose of examining and purchasing drugs.

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[4] LIRC rejected the ALJ's finding that Aiello had used his employee key to unlock the station door and gain entrance. LIRC did so upon proper consultation with the ALJ about the credibility of witnesses. The ALJ had no reason to doubt the testimony of the station manager.

The evidence is sufficient to support LIRC's inference that Steven was involved in a drug deal just prior to the assault which took his life. Not only was admitting Ekornaas, Aiello and Hensley a violation of two of his employer's rules,[5] those persons were not at the station for purposes to benefit the employer. In other words, the rules were not violated to advance the employer's interests. Likewise, there was no employment-related reason for Steven to go in the back room of the station with these men. LIRC's conclusion that Steven had stepped outside the course of his employment is supported by sufficient credible evidence and the reasonable inferences to be drawn from that evidence.

Kinney argues that the statements of Aiello and Hensley should not be admitted because they constitute hearsay. She claims that because Aiello and Hensley are incarcerated in the Waupun Correctional Institution, LIRC erred in determining that they were unavailable as witnesses.

We need not determine whether the statements constitute inadmissible hearsay. Although hearsay testimony may be admitted at the discretion of the ALJ, WIS. ADM. CODE § IND 80.12(1)(c), it should not be received over objection where direct testimony is obtainable, *see* ***Outagamie County v. Town of Brooklyn***, 18 Wis.2d 303, 312, 118 N.W.2d 201, 206 (1962).

Kinney objected to the admission of the statements. Here, however, Kinney contributed to the unavailability of the direct testimony. The parties attempted to take the videotape depositions of Aiello and Hensley at Waupun. Kinney's counsel, in conjunction with counsel for the Wisconsin Work Injury Supplemental Benefit Fund, advised Aiello and Hensley that if they intended to assert a Fifth Amendment privilege against testifying, that it could not be done on a question-by-question basis.[6] Aiello and Hensley were

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[5] Kinney argues that there is no evidence that Steven was informed of these work rules. We disagree. The station owner and manager indicated that the rules were communicated to employees.

[6] In ***State v. Wright,*** ___ Wis.2d ___, 537 N.W.2d 134, 137-38 (Ct. App. 1995), we adopted the rule that a defendant may selectively waive his Miranda rights by deciding to respond to some questions but not others. It follows that a defendant may selectively invoke his Fifth Amendment privilege.

informed that they could refuse to testify if they did not intend to testify as to the entire matter. Aiello and Hensley refused to testify. We deem Kinney judicially estopped from seeking the requested remand for the purpose of permitting her to subpoena Aiello and Hensley. *See* ***State v. Michels***, 141 Wis.2d 81, 97-98, 414 N.W.2d 311, 317 (Ct. App. 1987) (a party should not be heard to take a position on appeal different from that taken during the trial); *see also* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327, 330 (1936) (where a party has induced certain action, he or she cannot later complain on appeal).

The appellant's briefs cite forty-seven cases. For only fourteen of those citations does she provide pinpoint cites, that is a citation to the exact page on which the proposition the case is cited for can be found. The briefs fail to comply with the RULE 809.19(1)(e), STATS., and the incorporation of A UNIFORM SYSTEM OF CITATION (15th ed. 1991). For this violation of the rules of appellate procedure, we penalize counsel for the appellant $25. *See* RULE 809.83(2), STATS. Within ten days of the date of this opinion, counsel for the appellant shall submit payment of the $25 penalty to the clerk of this court and shall not charge the penalty to any client.

By the Court.—Judgment affirmed.

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